MAA OMWATI DEGREE COLLEGE HASSANPUR (PALWAL)

Notes

BBA 4th Sem

Business Law

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MERCANTILE LAW

An Introduction

To live peacefully in today's world, man needs to follow certain rules. These rules entail certain obligations and rights. To fulfill the obligations and to protect the rights, the government of every country makes certain rules which are referred to as the law of the land. Talking about the objectives and results of law, **William Anson** writes, *"The object of law is order, and the result of order is that men are enabled to look ahead with some sort of security as to the future. Although human action cannot be reduced to the uniformities of nature, men have yet endeavoured to reproduce by law something approaching to this uniformity."*

What is Mercantile Law?

Rules related to industry, business and professions are called commercial or mercantile law. Mercantile law refers to the constitutional principles, rules or regulations that govern the running of business or industry. This law is a collection of rules that are followed in business activities and transactions. In India, it becomes difficult to distinguish mercantile law from other laws because of the lack of a distinct and precise definition. In general (everyday language), by mercantile law, we mean the rules and regulations that are directly linked with business or commercial activity. Some eminent scholars have defined mercantile law as under:

Definitions

"That part of law which regulates the transactions of the mercantile community is called commercial or mercantile Law."—**Sen and Mitra.**

"Mercantile law may be defined as that branch of law which deals with the rights and obligations of mercantile persons arising out of mercantile transactions in respect of mercantile property."—**M.C. Shukla.**

"Commercial law includes the law applicable to ordinary transactions of merchants, bankers and traders, and denotes that branch of law which relates to the rights of property and relations of persons engaged in commerce."—**A.K. Sen.**

Scope of Indian Mercantile Law

In the present day business scenario, mercantile law is not confined to only the business community, it has its relations with every member of the society; for example, the Contract Act

is as much applicable to the business as to the non-business community. It is important to note that not only the business community enters into contracts, but the common man, in his day-to-day experiences, enters into a number of contracts. For example, when we travel by rail or air, perhaps we do not realise while doing so, we are bound by certain rules and regulations.

Mercantile law has a fairly wide scope. The government lays down the rules and regulations to run the business activities smoothly. These are all parts of the overall mercantile law.

The following laws are included in mercantile law:

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

Sources of Indian Mercantile Law

While talking about the sources of Indian mercantile law, it is important to keep in mind that English legislation has greatly influenced Indian legislation. Indian mercantile law has the following sources:

(1) Statutes: These are the rules and regulations that are enacted by the Lok Sabha or the Vidhan Sabhas under the Constitution. These rules have been introduced from time to time by the Central and State Governments in India. Some examples are the Contract Act, the Sale of Goods Act, the Partnership Act, the Companies Act, etc.

(2) English Common Law: This is the second important source of Indian mercantile law. In case where there are no clear-cut rules or where there is no clarity of law, Indian courts refer to the English common law. While explaining the rules also, the English common law is considered. Common law is considered to be England's oldest law. It refers to the set of rules which were derived from the common traditions and customs of old England. This law is based on the verdicts of British judges and was started in the last phase of the twelfth century.

(3) Principles of Equity: The King of England deputed 'chancellors' to listen to people's grievances and sort out disputes. The chancellors had no rules to go by and adopted the common socially accepted principles of justice. They sorted out the disputes on the principle of natural justice, equity and good conscience. The principles laid down by the chancellors were called the principles of Law and the courts of chancellors were called the Courts of Equity. Like in England, India also when the courts are unable to give justice because there are no laws to govern their action, they have the right to resort to natural law.

(4) Indian Customs and Usages: The people of India have always been influenced by Indian customs and usages. At times, these customs are so effective that their impact is more

than that of written rules and regulations. Mercantile law in India gives due recognition to these customs and traditions. For example, **hundi** is one such custom that is recognised under the Negotiable Instruments Act. Hence, customs and usages are also a source of mercantile law.

(5) Leading Cases: Sometimes old verdicts also become a source and are recognised by the courts because of conventions and precedents laid down by other courts in similar cases. For example, we can quote the cases of *Mohri Bibi vs. Dharam Dass* or *Lallman Shukla vs. Gauri Dutt* where the verdicts have been accepted as precedents by other courts in similar cases. The precedents set in the Supreme Court, High Courts and other Indian courts act as conventions for the courts to give their judgements in similar situations.

Need of Law

The need for law is felt when a dispute between parties crops up and needs to be resolved. To sort out the disputes, it becomes important to have a set of rules which are applicable in similar situations and by which the parties in dispute are bound. In the absence of law, it would be difficult to sort out any disputes. As the saying goes 'necessity is the mother of invention', the need for law makes it necessary to have the law.

Need of Knowledge of Mercantile Law

In principle, every citizen of the country should have a knowledge of the prevalent law of the land. No one can be exempted on the basis of ignorance of law. Ignorance of law is no excuse. If a person is found guilty in the eyes of the law, he or she cannot be forgiven on the basis of ignorance. It therefore becomes important to know the law of the land where one lives.

In the absence of law, neither can we demand our rights nor can we fulfil our obligations. There is as much need to know the law as there is for the law to be there. It would be no exaggeration if we say that 'law not only makes our life smooth, it also shows us a definite path to follow'.

QUESTIONS

1. What is meant by commercial law? What are its sources and scope?
2. 'A knowledge of law makes life easy.' Discuss mercantile law in the context of the statement.
3. 'Indian mercantile law is influenced by English common Law.' discuss.
4. Define mercantile law. What are its sources?

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INDIAN CONTRACT ACT, 1872-AN INTRODUCTION

Objectives and Importance

The Indian Contract Act occupies an important place in the Mercantile law of the country. Every citizen of the country—be he a businessman or a professional, a doctor, a teacher or an artist—is affected by this Act. We can feel its impact because in our day-to-day life, the law of the land has a direct bearing on our lives. The law gives us certain rights as citizens. At the same time, it imposes on us certain obligations. The Indian Contract Act is directly connected with these rights and obligations.

This act has a special importance for the commercial sector because a major part of the commercial activity is dependent upon it. To maintain law and order, and develop the business and industrial sector, it becomes important that the commitments made or the contracts entered into are honoured. The Indian Contract Act makes it obligatory that this is done and compels the defaultors to honour their commitments. According to **Sir William Anson**, *"The objective of law is to maintain order because only in a state of order can a man feel safe and secure."* The Contract Act envisages that the promises that have been made in a contract are kept.

Historical Background

Section 1 of the Indian Contract Act states that the Act will be named as Indian Contract Act, 1872 and that it will be applicable to the entire country except for the State of Jammu and Kashmir. This Act was enacted by the Constituent Assembly of India on 25 April 1872 and came into force on 1 September 1872.

According to Section 1 of the Act, *"Nothing herein contained shall affect the provisions of any statute, act or regulation not hereby expressly repealed, nor any usage or custom of trade, nor any incident of any contract not inconsistent with the provisions of this Act."*

Division of the Act

In the beginning, the Act had a very wide scope and included in it what are called the Indian Partnership Act and the Indian Sale of Goods Act. But today the scope of the Act has been greatly restricted. Issues related to the 'Sale of Goods' were repealed from the Act in 1930

when the new 'Sale of Goods Act' came into force. The new Act constitutes of 66 sections and is exhaustive, complete, scientific and has a wider sphere. The 'Partnership' part of the Act was also repealed in 1932 and a new legislation called the Partnership Act constituting 74 sections was enacted.

What the Indian Contract Act was when enacted and what the Act is today is illustrated in what follows.

Indian Contract Act, 1872

Old Contract Act	Present Contract Act
(i) Basic Principles Sections 1 to 75	(i) Basic Principles Sections 1 to 75
(ii) Sale of Goods Act Sections 76 to 123	(ii) Indemnity and Guarantee Sections 124 to 147
(iii) Indemnity and Guarantee Sections 124 to 147	(iii) Bailment Sections 148 to 181
(iv) Bailment Sections 148 to 181	(iv) Agency Sections 182 to 238
(v) Agency Sections 182 to 238	
(vi) Partnership Act Sections 239 to 266	

Some Fundamental Definitions

To understand and interpret the Indian Contract Act, 1872, it is important to understand the fundamental terms that are repeatedly used in the Act. These fundamental terms have been defined in Section 2 of the Act and are as follows:

(1) Proposal: Section 2(a) of the Act defines it as: When one person signifies to another his willingness to do or to abstain from doing anything with a view to obtain the assent of the other to such act or abstinence, he is said to make a proposal.

Example: If Anil says to Krishan that he wants to buy his scooter for Rs. 5,000, it would be said that Anil has made a proposal to Krishan.

(2) Acceptance and Promise: According to Section 2(b) of the Indian Contract Act: When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal, when accepted, becomes a promise.

Example: If, in response to Anil's proposal, Krishan says, *"Yes, I am prepared to sell my scooter for Rs. 5,000"*, it would mean the acceptance of Anil's proposal by Krishan.

(3) Promiser and Promisee: According to Section 2(c) of the Act, the person making the proposal is called the 'promisor' and the person accepting the proposal is called the 'promisee'.

(4) Consideration: Section 2(d) of the Act defines it as: When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or abstain from doing something, such act or abstinence or promise is called a consideration of the promise.

Example 1: If Anil buys Krishan's scooter for Rs. 5,000, for him the consideration for the amount is the scooter whereas for Krishan the consideration for scooter is the amount of Rs 5,000.

Example 2: A promises B that he will not enter into competition with the latter in a particular market for a period of five years if the latter pays him Rs. 1,00,000. B promises to pay the amount to A. The consideration for B is the competition free market sector for five years, while that for A is the amount of Rs. 1,00,000 that has been promised to be paid to him.

(5) Agreement: Section 2(e) of the Act defines it as: Every promise and every set of promises forming the consideration for each other is an agreement.

Example(i): If Anil promises to sell his scooter to Krishan for Rs. 5,000, and Krishan promises to pay Anil the said amount, both promises together constitute an agreement.

Example(ii): If Anil delivers the scooter to Krishan, and in return Krishan promises to pay Anil Rs. 5,000, these promises too would constitute an agreement.

(6) Reciprocal Promises: According to Section 2(f) of the Act, promises which form the consideration or part of the consideration for each other are called reciprocal promises.

In the example given above, if Anil promises to deliver the scooter to Krishan on a particular date, and the later promises to pay Anil Rs. 5,000 on the same day, both are reciprocal promises.

(7) Void Agreement: Section 2(g) of the Act defines a void agreement as 'an agreement not enforceable by law'.

Example: If Nishant promises his beloved Neha that he would make her a castle in the air, and Neha promises him her undying love if he does so, the agreement has no meaning and is void because it is not enforceable by law.

(8) Contract: Section 2(h) defines a contract as 'an agreement enforceable by law'.

(9) Voidable Contract: An agreement which is enforceable by law at the option of one or more of the parties thereto, but not at the option of others, is a voidable contract—Section 2(i).

Example: Ahmed wants to buy a young, healthy horse from Babu who is a horse trader. Babu sells an old sick horse to Ahmed saying that the animal is young and healthy. This is a case of one party (Babu) cheating the other party (Ahmed). Ahmed is the aggrieved party and has the right to break the contract or make the other party fulfill his obligation.

Void Contract: Section 2(j) of the Act defines it as 'a contract which ceases to be enforceable becomes void when it ceases to be enforceable'.

Example (i): Venura promises to give his daughter in marriage to Shanna's son, but the girl dies before marriage. As a result, the contract made between the parties becomes void.

(ii) Partap is a sculptor and has been commissioned to make a statue for Babu for a consideration of Rs. 10,000. After some days, Partap meets with an accident and loses both his hands. His art is dead with his hands which are amputated and it is not possible for him to fulfill his contract. The contract becomes void with the loss of Partap's hands.

(11) Plaintiff: A person who files a suit in a court of law against another for breach of contract is called the plaintiff.

(12) Defendant: The person against whom a suit has been filed in court and who has to defend himself against the charges of breach of contract is called the defendant.

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VALID CONTRACT AND ITS ELEMENTS

What is a Contract?

When we talk of a contract, the first question that comes up is to define what exactly is a contract. In other words, what are the essentials of a valid contract. Generally speaking a contract is an understanding or an agreement between two parties. But this does not completely or clearly define a contract. To understand the meaning of a contract, we need to have a look at the definition of a contract given by 'intellectuals' and experts of mercantile law.

Definitions

According to **Salmond,** a *"contract is an agreement creating and defining obligations between the parties."*

Sir William Anson defines a contract as *"an agreement enforceable by law made between two or more persons by which rights are acquired by one or more to acts or forbearances on the part of the other or others".*

According to **Leake,** *"an agreement as the source of legal contract imparts that one party shall be bound to some performance, which the other shall have a legal right to enforce."*

Sir Fredric Pollock opines that *"every agreement and promise enforceable by law is a contract".*

Section 2(h) of the Indian Contract Act defines a contract *"as an agreement enforceable by law".*

The above definitions and the Indian Contract Act make it abundantly clear that every contract must have two basic caracteristics:

1. An agreement between the parties.
2. The agreement should be enforceable by law.

For an agreement to be enforceable by law, it becomes imperative that it is based on valid and legal grounds — otherwise it will not be enforceable by law. A contract can only be enforceable by law when it imposes some legal obligation on the parties to the contract. In other words, agreement and obligation are the two fundamental elements of a contract. This means

that the commitment of the parties must meet, or there must be *consensus ad idem*. Consider an example—A has two buildings No. 1 and No. 2, and wants to sell building No. 1 to B, whereas B wants to buy building No. 2. In this case, there is no consensus between A and B, and as such, there is no possibility of a contract between the two.

For an agreement to be a contract, it is imperative that certain obligations are imposed on the parties concerned. These obligations need to be legal, not social obligations. At the same time, the Contract Act is also not the whole law of obligation.

Contract vs. Agreement

'All contracts are agreements but all agreements are not contracts' is a valid and true statement. Before we can critically examine the statement, it is necessary to understand the meaning of 'agreement' and 'contract'. According to Section 2(e), *"every promise or every set of promises forming the consideration for each other is an agreement."* In fact, an agreement is a proposal and its acceptance, by which two or more persons or parties promise to do or abstain from doing an act. It is, therefore, clear that an agreement is comprised of a promise or promises, and these promises by the parties to an agreement act as consideration for each other. According to Leake, for a contract to be legal, it needs to be an agreement that imposes certain obligations on one party and gives the right to enforce these obligations, to the other party. According to Section 2(h) of the Indian Contract Act, "an agreement enforceable by law is a contract". It is clear from these definitions that the three vital elements of a contract are:

(i) Agreement

(ii) Contractual Obligation

(iii) Enforceability by law.

From the preceding statements, it would be obvious that the term 'agreement' has a much wider scope than a 'contract'. An agreement can be religious, cultural, social or moral. Agreements that imply no legal obligations would remain agreements. They cannot be contracts. For example, Arun invites his friend Varun to tea and the latter accepts the invitation. This is a social agreement, not a contract, because it does not imply any legal obligation. It, therefore, follows that all agreements that do not imply legal obligation and are confined to social or moral obligations would always be agreements—they cannot become contracts.

We can, therefore, conclude from what has been discussed that: (a) all contracts are agreements, and (b) all agreements are not contracts.

All Contracts are Agreements

For a contract to be there, an agreement is essential. Without an agreement, there can be no contract. An agreement is the *sine qua non* and, as such, the primary essential element of a contract. As the saying goes 'where there is smoke, there is fire' for without fire, there can be no smoke. It could well be said 'where there is contract, there is agreement—without an agreement, there can be no contract. Just as a fire gives birth to smoke, in the same way an agreement gives birth to a contract.

Another essential element of a contract is the emergence of legal obligations for the parties to the contract. There are many agreements that do not entail any legal obligations. As such, these agreements cannot be called contracts. According to **Salmond**, the Contract Act is an act

related to the agreements that entail obligations and the obligations that arise out of agreements. Only those agreements that imply obligations are contracts. For example, A gives his car to 'B for repair and B asks for Rs. 200 for the repair work. If A agrees to pay the price and B agrees to repair the car, the agreement imposes an obligation on both — which is a contract between the two.

The third vital element of a contract is that the agreement must be enforceable by the law of the land. This implies that if one party fails to keep his promise, the other has the right to go to the court and force the defaultor to keep his promise. To convert an agreement into a contract, some core elements are vital without which the agreement cannot be legally binding and enforceable. These core elements are:

(i) Agreement constituting a proposal and its acceptance

(ii) Competence of the parties to enter into an agreement

(iii) Consensus of the parties to the agreement.

(iv) Valid objective and consideration

(v) Agreement not being declared void by law

(vi) Agreement being written, verified and registered

(vii) Agreement being enforceable by law.

From what has been discussed, it is clear that all contracts are agreements:

All Agreements are not Contracts

An agreement is termed a 'contract' only when it is enforceable by law. All agreements are not necessarily legally enforceable. It can rightly be said that an agreement has a much wider scope than a contract. An agreement is indispensable for a contract, whereas it is not necessary to have a contract for an agreement. Examples of agreements that are not legally binding are an invitation to dinner or to go for a walk and its acceptance. These are agreements, not contracts.

An agreement does not necessarily imply a legal obligation on the parties to the agreement. It is important here to clarify what exactly is an 'obligation'. Obligation is a legal tie which imposes upon a person or persons the necessity of doing or abstaining from doing a definite act or acts.

Some agreements do not impose any legal obligation on the parties to the agreement and, as such, they are not classified as contracts. Such agreements can neither be enforced by law nor do they impose any obligation. As an example, let us say that Saurab invites Gaurav to dinner and Gaurav accepts the invitation, but does not reach at the appointed time. Saurab cannot argue against it because the agreement does not entail an obligation, and is only a social agreement. In this connection, the case of *Balfore us. Mrs. Balfore* is an example. Mr. Balfore, who was employed in Sri Lanka, visited Britian to bring his wife to live with him. Mrs. Balfore could not come because she was not well and Mr. Balfore promised to send her £30 every month and came back to Sri Lanka — but he could not send the £30 he had promised to his wife, and she filed a suit against her husband. Justice Lord Atkins dismissed the suit because the agreement (Balfore's promise to send the money and his wife's acceptance) did not entail any contractual obligation.

An agreement need not necessarily be within the framework of law and be legally enforceable. If it is, then it is a contract. If A promises B to do physical harm to C whom the latter does not like, and B promises to pay A Rs. 1,000 to do that, it cannot be termed as a contract

because such an act would be against the law. Any agreement of which the object or consideration is unlawful is void, and cannot be called a contract.

It would be clear from what has been said so far that an agreement has a much wider scope than a contract. An agreement implies fulfilling some agreed conditions — it does not necessarily imply that the stipulated conditions conform to the law and are enforceable by it. It may well be said that 'agreement is the genus of which contract is the species'. It also makes it clear that all agreements are not contracts but all contracts are agreements.

Essentials of a Valid Contract

The essential features or elements of a valid contract are discussed in the following sections. Even if one of these elements is missing in an agreement, the agreement will not be enforceable by law and as such would not constitute a valid contract.

(1) Agreement — Proposal and Acceptance: A valid contract essentially involves two or more parties because an individual cannot enter into an agreement with himself. Section 2(e) of the Act stipulates that "every promise and every set of promises forming the consideration for each other is an agreement". To reach an agreement, it is implied that one party makes a proposal and the other party accepts the proposal. According to Section 2(b): When the person to whom the proposal is made signifies his assent thereto, the proposal is accepted. A proposal, when accepted, becomes a promise. Until the proposal is accepted, there is no promise and, as such, there cannot be an agreement. For example, if Mohan makes a proposal to sell his car to Sohan for Rs. 50,000 and Sohan accepts the proposal, there will be a valid agreement between the two.

(2) Competency or Contractual Capacity of Parties: The second essential feature of a valid contract is that the parties concerned are legally competent to enter into it. According to Section 11 of the Act, every person is competent to contract if he: (a) is of the age of majority, (b) is of sound mind, and (c) is not disqualified from contracting by any law to which he is subject. Every person who has attained the age of 18 years is a major. If a person is a minor who has a guardian appointed by the court or one whose property is under the supervision of the Court of Wards, such person would be considered a major when he attains the age of 21. Being of sound mind implies that, at the time of entering into a contract, one is capable to understand the terms of the contract and one's rights under such terms. Those who have been declared incompetent to enter into a contract as per the law include enemies of the country, diplomatic personnel, bankrupts and those who have been sentenced to terms of imprisonment, etc.

(3) Free Consent of Parties: The third element of a valid contract is that there must be a free and genuine consent of the parties to the agreement. According to Section 13, the consent of the parties is said to be free when they are of the same mind on the material terms of the contract. The parties are said to be of the same mind when they agree about the subject-matter of the contract in the same sense and at the same time. The *identity of views* is the pre-requisite. If such identity is not there, no agreement is possible. As per Section 14 of the Act, an agreement induced by coercion, undue influence, fraud, etc., would not be enforceable by law.

To cite an example, A makes a proposal to B to sell his Fiat car for Rs. 80,000. B accepts to buy the car, which he thinks is a Maruti because it is more popular than a Fiat. In this

example, there is a proposal by A which is accepted by B — but there is a difference between the concepts of A and B — and no agreement can be reached between the two. A wants to sell his car and B wants to buy a car. Even the price is acceptable, but the concepts of A and B are different. B thinks that he is buying a Maruti while A thinks he is selling a Fiat — and no agreement can be reached between the two. Consent of a party is free when there is no coercion, undue influence, fraud, misrepresentation or mistake. As per Section 14 of the Act, the agreement is invalid if free consent of the parties is not there.

(4) Lawful Consideration and Legal Object: The consideration or object of the contract is another essential feature. Except for special cases listed in Section 25, a valid contract has to have an object. As per Section 2(d), "*When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing an act, such act or abstinence or promise is called a consideration for the promise.*" For a valid contract, the consideration need not necessarily be in terms of a price — the consideration can even be in the past, present or future — but the consideration needs to be real. For example, Ajay offers to sell his book to Vijay for Rs. 20 and Vijay accepts the offer. In this case, Rs. 20 is the consideration for Ajay and the book is the consideration for Vijay. The object of the agreement must be lawful. In other words, it means that the object must not be (a) illegal, (b) immoral or (c) opposed to public policy (Section 23). If an agreement has a legal flaw, it would not be enforceable by law.

(5) Agreements not Expressly Declared Void: For a contract to be valid, it is essential that the agreement has not been declared void under the Indian Contract Act, 1872. Specifically void agreements include agreements related to interference or sabotage in marriage ceremony (except in the case of a minor), agreements that interrupt or sabotage a legal activity, that are related to gambling or promise to do impossible things.

(6) Writing and Registering Agreements: A contract may be by word of mouth or in writing. As per law, there is no difference between a contract in writing and a contract made by word. It is, however, in the interest of the parties that the contract is in writing. Some other formalities also need to be complied with to make the contract legally enforceable. In some cases, the document in which the contract is made is to be stamped and registered (like under the Transfer of Property Act). In some other cases, there is a statutory requirement that the contract be made in writing or in the presence of witnesses or registered. In such cases the statutory formalities must be complied with.

(7) Capable of Performance: A valid contract must be reasonable and practical to be performed. It must not promise the impossible — like injecting new life in a dead body or finding treasure by magic. A valid contract must be certain and definite — not vague and indefinite. The law does not reconize an impractical, indefinite or vague agreement and, as such, does not help enforce it.

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

Differences between an Agreement and a Contract

The differences between an agreement and a contract are listed in the table that follows.

No.	Basis of Difference	Agreement	Contract
1.	Section	Is defined in Section 2(e).	Is defined in Section 2(h)
2.	Definition	Every promise or every set of promises forming the consideration for each other is an agreement.	An agreement enforceable by law is a contract.
3.	Scope	Has a very wide scope because each contract is first an agreement.	The scope is limited because all agreements are not contracts.
4.	Nature	Covers legal and extra-legal affairs.	Covers only legal affairs.
5.	Base	Is based on proposal and acceptance of proposal.	Is based on agreement.
6.	Legality	Parties have no legal obligation.	Parties have legal obligations that are defined in the contract.
7.	Effect	Is not enforceable by law.	Is enforceable by law.

Kinds of Agreements

Broadly, agreements can be classified as under, depending upon what they are based.

(1) Based on Obligation

Such agreements are further classified into:

(a) Unilateral Agreements

(b) Bilateral Agreements

(a) Unilateral Agreement: In a unilateral agreement, one party to the agreement has fulfilled the commitment while the other has yet to do it. For example, A agrees to sell goods to B on one month's credit and immediately despatches the goods. A has fulfilled his commitment while B has yet to do it.

(b) Bilateral Agreement: An agreement in which both parties have to fulfill a commitment or commitments simultaneously, and each party's promise is a consideration for the other party is a bilateral agreement. The promises made in a bilateral agreement are called 'reciprocal promises'. To modify the example, given before, A agrees to sell goods to B at an agreed price after one month, and B agrees to pay for the goods when he receives them. Both A and B have committed, and one's promise is the consideration for the other. This is a typical bilateral agreement.

(2) Based on Mode of Creation

Agreements based on mode of creation are classified as:

(a) Express Agreements, (b) Implied Agreements

(a) Express Agreement: When a proposal is made and accepted explicitly, by word of mouth or in writing, the agreement reached is an 'express agreement'. For example, A wants to sell his car for Rs. 50,000, and makes a proposal to B, who wants to buy it. B accepts the proposal by word of mouth or in writing. The agreement thus reached would be an 'express agreement'.

(b) Implied Agreement: Agreements which are not express are called 'implied agreements'. These agreements are not expressed orally or in writing but are reflected in the thinking, behaviour, rites and customs of the parties concerned. For example, the bus driver does not orally invite the passengers to board the bus, he merely stops the bus at the bus stop and the passengers board without being invited. This silent or tacit invitation by the driver and its acceptance by the passengers is an implied agreement.

(3) Based on Enforceability

Agreements based on enforceability comprise:

(a) Void Agreements

(b) Voidable Agreements

(a) Void Agreement: According to Section 2(g) of the Indian Contract Act, any *"Agreement not enforceable by law is said to be a void agreement"*. A void agreement does not imply any legal rights or obligations for the parties to the contract. Such agreement does not have any legal effect, it is a nullity or *void ab initio* from the beginning. An agreement with a minor or one without consideration would be a void agreement. An agreement is also void when the parties to the agreement are mistaken about an essential element of the agreement. Consider an example. A agrees to buy some goods from B. The goods are on a ship on the high seas on way to India. Both A and B agree on the terms, but come to know later that before they reached the agreement, the goods had been destroyed because the ship had sunk. In the circumstances, their agreement would be considered void.

(b) Voidable Agreement: *"An agreement which is enforceable by law at the option of one or more of the parties thereto, but not at the option of the other or others"* is a voidable agreement as per Section 2(i) of the Indian Contract Act. Such an agreement lacks the essential element of free consent. When the consent of a party to the agreement is not free, or is caused by coercion, undue influence, misrepresentation of facts or fraud, the agreement is voidable. The party who has been coerced or influenced, and whose consent is not free, may repudiate, rescind or avoid the agreement, or may decide to be bound by it. The agreement is valid till it is rescinded or disowned by the party who is entitled to do so — which is the aggrieved party. Consider an example. Ajay threatens to kill Vijay if he does not agree to sell his property to the former at a price which is not even half of its market value, and makes Vijay sign an agreement to that effect. The agreement thus reached is a voidable agreement. Vijay can either be bound by it and accept the price offered, or he can repudiate the agreement as per law.

(4) Based on Law

Agreements based on law are:

(a) Legal Agreements

(b) Illegal Agreements

(a) Legal Agreement: Such an agreement has all the basic elements that are essential for a valid agreement. If A agrees to sell his car to B for Rs. 50,000 and B agrees to buy it at that price, it would be a legal agreement.

(b) Illegal Agreement: Any agreement that transgresses some rule of basic public policy, is criminal in nature or is immoral is an illegal agreement. Being immoral implies its going against the accepted public or social norms, and being criminal implies its going against the law of the land. Such an agreement is not only forbidden by law, it is a punishable offence and the parties to it invite the wrath of law by entering into an illegal agreement. Consider the following example. A proposes to B that he will give B Rs. 50,000 if the latter kills C, and B agrees to do the killing. In the first place, the agreement is illegal because it involves B doing a criminal act. If B does the job and kills C, and A goes back on his word and refuses to pay the promised amount, B cannot go to the court of law — if he does that, he would land himself in prison.

A void agreement is a much wider term as compared to an illegal agreement. All illegal agreements are void, but all void agreements or contracts are not necessarily illegal. An illegal agreement is not only void between the immediate parties to the agreement, it has the further effect that even the collateral transactions to the original agreement are also tainted with illegality. A collateral transaction is one that is subsidiary, incidental or auxiliary to the agreement. The following examples illustrate the issue.

A and B arrive at an agreement that if it rains tomorrow, then A will pay Rs. 100 to B; and if it does not, B will pay the amount to A. In the first place, this is a 'betting ' or a 'gambling' agreement, as winning or losing is a game of chance.. But if one party to the agreement approaches C for a loan of Rs. 100 and, being aware of the purpose for which the loan is being sought, C lends the amount of money to him, it will constitute a collateral transaction to the agreement between A and B. Take another example. A agrees with B to kill C for a consideration of Rs. 1,00,000 to be paid to A by B. Since B does not have the money, he approaches D for a loan of the required amount. D is aware of the purpose for which the loan is being sought, but gives the amount to B. The transaction between B and D is a collateral to the agreement between A and B, and is illegal since the original agreement is illegal.

(5) Based on Performance

Agreements based on execution can be:

(a) Executed Agreements

(b) Executory Agreements

(a) Executed Agreement: Executed means that which has been done. Such an agreement is one in which the parties to the agreement have performed their respective obligations. For example, A agrees to buy a scooter from B for Rs. 10,000. When B delivers the scooter, and A pays Rs. 10,000, i.e. when both the parties have performed their obligations, the agreement is said to be executed.

(b) Executory Agreement: 'Executory' means that which needs to be done. An executory agreement in one that remains to be executed and the parties have yet to perform their obligations. For example, A applies for a job and B agrees to give the job to A starting next month. The agreement reached is executory in the sense that both A and B have to fulfill their commitments.

An agreement can also be partly executed and partly executory. To cite an example, A agrees to paint B's house for a price. B pays the price but A has not yet finished painting the house. B has executed but A has not.

(6) Based on Enforceability

Agreements based on enforceability are:

(a) Enforceable Agreements

(b) Unenforceable Agreements

(a) Enforceable Agreement: An enforceable agreement is a valid agreement that has no loopholes. Such an agreement is enforceable by law because it incorporates all the provisions of the law.

(b) Unenforceable Agreement: An unenforceable contract is one that cannot be enforced in a court of law. The non-enforceability can be because of some technical defect, such as the execution of the agreement being barred by lapse of time or the conditions or terms being not clear in the agreement. The contract may be carried out by the concerned parties, but if there is a breach of contract by one party, the aggrieved party cannot claim damages or reimbursement. To take the recourse of law, the complainant has to file the complaint on a stamped paper of a specified value, otherwise the court will not admit the suit. Likewise, under the Limitation Act, if the period specified in the contract is over; or under the Stamp Act, if the stamp is not of the specified value, or the affidavit is not properly stamped, it will not be registered.

It should be noted here that even if a party to a contract is deprived of its competence to enforce the contract because of such deficiency, it does not make the contract void or voidable. That being so, there could be collateral effects which could be important. The law provides various remedies for such deficiencies, and once these have been implemented, the contract becomes enforceable. For example, if a contract is written on a stamped paper of lesser value than is required, the defaulting party can be allowed to put additional stamps on the payment of a penalty.

Kinds of Contract

The following section discusses the kinds of contracts.

(1) Valid Contract: A contract that fulfills the provisions under section 10 of the Indian Contract Act is a valid contract. If one or more of these elements is/are missing, the contract is voidable, void, illegal or unenforceable.

(2) Void Contract: As per Section 2(j) of the Indian Contract Act, "a contract which ceases to be enforceable by law becomes void when it ceases to be enforceable". A contract may be valid and binding on the parties when it is entered into, but may subsequently become void. Foe example, a contract between international traders may become void when a war breaks out between the importing country and the exporting country.

Normally a void agreement and a void contract are considered to be the same and the terms are, more or less, synonymous. But there is a difference. A contract, when entered into, may be valid and binding on the parties, and may later become unenforceable because of changed circumstances. To cite an example, Mohan commits to deliver 500 bags of wheat in Lucknow to Sohan after a month. Immediately thereafter, an ordinance bans the transportation of wheat from one state to another, and Mohan cannot fulfil his commitment. In this example,

the contract was valid when it was entered into; it became void or null in the changed circumstances.

Normally, a void agreement and a void contract are taken to be synonymous and both are taken to mean the same. But there is a subtle difference between the two. A void contract is valid when it is made, but a later change in law or circumstances make its performance impossible and it becomes void. For example, Mohan promises to deliver 500 bags of wheat to Sohan in Lucknow after one month. Later, after the contract is made, the government bans the inter-state movement of food grains, and Mohan cannot deliver what he has promised. In this example, the contract was valid when it was made; it later became void because of the restriction imposed by the government. The main difference between a void agreement and a void contract is that a void agreement is void from the beginning whereas a void contract is valid when it is made; it later becomes void because of changed circumstances.

Voidable Contract

A voidable contract is "*enforceable by law at the option of one or more of the parties thereto, but not at the option of the other or others*". Such a contract lacks one essential element of a valid contract. Those who have the right to repudiate or rescind such contracts need to exercise their right at the proper time, otherwise they lose the right and the contract becomes voidable. Any contract which does not have the essential element of free consent — i.e. it is caused by coercion, undue influence, misrepresentation or fraud — is voidable at the option of the party whose consent is not free. If A threatens to kill B and makes him sign a contract to sell his property to A at a throw-away price, B has the option to rescind the contract because he has been made to sign the contract under duress.

Difference between Void Agreement (Contract), and Voidable Contract

Basis of Difference	Void Agreement (Contract)	Voidable Contract
1. Definition	An agreement not enforceable by law is said to be a void agreement.	An agreement which is enforceable by law at the option of one or more of the parties thereto,but not at the option of other or others is a voidable contract.
2. Enforceability	Is not enforceable by law.	Is enforceable by the party whose consent to the contract is not free. He can rescind it or elect to be bound by it.
3. Duration of Legality	Is not enforceable by law from the beginning.	Is valid in the beginning and continues to be valid till it is repudiated by the aggrieved party.
4. Transfer of Title	Is not feasible under such contract. If it is done,the person to whom the title has been transferred does not have the right of ownership inspite of having paid the price in good faith.	Is feasible till such time as the contract is not repudiated and the party to whom the title has been transferred has the right of ownership if he has paid the price and the deal is with mutual consent.
5. Reason	An agreement is void because it lacks the basic elements of a valid contract.	A contract is voidable when the essential element of free consent is missing and is caused by coercion

6

FREE CONSENT OF PARTIES

An Introduction to Consent

An essential element of a valid contract is that the agreement is arrived at with the consent of the parties thereto. It is essential that the parties agree upon the same thing in the same sense at the same time and that such agreement is free and voluntary.

According to Section 13 of the Act, *"Two or more persons are said to consent when they agree upon the same thing in the same sense."*

As per the above definition, the following are essential for consent:

(1) There must be at least two parties. The parties may be more than two, but it cannot be only one.

(2) There must be only one subject of contract at one time.

(3) The parties must agree on the subject in the same sense.

In other words, there must be *consensus ad idem* between the parties, or the concept or understanding of the parties of the subject of the contract must be the same. If the understanding or concept of one party differs from that of the other, then there is no identity of views between the parties. In the absence of such consensus, there cannot be any consent and, as such, no contract can be made. For the parties to reach a consensus, it is essential that:

- there is no mistake relating to the nature of the contract.
- there is no mistake relating to the identity of the person making the contract, and
- there is no mistake relating to the subject matter of the contract.

The case of **Raffles vs. Wichelhaus** illustrates the point. In this case, one party agreed to buy 125 bales of cotton from the other to arrive on a ship named Peerless from Bombay. There were two ships of that name sailing from Bombay, one in October and the other in December. One party thought it was the ship sailing in October, while the other thought it was the one sailing in December. The court held that there was a mutual or bilateral mistake and therefore there was no contract.

In the case of **Sarat Chander vs. Kanai Lal**, one party got the other to sign a document by misrepresentation. The party signing the document believed that he was signing as a witness whereas the first party got his signature as a party to the contract. The court held that a contract did not exist because the parties had agreed to an act with different concepts.

What is Free Consent?

A valid contract requires not only the consent of the parties to the contract, it also requires that such consent is free. Consent is said to be free when it is not caused by:

1. Coercion as defined in Section 15.
2. Undue influence as defined in Section 16.
3. Fraud as defined in Section 17.
4. Misrepresentation as defined in Section 18.
5. Mistake, subject to the provision of Sections 20, 21 and 22.

1. Coercion

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

Coercion can be by any party against any other party, but the purpose of such act is to coerce or compel a party to agree to the terms of the contract. It need not necessarily proceed from a party to the contract and may even proceed from a stranger to the contract. Likewise, it may be directed against anybody—not necessarily the other contracting party. The intention of the person using it should, however, be to cause a party to enter into an agreement. As per Section 15, "It is immaterial whether the Indian Penal Code is or is not in force in the place where coercion is employed."

For example, A commits an act illegal as per Indian law while on board a British ship in international waters and compels B to make a contract. Later when the ship reaches Bombay, B files a suit to repudiate the contract because it was made under coercion, even if such coercion was committed in international seaway beyond the jurisdiction of Indian law. B would be entitled to repudiate or disown the contract in such a case.

If we analyse its definition, we can conclude that coercion is:

(1) Committing an act forbidden by Indian Penal Code: Such an act can include murder, dacioty, preventing a dead body from being cremated, kidnapping, physical beating or torture, etc. In the case of **Ranganayakamma vs. Alwar Satti**, a widow of 13 years was forced to adopt a boy by her husband's relatives before they allowed her to cremate the body of her dead husband. The court held that her consent was not free but caused by coercion because preventing the cremation of a dead body is an offence under Section 296 of the Indian Penal Code. Consequently, the adoption was set aside.

(2) Threatening to commit any act forbiddin by Indian Penal Code: A threat to commit an unlawful act to make a person agree to a proposal is deemed to be coercion. **Ammiraju vs. Seshamma** is a case in point where a person threatened his wife and son that he would commit suicide unless they signed a release deed of their property in his favour. The court set aside the release deed and ruled that it was obtained under coercion since a threat to commit suicide is an offence under the Indian Penal Code.

(3) Unlawful detention of property: *Detaining any property by unlawful means amounts to coercion. In one case, an agent refused to hand over the books of account to a new agent*

till such time that the principal released him from all obligations, and the principal was forced to give a release deed as demanded. The court later ruled that the release deed was obtained under coersion and, therefore, voidable at the principal's option.

(4) Threatening to detain property unlawfully: To make a threat to unlawfully detain a person's property to harm him or compel him to agree to contract is deemed to be coercion. In the case of **Bansraj vs. Secretary of State,** the state threatened to confiscate the property of a person if his son did not pay the fine that the state had imposed on him. The party paid the fine, but the court held that it was a contract induced by coercion.

A lawful threat—which implies a threat to take the recourse of law—is not illegal. If a person who has given a loan threatens to go to court if the debtor does not repay the loan, it would be a valid threat and would not be deemed as coercion.

Indian and English Laws of Coercion

The near equivalent term for coercion under the English law is 'duress' or 'menace', but coercion has, in fact, a much wider scope. If a person physically harms or molests another, or threatens to do so, and thereby obtains the other party's consent, such person would be using duress. Coercion is more of a threat with regard to goods or property in the form of detaining or threatening to detain such goods or property unlawfully. Duress involves actual or threatened violence by one party or his agent over the person of another (or his wife, child or parent) to obtain his agreement or consent, whereas coercion can be by any party against any other to obtain such consent.

Effect of Coercion

A contract made by use of force or coercion is voidable at the option of the party whose consent has been obtained by coercion. If the party that has been coerced so desires, he can repudiate the contract, or he can fulfill his obligation under the contract and make the other party do the same.

Under Section 72, if the person whose consent is not free and is obtained by coercion wants to repudiate the contract, then he has to return the consideration that was received by him under the contract.

Burden of Proof

The party that wants to repudiate a contract on the plea that his consent has been obtained by coercion has to prove the usage of coercion by the other contracting party. The burden of proof lies on the party making such plea.

What is Included in Coercion?

Coercion includes: (i) physical discomfort, (ii) fear and (iii) threat of physical or financial harm. It is not necessary that there be actual physical harm or injury—a threat of such harm or injury to induce fear is tantamount to coercion. Besides, any act which is unlawful under the Indian Penal Code, or a threat to commit such act, also constitutes coercion. Unlawful activities under the Indian Penal Code include murder, rape or molestation of a woman, theft or dacoity, beating and physical torture, preventing the cremation of a dead body, threat to commit suicide etc. To unlawfully detain, or threaten to detain, goods or property to cause harm to a person also comes under coercion.

Is Threat to Commit Suicide Coercion?

The issue whether a threat to commit suicide amounts to coercion was raised in **Amirazu vs. Seshamma** case in which a person threatend to commit suicide if his wife and son did not execute a release deed in respect of their property in his favour. Both, wife and son complied and did as they were told. Madras High Court held the view that the threat to commit suicide was tantamount to coercion. Justices Wallis and Ayyar held that while a *threat* to commit suicide is not punishable under the Indian Penal Code, an *attempt* to commit suicide is punishable under Section 309 of the Penal Code. But Justice Oldfield was of the opinion that Section 15 needed to be interpreted in the correct perspective. An act (threat to commit suicide) which is not punishable by law cannot be declared illegal by law. The second interpretation would seem to be more relevant.

2. Undue Influence

According to Section 16(1) of the Contract Act, *"A contract is said to be induced by 'undue influence' where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other."*

According to its definition, the following constitute what is termed as 'undue influence'.

(a) There being such agreement between the parties where one party is in a position to influence the free consent of the other.

(b) The party in such position making use of his position to gain undue advantage over the other.

(c) The party in such position gaining undue advantage.

To establish the existence of undue influence, firstly it is necessary to prove that one party to the contract was in a position 'to dominate the will of the other' and secondly that the party had used that position 'to obtain an unfair advantage over the other'. If any of the two conditions is not there, then there can be no undue influence.

Position to Dominate the Will

Having clarified what is undue influence, it is pertinent to ask how and under what situations can one party dominate the will of the other. Under Section 16(2) of the Act, a party is deemed to be in a position to dominate the will of another in the following conditions:

(a) When one party holds a real or apparent authority over the other. Examples of such authority would include the relationship between teacher and student, master and servant, father and son, landlord and labourer, religious teacher and disciple, etc.

(b) When the party stands in a fiduciary relationship, i.e. a relationship of trust and confidence with the other, like the relation between an advocate and client.

(c) When the party makes a contract with a person whose mental capacity is temporarily or permanently impaired for reason of age, illness or mental or physical distress. Such relationship exists, for example, between a doctor and his patient.

However, there are relationships where such domination cannot be deemed to be undue influence — like the relation between husband and wife, or between mother and daughter. Some examples of what constitutes undue influence are discussed in what follows:

1. A is a rich landowner and B a poor Farmer. B has a Jersey cow valued at Rs. 5,0 If A uses his authority and forces B to sell the cow for Rs. 2,000, he would be using influence.

2. A advanced some money to his son B when the later was a minor. When B becam a major. A used his parental authority to get a bond from B for an amount greater than sum due in respect of the advance. In this case, A has used undue influence.

3. A is a patient *writhing* in the agony of physical pain. The doctor refuses to give a pain killer unless he signs an affidavit and, because of sheer incapacity to suffer more A signs the required affidavit. Here the doctor has used undue influence.

4. A is a village money-lender who promises to give a loan to B on conditions that totally unreasonable because he knows that B is in desperate need of money. Here, A is undue influence. The burden of proof that A was using undue influence lies with B whose A was trying to dominate.

There could be situations where the conditions imposed by a party might sound like undue influence, but it may really not be the case. For example, A approaches a banker for a substantial loan when the money market is very tight. Because of the market condition, the banker lends a rate of interest that is higher than the normal interest rate. A agrees to take the loan at a higher rate of interest. This contract is a normal business transaction. Since money is scarce, the rate of interest is higher, and there is no undue influence exercised by the banker.

Burden of Proof

In any action to repudiate a contract on the ground of undue influence, the party seeking to repudiate the contract needs to establish:

(a) That the other party was in a position to dominate the will of party seeking repudiation. Mere proof of nearness of relationship is no ground to assume that the relation was in a position to dominate the will of the other.

(b) That the other party actually used his influence to obtain the first party's consent to the contract; and

(c) That the transaction was unconscionable or unreasonable.

Effects of Undue Influence

According to Section 19(A), undue influence in a contract has the following effects:

(i) The contract is voidable at the option of the party whose consent was obtained by undue influence.

(ii) The contract may be set aside absolutely or, if the party entitled to repudiate the contract has received any benefit thereunder, upon such terms and conditions as may seem just and equitable to the court.

Some leading cases relating to undue influence are cited in what follows:

(1) Dila Ram vs. Sardha: An old man, extremely ill and weak, under undue influence was made to contract to pay an exorbitant fee to the doctor for his treatment. The court set aside the contract because it was made under undue influence.

(2) Mannu Singh vs. Umadatt Pande: A spiritual guru induced his devotee to execute a gift deed of all his property in favour of the guru in return of a promise of salvation. The court held that the consent of the devotee was given under undue influence.

(3) Ranee Annapurni vs. Swaminathan: A poor widow was induced by a money-lender to agree to pay 100 per cent interest on a loan of Rs. 1500. She needed the money to establish her right to maintenance. Madras High Court held that it was a case of undue influence and reduced the rate of interest to 24 per cent.

(4) Kotumal vs. Swaminathan: The court held that the question of usage of undue influence can only be raised by a party to the contract and not by an outsider who is not a party to the contract.

Unconscionable Transaction

An unconscionable transaction is not a transaction done by fraud. It is rather a transaction in which a person in a dominant position makes unreasonable use of his position or power over the other party and enters into a contract, which is so much to his advantage that it 'shocks the conscience', or makes an exorbitant profit of the other's distress. An unconscional transaction is taking advantage of the other party's weakness without transgressing the boundaries of law. The party's agreement to the contract may not have been induced by force of threat to use force, but by the fact that such possibility existed. A high rate of interest in a money-lending transaction will not make it unconscionable because it is the business of money-lenders to give money on interest. But an exorbitant rate of interest makes the transaction unconscionable. The burden of proof that no undue influence was used lies on the lender.

A contract with a woman who observes *purdah* — or who is commonly referred to as *pardanashin*—is presumed to have been influenced by undue influence. The law classifies the contracts made in the following situations as invalid contracts:

1. A party to the contract being ignorant of the terms and conditions of the contract.
2. There being no independent counsel to the party.
3. An exorbitantly high rate of interest on loans.
4. A party to the contract not understanding the legal implications of his commitment under the contract.

For example, in the case of **Chuni Kunwar vs. Rup Singh,** an inheritor of an estate had executed a bond of Rs. 25,000 for a loan of Rs. 3,600. The court set aside the contract and decreed that an interest of 20 per cent would be charged on Rs. 3,600.

A contract is valid only when no undue advantage is taken of the weakness or insecurity of a party to the contract by the other party.

Pardanashin Women

A *pardanashin* woman is one who observes seclusion because of religion or custom of a community. Such women do not intermingle with outsiders and keep their face and body covered by a *burqa*. The law gives a special status to *pardanashin* women. In India, a *pardanashin* woman is one who stays within the four walls of the house, or observes seclusion. As per law, such women need to prove that they are *pardanashin*. A woman who goes to the court, and gives evidence, collects and settles rent with tenants, and communicates in business matters with men other than her family members is not a *pardanashin* woman even if she lives in seclusion or does all these things dressed in a *burqa* **(Isamil Musssajee vs. Hafiz Boo).**

In India, there have been (and are) cases when *pardanashin* women have made contracts and have later gone to court and demanded that the contract be declared void. The law recognises

a woman to be *pardanashin* when she can easily be unduly influenced because she is ignoran or unaware of wordly affairs or the law of the land.

One needs to be very careful when making a contract with a *pardanashin* woman. A person going to court in such a contract needs to prove to the satisfaction of the court that

1. The terms of the contract were explicitly explained to her.
2. She had understood the terms of the contract.
3. She had free and unbiased advice in the matter.
4. The other party's behaviour was legally correct.
5. She had understood her obligations under the contract and her consent to the contract was free and voluntary.

It is also required to prove that no undue influence or coercion was used in the contract and that she had made the contract of her own free will.

Difference Between Coercion and Undue Influence

Basis of Difference	Coercion	Undue Influence
1. Meaning	Consent is obtained by use of force or a threat to use force. It includes detaining or threatening to detain somebody's property illegaly.	Consent is obtained by one party misusing his dominating position or by moral influence.
2. Type	It is mainly of physical character and implies the use or threat to use force.	It is of moral character and implies the use of moral force or mental pressure.
3. Relations of Parties	There needs to be no definite relation between the parties.	There needs to be a definite fiduciary,legal or authoritative relation between the parties.
4. Usage	Coercion is used by the promisee against the promisor or somebody near and dear to the promisor.	Can only be used by the promisee against the promisor and nobody else.
5. Effect	The contract is voidable at the option of the aggrieved party.	The contract can be set aside completely or be void on the terms set by the court..

3. Fraud

According to Section 17, fraud means and includes any of the following acts committed by a party to a contract or with his connivance, or by his agent with intent to deceive or 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 meant to deceive;

(5) Any such act or commission as the law specially declares to be fraudulent.

(6) Sometimes, being silent and not saying anything can also be a fraud. Some examples of acts of fraud are listed hereunder:

(1) The suggestion that a fact is true when it is not true: If a party to a contract willfully and knowingly says something which is not true, and he knows it to be untrue, he is guilty of fraud. For example, if A sells a shoe to B and says that it is made from calf leather, while in reality the shoe is made from ordinary leather, A would be committing a fraud, and the contract is voidable at the option of B. But for a party to express an opinion or a desire with regard to something is not a fraud. If A buys B's car, and B tells him 'I' think the car will give you 15 kilometers to a litre, B is not committing a fraud — he is just expressing an opinion. If a person makes a statement which is not true, but he believes it to be true, it will not be a fraud but a false statement.

(2) Active concealment of a fact: If a party to a contract conceals a fact that he is duty-bound to disclose, he is guilty of fraud. The law stipulates that a person buying something is aware of the quality, quantity, price, etc., of what he is buying. Even if he buys something defective or not of the quality he is looking for, he cannot blame the seller. The seller is not obliged to explain every detail about what he is trying to sell. He is only obliged to explain the product details which are not apparent or which are not noticeable or beyond the understanding of a normal man. Concealment of a fact cannot be termed a fraud unless it is obligatory for the person concealing it disclose the fact. In other words, when a contract is based on trust and confidence, there is no concealment of facts between the parties to the contract.

For example, A sells a motorcycle to B. There is a defect in the motorcycle which is not apparent, but which is a major defect. A conceals this fact from B. Here A has committed a fraud and the contract is voidable at B's option.

(3) Promise with the intention of non-performance: If the party making the contract does not intend to perform the contract or stick to the terms of the contract, then it will be a case of fraud. For example, if A takes a loan from B and promises to pay it back by certain date while in reality he has no such intention, he would be committing an act of fraud. But a mere allegation of a party's intention of non-performance does not make the contract void.

(4) Any other act done to deceive or a fraudulent act: Man is an ingenious being and is adept in finding newer and unusual ways to commit an act of fraud. It is, therefore, very difficult to confine the parameters of fraud to its stated definition. The law recognizes all acts as fraudulent which are not listed in the sections of the Contract Act and can be used by one party by misrepresentation or concealment to persuade the other to make a contract.

(5) Any act or omission declared to be fraudulent by law: Acts, or omissions thereof, which have been declared fraudulent by law are acts of fraud. According to Company Law, a misrepresentation in a company's prospectus is an act of fraud. Under the Insolvency Act, if an insolvent transfers his property to deceive or mislead his creditors, it is deemed to be a fraud.

(6) Sometimes silence is also fraud: Section 17 does not hold silence to be an act of fraud even when it influences a party in making or not making a contract. But if the conditions are such that it becomes the lawful duty of a person to speak, then silence becomes a fraud. It also is a fraud when such silence is equivalent to speech. For example, A sells his horse in

an auction to B. A knows that the horse is unsound, but he does not say anything about it. This act is not fraud. But if B is A's son, then the relationship warrants that A disclose the fact of the horse being unsound to B. Here the relationship between the two makes it A's duty to disclose the fact to B. If he does not do so, it will amount to fraud. Here A's silence is equivalent to speech.

Elements of Fraud

If we analyse the definition of fraud, the following become discernable as the elements of an act of fraud:

(1) Fraudulent work can be done by a party or his agent: In this connection, the case of **Reese Rive Silver Mining Co. vs. Smith** can be cited as an example. The company had issued a prospectus that gave false information about the unbounded wealth of Nevada. A shareholder who had bought the shares of the company wanted to repudiate the contract. The court held the contract to be voidable because the company directors had committed fraud as the company's agents.

(2) The object of the fraudulent act must be to deceive the other party: The intention must be to deceive the other party and the party must have succumbed to such deception. If the object is not to deceive the other party, but the party is deceived for whatever reason, the act is not deemed to be fraudulent. Mere falsehood is not enough reason to give the right to a party to repudiate the contract. It must have induced the party to act upon it. A deceipt which does not deceive is not fraud. Consider an example. A obtained a false certificate from an animal specialist that a horse he wanted to sell was sound and displayed it on the stable door. B took the certificate to be genuine and bought the horse. The court held that the contract was based on fraud. If B had not read the certificate and bought the horse, the contract could not have been held void because there would have been no fraud.

(3) The fraud must be against the party or his agent: A fraudulent act need not necessarily be against the party to the contract. It can also be against agent of the party. The intention of the party doing the act of fraud must be to induce the other party — directly or indirectly through the party's agent — to make a contract.

(4) The other party must have suffered some loss: It is a common rule of law that there is 'no fraud without damage'. As such 'fraud without damage' or 'damage without fraud' does not invite an action on deceit.

Forms of Fraud

A fraud can be of any of the following forms:

(a) Fraud by suggestion

(b) Fraud by active concealment

(c) Fraud by silence

(a) Fraud by Suggestion or Representation: When a party to a contract makes a suggestion that a fact is true, being aware that it is not true, it is deemed that he is trying to induce the other party by fraud to enter into a contract. Such fraud is called 'fraud by suggestion'. Take an example. A is a dealer in pure *ghee*, but he very well knows that the *ghee* he is selling is not 100 per cent pure. If a customer buys *ghee* from A on his assurance of it being totally pure, it would be a case of 'fraud by suggestion' by A.

In the case of **Kala Meah vs. Parperink**, the court held that since the person auctioning a property had made false statements, it was a case of fraud by suggestion.

It is important that the representation must relate to a material fact which exists now or existed in the past. An opinion, commendatory statement, hearsay or high-profile description is not regarded as a representation of a fact or a suggestion. For example, A wants to sell a horse to B and says, 'It's a beautiful horse and a price of Rs. 2,000 is not a high price for it.' A is only giving his opinion about the horse to B — it is upto B to accept or reject it — and as such, it constitutes no fraud. But if A were to say to B, 'Only last week, I bought this horse for Rs. 2,000' while in fact he had paid only Rs. 1,500 for the horse, he would be misrepresenting a fact. And if B buys the horse on A's representation (which is not true), A would be committing an act of fraud, and B can get the contract set aside if he so desires.

(b) Fraud by Active Concealment: When a party to a contract, knowingly or wilfully, conceals a material and important fact concerning the contract which he is lawfully bound to disclose to the other party, the party withholding such information is guilty of fraud by active concealment. It is important to note here that it is not obligatory to specify all details in every contract. The common rule of law called *caveat emptor* stipulates that the buyer must beware of his own accord. The seller is not obliged by law to give the details — even important details — of what he is trying to sell. For example, A sells his horse to B. A knows that the horse is unsound, but he does not mention the horse's condition to B. A is committing no fraud by not telling B that the horse is unsound. The law stipulates that both parties to a contract have the means to investigate the subject of the contract, and as such, the law does not stipulate on one party to 'educate' the other.

However, in the following situations, a party to a contract is bound by law to disclose the salient or important aspects of the contract to the other:

(1) Statutory obligation to disclose a material fact: According to the rules, parties to a contract are obliged to disclose such material or important issues to the other party as are mandatory under any act or law. For example, Sections 55 and 108 of the Transfer of Property Act make it obligatory for the seller or the lessor to give all material documentary information about the title of the property to the buyer or the lessee.

(2) Contracts uberrimae fideid: Such contracts are also called contracts of utmost *faith*. In such contracts, one party to the contract has the information or the means to get the information, which the other does not. The party who has the information, or access to it, is obliged by law to give specific information to the other party to help the party arrive at a decision to make the contract. The following are such contracts of utmost faith:

(i) family settlements, (ii) insurance contracts, (iii) contracts related to sale of land property, (iv) contracts of guarantee, (v) contracts for allotment of shares, (vi) contracts of marria and (vii) contracts of partnership.

(i) Family Settlements: In settlement of family disputes, members are obliged to disc the material facts. For example, in a property settlement between brothers, if one brother is a of the fact that a property or land is valued more than the others, the fact should be known to others, otherwise the settlement becomes voidable when the fact is known by

(ii) Contracts of Insurance: In such contracts, the insured has more information about what he wants to get insured than the company doing the insurance, or the insurer. It is, therefore, obligatory for the insured party to provide the insurer such information as may be required by the insurer to provide the insurance cover. For example, for a life insurance policy, the company would need information about the age, state of health, etc., of the person getting such policy.

(iii) Contracts for Sale of Land: The seller of land is obliged by law to make known to the potential buyer all such facts about the land and his title thereof of which the buyer does not have knowledge, otherwise the contract can be said to have been made by fraud and set aside.

(iv) Contracts of Guarantee: When one party seeks a guarantee from another about a third party, the party seeking such guarantee is obliged by law to give all material information about the concerned party to the provider of the guarantee.

(v) Contracts for Allotment of Shares: In such contracts, it is expected of the company selling the shares to give authentic information about its financial position (like capital, assets, etc.) so that the buyer can make the decision to invest in its shares.

(vi) Contracts of Marriage: In contracts of marriage, each party is obliged by law to provide such information to the other as is necessary for the party to accept the proposal of marriage.

(vii) Contracts of Partnership: A partnership contract is a contract of utmost faith. Every partner is obliged by law that he is honest and truthful in giving information to other partners on financial and other matters that are likely to affect the functioning of the partnership.

Fraud by Silence: The third face of fraud is fraud by silence. Mere silence is not a fraud, even if it has an effect on the other party. But being silent in the following situations is deemed a fraud by law:

(i) If the situation is such that a person is bound by law to reveal the truth, keeping silence is deemed to be a fraud. Such situations occur in contracts of utmost faith when keeping silence about the important aspects of a contract is deemed to be a fraud because the purpose of such silence is to give a wrong impression or misguide the other party.

(ii) When keeping silence is as good as speaking.

Examples:

1. A sells his horse to B knowing that the horse is of unsound health. He does not tell B anything about the condition of the horse. A commits no fraud in such situation.

2. In the above example, if B is A's son, the relationship between the two makes it obligatory for A to tell B about the condition of the horse. If A does not, he commits a fraud.

3. If B says to A, If you do not say otherwise, I will take it that the horse is of sound health, and A keeps mum, his silence is as good as saying that the horse is in sound health and would be deemed a fraud.

Mere Silence is not Fraud

According to Section 17, mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud unless the circumstances of the case are such that it is the duty of the person keeping silent to speak out, otherwise his silence is in itself equivalent to speech.

In a nutshell, mere silence is not a fraud. In **Keates vs. Lord Cadogan** case, it was held that a landlord was not obliged to tell the tenant that the building was in a delaphidated condition before letting his house on rent. Section 17 does not stipulate mere silence as a fraud, even if it makes a difference in a party's decision to make a contract. Silence is tantamount to fraud in the following situations:

(a) Where circumstances cast a duty on the person keeping silence to speak: For example, A sells his house to his son B who has just become a major. A knows that the house is mortgaged. Because of the relationship of 'utmost faith' between the two, it becomes obligatory for A to reveal the fact of the house being mortgaged to B. If A remains silent, it would amount to fraud.

(b) Where silence is equivalent to speech: In situations where silence is equivalent to speech in the sense that the implication of not speaking or speaking the truth, is the same, then keeping silence is deemed to be a fraud.

The onus of specifying the details of a contract does not fall on all the parties to a specific contract. When you are buying something, the primary rule is that you must be aware of what you want to buy. This is what is referred to a *caveat emptor* or *let the buyer beware*. In other words, the seller is not obliged by law to enumerate the drawbacks, or the minuses, of what he is trying to sell — the buyer is supposed to know what he wants to buy. Each party to a contract has the right 'to be clever', or to use his intelligence or tact to take the maximum advantage from the other party. That is a business strategy, but willful and intentional untruth or misstatement is a fraud.

Non-disclosure of Facts Amounting to Fraud

The following are the situations when a party is bound by law to disclose the facts as he knows them to be.

(1) When a representation is true when it is made but, to the knowledge of the party, is falsified by later events: Such representation must be corrected. If it is not corrected, the other party can rescind the contract. In **Will vs. O'Flamagan** case, the negotiation for the sale of a medical practice started in January when it was represented that the annual receipts were £2000. Later the seller became physically sick and could not personally attend cases, and the receipts touched a bottom of £5 a week. The court held the contract void because the steep fall in receipts was not disclosed.

(2) When a statement literally true is misleading: A party to the contract might make a statement disclosing all that he knows, but the statement is misleading because it does not reveal the whole truth. Such a statement would be fraud. For example, the buyer in a land deal asks the seller's counsel whether or not there is any restriction on the sale or purchase of land in the state, and the counsel says that he knows of no such restriction — he does not say that he has not read the relevant law and its latest amendments — the counsel's statement is correct but misleading, and gives the right to rescind the contract to the buyer.

(3) Trade customs: Some business transactions are governed by specific rules pertaining to the business, and non-disclosure of such customs amounts to fraud. For example, if a trader does not reveal the purity of gold in carats, it would amount to fraud.

(4) Fiduciary relationships: In such relationships, one party is lawfully bound to disclose the salient or important information that can help the other party in arriving at a decision — for example, an agent is bound by law to keep his principal informed of his activities. The law is also applicable in *gaurdian and ward*, and *solicitor and client* relationships.

Effects of Fraud

Section 19 of the Contract Act gives the following rights to a party who has made a contract as a result of a fraud committed by the other party:

(1) Right to repudiate the contract: If the consent of a party to the contract has been obtained by 'fraudulent silence', but the party could have known the correct position by reasonable effort and had the means to make such effort, the party in question cannot repudiate the contract.

(2) Right to affirm the contract: The party who has been the victim of fraud can confirm the contract if he so desires and enforce the other party to carry out the terms of the contract, or he can terminate the contract. But if, after becoming aware that a fraud has been committed, the party does not repudiate the contract, then he loses his right to confirm or rescind the contract and is liable to be charged as guilty if he files a suit for fraud.

(3) Claim for restitution: The aggrieved party can claim restitution. In other words, if the party has advanced any money or transferred any property to the other party under the contract, he is legally entitled to get it back. If the party has suffered any financial or other loss because of making the contract, he is entitled to receive damages for the same.

Examples:

A makes a misrepresentation to defraud B and says that his factory has the capacity to manufacture 200 quintals of ultramarine a year, and induces B to buy the factory. The contract is, in this case, voidable at B's option.

A makes a fraudulent statement that his property is free from mortgage, on the basis of which B buys the property. The property is in fact mortgaged to a third party. In this case, B is entitled by law to enforce A to clear the mortgage and give him a clear title to the property.

4. Misrepresentation

As the word suggests, it is made up of two words — *mis* plus *representation* — which literally mean a false statement. Misrepresentation is a false statement which the person making it believes to be true or which he does not know to be false. The Indian Contract Act classifies misrepresentation under two heads:

(1) Fraudulent Misrepresentation: A fraudulent misrepresentation is one which is knowingly and willfully made to deceive or defraud a person. The law uses the word 'fraud' for such misrepresentation, which has been defined in Section 17 of the Act.

(2) Innocent Misrepresentation: A misrepresentation which is made unknowingly is termed an innocent misrepresentation, and the person making such misrepresentation is not guilty of fraud. The law classifies it as 'innocent misrepresentation'. A carelessly made statement could later be proved to be untrue, and become a misrepresentation. For example, if A shows a yellow metal to B and asks if it is gold, and B replies in the affirmative without even looking at the metal, it would be an innocent misrepresentation on the part of B because he has no intention of defrauding A.

William Anson defines misrepresentation as *"a false statement which the person making it honestly believes to be true or which, at any rate, he does not know to be false."*

Essentials of Misrepresentation

The following are the essentials of a misrepresentation.

1. A misrepresentation is a positive assertion about a material fact. Mere expressing an opinion does not amount to misrepresentation.
2. It is made before the conclusion of the contract with a view to induce the other party to enter into the contract.
3. It is not essentially an intention to defraud a party to the contract.
4. The party making a misrepresentation is normally benefited at the expense of the other party.
5. The party making a misrepresentation believes the fact of statement to be true while it really is not.

Forms of Misrepresentation

According to Section 18 of the Indian Contract Act, the forms of misrepresentation are as under:

(1) By positive statement: Section 18(1) defines this form of misrepresentation as 'the *positive assertion* in a manner not warranted by the information of the person making it, of that which is not true, through he believes it to be true'.

For example, A proposes to sell his farm to B and says that it yields a 1000 quintals of rice a season. On A's saying so, B buys the farm, but later finds that the yield is only 800 quintals. A actually believed that the yield was 1000 quintel though he had not measured the yield and had no valid example to say so. In this case, A would be deemed to have made a misrepresentation. On the other hand, if the information that A had warranted such an estimation, then A would not be making a misrepresentation but it would be a related mistake on his part.

(2) By breach of duty without intention to deceive: According to Section 18(2), 'any *breach of duty* which, without an intent to deceive, gains an advantage to the person committing it, or any one claiming under him, by misleading another to his prejudice or to the prejudice of anyone claiming under him' constitutes an act of misrepresentation. In some contracts, like contracts to utmost faith where one party has the means to access the information which the other party does not have, the party having such means is bound by law to make the required information available to the other party. Not doing so is deemed to be dereliction of duty. If it is intentionally done with a view to deceive the other party, it amounts to fraud. For example, A declares to be 22 years old when he is getting himself a life insurance policy, though he really is 25, and the company charges him a low premium for the policy. If A does not exactly know his age but believes he is 22, and had no intention to deceive the company by giving his age wrong, it would be a misrepresentation without intention to deceive. If the intention was to deceive the company, it would amount to fraud.

(3) Causing mistake by innocent misrepresentation: Section 18(3) defines such misrepresentation as 'causing, however innocently, a party to an agreement to make a mistake as to the substance of something which is the subject of the agreement'. For example, A says to B that his building is in perfect condition and offers it to B for a price. B accepts the offer and buys the building. While making the offer, A had no idea that there is a crack in the

foundation of the building because of which it can collapse. If B comes to know of it, he can reject or rescind the contract on the basis of misrepresentation. But if the building requires minor repairs, B cannot repudiate the contract because such misrepresentation is not about important issue. If the person making a misrepresentation comes to know that the statement he has made is incorrect, he becomes duty — bound to reveal it to the other party. If he does not do that, he is deemed to have deceived the other party and is guilty of fraud.

Effects of Misrepresentation

Section 19 defines the rights of party to a contract whose interest has been jeopardised by an act of misrepresentation of the other party. These are briefly discussed in what follows.

(1) Right to repudiate the contract: The aggrieved party has the right to annul the contract if he so desires, but the contract is voidable only on the condition that he does have the means to easily verify the content of the misrepresentation and, as such, accepts other party's word.

(2) Right to affirm the contract: The aggrieved party reserves the right to affirm contract on the condition that he be placed in a position in which he would have been if representation had been true; and enforce the other party to stick to all the conditions of contract. The law permits him to file a suit to enforce his right.

(3) Right to restitution: The aggrieved party has the right to demand restitution there has been exchange of money or property under the contract, the aggrieved party has right to get back such money or property.

(4) No right to damages: The aggrieved party does not have any right to claim damages for having been induced to make such contract.

Difference Between Fraud and Misrepresentation

Basis of Difference	Fraud	Misrepresentation
1. Intention	The intention in a fraud is to deceive the other party.	The intention is not to deceive, it is the result of being ignorant about something or having wrong information.
2. Rights of the Aggrieved Party	The aggrieved party can: (a) repudiate the contract,(b)affirm the contract, (c) claim damages.	The aggrieved party can: (a) repudiate the contract, (b) affirm the contract.
3. Defence	In 'fraud by silence', the accused cannot claim that the other party had the means to access the information or could have known the truth by ordinary means.	In a misrepresentation,the accused can claim that the other party had the means to access the information or to know the correct position by ordinary means.
4. Legality	In case of fraud, the aggrieved party can file a suit to set aside the contract at any time. In other words,a contract made by fraud cannot be a valid contract.	In case of misrepresentation, if the aggrieved party does not file a suit at the proper time, the contract is deemed to be a valid contract.
5. Nature	A fraud is intentional and deliberate.	A misrepresentation is the result of being ignorant of a fact or has

5. Mistake

The Indian Contract Act does not define a mistake, but it may be defined as *an erroneous belief about something*. It may be a mistake of law or a mistake of fact.

A contract is valid only when the parties to it are agreed about something in the same spirit. If the concept of the parties about an issue is not the same, or their views are divergent, the parties are not deemed to be in agreement. Such a situation is what is called a *mistake*.

According to Section 20, *'Where both the parties to an agreement are under a mistake as to matter of fact essential to the agreement, the agreement is void'*.

Kinds of Mistake

A mistake may be:

(1) Mistake as to the law.

(2) Mistake as to the fact.

Mistakes as to law are of three categories:

(a) Mistake as to the law of the country: Every person is expected to know the law of the country. As the saying goes, *ignorance of law is no excuse*. A party cannot be allowed any relief on the ground that he has done or not done an act in ignorance of law. For example, if a person commits a theft and says that he was not aware that thieving was a legal offence and may therefore be excused, cannot be exempted from punishment.

(b) Mistake as to foreign Law: A citizen of a country is expected to know the law of his own country, but he is not supposed to know the law of a country other than his own. If a person commits a mistake about the law of a foreign land, such a mistake may be excuseable. Such a mistake is deemed to be a mistake as to a fact.

(c) Mistake as to private rights: A mistake as to the private rights of the parties to a contract is deemed to be a mistake as to a fact and the contract becomes void. Any money exchanged between the parties as a result of such mistake is returnable to the concerned party. Consider an example. A and B together take a loan of Rs. 2,000 from C. A repays the amount to C without the knowledge of B, who later again repays the amount to C. Here C is obliged by law to return the amount of Rs. 2,000 to B.

Mistakes as to fact render a contract to be void in the following situations:

(a) Mistake by both parties: To scrap a contract, the mistake should have been made by both parties to the contract, i.e. that parties should be having differing points of view about the same thing. For example, A makes an offer to sell his Shivaji Park house to B, which the later accepts. B is not aware that A has two houses and thinks that the Greater Kailash house (where he had met A and which he had liked) is the one being offered to him, and that is why he accepts the offer, whereas A thinks that B's acceptance is for the Shivaji Park house. What is absent in the contract is *real consent* because both parties are thinking about different houses. As a result, there is deemed to be no agreement and the contract is void. In the case of **Hem Singh vs. Bhagwat,** a blind person was induced to sign a bond on the pretext that it would be advantageous for him to do so, whereas the bond was in fact to his disadvantage. The contract was later held void by the court. A contract is void if it is the result of one-sided mistake of a handicapped person or a minor.

Section 22 clearly states that a contract cannot be voidable because a party to it has a mistake as to a fact. For example, A wants to sell his scooter for Rs. 3,800, but by mistake he writes the amount as Rs. 3,300 in his offer, which is accepted by B. The contract cannot be held void because of this one-sided mistake of A. But if a party to the contract can prove that the one-sided mistake was because of fraud or willful misrepresentation by the other party, then the contract becomes voidable.

(b) **The mistake must relate to a matter of fact essential to the contract:** A contract is not deemed to be void on the basis of a mistake as to judgement, a mistake as to expectation or a mistaken belief. If a person expects price to go up, and instead it starts to decline, he cannot repudiate a contract on this account.

Forms of Mistake of Facts

A mistake of fact may be a:

1. Unilateral Mistake
2. Bilateral Mistake

1. Unilateral Mistake: If the mistake is on the part of one party to the contract as to a matter of fact essential to the contract, the contract remains valid unless the mistake is not the result of a fraud or wilfull misrepresentation on the part of the other party. For example, A wants to sell his car to B for Rs. 80,000 but by mistake he makes a offer for Rs. 60,000, which B accepts. A cannot repudiate the contract on the ground that he has committed a mistake about the price. Or take another example. If A wants to buy 5 quintals of rice from B, and makes the deal thinking he is buying 'old Basmati' rice whereas the stock is from the new crop, it will be a valid contract. But if a party to a contract has committed fraud or made a deliberate misrepresentation that has caused the other party to make a mistake, the contract becomes voidable at the instance of the party who has made the mistake.

Types of Unilateral Mistake

The types of unilateral mistakes are as under:

(i) Mistake as to person contracted with: A fundamental rule of law is that if one party makes a proposal to another with whom he wants to make a contract, any third party does not have the right to accept such proposal. In cases of **Cundy vs. Lindsay** and **Bolton vs. Jones**, the contract was held void because one party was mistaken about the identity of the other with whom the contract was made.

In **Cundy vs. Lindsay,** there was a mistake in identifying the person with whom the contract was made, and consequently the contract was held void. There was a similar mistake in the case of **Bolton vs. Jones**. Bolton had bought a hose-pipe business from Brocklehurst, and Jones had placed an order with Brocklehurst for the supply of certain goods. Bolton had supplied the goods without informing Jones that the business had changed hands and that he was the new owner. Later Bolton filed a suit because Jones did not make the payment for the goods. The court held that Jones wanted to make a contract with Brocklehurst, not Jones, and refused to recognise the contract.

If the identity of the person making a contract is vital, it follows that the contract is not enforceable by anybody else. In the case of **Lake vs. Simmons**, a woman, claiming that she was the wife of a Baron, took two pearl necklaces from a jeweller allegedly to show them to her husband, and sold the same to a third party. The court held that there did not exist a contract between the woman and the jeweller, and the buyer of the necklaces could not claim to be the owner. As such, the necklaces should be returned to the jeweller. The basis of the court's decision was that the jeweller did not want to make a contract with the woman—he wanted to make such contract with the Baron's wife. It was a case of mistaken identity, and the contract was held void.

(ii) Mistake as to the nature of a document signed: As a normal rule of law, a person who signs a document is bound by the contents of the document, even if he has not read the document and does not know what is written therein. But if the person is blind, illerate or senile, or if the document is based on a fraudulent misrepresentation of a fact, then the signer can plead *non-set factum* (it is not his deed) and disown the document. When a person makes a contract against his wish under the inducement of the other party, it is deemed to be a mistake as to the nature of document signed and the contract will be void. In the case of **Foster vs. Mackumon**, an old man of poor sight endorsed a bill of exchange thinking that it was a surety. The court absolved the signer of his obligation under the contract. Likewise, if A gets B to sign a document saying that it is an insurance letter while in reality he is getting A's signature on a bond, A cannot bind B to the contents of the document.

2. Bilateral Mistake: When both the parties to a contract are under a mistake as to a matter of fact essential to the contract, it is a case of bilateral mistake.

Types of Bilateral Mistake

The types of bilateral mistakes are:

(1) Mistake as to subject matter: When both the parties to a contract are working under a mistake relating to the subject matter, the contract is void. Such mistakes can be about the following matters related to a contract.

(a) Regarding Existence: If the parties believe the subject matter of the contract to be in existence, which at the time of the contract is non-existent, the contract is void. In the case of **Courtusier vs. Hastie**, a contract was made to buy the merchandise on board a ship which was on the way from one port to another. The contracting parties did not know that the ship had sunk and there was no merchandise for which the contract was being made.

(b) Regarding Identity: When both parties are not agreed about the identity of the subject matter, i.e. when one party intends to deal in one thing and the other party intends to deal in another, the contract is void. In this connection, the verdict in **Raffles vs. Wichelhaus** is important. There were two ships, both named 'Peerless' sailing from Bombay, and there was a mistake as to which ship was carrying a particular cargo. The seller was selling the cargo of one ship whereas the buyer thought he was buying the cargo of the other. It was a mistake about the identity of the subject matter of the contract, and the contract was held void.

(c) Regarding Title: When the parties to a contract are not agreed as to the title of the subject matter, the contract is void. If one party believes that he is the owner of something and has the right to sell it (while in reality he has no such right), and the other party buys it

believing that the first party is the lawful owner, the contract is void. In the case of **Raja Kunmar vs. Mehboob Baksh**, A bought a piece of land from B and constructed a house. It came to light later that B was not the owner and had no right to sell the land, though B honestly believed himself to be the owner. Both had made the contract in good faith, but both were mistaken, and the contract was held void.

(d) Regarding Price: Sometimes both parties are mistaken about the price of the subject matter of the contract. The contract is void in this case. In the case **Webster vs. Cecil**, the buyer and seller had agreed about a property deal, but while making the offer, the seller had written the amount £1200 instead of £2100. The buyer accepted the offer, knowing that the amount was wrongly quoted. The court held the contract void.

(e) Regarding Quantity: If both parties are mistaken as to the quantity of the subject matter, the contract is void. In the case of **Cox vs. Prentice**, a silver bar was sold under a mistake as to its weight. The parties were mistaken about the weight of the bar as it was and as it was supposed to be. The contract was held void.

(f) Regarding Quality: A mistake about the quality of the subject matter by both parties also renders a contract to be void. In such a case, both parties have different concepts of what constitute the elements of the subject matter. In contrast to this, if only one party has such misconception, the contract is not void. In the case of **Smith vs. Hughes**, the seller wanted to sell rice from a new crop and the buyer wanted to buy rice from the old crop. The seller had shown a sample of rice to the buyer and said nothing about the crop being old or new. The court held the contract valid.

(ii) Mistake as to Possibility of Performance: When the parties to a contract believe the contract to be performable when it is not so, it is a void contract. A mistake as to the possibility of performance can be one of the following two:

(a) Physical Impossibility: In case of an accident or a happening beyond the control of the parties, which makes the performance of the contract impossible, the contract is void. In the case of **Griffith vs. Brymer**, a contract for the hire of a room for witnessing the coronation procession of Edward VII was held to be void because, unknown to the parties, the procession had already been cancelled.

(b) Legal Impossibility: A contract is void if it provides that something shall be done which, by law, cannot be done. For example, a person might contract to supply rice from Delhi to Kanpur, but it may not be possible because of the state government's ban on the entry of rice into the state.

Effect of Mistake

According to Section 20 of the Indian Contract Act, if the parties to an agreement are mistaken about an essential subject matter of the agreement, the agreement is void. If a person makes an agreement which is invalid because of being based on a mistake, he can treat the agreement as void and can defend himself against any action by the other party. Also if he has transferred any money or property to the other party under the contract, he can, by law, claim the same.

Effect of Consent Which is not Free

According to Sections 19, 19(a) and 20, the effects of the consent of a party to a contract not being free are as under:

1. When the consent of a party to an agreement is obtained by coercion, fraud or deliberate misrepresentation, the contract so made is voidable at the instance of the party whose consent

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LAWFUL CONSIDERATION AND OBJECT

Consideration and Object-An Introduction

Another important element of a valid contract is lawful **consideration or object.** Barr a few exceptions, a contract without consideration or object is termed a 'gamble' or 'a gam chance', and is void. 'Consideration' and 'object' represent the same thing from the point view of the parties to the contract. A contract is an agreement between two parties, and w is an **object** for one party is the **consideration** for the other. For example, A makes a contr to sell his watch to B for Rs. 1,000. Here, selling the watch is A's object and B's considera Likewise, the payment of Rs. 1,000 is the consideration for A while it is the object of the contr for B.

Meaning of Consideration

In everyday language, a consideration is 'something for something'. If a person doe promises to do, something, he expects (and is promised) something in return—which is the q pro que or compensation—without which the promise is not valid. This 'something' is cal consideration. In other words, 'consideration is the price that is paid for buying somebo promise'. When one person makes a promise to another, he does so to receive or gain someth which the other person has or which can be made available by him to the person making promise. A consideration can be a profit or loss, a benefit or damage, or an obligation, bu contract without consideration is not enforceable by law. If A promises to give a gift worth 10,000 to B, and expects nothing in return, it is not a contract. If A later changes his mi B cannot sue him for breach of promise.

According to **Blackstone,** *"Consideration is the recompense given by the party contract to the other."* **Pollock** *defines it "as the price for which the promise of the other is bough and promise thus given for value is enforceable".* According to Section 2(d) of the Indian Cont Act, *"When at the desire of the promisor, the promisee or any other person has done or abstain from doing, or does or abstains from doing, or promises to do or abstain from doing someth such act or abstinence or promise is called a consideration for the promise."*

In English law, a valuable consideration in the sense of the law may consist either in some right, interest, profit or benefit occurring to one party for some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other.

Elements of Consideration

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

(1) Consideration must be the result of the promisor's desire: Any action, or abstinence from action, must be at the desire or request of the promisor. If such action, or abstinence thereof, is at the instance of a third party, or is done without the consent or desire of the promisor, then it is not a consideration. In other words, if a person does not need a thing or service which is provided to him, he does not become liable to pay for it if it is provided without his express demand. Hence, a promisor's desire or instruction is a prerequisite for consideration. If A sells his car, which is valued at Rs. 100,000, to B for Rs. 50,000, it does not make the transaction illegal because the contract involves a consideration that has been defined and is at the desire of the promisor. The case of **Durga Parsad vs. Baldeo** is an important example. In this case, a party B spent some money on the construction of a market, at the desire of the Collector of the District. In consideration of this, D, who was using the market promised to pay some money to B. The court held the contract void because the consideration for B was not defined by D and he had not constructed the market at the instance of D.

(2) Consideration may move from the promisee or any other person: It is not necessary that the consideration is from the promisee; it may come from any other person. In this connection, the law recognizes the *Doctrine of Constructive Consideration* which stipulates that even if the consideration is not from the promisee, the promisee must be a party to the consideration. This implies that as long as there is consideration for a promise, it is immaterial who has furnished it, but a stranger to a consideration will be able to sue only if he is a party to the contract. In the case of **Chinayya vs. Ramayya**, a father left his entire property to his daughter under the condition that she will pay a certain amount of money annually to her uncle (i.e. father's younger brother). The daughter promised to pay the agreed amount annually, but stopped doing it after a time on the plea that no consideration moved from her uncle to herself, but the plea was rejected by the court. It was held that an indirect consideration had moved from her uncle. The law stipulates that 'a stranger to consideration can sue but a stranger to a contract cannot'.

(3) Consideration may be a promise to do or abstain from doing something: it can be for a negative or a positive act. In a positive act, the promisee does something at the express wish of the promisor whereas, in a negative act, the promisee abstains from or postpones doing something at the wish of the promisor. For example, a makes a contract to sell his house for Rs. 10 lakh to B. In this case, Rs. 10 lakh is a positive consideration for A. On the other hand, if A has given a loan of Rs. 10 lakh to B to be paid back by a certain date, and is thinking of filing a suit because he has not received repayment, and is approached by B with a request not to file the suit and accept Rs. 1 lakh as interest for one year, after which he will repay the loan, it will be a negative act which is a consideration for A for not filing the suit.

(4) Consideration may be past, present or future: The Indian Contract Act recognises past, present and future considerations whereas the English law does not recognise a past consideration. These are briefly discussed in what follows.

Past Consideration: When a consideration by a party for a present promise was given in the past, i.e. before the date of the promise, it is said to be a *past consideration*. It implies consideration for having done, or having abstained from doing, something in the past. For example, A renders a service to B that the latter wants. After a week, B promises to pay Rs. 1,000 to A for the service. It is a past consideration and A is entitled to the promised amount.

The English law does not recognize a past consideration. According to Anson, a past consideration *"is a mere sentiment of gratitude or honour prompting a return for benefits received."*

Present Consideration: A consideration to do or abstain from doing something given simultaneously with the promise is a *present consideration*. A cash sale, for example, is a present consideration.

Future Consideration: When the consideration from one party to the other is to pass subsequent to the act of doing or abstaining from doing something, it is called a future consideration. For example, if A promises to sell 100 quintals of rice from the coming crop at Rs. 800 per quintal to B, and B promises to make the payment for the same within a week of its receipt, it is a case of future consideration.

(5) Consideration must be legal, real and certain: A contract wherein the consideration is illegal, unreal or uncertain is void, the parties to such contract cannot take the recourse of law to enforce their rights. For example, if A promises to pay Rs. 10,000 to B to beat up C against whom he has a grudge, it would be an illegal consideration for B to accept because if he does beat up C and A refuses to pay the amount, he cannot take the recourse of law to get it. If X promises to give an amount of money to Y, and Y promises to pray for X's long life, it would be a consideration which is not real for X. Similarly, if A promises to sell his car to B for whatever B wants to pay for it, it would be an uncertain consideration for B, and the contract would be void.

(6) Consideration need not be adequate: As said earlier, consideration is 'something in return'. The 'something in return need not necessarily be equal to 'something given'. The law provides that a contract should be supported by a consideration. So long there is a consideration, the law is not concerned about its being adequate, as per Section 25, but a contract must have a consideration. An agreement does not become void because of the consideration not being adequate. If A decides to sell his car valued at Rs. 100,000 for Rs. 10,000 to B, it is his 'free consent' and the agreement will be deemed to be a contract.

Agreement without Consideration—Exceptions

For contract to be legally valid, it must have a consideration and an object; otherwise the contract is a *wager* or a *gamble* and is void from the legal viewpoint. Consideration is a term which means **'something in return' or quid pro quo**. If there is no compensation in return for a promise, there is no legal obligation in the contract. For example, A promises to present a watch to B on his birthday. If A does not do that, B cannot sue A because there is no consideration for A for his promise made to B. But if A makes an offer to sell his watch to B for Rs. 200, and B accepts the offer, Rs. 200 is the consideration for A and watch is the consideration for B.

According to Section 2(d) of the Indian Contract Act, if at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or undertakes to do or abstain from doing, something, then such 'doing' or 'abstaining from doing' becomes the consideration for the promise.

A contract is valid only when it is based on a consideration. If there is no legal obligation in a contract which can be enforced by law, mere promise and its acceptance does not constitute a contract. For a lawful obligation between the parties to a contract to exist, consideration becomes an essential element of a contract. If there is no consideration, there is no contract. As Salmond and Winfield have said, *"A promise without consideration is a gift, but a promise made for a consideration is a bargain."* It is a legal fact. An agreement without consideration is a void promise because it does not imply any obligation. In this context, an important example is the case of **Abdul Aziz vs. Masum Ali**. The secretary of a Mosque Committee filed a suit to enforce a promise which the promisor had made to subscribe Rs. 500 to the rebuilding of a *masjid*. The court held that *"The promise was not enforceable because there was no consideration as the person who made the promise gained nothing in return for the promise made"*.

While a consideration is essential for a valid contract, a contract cannot be held void on the plea that such consideration is inadequate. An agreement can be a contract even with inadequate consideration. The parties to the contract must receive some consideration for the promises made. The law does not take into account the adequacy or inadequacy of the consideration.

Exceptions to the Rule

It has been mentioned earlier that a contract is void if there is no consideration for the parties. But Section 25 of the Act follows some exceptions to this vital law of a contract. A contract can be valid even without consideration in the following situations:

(1) When the promise is made out of natural love and affection: According to Section 25, *"An agreement made without consideration is void unless it is expressed in writing, and registered under the law for the time being in force for the registration of documents, and is made on account of natural love and affection between parties standing in a near relation to each other."*

It follows, therefore, that the following four elements are essential for such agreement:

(a) The agreement must be written.
(b) The agreement must be registered under the prevailing law.
(c) The parties to the agreement must be intimately related, and
(d) There must be love and affection between the parties.

For example, A promises to give Rs. 2,00,000 to his son B because of his love and affection for the later. A makes the promise in writing and registers the same. The promise, in this case, is a valid contract because of the very near relationship between the two.

An important point to be noted is that Section 25 not only stipulates a close relationship between the parties, it also specifies that such relationship must be of love and affection. **Rajlukhy vs. Bhootnath** is a case in point. In this case, a Hindu husband, after referring to quarrels and disagreement between himself and his wife, promised to pay a certain amount as allowance to his wife vide a written document that was duly registered. But the court held the agreement void since the essential element of love and affection between the parties was missing.

In another similar case, **Venkataswamy vs. Rangaswamy,** an elder brother, out of love an affection, executed a written and registered document to discharge the debt of his younger

brother. The court held that the contract was valid even without consideration because it incorporated the four essential elements of Section 25(1).

(2) **When the promise is made to compensate for voluntary service:** According to Section 25(2), a promise to compensate, wholly or in part, a person who has already voluntarily done something for the promisor, or has performed an act for which the promisor was legally bound, is a valid contract even without consideration. But it is essential in this case that the act must have been voluntary, and done for the promisor who was in existence when the act was done, and must not have been done without expecting any consideration. There can be two instances of such a situation:

(a) When there is a promise to partially or completely indemnify a person who has voluntarily done something for the promisor. For example, if A finds B's purse and gives it to him, and B promises to pay Rs. 100 to A, it is a valid contract because B has voluntarily done something for A even though there was no consideration.

(b) When there is a promise to partially or completely indemnify a person who has voluntarily done something for which the promisor was legally bound. For example, if A voluntarily supports B's infant son, and B promises to compensate A for the expense incurred in doing so, it would be a valid contract by law.

(3) When the promise is made to pay a time-barred debt: According to Section 25(3), a promise by a debtor to pay a time-barred debt is enforceable provided it is made in writing and is signed by the debtor or his agent generally or specially authorised on his behalf. For example, A owes Rs. 1,00,000 to B, but the debt is time barred under the Law of Limitation. Even so, if A gives a written promise to B to pay Rs. 50,000, it is deemed a valid contract.

(4) When the contract is of agency: According to Section 185 of the Indian Contract Act, no consideration is necessary in a contract of agency. A person who works as an agent for another is not legally entitled to a consideration unless there is an agreement to such effect between the concerned parties.

(5) When the contract is for gratuitous, bailment: A bailment arises when one person (the bailor) transfers his possession to another person (the bailee) on the condition that the bailee will restore such possession to the bailor after the purpose for which the transfer was made is accomplished. No consideration is necessary when such bailment is gratuitous, like when A lends his furniture to B on the occasion of the marriage of the latter's daughter.

(6) When the promise is for a gift or donation: Such a promise does not entail a consideration. Therefore, a promisor of a gift or donation is not liable to keep his promise and cannot be enforced to do so.

For example, A makes a verbal promise to donate Rs. 1,000 towards the construction of a room in a mosque, and later refuses to give the amount. Here, A is not lawfully bound to do it. But if the promisee, on the strength of the promise, makes a commitment that can result in a loss to the promisee if the promisor does not fulfill his promise, the promisee can lawfully claim such damage. A case in point is **Kedar Nath vs. Gauri Mohammed,** in which the defendant had promised a sum of money for the construction of the town hall in Howrah, and the secretary had made a plan and given the job to a contractor whom he was liable to pay for the job. Later the promisor refused to pay the amount promised. It was held that even though the promise was for a donation, it involved a consideration because the secretary of the committee had incurred a liability because of it, and as such the promisor was liable for payment.

Adequacy of Consideration

A vital question related to consideration is: *What is an adequate consideration?* The Act gives no answer to it since the question of adequacy of consideration is more related to the parties to a contract than to the law governing it—it is the parties who make the decision as to the adequacy or otherwise of the consideration. As said earlier, consideration implies 'something for something'. The 'something received' need not by law be of the value as 'something given'. The law only stipulates that a consideration must be an element of a valid contract, it does not stipulate if such consideration is adequate or not; nor does it specify what constitutes an adequate consideration. The concerned parties are presumed to make a contract of their 'free consent' and it devolves on the parties to assess the benefit or otherwise of the promise made under the contract. The consideration in a contract must have a value, by law, but its value need not necessarily be equal to the value of the promise.

According to Sir William Anson, *"Consideration need not be adequate, but it must be of some value in the eyes of the law."* Bargaining between the parties to a contract is not the concern of law. If a person receives a benefit in a contract, the law does not query whether or not the benefit is equal to the value of the promise that the person has made. The consideration can be for a promisee or for a third party. It can also be that there is no benefit to any party and there is a loss to the promisor. It is something to be decided by the parties to the contract, and not by a court of law. Section 25(2) of the Act makes it clear that a contract is not void because of inadequacy of consideration if the parties to the contract have given their free consent. But while deciding whether or not the consent of the parties was free, the court might examine the adequacy or otherwise of the consideration. If there exists the free consent of parties, a contract with inadequate consideration is a valid contract. For example, if A decides to sell his car worth Rs. 1,00,000 for Rs. 10,000, and gives his free consent to such agreement, the contract is valid even with inadequate consideration.

Difference between Stranger to Consideration and Stranger to Contract

A stranger to a contract cannot sue, but a stranger to a consideration can sue.

Stranger to Contract

A person who is not a party to a contract is deemed to be a stranger to the contract. It is a general rule of law that only parties to a contract may sue or be sued on matters relating to the contract, and strangers may not. A contract does not give any right(s) to, nor does it impose any obligation(s) on, strangers to the contract. This rule is known as the *doctrine of privity of contract*, which means the relationship subsisting between the parties who have entered into contractual obligations, and implies a mutuality of will and creates a legal bond between the parties. For example, A promises B that he will give an annuity of Rs. 5,000 to C who is a friend of B, in consideration of which B transfers his property to A. Later if A fails to fulfill his part of the contract, only B can sue A for non-fulfilment of promise. C cannot sue because he is not a party to the contract.

Indian and English law are the same on this issue. A contract cannot confer rights impose obligations arising under it on any person other than the parties to the contract

Stranger to Consideration

As per the Indian Contract Act, a valid contract has to have a lawful consideration object—that the consideration is from the promisor is not obligatory. The consideration can from any person other than a party to the contract, but a person other than the parties to contract does not have the right to sue. According to Section 2(d) of the Contract Act, desire of the promisor, the promisee or any other person can provide the consideration therefore, clear that a person other than a party to the contract can provide the consideration The person who does not provide a consideration, even though he is a party to the contract is deemed to be a 'stranger to consideration', but such person has a right to sue with respect to his rights arising from the contract.

For example, A promises to sell his car to B, C, who is B's friend, pays the price of the car to A. Even though B is a stranger to the consideration in the sense that it has been paid by C, he is still a party to the contract and can sue A if the latter commits a breach of contract.

The law recognises the doctrine of constructive consideration, which stipulates that person may be a stranger to the consideration but he must not be a stranger to the contract. The following two cases illustrate the point.

In **Dunlop Tyre Co. Ltd. vs. Salfridge,** S bought tyres from the Dunlop Tyre Co. and sold them to D, a sub-dealer, who agreed with S not to sell the tyres below Dunlop's list price and pay £5 as damages to Dunlop Tyre Co. on every tyre that was sold below the list price. D sold two tyres at less than the list price, and thereupon Dunlop Tyre Co. filed suit against D for breach of promise. The suit was dismissed because the court held the company to be a stranger to the contract. Justice Lord Holden ruled that only a party to the contract has the right to enforce the contract.

Similarly in the case of **Said vs. Butt**, a theatre manager had instructed that no ticket be sold to X. On learning this, X asked his friend to buy a ticket and tried to enter the theatre where he was not allowed entry. Thereupon X filed a suit. The court upheld X being barred from entry because there was no contract between X and the manager.

Exceptions to the Rule

The following are the exceptions to the rule that a stranger to a contract cannot sue

(1) Where a Trust is Created: A person in whose favour a trust is created can enforce his interest even though he is not a party to the contract.

(2) Marriage Settlement of a Minor: A stranger to a contract can sue in cases related to a marriage settlement. Marriages of minors are common in India. A minor can sue change such contract for his benefit. In this context, the case of **Khuaja Mohammad Ka vs Hussaini Begum** is an important example where a Muslim lady sued her father-in-law recover arrears of allowance payable to her under an agreement between her father-in-law Kha Mohammad and her father. At the time of marriage, both she and her husband were min The Privy Council deemed that, inspite of being a stranger to the contract, she could enfo her right under the contract.

(3) Partition in Joint Hindu Family: If, at the time of partition of a joint Hindu family, an agreement or contract is made for the maintenance or marriage of a person, such person has the right to enforce the contract even if he is not a party to it.

(4) Agency: Contracts made by an agent on behalf of a principal are enforceable by law.

(5) Charge on Specific Immovable Property: If a charge has been created for the benefit of a person in an immovable property, the beneficiary can enforce such contract even though he is not a party to the contract.

(6) Assignee: If the party to a contract assigns his rights to another person, then the assignee can sue for the enforcement of his rights. Endorsement of Bills of Exchange is an example of such enforcement.

Difference as to Consideration between Indian and English Law

Despite similarities in other respects, there are dissimilarities between the Indian and English law so far as consideration is concerned. These are as under:

(1) Existence of Consideration: Under English law, a contract is of two types, a simple contract or a contract under seal. For a simple contract, consideration is mandatory whereas a contract under seal is valid without a consideration. The Indian Contract Act, under Section 25, stipulates compensation to be mandatory in any contract. So does the English law.

(2) Adequacy of Consideration: Indian and English laws both do not recognize the inadequacy of consideration. As per Indian law, inadequacy of consideration does not make a contract invalid, but the law reserves the right to let the court investigate the adequacy of consideration to determine whether the contract was by 'free consent'. English law also stipulates the existence of consideration but it does not delve into the adequacy of consideration— it only stipulates that there is a consideration.

(3) Consideration on Whose Behalf: Under English law, consideration can only be given by the promisee; other than the promisee, nobody can give such consideration. But Indian law permits a person other than the promisee to provide the consideration.

(4) Past Consideration: Indian law recognizes past considerations whereas the English law does not.

(5) Position of a Stranger: English law does not grant any right to a stranger to the consideration whereas a stranger to a consideration can enforce his right under specified conditions under the Indian law.

Unlawful Consideration and Object

A lawful contract need not only to have a consideration, it also needs to have an object. An agreement that has an unlawful consideration or an unlawful object is a void agreement. According to Section 23 of the Indian Contract Act, consideration or object of a contract is unlawful and void in the following situations:

(1) If an act is forbidden by law: If the consideration or object of a contract is illegal or forbidden by law, it makes the contract void. For example, if the consideration of a contract is to physically harm or kill a person, it is an illegal consideration because such activity is unlawful under the Indian Penal Code.

(2) If an act defeats the provisions of law: If the consideration or object of an agreement is such that, if it is allowed to be implemented, it defeats the provisions of any law,

then the agreement is deemed to be unlawful. Consider an example. A has arrears of revenue and his land is being sold to recover the taxes due from him, and the provision of law stipulates that a defaultor cannot himself acquire a property being sold to recover legitimate revenue arrears. A wants to retain the possession of the land, and enters into an agreement with B under which B would acquire the land and later transfer it to A for the price at which he bought it. Such agreement will be deemed to be unlawful because it renders the transaction, in effect, to be a purchase by the defaultor and would defeat the object of law.

(3) If it is fraudulent: If the object of a contract is to defraud or cheat a person, it is deemed to be void. For example, A is the owner of a piece of land, and B is his agent. Without the knowledge of A, B agrees to execute a deed to transfer the land to C for a consideration. In such a situation, the contract between B and C would be deemed to be fraudulent and, as such, would be void.

(4) If it involves injury to the person or property of another: If any two persons enter into a contract with the object of causing injury to a third person or to cause a damage to his property, the contract is deemed to have an illegal consideration and is void. For example, the owner of a printing press cannot legally receive compensation under an agreement from a person to publish anything defamatory about a third person. Likewise, if A makes an agreement with B that the latter will publish something defamatory about C, and promises to indemnify him against any action or damages, the agreement would be void. In case of an action against B, A is not bound by law to indemnify B. No suit can be filed for the recovery of any money paid in advance or for the recovery of expenses incurred for a defamatory publication.

(5) If the court regards it as immoral: An agreement that has an immoral consideration or object is unlawful, e.g. an agreement to induce a women into prostitution or an agreement between a husband and wife for future separation. If A agrees to let his daughter to B for concubinage (i.e. living together as man and wife without being married) the agreement would be immoral and, as such, would be void. For example, a landlord cannot recover the rent for his property if he has knowingly let it out to a prostitute who wants to carry her activity of prostitution from the premises.

Agreements Opposed to Public Policy

'Public policy' is a term which has a very wide scope and includes issues related to political, social and economic matters. The term as such is not defined in the Contract Act. Because of its scope and flexibility, it becomes difficult to define exactly what constitutes 'public policy'. But one issue is clear—that any contract which is against public interest and does harm to it, or is against the interest of the country is void. It is to be noted that there has to be a damage to the public good, and not just the possibility of such damage, for an agreement to be void. For example, if A rents out his house to B to be used as a gambling den, it would be against public good and would be void. Likewise, a husband letting a third person have an illicit relation with his wife for a consideration is deemed to be against public good. All agreements against public good are deemed to be against public policy.

It is difficult to give a clear cut classification of agreements which are bad on the ground of public policy because 'public policy' is a vague and elastic term; its interpretation may vary and can provide a judge with an excuse to invalidate any contract. According to Justice Burrough, *" public policy is a very unruly horse, and when once you get astride it, you never know where it will carry you."*

A reference to the case of **Gerulal vs. Mahadeodas** elucidates this point. It was observed in this case that *"Public policy is a vague and unsatisfactory term, it is an elusive concept."* The doctrine of public policy is a branch of common law, and should be invoked only in clear and incontestable cases of harm to the public. Section 23 of the Contract Act gives the right to the court to judge for itself what constitutes public policy and public good. Some examples of agreements against public policy are discussed in what follows:

(1) Agreement of Trading with Alien Enemy: An agreement made with an alien enemy in the time of a war is illegal on the ground of public policy. Such agreements are deemed to confer upon the enemy country an immediate or future benefit. Contracts entered into before the outbreak of war are either suspended or dissolved.

(2) Agreement Stifling Prosecution: It is in public interest that if a person has committed a crime, he must be prosecuted. The law stipulates that "you *shall not make a trade of felony*". An agreement not to prosecute an offender is an agreement stifling prosecution and is unlawful.

(3) Agreement Interfering with the Course of Justice: If the object of an agreement is to interfere with the course of justice by exerting undue influence, it is an unlawful agreement. For example, using improper influence with the judge or officers of justice is unlawful. But an agreement to refer present or future disputes to arbitration is a valid agreement.

(4) Agreements to Change the Period of Limitation: Agreements which curtail or extend the period of limitation prescribed by the law of limitation are void because their object is to defeat the provisions of law. For example, if A gives a loan of Rs. 10,000 to B and makes an agreement that he will have the right to sue B even after 3 years, it would be a void agreement.

(5) Agreements for Procuring Public Office or Title by Bribe: A public office or title is obtained because one is qualified or competent. An agreement for the sale or transfer of a public office or title, or for the procurement of public recognition for monetary consideration is unlawful because it is opposed to public policy. For example, if A agrees to sell his M.A. degree to B for a price, the agreement is void. Likewise, if a person agrees to procure the title of Padma Shri for a monetary consideration, it will be a void agreement. **Pakinson vs. College of Ambulance** is an important example. In this case, a dean of the college promised a title to a very rich man and received a large amount of money as a donation. Later when no such title was given, the person filed a suit against the college. The court held the agreement against public policy and as such declared it void, and the money was not returned to the person who gave it because he could not lawfully claim it. Likewise if A promises to get B a government job and B promises to pay Rs. 10,000 to A, it will be a void agreement.

(6) Marriage Brokerage Agreement: An agreement for arranging a marriage for a price (brokerage) is void because it is against public policy. If such brokerage is not paid, the broker cannot sue the party not paying it. But if the amount of brokerage has been paid, and the broker is not able to arrange the marriage, he can be sued for the recovery of the brokerage.

(7) Agreement Restraing Parental Authority: A parent is the legal guardian of a child. This right of guardianship cannot be bartered away by any agreement. If an agreement is made against parental right, it is against public policy and, as such, void. In the case of **Gindu vs. Annie Besant**, Gindu gave the custody of her two sons to Annie Besant and promised not to withdraw the consent to the agreement. Later in a suit to get back the custody of the children, it was held that Annie Besant had to return the children to Gindu.

(8) Agreement to Create Monopoly: Any agreement that tends to create a monopoly is against public policy and is void.

(9) Agreement Interfering with Marital Duties: Any such agreement that hinders with or hinders a person's performance of marital duties is deemed to be against public policy. An agreement that enforces a person to stay with his wife's parents restricts his rights as a husband and is void.

(10) Agreement Restricting Personal Liberty: An agreement that unduly restricts the personal freedom of the parties to it is void as being against public policy. In the case of **Rama Shastrier vs. Ambela**, a debtor executed a bond to work for an extremely low wage. The court held the agreement void because it amounted to slave labour and restricted the debtor's freedom.

(11) Agreement to Defraud Revenue: An agreement with the object of defrauding the revenue authorities is not enforceable, being against public policy. A contract by which an employee gets an expense allowance grossly in excess of the expenses actually incurred is illegal and a fraud on revenue authorities.

(12) Agreement with Immoral Consideration: Any agreement based on a consideration which is immoral is void. For example, if a person makes an agreement for his daughter to have a sexual relation with another person and receives some money in return, he commits an immoral act and the agreement is void.

(13) Agreement Creating Interest Opposed to Duty: If a person enters into an agreement that binds him to do something contrary to his professional or public duty, the agreement is void on the ground of public policy. Examples of such agreements could be an agreement by an agent to make a secret profit, or an agreement by a newspaper correspondent to refrain from commenting on the conduct of a person.

(14) Agreement for Improper Promotion of Litigation: Such agreements are of two types:

(a) Maintenance: Which is an agreement to give assistance, financial or otherwise, to another person to bring or defend legal proceedings when the person giving such assistance has got no legal interest of his own in such proceeding. For example, if A promises to pay Rs. 10,000 to B if the latter will file a suit against C, and B agrees, the agreement between the two would be a maintenance. The purpose of A is only to annoy or harass C and encourage litigation to cause him inconvenience.

(b) Champerty: Which is an agreement whereby one party is to assist the other to bring an action for recovering money or property, and share the proceeds of such action. The difference between 'maintenance' and 'champerty' is that in a maintenance agreement, the person giving the assistance does not have any right, whereas in a champerty agreement, he has the right to receive a share in the proceeds of litigation.

Consideration and Object being Unlawful in Part

According to Section 24, if the object and consideration of an agreement are partially unlawful, then the agreement is void. Consider an example. A proposes to B to look after his business that deals in legal imports and smuggling and promises to pay him Rs. 10,000 per month, to which B agrees. The agreement is void because the object of A's promise and B's consideration are not totally lawful.

DISCHARGE OF CONTRACT

What is Discharge of Contract?

A contract involves two parties—a promisor and a promisee. When a contract is made, certain obligations devolve on the parties to the contract. When the parties to the contract fulfill their obligations, the contract is said to be executed. Discharge of contract implies termination of the contractual obligations. In other words, the rights and obligations created by a contract cease to be operative when the contract is terminated.

A contract defines the rights and obligations of the parties, and the fulfillment of obligations by the parties is the termination or discharge of a contract. Performance of obligations, therefore, is the accepted primary mode of the discharge of a contract. There may be situations where the parties to the contract do not actually have to perform their promises, and the contract is terminated. These situatiaons, in one way or the other, terminate a contract. The discharge, or termination, of a contract can be:

1. By performance.
2. By mutual consent or agreement.
3. By impossibility of performance.
4. By lapse of time.
5. By operation of law, and
6. By breach of contract.

The various modes of discharge are discussed in what follows.

1. Discharge by Performance

Performance is the general accepted method of discharge of a contract. Performance implies doing what is stipulated in the contract. Discharge takes place when the parties fulfill their obligation within the time and in the manner prescribed in the contract. For example, A makes a contract to sell his house to B for Rs. 10,00,000. Here, when B pays Rs. 10,00,000, and takes possession of the house, the contract is deemed to be complete because both the parties have fulfilled their promises. Each party to a contract is obliged by law to either actually perform or offer to perform (i.e. tender) its promise under the contract. Offer of performance implies that one party (the promisor) offers to perform his obligation but the other party (the promisee) may or may not accept the performance. The effect of an offer to perform (or a tender) is

equivalent to actual performance. Whether a contract is dischargeable by actual performance or by an offer to perform depends upon the kind and structure of the contract.

2. Discharge by Mutual Consent or Agreement

A contract is made by the consent or agreement of the parties to it. It can likewise be terminated by the agreement of the parties to the contract. According to Section 62, if the parties to a contract agree to make a new contract, or reject the prevailing contract, or make changes in it, then the performance of the prevailing contract becomes irrelevant and is not required. A contract may be terminated by mutual consent in the following ways:

(i) Novation: When both parties, by mutual consent, agree to make a new contract to replace the existing one between the parties, *novation* is said to take place. In this process the new contract is substituted for an existing contract. Novation can take place between the parties to an existing contract, or between one of the parties to an existing contract and a third party. Novation of a contract can imply not only a change in the parties to a contract, but also a change in the nature of the contract. For example, A makes an agreement with B to supply him 500 quintals of rice at Rs. 900 per quintal on a certain date. Before the date of delivery, B proposes to buy 800 quintals of wheat from A at Rs. 250 per quintal instead of rice, to which A agrees. This would amount to a novation of the contract between the two.

Under novation, one party to the original contract may be absolved of his obligations and a new party might accept to perform these obligations. The new contract signifies the end of the original contract. For example, A owes some money to B, and an agreement is reached between A, B and C whereby A agrees to consider C as his debtor instead of B. In this case the original agreement between A and B is no more valid, and a new agreement is made between A and C. But the point to be noted is that the new third party must accept to obligation under the contract. If he does not, then there is no new agreement and no novation.

(ii) Alteration: Parties to a contract have the right to alter the terms of the original contract by mutual consent. In case of such alteration, when it is done by the consent of the parties, the parties are lawfully bound to the performance of the altered contract, and the original contract is discharged. In other words, alteration signifies the discharge of all obligations under the original contract. Alteration can be regarding time, place, quantity or price, etc. For example, A promises to supply 3000 metres of a certain cloth at Rs. 10 per metre to B within 3 months. Later A and B make an alteration in the contract to the effect that A will supply 200 metres of a superior quality of cloth at another price within 4 months. This alteration discharges the old contract between the two.

In this way, novation and alteration both result in a new contract to replace the original. But there is an important difference between the two. Novation absolves the parties of their obligations under the old contract when they substitute it with a new one, or when a new party enters into the contract to replace one of the parties; while in alteration, the parties to the contract remain the same, only the old contract is replaced by a new one with altered terms and conditions.

(iii) Remission or Waiver: According to Section 63 of the Indian Contract Act, the promisee has the right to dispense with or remit the performance of a promise by the promisor, or to extend the time for performance or accept any other satisfaction instead of performance.

Such acceptance of a lesser or delayed fulfillment of a promise by the promisee is called remission or waiver. For example, A owes B Rs. 5,000. B is in acute shortage of money and decides to accept Rs. 2,000 from A at the time and place agreed in discharge of the whole debt.

(iv) Accord and Satisfaction: When both parties to a contract agree to make a new contract to absolve themselves of performance under the original contract, and the promisor performs the promise given under the new contract, the original contract is deemed to have been discharged with accord and satisfaction. It is so called because the new contract is made with the accord of the parties to the original contract, and its performance gives satisfaction to both parties. For example A owes Rs. 2,000 to B. He also owes money to C, D and others. A makes a contract with all creditors whereby he promises to pay 50 paise to a rupee to all his creditors. If he pays Rs. 1,000 to B, it will be deemed that he has cleared his debt to B. Here the payment of 50 paise to a rupee is by the 'accord' of A and B, and Rs. 1,000 is the 'satisfaction' of A.

3. Discharge by Impossibility of Performance

Section 56 makes it clear that if an agreement contains an undertaking to perform an impossible act, it is void *ab initio*. Any such agreement is deemed to be void. For example, if A makes an agreement with B to find a lost treasure by magic, it will be a void agreement.

But there could be cases where the performance of a contract is possible and practical when it is made, but later becomes impossible or unlawful because of the occurrence of some event over which the promisor has no control. In such cases, the parties to the contract are absolved of their obligations under the contract and are not required to perform their promises. Such a situation is called *supervening impossibility*. The abrogation of a contract because of impossibility of performance is also termed as the Doctrine of Frustration.

Supervening impossibility can be the result of an act of a party to the contract, or it is because of something which is beyond the control of the parties to the contract. The following are the situations where such impossibility can occur.

(i) Destruction of subject matter: When the subject matter of a contract is destroyed after the contract is made, and neither of the parties to the contract can be blamed for its destruction, the contract becomes void. In the case of **Taylor vs. Coldwell,** a theatre was booked for a musical performance, but there was a fire and it was completely destroyed. The court held the contract to be void and released the promisor from performing.

(ii) Change of law: If a person makes a contract to perform an act which is within the law when the contract is made but later becomes unlawful because of a change in law or a new law, the contract is discharged. For example, A makes a contract to supply a particular variety of wood from a forest. After the contract is made, a new law prohibits the cutting of wood from the forest. The contract is deemed to be void. In the case of **Noorbux vs. Kalyan,** a party made a contract to transport goods by road from one place to another. After the contract was made, the government requisitioned all the trucks, and the contract was held to be void.

(iii) Non-occurrence of an event: If the contract is based on the occurrence of an event, the non-occurrence of such event will make the contract void. In the case of **Krell vs. Henry,** Henry rented a room for two days from Krell for witnessing the coronation procession of King Edward VII. Krell knew the purpose for which the room was rented, but it was not

mentioned in the contract. The procession was cancelled because of the king being sick. H... court excused Henry from paying the rent because it held that the basis of renting the ... was the procession, and its cancellation discharged the contract.

(iv) Personal incapacity or death: When the execution of a contract is dependent ... the personal skill or qualification of a party, the contract is discharged on the incapacity or ... of that party. In the case of **Robinson vs. Davidson,** Davidson made a contract to work ... Robinson in a theatre for six months, but was so sick that he could not do so on many occasions ... and was sued. The court held the performance of the contract on these occasions to be impossible.

(v) Outbreak of war: All contracts made with an alien enemy during wartime are ... Even when the parties make the contract when the relations between the countries are friendly, ... the out break of war makes the performance of the contract impossible. In such cases, ... the contract is deemed to be discharged or is suspended till the war is over. In the case of ... **Bank Line Ltd. vs. Capell and Co.**, a contract was held to be impossible because ... government had taken over a ship for wartime operations.

Unforeseen impossibility of performance makes a contract void. If a party has gained ... something under such a contract from the other party, then such party can be bound by ... to reimburse the other. If the promisee has suffered a loss because of some act of the promisor ... the latter has to compensate the former for such loss.

4. Discharge by Lapse of Time

If a contract is to be performed within a specified time, each party to it must perform ... his promise within the stipulated time. On the completion of the stipulated time, the contract is ... discharged. Under the Indian Limitation Act, the parties can claim the rights under a contract ... within a specified period or the contract is terminated. For example, if a debtor does not pay ... his debt by the agreed date, the creditor must file a suit within three years. If he does not sue ... within that period, he loses the legal right to claim the debt, and the debtor is not legally ... bound to pay.

5. Discharge by Operation of Law

In some situations, a contract may be terminated by the operation of law. According to ... Section 37, if, under the provisions of the Act or any other law, the contract is discharged or ... terminated, it is not necessary for the parties to perform their obligations under the contract. For ... example, a contract based on the personal skill or qualification of a party to it is terminated by ... the death of a party.

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

(i) By Merger

(ii) By Unauthorised Alteration

(iii) By Insolvency.

(i) Discharge by Merger: When an inferior right accruing to a party under a contract ... merges into a superior right accruing to the same party under the same or some other contract, ... a merger is said to take place. For example, when the lessee of an immovable property becomes ... the legal owner of the property, the lease deed is terminated.

For a merger to take place, the following conditions need to be met:

(a) The parties to the contract must be the same.

(b) There must be no change in the basic ingredient of the contract.

(c) The rights under the contract must be different. One right should be superior and the other inferior.

(ii) Discharge by Unauthorised Alteration: When a material alteration is made in the terms of the original contract by one party without the knowledge and consent of the other, the contract is discharged and can be avoided. If some written document is lost, or the rate of interest is altered in a written document, or there is an alteration in the amount to be paid to or by a party, the contract is terminated.

(iii) Discharge by Insolvency: If a debtor is declared insolvent under the provision of law, he is absolved of all obligations under the contract, and the contract terminates.

6. Discharge by Breach

According to Section 39, if a party to a contract, without a valid or lawful reason, refuses to perform his obligation under the contract, or makes the contract impossible to be performed, the other party has the right to repudiate the contract. When such contract is repudiated, the aggrieved party has the right to sue for his rights under the contract. A breach of contract can be:

(i) Actual breach

(ii) Anticipatory or constructive breach.

(i) Actual breach: If a party to a contract fails to perform his obligation under the contract in the stipulated time or refuses to perform such obligation, then such breach of contract is called *actual breach*. For example, Harish promises to deliver a horse to Shyam on 19 April. On the appointed day, he refuses to deliver the horse. It is a case of actual breach.

(ii) Anticipatory or constructive breach: If a party to a contract, before the stipulated time of his performance, by word of mouth or by behaviour, makes known his intention not to perform his promise, or wilfully disables himself for such performance, it is deemed to be *anticipatory* or *constructive breach* of contract. In the preceding example, if Harish informs Shyam before 19 April of his intention not to deliver the horse and sells the horse to Ashok before that date, it will be a case of anticipatory and constructive breach of contract on the part of Harish.

In a situation of anticipatory or constructive breach of contract, the aggrieved party has the right to:

(i) assume the anticipatory breach to be an actual breach of contract and sue for breach of promise.

(ii) not to assume the anticipatory breach to be an actual breach and wait for the performance of contract on the stipulated date, and sue for breach of promise if the promisor fails to perform.

Effect of Breach of Contract

According to Section 39 of the Indian Contract Act, if a party to a contract does not perform his obligation or disables himself to perform such obligation, the other party can repudiate the contract. But if other party, i.e. the promisee, conveys by word of mouth or by his behaviour to continue the contract, then the first party, i.e. the promisor, can perform his obligation under the contract. The aggrieved party can also file a suit for damages against the party responsible for breach of contract.

Doctrine of Frustration

If a contract is entered into on the basis of existence or occurrence of a particular state of things or an event, and there is a change in the state of things or the event does not occur, the contract is discharged. This kind of failure of the object of a contract is often called 'frustration of the contract'. In old England, a set of rules were established under the Common Law which stipulated that, unless it was clearly specified at the time of making the contract, a contract cannot deemed to be discharged on the grounds of impossibility of performance, and the promisor was answerable for such breach of contract. This law was applied in the case of **Paradine vs. Jane**, where it was held that, in the absence of an agreement to the contrary, each person was lawfully bound to perform his promise under all circumstances. The court explained this law as under:

> If one person has engaged another for the repair of his house, such person is obliged to repair the house under all circumstances, even if the house is struck by lightening or destroyed by enemy fire. The repairer cannot take the plea of the act being impossible of performance.

Later, it was realised that the law was too strict on the promisor. As a result, it became the practice to keep in mind the circumstances of the case. This change in the attitude of law is illustrated in the case of **Taylor vs. Coldwell**. In this case, the subject matter itself of the contract was destroyed. It was held that when the subject-matter of a contract becomes impossible to be implemented because of reasons beyond the control of parties to the contract, it becomes a void contract. Such contract is deemed to be discharged and the parties are absolved of their obligations. But if the turn of events is such that it does not affect the circumstances leading to the performance of a contract, the parties to the contract cannot take the recourse of this law for non-implementation.

Definition of Frustration

When the object of a contract becomes impossible of performance or when, for reasons beyond the reach or control of the parties, the contract is impossible of performance, it becomes a frustrated contract. When a contract becomes impossible to perform, it is terminated and the parties are released of their obligations under the contract.

According to Wright and Porter, if an event occurs or there is a change in circumstances that makes the object on which a contract is founded to be no more possible of achievement, it implies that the parties are bound to perform under conditions which they would never have accepted at the time of making the contract. In such circumstance, the contract will deem to be frustrated.

The above definitions make it clear that the doctrine of frustration is applicable in cases where:

1. An unexpected event makes the performance of a contract impossible.
2. An unexpected event changes the circumstance so that the parties to the contract cannot perform their promise, and thus makes the acievement of the object of contract a frustrated exercise.

Such a situation can arise when an event occurs that the parties to the contract could not have anticipated or, when the contract is performed, the object of the contract is changed

which defeats the purpose of the original contract, or there is occurrence of an event beyond the control of parties, like the declaration of war, enactment of a new law or a change in the political scenario. Consider an example. Dharampal, who is a contractor, signs a contract for the construction of a bridge. Later, the construction is stopped by a government order. In this case, Dharampal will be absolved of his promise because he is helpless in performing for no fault of his.

The law stipulates that a party is absolved from performance only when such performance is physically and practically impossible. The mere fact that performance has become expensive or difficult does not make it impossible. Such difficulties that make performance an impossibility are termed frustration.

The doctrine of frustration is based on the maxim *Les non cogit ad impossibilia*, which means that the law does not compel the impossible. Such impossibility can be a change in law, the wrath of gods or a declaration of war.

Limitations of the Doctrine of Frustration

The doctrine of frustration is not applicable in the following situations:

1. When a condition in the contract contradicts the other clearly defined conditions, and goes against such conditions.
2. When an issue reflects the inclination of one party and not the other.
3. When the contract is non-performable because of a wilfull and deliberate act of a party to the contract.

Indian Law of Frustration

What is called 'frustration' in the English law and 'supervening impossibility' in Indian Law signifies the same. The doctrine comes into play when the common object of a contract can no longer be achieved, or when the contract, after it is made, becomes impossible of performance due to circumstance beyond the control or contemplation of the parties. This can be because of the contract being impossible to perform, or the parties' helplessness in being able to perform it. In fact 'impossibility of performance' and being 'helpless' is about the same thing, and one expression can be used for the other. Changed circumstances can make the performance of a contract impossible, that is why the concerned parties are released of their obligations once the circumstances have changed. This is because the parties, when they made the contract, were contemplating to function on 'possibilities' rather than 'impossibilities'.

The case of **Satyabrat Ghosh vs. Mugneeram Bangur and Co.** illustrates the point. In this case, Mugneeram Bangur and Co. was a land owner who had divided its land into housing plots and invited applications from those desiring to build houses. The contract envisaged a part of the price as advance payment. One third of the sale price was to be paid within one month after the development of roads, sewerage and other facilities had been completed, and the balance was payable in 6 years at 6 per cent annual rate of interest. After a time, Basu made a contract with the company to buy a plot, which he later transferred to Satyabrat Ghosh. Just before the transfer, the government acquired the entire land under the Defence of India Rules. Basu was informed about the cancellation of the contract and was asked to take back the advance he had paid. The company had taken the plea that since the land had been acquired by the government, it was no more possible for it to make housing plots on the land. Satyabrat

sued the company and said that it was lawfully bound to give possession of the land to the buyer, and that it could not take recourse of the doctrine of frustration and make the contract voidable on the plea of its being impossible. The Supreme Court held that, since there was no state of war at the time and the development of land had taken a long time, Satyabrat Ghose was entitled to damages.

The law of frustration is not enforceable in India because the parties might have given their consent to the contract due to an implied condition which would absolve them of their liability. When a contract becomes impossible of performance, the law provides relief to the parties when the object of a contract has become impossible of performance because of the happening of an external event beyond the control of the parties. When an event occurs to the changed circumstances make the performance of a contract impossible, the contract is terminated as per the law of frustration. The courts, as a matter of course, investigate the circumstances of the case to come to a decision if the occurrence of an external event or change in circumstances have rendered the contract to be impossible of performance. The intention of the parties at the time of making the contract, their confidence and knowledge, helps the courts in such investigation and serve as a proof of the changed conditions that make the contract unoperateable. But such a decision can only be taken by a court of law. This is an important and decisive rule and is covered by Section 56 of the Contract Act.

In this connection, the case of **State of Rajasthan vs. Madan Swarup** is an important illustration. In this case, the government of Bikaner appointed Madan Swarup, an advocate, to follow up criminal cases in the State High Court. When Bikaner was merged with State of Rajasthan, the High Court ceased to exist in Bikaner, and was established instead in Jodhpur. As a result, Madan Swarup lost his job, and he filed a suit against the Government of Rajasthan for breach of promise and made a claim for damages. The court held that the circumstances had become such that it was not possible for the government to perform its part of the contract. The contract had terminated and there was no breach. It was a case under the doctrine of frustration, and the plaintiff was not entitled to any damages.

Exceptions of the Doctrine

The doctrine of frustration is not applicable in the following situations.

(1) Difficulty of Performance: After having made a promise, the promisor cannot be excused from its performance on the plea that such performance has become difficult because it is more expensive.

(2) Commercial Impossibility: A wholesaler cannot go back on his contracts with the retailers and other buyers on the ground that the manufacturer has stopped or cut down the production of an item. Likewise, a contract does not become voidable if there is an increase in wages of workers, increase in the price of raw material, reduced profit, bad weather or lack of transportation since these are not covered by the doctrine, and the promisor is not absolved of his promise to perform.

(3) Strike, Lockout, Riots and Civil Disturbance: If the contract does not have a special clause about these, then a strike, lockout, riot or civil disturbance does not allow a promisor to plead the impossibility of performance or refuse to perform his promise. In the case of *Hari Laxman vs. Secretary of State of India*, a repairer of vessels for making salt refused to perform his promise on the plea that the workers had gone on strike. The courts rejected the plea and held him responsible for his promise.

(4) Failure of One of the Objectives: When a contract is made for more than one objective, the failure (or impossibility) of achieving one objective does not terminate the contract.

Consequences of Frustration

1. Under the doctrine of frustration, a contract does not become voidable at the desire of a party to the contract—it is deemed to be discharged and terminated.

2. If a party to the contract has received some money or any other profit from the other party in a contract so terminated, the receiving party is lawfully bound to return such money or profit to the other party.

3. Under the provision of Land Reform Act, 1943, if the party receiving a profit or gain under the contract has incurred any expense in such regard, he can take the recourse of law to claim such expense. If the court feels it is justifield, it can direct the other party to reimburse the first party or allow the first party to deduct the expense from the amount repayable.

4. If a party has received any valuable item besides cash under such a contract, the court can direct the party who has received such item to make payment for it, but the payment will not be more than the actual value of such item.

Impossibility of Performance not an Excuse

According to Justice Scrutton, the impossibility of performance cannot deemed to be an excuse for the non-performance of a contract. When a person makes a contract to do some act, he is liable to perform until such performance becomes impossible for some unexpected reason. In other words, such impossibility should be complete. If the contract is not impossible, but only difficult, for performance, it is not deemed to be terminated. Such situations can be as under:

(1) Difficulty of performance: Sometimes something might happen that makes the performance of a contract difficult or expensive. Just because of difficulty in performance or the performance being more expensive does not absolve the parties from performance.

In the case of **Blackburn Bobbin Co. vs. Allen and Sons,** a person made a contract to sell a certain quantity of timber from Finland to be supplied between July and September. A war broke out in August and transportation became very difficult. As a result, he could not bring the timber from Finland. It was held that getting timber from Finland had become difficult, not impossible, and the contract could not be terminated.

(2) Commercial impossibility: A contract is not discharged because the profits are not what was expected, the raw materials have become expensive, the wages have increased or the currency devalued. For example, Ashok makes a contract to sell some goods at a certain price. After he has made the contract, the price of goods shoots up, and Ashok wants to terminate the contract. But he cannot terminate the contract on the ground of the prices sky-rocketing.

(3) Impossibility due to failure of a third party: In contracts where the promisor is dependent on a third party for his performance, and cannot perform because of the non-performance of the third party, such non-performance is not deemed to be because of impossibility. For example, A promises to deliver 500 blankets to B, and has to purchase the same from the manufacturer. If A cannot procure these blankets from the manufacturer, he still can perform what he has promised by purchasing the blankets from the open market. In such a case, A cannot be absolved of performance and is liable to be sued for damages.

(4) Strike, lockout and civil disturbance: These events do not discharge a contract unless the parties have specifically agreed otherwise at the time of making the contract. In the case of **Jacobs vs. Credit Lyonnais,** A made a contract to supply certain goods to B. The goods were to be procured from Algeria, where there were strikes and civil disturbance, and A could not deliver the goods. It was held that it was no excuse for non-performance.

(5) Failure of one of the objects: When a contrct is made for more than one object, the failure of one of the objects does not discharge the contract. In the case of **H.B. Steamboat Co. vs. Hutton,** A agreed to let out a boat to B to view a naval exercise on the occasion of the king's coronation and to sail around the fleet. The naval review was abandoned because of the king's illness, but the fleet was assembled and the boat could be used to sail around the fleet. The court held that the contract could not be discharged because one of the objects had been achieved.

Restitution Regarding Voidable and Void Contracts

Sections 64-67 and 75

1. When a contract is voidable at the option of one party to the contract, and the party repudiates it, the other party need not perform his obligation under the contract. If the party repudiating the contract has received any profit from the other party under the contract, he is liable to return such profit. (Section 64)

2. When it becomes clear that an agreement is void and the contract becomes void, a party who has received a profit under such agreement or contract is liable to return such profit and pay damages to the party from whom such profit has been received. (Section 65)

3. A voidable contract can be confirmed or repudiated in the manner and under the rules that are applicable for such confirmation or repudiation. (Section 66)

4. If a promisee wilfully neglects or refuses to provide appropriate facilities to the promisor, the promisor is absolved of his promise to perform because of such neglect or refusal. (Section 67)

5. When a party, lawfully and in proper manner, repudiates a contract, he is entitled to claim the damages he has incurred because of the contract not being performed.

IMPLIED, QUASI OR CONSTRUCTIVE CONTRACTS

Implied Contracts—An Introduction

As a matter of a law, a valid contract must have certain essential elements—like a proposal and its acceptance, capacity of the parties to contract, free consent of the parties, and a legal object and consideration. The agreement must not be a void agreement and, if required, the contract must be written on official paper, duly testified by witnesses and registered. The absence of one or more of the basic elements does not make a valid contract. But some relationships are such that, even though they are logically not contracts, they create the same type of obligations as valid contracts. Under certrain conditions, the law creates and enforces legal rights and obligations when no real contract exists. These obligations are known as *quasi* or *Implied* contracts because, even though there is no agreement or contract between the parties, they are placed in a position as if there were a contract between them.

The Indian Contract Act does not give a definition of an implied contract, but the definition of a quasi contract is as follows. "*Quasi contract is a transaction in which there is no contract between the parties, the law creates certain rights and obligations between them which are similar to those created by a contract.*" In other words, contracts that are created without a proposal and its acceptance are *implied* contracts. Consider an example. A gas company sends a gas cylinder to A but, by mistake, it is delivered to B, who takes it and uses it. In this case, the company reserves the right to receive the payment for the cylinder from B. These relationships are known as *quasi contracts* or *constructive contracts* under the English law, and "*certain relations resembling those of contracts*" under the Indian law.

Characteristics of Implied Contracts

The following are the characteristics of implied contracts.

1. Such contracts are not made by the desire of the parties but are created by law of the land.

...into being after a party has received ... the parties.

4. Such contracts are valid in case of a particular individual.

Differences Between Simple and Implied Contracts

In reality, an implied contract cannot really be called a contract because such contract is created by the law, whereas a normal contract is created by an agreement between parties. The following are the differences between the two.

1. A normal contract is the outcome of the desire of the parties to it whereas an implied contract is not. A proposal and its acceptance are essential for a normal contract, whereas it is not so in an implied contract.

2. In a normal contract, obligations of the parties arise as soon as a contract is made whereas, in an implied contract, obligations are created by the operation of law.

3. An implied contract arises when a party has received a profit or money whereas it is not so in a normal contract.

Types of Implied Contracts

Sections 68-72 of the Indian Contract Act describe the various types of implied contracts, which are as under:

(1) Supply of necessities to persons incompetent to contract: According to Section 68, "*If a person incapable of entering into a contract, or any one whom he is legally bound to support, is supplied by another person with necessaries suited to his condition in life, the person who has furnished such supplies is entitled to be reimbused from the property of such incapable person.*" For example, Ajay is a minor. He buys rice for food from Vijay. Vijay can receive the cost of rice from Ajay's property.

It is not essential that such necessaries of life be provided only to the person who is incapable of making a contract. If these are provided to those who are dependent upon him, even then the price of such goods can be realised from the property of the incapable person. For example, A provides the necessaries of life to the wife and children of a lunatic B. In this case, A is entitled to be reimbursed from B's property. In this connection, the following conditions need to be met.

(a) The goods provided to the incapable person must only be the necessaries of life. The term 'necessaries' can include "goods suitable to the condition in life" and social status of such person.

(b) Such necessaries must only be provided to the incapable person or those who are dependent upon him.

(c) Such necessaries must not be a gift or a charity.

(d) It is only the property of the incapable person, if there is any, which is liable for meeting the liability; the person himself is not personally liable.

(e) Only a reasonable price for these necessaries can be realised from the property of the incapable person. It needs to be kept in mind that, if the incapable person already has a stock of such goods as are supplied to him, then such goods will not be deemed to be 'necessaries'. In various cases, the expense on a minor's education, reasonable expense on the marriage of

minor's sister, the expense on the cremation or funeral of an incapable person's wife, husband or children, expense on the *Shradh* of an incapable's ancestors or legal expense for the security of such person's property have been held to be such necessaries.

(2) Interest in payment due by another: According to Section 69, "*A person who is interested in the payment of money which another is bound by law to pay, or who therefore pays it, is entitled to be reimbursed by the other.*" The case of ***Hazari Lal vs. Naurang Lal*** is an important illustration. In this case, H was the lease-holder of land that belonged to N, who had not paid any land revenue for many years. The state had served a notice to N that unless the arears of the revenue were paid by a certain date, the land would be auctioned to realise the arears. According to the legislation, H's lease would terminate with the sale of the land. H, therefore, paid the revenue arears and later claimed the same from N. The court held that N was liable to pay H the amount he had paid to clear the arears.

(3) Voluntary but non-gratuitous acts: As per Section 70 of the Act, "*When a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously, and such perpson enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.*" For example, Mohan, a tradesman, delivers some goods by mistake at Sudarshan's house. Sudarshan treats the goods as his own and uses them. Sudarshan thereby makes himself liable to pay for the goods.

To claim a right under this section, it is essential that the act must be lawful and lawfully performed, and the person doing the act should not have intended to do it gratuitously. There also must be a benefit in the performance of the act for the person for whom the act is done. For example, Madan saves the property of Hari from being destroyed by fire. If the circumstance indicate that Madan did so gratuitously without any intention of being compensated for doing it, then he cannot claim anything from Hari for doing so.

(4) Responsibility of finder of goods: According to Section 71, "*A person who finds goods belonging to another, and takes them into his custody, is subject to the same responsibility as a bailee.*" It is the duty of the finder to take adequate care of the goods as he would, under similar circumstances, if he were the owner of the same bulk, quality and value of goods. He must also try to trace the owner of the goods. When he finds the lawful owner, he must return the goods to the owner. If he has spent some money on the maintenance of goods or on trying to find the owner, he is legally entitled to be reimbursed for such expense. Till the owner of goods is found, the right of possession will rest in the finder and he can retain the goods as his own. If the owner of goods does not pay the finder the expense incurred by him on the maintenance of goods or trying to find the owner, the finder may refuse to hand over the goods to the owner, but he cannot sue the owner for reimbursement of the expense incurred by him. If the expense of the finder is two-thirds of the cost of goods, and the goods are likely to be spoiled if they are kept on longer, the finder has the right to sell them if the lawful owner refuses to reimburse him for the expense incurred, or if the owner is yet not found.

Here, there is no contract between the finder of the goods and their owner, yet the circumstances establish a relationship between the two which is almost tantamount to a contract

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CONSEQUENCES OF BREACH OF CONTRACT

What is Breach of Contract?

A contract gives rise to rights and obligations. When the obligations under a contract have been performed, the contract terminates. A contract is discharged only by performance of obligations. On the other hand, if a party to a contract does not perform his obligations, or expressly refuses to perform the contract, it amounts to what is called 'breach of contract'.

In the case of a breach of contract, the party who does not, or refuses to, perform his obligations is called the *defaulting party* whereas the other party is the *aggrieved party*.

Remedies Available to Aggrieved Party

When a party to a contract commits a breach of contract, the other party can take recourse of some remedies that the law provides. The remedies available to the aggrieved party in case of breach of contract are as under:

(1) Exoneration: When one party to a contract refuses or fails to perform, i.e. commits a breach of contract, the aggrieved party can assume the contract to terminate, rescind the contract and is exempted from further performance. For example, Mohan makes a contract to sell certain goods to Sohan for Rs. 10,000, and Sohan promises to make the payment on delivery. If Mohan refuses to deliver the goods at the promised time, Sohan can assume the contract to terminate. In this case, he is freed from his commitment to pay Rs. 10,000.

Exceptions: In the following situations, the agrieved party is not exempted from performance, i.e. the aggrieved party cannot rescind the contract.

(a) When the aggrieved party who wants to be exonerated from the contract has given his express or tacit confirmation to the contract. For example, if Ramesh buys some shares knowing that the company's prospectus contains false information, and makes a profit by selling some of them, he cannot later rescind the contract and be exonerated.

(b) When the contract is not divisible, the aggrieved party cannot rescined one part of the contract.

(c) When, without the fault of parties to the contract, the circumstances change, and it is no more possible for the parties to go back to the old state, the aggrieved party cannot be exonerated from performance.

(d) When the contract is in a state of change with the enterance of a third party, and the third party has, lawfully and in good faith, acquired the right of performance of the whole, or a part of the contract, the aggrieved party cannot be exonerated.

(2) Claim for damages: Damages are a monetary compensation allowed to the aggrieved party by law for the loss or injury suffered by him for the breach of a contract. The aggrieved party can sue for claiming such right under the contract. It is important to note here that damages are a compensation for the loss suffered by, or the damage done, to the aggrieved party by the breach, and consequent abrogation, of contract. The law, therefore, will allow such damages as are comensurate with the loss of the aggrieved party. The purpose here is to help the party who has suffered a loss to retain the position it had before the loss was imposed upon the party by the breach of contract. For example, A promises to deliver 100 cycle tyres at Rs. 50 each to B on 1 May, 2005, but does not perform his promise on that date. In such circumstances, if the price of a cycle tyre on 1 May is Rs. 55 per tyre, then B is entitled to claim damages at Rs. 5 per tyre from A, and can sue for such damages.

(3) Claim for 'quantum merit': *Quantum merit* literally means 'as much as earned' and implies payment to a party of as much money as the party would have earned, had there been no breach of contract. When one party, at the request of another does something or supplies some goods to the other party, and if the compensation for such goods or services has not been defined at the time of the contract, then the law decides what should be an adequate compensation for such goods or service, which is what is called 'quantum merit'. How much or what would be such compensation depends upon the circumstances of the case.

This provision of law has a lot of importance in the case of a breach of contract. The aggrieved paprty has the right to be adequately compensated for an obligation performed under a contract which, in the case of a breach of contract, is determined by law. For example, A promises to construct a house for B for Rs. 50,000. After A has started construction, but before its completion, B abrogates the contract and stops A from work. In such situation, A can sue for an adequate compensation for the work that he has already done and can also sue for damages.

But if a contract is made that defines the compensation to be paid to a party for a complete job, and only a part of the job is completed, the party doing the job cannot claim to be paid under the 'as much as earned' principle. For example, a builder who has contracted to construct a building, and has constructed only a part of the building, cannot sue for compensation under *quantum merit*. But if it has been defined in the contract that the builder is to receive a specified payment as and when he has completed the construction of a specified portion of the building, the principle of quantum merit is operative, and the builder is entitled to such payment.

For the law of *quantum merit* to be operative, it is necessary for the contract to be divisible in the sense that it is possible to estimate the value of the part that has been executed. It is also essential that the contract is not abrogated by the party making the demand for compensation.

If a party abrogates the contract, he is not entitled to sue for payment under the law of quantum meruit. For example, Narain contracts to write a book for a publisher. After having written two chapters, he refuses to complete the book. In this case, Narain cannot claim to be paid for the two chapters he has written.

(4) Claim for specific performance: When, in the case of a breach of contract, damages are not deemed to be an adequate remedy, the aggreived party can sue the party in breach to carry out his promise; in other words, the party in breach can be lawfully bound to perform as per the terms of the original contract. This is a direction by the court for specific performance of the contract at the suit of the aggreived party. For example, A is looking for a house in a locality for his residence, and finds one. He contracts with the owner B to buy the house. Later B refuses to sell the house to A. In this case, damages from B for such breach of contract are not an adequate remedy for A because damages will not enable A to have the type of house he wants in the locality. In such situation, A can appeal to the court for the specific performance of the contract.

Specific performance is at the discretion of the court when the court feels that damages are not an adequate remedy because there is not other remedy for the aggrieved party than the performance of the contract. Situations have been defined in the Specific Relief Act in which the aggrieved party does have a right to specific performance of the contract, and damages are not deemed to be an adequate remedy. Specific performance is not applicable in case of contracts involving personal service.

(5) Claim for injunction: An injunction is a means of claiming specific performance where such performance involves restraining a party from doing what he has promised not to do. It is a negative order by the court that restrains a party from doing something. For example, A is a singer who contracts to perform twice a week in a theatre for two months, and not to perform in any other theatre in town during this period. After the fifth night, she is absent. The owner of the theatre is entitled to damages from A in this case and, though he cannot enforce her to perform in his theatre, he can get an injunction through the court that prevents A from performing in any other theatre. In the case of **Warner Bros. vs. Nelson,** a film actress agreed to act exclusively for Warner Bros for a year, and for no other producer. During the year, she contracted to act for another producer. It was held that she could be restrained by injunction from doing so.

Assessment of Damages

When there is a breach of contract and the aggrieved party sues for damages, the question that arises before the court is how to assess the damages to be paid to the aggrieved party. The object of awarding damages for the breach of contract is to put the aggrieved party in the position it would be if there had been no breach of contract.

In the matter of assessment of damages, the case of **Hadley vs. Baxendale** is an important illustration that gives a clear and detailed explaination of the rules governing the assessment of damages. In this case, there was a breakdown of a shaft in Hadley's mill, and the operation of the mill came to stop. Hadley delivered the shaft to Baxendale to get it repaired from the manufacturer in Greenwich. By the neglect of Baxendable, the delivery of the shaft was delayed beyond a reasonable time, and Hedley's mill was idle for a longer time than it would have been if there was no breach on the part of Bexedale, and Hadley was put to loss because of it. Hadley filed a claim against Baxendale for the expenses incurred and damages for the loss he had suffered because of the mill being idle. The court accepted Hadley's claim for the expenses he had undergone because these had resulted from the breach of contract and could be claimed as damages, but it refused to accept Hadley's claim to be reimbursed for the loss of profit (which he would have earned if the mill was no idle) because of the reason for such loss being indirect and remote. It held that such claim was only valid if the other party had prior information that delay in the delivery of shaft would entail a loss to the mill.

In this case, Justice Alderson observed that "where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be considered as arising naturally,... or such as may reasonably be supposed to have been in the contemplation of both the parties at the time they made the contract "damages that constitute the basis of Sections 73 and 74 of the Indian Contract Act. The rules given in these sections are as under:

(1) In case of a breach of contract, the aggrieved party is entitled to such damages:

(a) that arise naturally from such breach, and

(b) that were in the knowledge of the parties as being payable in the event of breach of contract.

(2) Such compensation is not to be given for any remote or indirect loss or damage sustained by reason of the breach. (Section 73)

(3) In estimating the loss or damage arising from the breach of contract, the means which existed for remedying the inconvenience caused by the non-performance of the contract must be taken into account.

When a party suffers a loss because of breach of contract, he should explore all possibilities, and use his intelligence and ability, to reduce such damage. If the party makes no attempt to reduce such loss, he may not be entitled to claim the damages to the extent of the loss incurred. Consider an example. A makes a contract with B to buy cotton for his mill. B is unsuccessful in delivering cotton. A should not let his mill be idle and try to procure cotton from somebody else. If he has to pay a higher price for cotton, he should sue B and claim the difference between the market price and the contract price of cotton that B had contracted to supply. He should not keep the mill idle and thereby increase his loss.

(4) If the terms of a contract define the amount of damages to be paid in case of breach of contract, the aggrieved party is entitled only to a reasonable amount of damages which does not exceed the amount mentioned in the contract. But in a bail bond or recognizance, the total amount needs to be deposited. For example, if A gives a bond in a court to appear before it on a fixed date, and promises to pay Rs. 5,000 if he does not, he is liable to pay the full amount in case of default (Section 74).

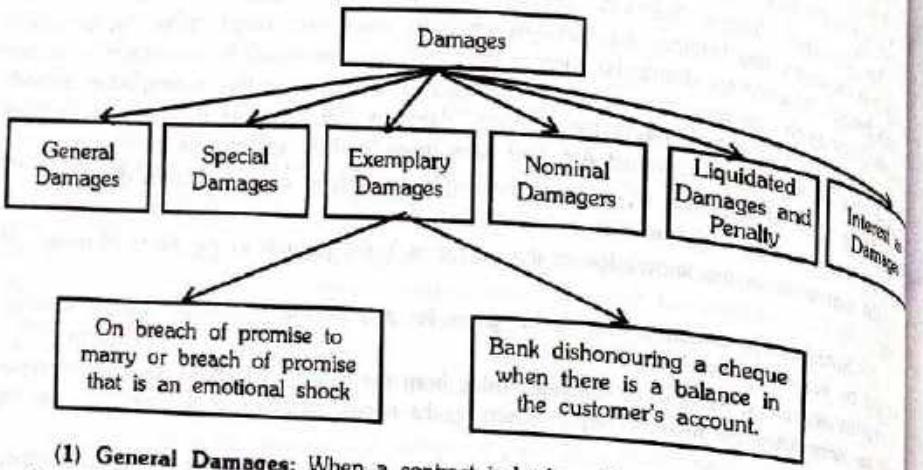
The amount of 'reasonable' damages is decided by the court.

(5) Damages can be of different types: Like ordinary damages, special damages, damages for loss of reputation, nominal damages, etc. Different situations call for different rules for enforcing such damages.

Kinds/Types of Damages

The following are the kinds of damages payable to the aggrieved party:

1. General Damages
2. Special Damages
3. Examplary or Vindictive Damages
4. Nominal Damages
5. Liquated Damages and Penalty
6. Interest as Damages



(1) General Damages: When a contract is broken, the natural and direct loss suffered by the aggrieved party is called 'general damage', and the aggrieved party can claim such damage. The damages are the proximate consequence of the breach and are assessed keeping in mind the circumstance prevailing at the time of breach; later circumstance, which might affect the measure of such damages, are not taken into account.

For example, A makes a contract to procure 50 bags of wheat from B. On the day of delivery, B fails to deliver and A has to procure the wheat from the open market where he has to pay Rs. 200 more than he would have paid to B for the quantity of wheat. The loss of Rs. 200 is a general loss and A is entitled to claim the same from B.

(2) Special Damages: A loss that arises out of special circumstances prevailing at the time of breach of contract is called special damages, and includes damages other than those arising from the breach of contract. Special damages can be claimed only if they may reasonably be supposed to have been in the contemplation of the parties at the time of making the contract as the probable result of the breach of contract, and it has been agreed that such damages would be payable by the defaulting party. The following are the situations in which the aggrieved party is entitled to such damages.

(a) Special damages can be claimed only if there is a special loss to the aggrieved party.

(b) Both the parties to the contract are in the know of the special circumstances leading to such loss.

(c) The contract envisages the payment of special damages.

(d) The damage is the natural result of the prevailing circumstances.

Example: B contracts with a railway company to transport fodder to a destination where a cattle fair is going to be held. He also informs the rail company that the fodder is meant for the cattle fair. If the fodder does not reach in time, there will be a special loss to B. If the delivery is delayed, B is entitled not only to loss he suffers because of late delivery but can also claim the profit he would have made by selling the fodder in the cattle fair.

(3) Exemplary or Vindictive Damages: Sometimes the breach of a contract may result in the loss of credibility of a party and may hurt the party's reputation. The party's goodwill is damaged and there is an emotional shock. In such circumstance, if the court feels that ordinary damages are not enough compensation for the loss of reputation or emotional damage suffered by the aggrieved party, the court may impose exemplary damages on the defaulter. Even though a marriage is not a contract by law, if a person makes such contract, and later the contract is terminated without any valid reason, it can be a great emotional damage that cannot be measured in terms of money. In such cases, the court would impose a punishment on the defaulter that might serve as an example to others. In the same manner, if a person's bank account has a balance and the bank returns a cheque issued by him, the person losses his credibility and his reputation is damaged. In such cases of carelessness, the court can impose exemplary or vindictive damages besides damages for hurting a person's reputation.

In the case of **Jefferson vs. Paskall,** the justice opined that breach of a marriage contract not only implies that loss of money spent on making arrangements for the marriage or for the purchase of goods required for marriage, it hurts the emotions of a girl who is looking forward to meet her husband and stay with him. Besides, there is a social damage to the girl's reputation. Therefore, ordinary damages are not an adequate compensation for such loss.

In the case of **Addis vs. Gramophone Co.,** it was held that if a bank returns a trader's cheque unpaid, even when there is enough money in the account holder's balance, for no valid reason, the bank is liable to exemplary damages because the trader loses his credibility in trade, especially if the amount of the cheque is not large.

In the case of **Broome vs. Cassell and Co.,** an author wrote a defamatory article about a known naval officer, which was published in a book. The officer filed a suit against the author and the publisher, and the learned judge held that the plaintiff was entitled to exemplary damages besides the ordinary damages.

The objective of exemplary or vindictive damages is not only to compensate the aggrieved party, it is also to punish the defaulter.

(4) Nominal Damages: When the aggrieved party has not in fact suffered any loss by reason of the breach of contract, the damaged recoverable by him are nominal, i.e. very small. Such damages are a recognition by the court of the right of the aggrieved party to sue for damages, and a warning to the defaulting party that it has committed a breach of contract.

(5) Liquidated Damages and Penalty: At times, the parties to a contract agree, when making the contract, that, in the event of a breach of the contract, the party responsible for the breach would pay a specified sum as damages to the other party. Such payment may amount to either liquidated damages or penalty.

Liquidated Damages: At the time of making a contract, if the parties agree to it fix an amount which is a fair and genuine pre-assessment of the probable loss that might ensue as a result of the breach, such amount is called liquidated damages. In other words, it is an estimation of the amount that is payable by the defaulting party to the aggrieved party at the breach of a contract. The court cannot increase or decrease the amount of such damages.

Penalty: When, at the time of making contract, a sum which is disproportionate to the damage likely to be caused by the breach of contract is fixed by the parties to be paid to the aggrieved party in case of breach, such sum is called penalty. The amount of penalty is not related to the damages likely to be caused to the aggrieved party in case of a breach, but is disproportionately more, and is fixed with a view to ensuring the performance of the contract. The court reserves the right to reduce of amount of penalty if it feels it is unreasonable.

The parties to a contract may use the words 'penalty' or 'liquidated damages' interchangeably. In case of breach of a contract, if the court feels that what has been described as penalty in the contract is in fact liquidated damages, it does not interfere in the payment of the damages and allows such amount to be paid as a penalty. On the other hand, if the court feels that the amount mentioned is disproportionate to the actual loss, and is, in fact, a penalty, it allows the payment to the aggrieved party only of the amount which it feels is justified in the circumstances. Whether the amount specified in a contract is a liquidated damage or a penalty is decided by the court after examining the circumstance of the case. An amount that is described as liquidated damages in the contract could be taken as penalty at the discretion of the court if it feels that such amount is disportionate to the actual loss.

The amount of penalty is a warning of serious consequences of a breach while liquidated damages are an estimation of the likely loss. In case of breach of contract, the criteria to ascertain whether the amount mentioned in a contract is liquidated damages or penalty is as follows.

If the amount is reasonably related to the likely loss to a party in case of a breach, i.e. it is approximately the same as would be the loss when the contract is terminated, then it is taken to be 'liquidated damages'. But if it is not related to the likely loss in the event of a breach of contract, and is meant to frighten or intimidate the offending party so that the party performs the contract because of fear or intimidation, the amount would be taken to be a penalty.

The Indian law makes no distinction between liquidated damages and penalty. According to Section 74, the law permits only a 'reasonable compensation' which can, in no case, exceed the amount mentioned in the contract.

Difference between Liquidated Damages and Penalty

The differences between the two are as under:

Basis of Difference	Liquidated Damages	Penalty
1. Object	The object is to save the aggrieved party from loss in case of a breach of contract.	The object is to intimidate the promisor to perform his promise under the contract.
2. Amount	The amount is approximately the same as would be the loss to the aggrieved party in case of a breach of contract.	The amount is much more than the expected loss to the aggrieved party.
3. Right of Court	The court does not have the right to reduce the amount.	The court has the right to reduce the amount.

(6) Interest as Damages: When a party to a contract does not make a payment on the stipulated date, is the party liable to pay damages in the form of interest on the amount? This is an important issue in the case of a breach of contract. Normally, in the case of breach of contract, the offending party is liable to pay interest in the following situations.

(a) When the date of payment is not fixed: When the date of payment of an amount is not specified, no interest can be claimed as damages from the party. But if it is agreed in the contract that the payment is to be made by a certain date and, in case of default, interest will be chargeable on the amount, then a delayed payment has to be made with interest. The court allows a reasonable rate of interest in such cases, which is approximate, to the market rate of interest. The court also reserves the right to reduce the rate of interest if it feels it is too high.

(b) Interest from the date of default: When an amount is payable by a certain date on a specific rate of interest, and it is decided by the parties that, in case the payment is not made by that date, the interest will be at a higher rate, such higher rate of interest is payable from the date of default and not from the date of agreement. If the increased rate of interest is reasonable, it is treated as liquidated damages and the court does not intervene. But if the rate of interest is too high, or even if the default rate is reasonable but is being charged from the date of the agreement, it is deemed to be a penalty and the court reserves the right to reduce it.

Let us say the interest is being charged at 60 per cent instead of 12 per cent. The court can say that 60 per cent is not a reasonable rate and fix another lower rate of interest.

(c) Payment of compound interest:

(i) At the same rate as simple interest: A stipulation for payment of compound interest on failure to pay simple interest at the same rate as payable on the principal is valid because it is not a penalty under Section 74.

(ii) At a higher rate than simple interest: A stipulation for payment of compound interest at a rate higher than that of simple interest is deemed to be a penalty and can be reduced at the discretion of the court.

(iii) Rebate on rate of interest: When the parties have agreed on a lower rate of interest if there is no default in payment, and a default in payment occurs, a higher rate of interest is not deemed to be a penalty. For example, Ram and Shyam make a contract that if Ram keeps on paying interest on the due date, the rate of interest will be 12 per cent, but will be increased to 18 per cent in case of a default in payment. The higher rate of interest in case of default will be deemed to be a valid increase, and not a penalty.

Is High Rate of Interest Always a Penalty?

It is beyond the jurisdiction of the court to dictate as to what agreements can be made between the parties. The court does not have the right to change or intervene in the fixation of rates of interest between the parties to a contract. But the law stipulates that:

(i) A party is not subjected to undue pressure.

(ii) The courts are satisfied that the rate of interest is not so high as to be considered a penalty.

(iii) The rate of interest can be changed to give justice to the parties.

(iv) The rate of interest is not unreasonable under the Loan Act, 1918.

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CONTRACTS OF INDEMNITY AND GUARANTEE

Contract of Indemnity—an Introduction

According to Section 124 of the Indian Contract Act, *"A contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person, is called a contract of indemnity."*

Example (i)—Amit contracts with Rajesh that he will 'indemnify' Rajesh against the consequences of proceedings which Rahul may take against Rajesh. If Rajesh has to pay Rs. 20,000 as a consequence of such proceedings, Amit will have to pay that amount because he has promised to indemnify Rajesh.

Example (ii)—B makes a contract, to sell a horse to C. A wants to buy the horse and proposes that B sell the horse to him and, if C resorts to legal proceedings against B, he (A) will be responsible for any damages that might have to be paid by B. What A is proposing is a contract of indemnity that indemnifies B against any loss that he might suffer because of proceeding against him by C.

The person who promises to protect another from a loss is called the **indemnifier,** and the person who is so protected is called the **indemnity holder.**

Essentials of the Contract of Indemnity

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

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

If we examine it closely, we find that the definition of 'contract of indemnity' as given in the Indian Contract Act is not exhaustive because it only includes an express promise to indemnify against loss caused by the conduct of the promisor himself or by the conduct of any third party. It does not include cases where the loss is because of the conduct of promisee himself or from

an external event or accident beyond the control of the parties. Such cases are not covered by the law of indemnity—which really is not a fact. In the case of **Gajanan Moreshwar vs. Moreshwar Madan**, Justice M.C. Chagla of the Bombay High Court observed that Section 124 of the Contract Act was not exhaustive on the law of indemnity and should apply the same equitable principles that the English law does. According to Justice Chagla, the promisor is bound to indemnify the promisee against a loss caused by any event because, only in that case, can contracts of insurance be covered under the act. In English law, a contract of indemnity has been defined as *"a promise to save another person from harm or loss caused as a result of a transaction entered into at the instance of the promisor"*. This definition covers the loss caused by events or accidents which do not depend on the conduct of any person. This definition is much wider in its scope. It is for this reason that the English law in respect of indemnity is followed by the courts in India.

Like other contracts, a contract of indemnity may be express or implied. An express contract can be by word of mouth or written. On the other hand, an implied contract is apparent from the circumstances of the case, for example, an act done by A at the instance of B. An implied contract may also be inferred from the relationship of parties, and the obligations arising therefrom. For example, an agent is indemnified by the principal for all lawfull acts done on his (principal's) behalf.

In fact, a contract of indemnity is a form of a general contract. As such, it needs to have all the essential elements of a valid contract—like the parties' capacity to contract, their free consent, a legal object, etc. If any one of the essential elements is lacking, it cannot be called a contract. A contract of indemnity without free consent and valid object is not recognized by law. If A asks B to beat up C and offers him Rs. 200 as an indemnity against the consequence and B does it and is fined Rs. 500, he cannot lawfully claim the money from A.

Rights of Indemnity-holder

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

(1) Damages: Which the indemnity-holder may be compelled to pay in any suit to which the promise to indemnify applies.

(2) Cost of litigation: Which the indemnified may have to incur in bringing or defending such suits. But the indemnified is entitled such cost when he has acted with foresight as a prudent man would under similar circumstances. Besides, the indemnity-holder must act as per the instruction of the indemnifier, failing which he ceases to have the right to indemnity.

(3) Sums paid under the conditions of compromise: Which include all sums which the indemnified has paid under the terms of comprise of any suit related to the promise of indemnity, provided he has acted according to the wishes of the indemnifier and acted as a sane and prudent person would under similar circumstances, and the compromise is made with the consent of the indemnifier.

The indemnity-holder has these rights only if he has not violated any condition of the indemnity contract and has acted in good faith and like a normal and intelligent person.

Rights of Indemnifier

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

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

2. If the indemnifier has indemnified the indemnity holder, he gets the right to sue third parties on behalf of the indemnified.

3. If the indemnified suffers any damages which are not covered by the contract of indemnity, the indemnifier is not bound by law to pay such damages.

4. The indemnifier is entitled to sue third parties only to the extent of the damages he has paid to the indemnified.

Commencement of Indemnifier's Liability

Section 125 of the Indian Contract Act does not specify the time of commencement of the indemnifier's liability. Different High Courts have made differing observations and given different verdicts. Calcutta, Madras, Allahabad and Patna High Courts have held that the indemnity-holder can claim such indemnity as has been promised to him when he is called upon to perform an act or to pay damages against which he has been indemnified. In other words, the indemnifier's obligation is concurrent with indemnity-holder's. For example, Sachin gives a stolen item to Ankur to auction, and Ankur asks Sachin for indemnity if he is sued for damages by the owner of the item. Ankur is entitled to claim damages as soon as he is sued by the owner—he need not wait till he makes the payment of such damages.

But Bombay, Lahore and Nagpur High Courts have given contrary verdicts. The courts have held that the indemnifier's obligation arises only when the indemnity-holder has actually performed his obligation. In other words, an indemnity is only a reimbursement of the loss suffered by the indemnity-holder.

Of the two schools of thought, the first is akin to the English interpretation. In the case of **Parker vs. Levis**, the court observed that if a person expressly indemnifies somebody, and a suit is filed in a court of law, then the indemnity-holder can ask the indemnifier to protect him. If the indemnifier does not do so, the holder of the indemnity is entitled to make a settlement on his own terms and later sue the indemnifier under the contract of indemnity. Justice Chagla made a similar observation in the case of **Ganjan vs. Moreshwar** when he said that *"if the indemnified has incurred a liability, and that liability is absolute, he is entitled to call upon the indemnifier to save him from that liability and pay it off"*. Justice Backley has a critical comment about this in the words: "Indemnity is not given by repayment after payment. Indemnity requires that the party to be indemnified shall never be called upon to pay."

Contract of Guarantee

According to Section 126 of the Indian Contract Act, *"A contract of guarantee is a contract to perform the promise, or discharge the liability, of a third person in case of his default."*

In a contract of guarantee, the person who gives the guarantee is called the 'surety', the person in respect of whose default the guarantee is given is called the 'principal debtor', and the person to whom the guarantee is given is called the 'creditor'. The contract can be oral or written, but English law stipulates it to be in writing. A guarantee can be for the good conduct of a party, in respect of a loan or purchase of goods on credit. For example, A requests B to give Rs. 50,000 to C, and guarantees that C will repay the amount within a year. If C does not, A himself will pay the amount to B. This contract would be a contract of guarantee.

Essential Elements of a Contract of Guarantee

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

1. A contract of guarantee can only be between at least three parties—surety, principal debtor and creditor.
2. Free consent of all parties is essential for a contract to be valid.
3. The surety's obligation arises only when the principal debtor makes a default in the performance of his obligation—i.e. does not repay a debt.
4. A contract of guarantee can be oral or written. It cannot be an implied contract.
5. Till such time as the obligation of the principal debtor does not arise, the surety is also free from his obligation. The surety's obligation is confined to the obligation of the principal debtor in the contract and arises only in the case of default of principal debtor in the performance of his obligation. The primary liability in a contract of guarantee is that of the principal debtor. The liability of the surety is secondary. For example, for the realisation of a time-barred debt, the principal debtor cannot be sued and his obligation to pay does not arise under the law. The surety, likewise, cannot be sued in such case.

Purpose of Contract of Guarantee

Normally, the purpose of a contract of guarantee can be one of the following: (i) for the security of a loan given to a party, (ii) for the assurance of good conduct and honesty of an employee in service contracts, and (iii) for the indemnity of a third party from loss resulting from the non-payment of a debt.

Difference Between Contracts of Indemnity and Guarantee

Basis of Difference	Contract of Indemnity	Contract of Guarantee
1. Function	Indemnifier promises to protect the indemnified against the consequences of the conduct of the indemnity-holder or a third party.	Surety promises to perform the obligation or promise of a third party.
2. Parties to the Contract	There are only two parties to the contract—the indemnifier and the indemnity-holder.	There are three parties to the contract—the principal debtor, the creditor and the surety.
3. Object	The purpose is a safety from an uncertain future event.	The purpose is to assure the other party of the performance of an obligation.
4. Liability	Liability of the indemnifier is primary.	Liability of surety is secondary—i.e. it arise only in case of default of the debtor.
5. Number of Contracts	There is only one contract—between the indemnifier and the indemnity holder.	There are three contracts: —between the principal debtor and the creditor. —between the creditor and the surety —an implied contract between the principal debtor and the surety.
6. Scope	Scope is limited and does not include contracts of guarantee.	Scope is wide and includes contracts of indemnity.
7. Nature	The contract is a security against loss.	The contract is an assurance to the creditor.
8. Consideration	Indemnifier receives a consideration from the indemnity-holder at the beginning of the contract.	Surety does not receive any consideration. The only consideration for the surety is the expected gain of the principal debtor.
9. Right to Sue	Indemnifier cannot sue a third party for loss in his own name. He can only sue on behalf of the indemnified.	Surety, on discharging a debt due by the principal debtor, can sue the principal debtor in his own right.

Guarantee Without Knowledge of Principal Debtor

A contract of guarantee essentially has three parties to it, viz. principal debtor, creditor and surety. Can a party stand surety for another party without the knowledge and consent of the other party? The verdict on this issue was given by the Tamil Nadu High Court in the case of **Periamaran Mararkkayar vs. Banians and Co.** In this case, A made a contract to buy some goods from B, after which C guaranteed the performance of contract by A. C was not a party to the contract between B and A. C had to pay damages to B when A defaulted in his performance of the contract, and C filed a suit against A. The court, when giving the verdict, observed that the surety can only assume the obligation of performance at the express or implied request of the principal debtor and, only if he does so, can he sue the debtor for the reimbursement of the amount that he has paid to the creditor. The court observed that there was no contract of guarantee because there were no three parties in the contract, and the contract was, in fact, a contract of indemnity between the creditor and surety. The court, therefore, held the contract void.

Consideration for Guarantee Contract

In a contract of guarantee, it is not essential that there is a consideration for the surety. According to Section 127 of the Contract Act, "Anything done, or promise made for the benefit of the principal debtor, may be a sufficient consideration to the surety for giving the guarantee." In other words, the consideration can be not in terms of a profit or gain for the promisor, it can be in terms of the promisor preventing a loss to the promisee. The basic characteristic of such contract is the promisor's willingness to undergo a possible loss, or inconvenience for the benefit of the promisee. The following examples illustrate the point.

Example 1: B requests A to sell him some goods on credit. A is willing to do so if C guarantees that the payment will made on schedule. C guarantees that it will be done. Here C's promise is the consideration for A. C actually receives no monetary benefit, but the fact that A has confidence in him and he has been of help to B is the consideration for C.

Example 2: B sells some goods to C and delivers them. Later A requests B that he should not take any legal action for the payment of goods he has delivered to C for one year, and promises to pay the cost of goods to B in case of a default on the part of A. B agrees to the proposal. B's agreement, in this case, is the consideration for A.

Types of Guarantee

Mainly, a guarantee is of the following types:

(1) Retrospective guarantee: A guarantee which is with respect to an existing or an old debt of a party is called a retrospective guarantee.

(2) Prospective guarantee: A guarantee for a future debt or obligation is a prospective guarantee. This guarantee is of two types:

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

(b) Continuing guarantee: According to Section 129 of the Indian Contrtact Act, "When a guarantee extends to a series of transactions, it is called a continuing guarantee." Such guarantee is not confirmed to one transaction. Such guarantee is for a specified period and for specified transactions, and the party who is giving such guarantee—i.e. the surety—can limit his commitment to the transaction and the duration specified in the contract. The salient features of a continuing guarantee are:

(i) Such guarantee is valid for a series of continuing transactions provided the transactions are within the limits of the guarantee in terms of amount and time period.

(ii) Such guarantee is only applicable to specific transactions involving a specific amount of money.

(iii) The surety reserves the right to be kept informed about the probable future transactions.

(iv) In the absence of an agreement to the contrary, the continuing guarantee terminates in the event of death of the guarantor.

If the surety, i.e. the guarantor, so desires, he can specify the period and amount of guarantee at the time of giving the guarantee.

Revocation or Termination of Continuing Guarantee

A continuing guarantee is terminated in the following two ways:

(1) By Notice: According to Section 130, a continuing guarantee can be revoked by the surety giving a notice to the creditor of such revocation as to future transactions. In the event of revocation, the surety is not responsible to the creditor for any future transactions, but continues to be responsible for all such transactions that have been done till the notice of revocation of guarantee is received by the creditor. For example, A gives a continuing guarantee to C to give goods on credit to the extent of Rs. 21,000 to B. After a period, A revokes his guarantee. At

the time of revocation, B owes Rs. 10,000 to C for the goods which he has received. In this case, A is lawfully bound to pay this amount to C in case of default on the part of B.

(2) By Surety's Death: According to Section 131, the death of the surety operates, in the absence of any contract to the contrary, as a revocation of a continuing guarantee, so far as regards future transactions. The liability of the surety for the previous transactions, however, remains. In such case, it is not essential that the creditor is aware of the surety's death. If, after the surety's death, the creditor does some transaction without knowing that the surety is dead, this rule is applicable and the surety's property is not liable for any transaction after the surety's death. But this rule is not applicable if contrary to it has been agreed to in the contract. In the case of **Durga Priya Chowdhry vs. Durga Parshad Roy**, it was held that, if it has been agreed between the surety and the creditor that the guarantee will be valid for a specified period after the surety's death and will be payable from his property, then the surety's successor is bound by such promise. According to English law, the knowledge of the creditor about the surety's death is essential for the guarantee to terminate.

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

(a) Guarantee obtained by Misrepresentation: According to Section 142, any such guarantee which is obtained by the creditor, or with his knowledge and concurrence, by misrepresenting some important part of the contract is invalid. Likewise, if some important relationship between the creditor and the principal debtor is misrepresented by the creditor, or with his knowledge and concurrence, then the guarantee of the surety becomes invalid on the ground of fraud and misrepresentation.

For example, A appoints B as a manager in his firm and tells C that he is being appointed as an auditor. On that assumption, C gives a guarantee of good conduct of B. C's guarantee, in this case, has been obtained by misrepresentation. As a result, C will not be held responsible for B's good conduct.

(b) Guarantee obtained by Concealment: Under the provision of Section 143, of the Indian Contract Act, any such guarantee which is obtained by the creditor by concealing, or keeping silent about, some important aspects of the contract is invalid.

For example, A appoints B as a clerk in his firm for the collection of debts payable to A. B does not give proper account of collection is some cases, and A demands a guarantee from B so that he gives a proper account of the debt collected by him. At the instance of A, C gives a guarantee of good conduct of B. But A does not disclose the past behaviour of B to A. If B again does any misappropriation of money, C cannot be held responsible because he was kept in the dark about the previous misappropriation on the part of B.

(c) Guarantee on the Condition of Joining Co-sureties: According to Section 144 of the Contract Act, when a person stands guarantee with respect to a contract on the condition that the creditor will not deem it to be operative untill another person joins him as a co-surety, such guarantee is invalid if the other person does not become a co-surety. In such a case, the

guarantee is given by a person on the condition, and in the belief, that another person will agree to become a co-surety, and if the other person does not join him, the surety reserves the right to be absolved of his obligation.

For example, Kamal and Vimal make a contract that if Chaman agrees to join them as a co-surety, Kamal is prepared to stand guarantee of Rs. 50,000 for Krishan's good conduct. Chaman refuses to join them a co-surety. In this case, Kamal cannot be held responsible for Krishan's good conduct.

Liability of Surety

Before discussing the liability of the surety, it is important to note that the liability of the surety arises only if there is a default on the part of the principal debtor. If the principal debtor does not default, and makes the payment as per his promise, the liability of the surety does not arise. The surety's liability is *secondary*, the *primary* liability being that of the principal debtor. The creditor cannot directly ask the surety to perform unless there has been a default in the performance of the principal debtor. The surety's liability arises only when the principal debtor, by intent or by the occurrence of an unforseen event, fails in his performance, e.g. when the principal debtor does not repay a loan or has become insolvent.

(1) The liability of the surety is co-extensive with that of the principal debtor: Section 128 of the Indian Contract Act deals with the nature of the surety's liability. According to this section, the liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract. In other words, the quantum of the surety's obligation, unless specified otherwise in the contract, is the same as that of the principal debtor. Consider an example, Hari guarantees Ram about the payment of a bill of exchange by Mahesh. Mahesh does not make the payment. In this case, Hari is liable not only for the amount of the bill but also for any interest and charges which may have become due on it. The surety can, however, define the limitation of his liability at the time of making the contract. In such situation, whatever may be the extent of the principal debtor's liability, the surety's liability is confined to the pre-defined limitations. For example, if the principal debtor owes Rs. 10,000 to the creditor, and the surety has defined his liability to be Rs. 5,000, he is liable to pay only that amount in the case of a default by the principal debtor. That is why a surety is sometimes called a *favoured debtor.*

It is important to clarify here that if the circumstance are such that the principal debtor cannot be held responsible for the discharge of his obligation, it does not imply that the surety is absolved of his liability. In other words, if the principal debtor is incapable of making a contract—e.g. he is a minor, a lunatic, etc.—the contract between him and the creditor is void and cannot be enforced by law. In such case, the surety is deemed to be the principal debtor. It is, therefore, clear that in certain situation, the liability of the surety is the same as that of the principal debtor.

(2) Liability of surety commences with the default of the principal debtor: As soon as the principal debtor defaults in his performance, the surety's liability becomes operative. The creditor is not bound by law to inform the surety of such default or to explore the possibilities of making the principal debtor perform his promise before initiating preceedings against the surety. When a debt to the creditor becomes due for payment, the creditor has the right to demand such payment from the principal debtor or the surety. In other words, it implies that the creditor can sue the surety without sueing the principal debtor. It was observed in the case of **Sankra vs. Virubakshaba** that the creditor need not necessarily file a suit against the debtor, and can initiate the proceedings directly against the surety.

(3) Liability of co-surities: According to Section 132 of Contract Act, when two parties make a contract with a third party that implies a specific liability on the part of a third person, and also agree that one of them will be held liable in case of a default of the other, i.e. one person is deemed to be the surety of the other, and the third person is not a party to this contract, then, under the first contract, the liability of both towards the third person will not be influenced by their mutual contract, even if the third person is in the know of the contract between the first two. In other words, it can be said that, when two persons jointly take a loan, and one of them is a surety for the other, it does diminish his liability to the creditor, but he certainly can use his rights as a surety. For example, A and B make an affidavit to work jointly wherein A has written it as a surety for B. C is aware of the existence of the affidavit from the very beginning. The fact that A has written as a surety for B and C knows about it will not be a reason for security on the filing of a suit by C against A.

Discharge of Surety from Liability

A surety is said to be discharged when his liability comes to an end. The surety is discharged of his liability in the following situations.

(1) By notice of revocation: According to Section 130 of the Indian Contract Act, a continuing guarantee can be revoked by the surety at any time with respect to future transactions by the surety giving a notice to the creditor of his intention to revoke the guarantee; which implies that, after such notice has been given to the creditor, the surety is not held responsible for any future transactions. But in case of an obligation arising by a specific guarnatee given earlier, the surety cannot revoke such obligation. If there is no such obligation, the surety can revoke the guarantee by giving a notice to the creditor. For example, A gives a loan of Rs. 10,000 to B with C being the surety. Here the guarantee cannot be revoked because the surety's obligation is not completed.

(2) By surety's death: As per Section 131, the death of the surety operates, in the absence of any contract to the contrary, as a revocation of the guarantee. The surety's property, after the surety's death, cannot be subjected to any transaction between the creditor and the principal debtor after the death of the surety.

(3) By variation in the terms of the original contract: According to Section 133, if there is a major modification in the terms of the contract without the agreement of the surety, the surety is absolved of all responsibility in future contracts. The surety has the right to withdraw his guarantee even if the modification of the contract goes in his favour. But if the surety has given an express or implied consent to such variation, he is lawfully bound by his commitment and cannot be absolved of his promise. In the case of **Blest vs. Brown**, Lord Westbury observed that "... *you bind him* (i.e. the surety) *to the letter of his engagement. Beyond the proper interpretation of that engagement, you have no hold upon him. If that engagement, be altered (without the surety's consent), no matter whether it be altered for his benefit, no matter whether the alteration be innocently made, 'the contract is no longer that for which I engaged to be surety; you have put an end to the contract that I guaranteed and my obligation therefore is at an end'.*"

Consider an example. Amar promises to pay Rs. 30,000 to Akbar on 1st March, 1998. Anthony stands guarantee for this loan. If Amar pays the amount to Akbar on 20 February, Anthony is absolved of his promise because a major change in the terms of the contract has been made without the concurrence of Anthony. Likewise, if a trader engages Sushil on monthly wages as a salesman, and Roopak stands guarantee for his good conduct for the amount of Rs. 20,000, the surety (Roopak in this case) reserves the right to withdraw his guarantee if there is a change in the terms of Sushil's employment—for example, if Sushil's rumeneration is to be in terms of commission or salary plus commission.

(4) By release or discharge of the principal debtor: According to Section 149, when the creditor and the principal debtor make a contract that nullifies the obligation of the principal debtor, or the creditor does some act, or neglects to do some act, that releases the principal debtor from his obligation, the surety is also released from his liability under the guarantee. Consier an example. A contracts with B to construct his house in a specified time limit, and B promises to provide the wood to be used in construction. C is the surety for A's performance. B does not provide the required wood for wood work. As a result, C is released of his guarantee. Likewise, A leases his land to B for cultivation of ultramarine at a specified rate. C stands guarantee for A. A redirects the water supply to the land that makes it impossible for B to do such cultivation. The legal implication of such situation will be that B is released of his obligation and C is released of his guarantee.

(5) Agreement with the principal debtor: According to Section 135 of the Contract Act, if the creditor and the principal debtor, without the consent of the surety, make a contract that amounts to a settlement between the two, and the creditor promises to extend the time limit of the debtor's liability and not to initiate proceedings against the debtor, the surety is released of his obligation. The surety is, however, lawfully bound in the following situations:

(a) If the creditor makes a contract with a third party to extend the time limit for the performance of the principal debtor, the surety's liability does not come to an end (Section 136).

(b) Not filing a suit against the principal debtor, or not initiating any other proceedings against him, does not absolve the surety of his liability. For example, A is a debtor of B, and C guarantees the payment of loan given to A. If A fails to make the payment and B does not initiate any proceedings against A, it does not absolve C of his liability (Section 137).

(c) Where there are co-sureties, and the creditor releases one of the sureties of his obligation, the liability of the remaining sureties is not deemed to terminate, nor does the released surety's obligation to the co-sureties. For example, Ashok, Vinod and Karun are co-sureties for a loan of Rs. 5,00,000 given by Shyam to Anil. Shyam later releases Karun of his liability as a co-surety. Anil defaults in payment, and Shyam recovers his debt to Anil by proceedings against Ashok and Vinod. In this case, Karun's liability is not over; he remains answerable to Ashok and Vinod.

(6) By the creditor's act or omission impairing surety's remedy: According to Section 139, if the creditor does some act which is inconsistant with the rights of the creditor or fails to do some act which is his lawful duty towards the surety, then the surety is absolved of his liability. For example, Subodh gets Dinesh a job in the establishment of Amir Chand and stands guarantee for the character and good conduct of Dinesh. Amir Chand promises that he will check the accounts of Dinesh at least once every month. Amir Chand fails to do that and Dinesh embezzles money from the funds that he handles. Subodh, in this case, will not be liable for reimbursement of funds because Amir Chand has failed to do something which he had promised to Subodh he would do.

(7) Loss of security by the creditor: According to Section 141, if some asset has been kept as security for the loan with the creditor, the surety has the right to demand the return of such asset when he discharges his liability. If the creditor loses the asset, or returns it to the principapl debtor without the consent of the surety, the liability of the surety is reduced to the extent of the value of such asset. For example, A gives a loan of Rs. 50,000 to B and C stands guarantee for the loan. A also keeps some furniture belonging to B as a security, and later returns it to B without the knowledge or consent of C. B later becomes insolvent, and A files a suit against C. In this case, C's liability to A is reduced to the extent of the value of the furniture which was kept as security.

(8) Guarantee obtained by misrepresentation: According to Section 142, if a guarantee is obtained by misrepresentation on the part of the creditor, or without his knowledge and consent of some important aspect of the agreement, such guarantee is invalid and the surety is absolved of his liability.

(9) Guarantee obtained by concealment: Under the provision of Section 143, if the creditor conceals, or is silent about, some important aspect of the contract which he should bring to the notice of the surety, the guarantee becomes invalid and the surety is absolved of all liability.

(10) Guarantee given on the condition of joining co-surety: According to Section 144, if a person gives a guarantee on the condition that the creditor will not act on such guarantee untill another person (named by the surety) joins in the guarantee as a co-surety, and the person so named does not join, the guarantee is invalid and the surety is absolved of his liability.

Rights of Surety

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

(1) Rights against principal debtor: Under Section 140, in the case of a default on the part of the principal debtor, the surety has made the payment of a loan or has performed his promise, the surety has the same rights against the principal debtor as those of the creditor, and can recover from the latter the amount he has paid with interest. In the case of insolvency of the principal debtor, the surety has the right to prove, as a creditor, the insolvent's debt to him. Likewise, the surety has the same right as a creditor to prevent the principal debtor to sell goods (to the extent of the value of the surety's claim) or stop the transportation of the goods sold by the principal debtor.

According to Section 143, if the creditor has some kinowledge about the principal debtor, or his conduct, which should be known to the surety, and he does not disclose it to the latter, the surety is relieved of his liability under the contract. In other words, the surety has the right to be informed about the conduct of the principal debtor. Take an example. A employs B to make collection of money from his customers. After some days, B is not able to give a reasonable

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CONTRACTS OF BAILMENT

Bailment—an Introduction

A contract of bailment, like a contract of indemnity or guarantee, is a special type of business contract. The rules governing the contracts of bailment and pledge are defined in Sections 148-181 of the Indian Contract Act. This chapter is about the law governing the contracts of bailment.

The word 'bailment' is derived from the French word *'balier'*, which means 'to deliver'. It means any kind of 'handing over' of goods from one person to another. Bailment implies 'voluntary change of possession from one person to another'. A contract of bailment is a contract in which one person delivers some goods to another for some purpose and, when the purpose is accomplished, the goods are returned or otherwise disposed of according to the directions of the person delivering them.

A contract of bailment is one in which a specific property, and the rights to it, of one person is transferred to another for a specific period. The ownership of such property or goods remains with the person owning the property, but the right of possession is transferred to the other person.

According to Section 148 of the Indian Contract Act, "*A bailment is the delivery of goods by one person to another for some purpose upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them.*" The person delivering the goods is called the 'bailor', and the person to whom the goods are delivered is called the 'bailee'.

Example: Suman delivers a piece of cloth to a tailor to be stitched into a coat. Here, there is a contract of bailment, between Suman and the tailor. Suman is the 'bailor', and the tailor is the 'bailee', and the purpose of delivering the cloth is to get a coat stitched. The tailor will return the cloth to Suman after stitching. Likewise, if Anita delivers some clothes to a washerman for washing, or Rakesh gives his television for repair to a mechanic, these will be contracts of bailment.

Characteristics of Bailment

After analysing the definition of bailment as given in Section 148, we find the characteristics of bailment to be as under:

(1) Bailment is a contract: Except for some specific situations, a bailment is a contract, created by an agreement between the bailor and the bailee, which implies that it is a proposal by one party and is accepted by the other. And, as such, it must have the essential elements of a valid contract. The finder of lost goods is also a bailee, though the bailment in such a case is implied and not express.

(2) Bailment is of movable goods: A contract of bailment can only be made for movable goods, or the possession can be given only of movable goods. Such contract cannot be made for an immovable property like land or building. But currency is not considered to be a movable property.

(3) Bailment involves transfer of possession of goods: A contract of bailment necessarily involves delivery of possession of goods by the bailor to the bailee. If there is no such transfer, then there is no bailment. Such delivery can be *actual, constructive* or *token*. According to Section 149, the delivery of goods to the bailee can be by any act that ensures that the goods are transferred to the bailee or his agent. Mere custody of goods does not constitute a transfer. A servant who takes care of goods for his master merely has the custody of such goods. Here the possession remains with the master and the servant does not become a bailee.

(4) The transfer under bailment is temporary: The transfer of rights to goods under a contract of bailment must be for a specific objective for a temporary period. The objective must not be a permanent transfer, which amounts a sale of goods. If A gives a permanent transfer of his watch to B for a consideration of Rs. 100, it amounts to a sale, not a bailment. In other words, there is not transfer of ownership in a contract of bailment.

(5) The goods must be delivered to the other person: In a contract of bailment, it is important that the goods are delivered to the bailee. The case of **Inder Kumar vs. the State of UP** is an important illustration. *In this case, a person placed his baggage on the roof of a bus and the baggage was lost. The court held that it was not a case of bailment since the baggage was not delivered by one person to another. Likewise, in the case of* **Kaliaperumal vs. Visalakshmi,** a lady gave her jewellery to a goldsmith to melt it and make her new jewellery. Every evening she received the unfinished jewellery and locked it in a box at the goldsmith's premises, and kept the key to the box with herself. One night, the jewellery was stolen from the box. The court held that there was no bailment as the goldsmith (the bailee) had not been delivered the jewellery by the lady (the bailor).

(6) The bailor has the right to the return of goods: As per its definition, a contract of bailment stipulates that the goods will be returned or will be otherwise disposed of according to the directions of the person delivering them. If the goods are not returned to the bailor, then it is not a bailment. But it must be noted that it is not essential that the goods are returned in the condition they were received by the bailee. In some cases, the goods that are delivered are meant to be modified or changed. When a piece of cloth is given to a tailor for stitching, the tailor returns it in a modified form—in the shape of a shirt, a pant or some other garment.

Delivery of Goods in a Contract of Bailment

Delivery of goods has a special importance in a contract of bailment. According to Section 149, the delivery of goods is deemed to be affected to the bailee when the goods are given to

the possession of the bailee or his accredited agent by the bailor. Such delivery can be made in the following three ways.

(1) Actual Delivery: When the goods are actually delivered in physical terms, it is said to be an actual delivery, like giving the cloth to a tailor for stitching or a TV set for repair to a mechanic cited in the previous examples. In other words, an actual delivery is a visible and physical delivery.

(2) Constructive Delivery: Physical transfer of goods (like it is done in an actual delivery) is not essential in constructive delivery. Such delivery may be made by doing something which has the effect of putting the goods in the possession of the intended bailee or any person authorised to hold them on his behalf. For example, if Vipin buys a radio, and leaves it with the seller so that he can get a cabinet made, it will be a constructive delivery, because Vipin has not physically been delivered the radio by the seller. The seller will be the bailee and the contract will be one of bailment. The contract arises out of a constructive delivery of goods.

(3) Token Delivery: In token or symbolic delivery, the goods are not delivered to the bailee— only an act is performed that transfers the goods to the bailee or his authorised agent, i.e. the possession of goods is transferred to the bailee; for example, handing over the key to a godown or giving the delivery authorisation to load goods in a truck.

Is Deposit in Bank a Bailment?

Is depositing cash money in a bank a contract of bailment? The answer would be 'No' because the currency notes or coins deposited in a bank are not returned in the same form (in terms of denomination of currency) in which the money is deposited. The bank does not guarantee to return the money in the form it was deposited—it guarantees to return the value of money that was deposited. In other words, the relationship between a client and a bank is one of a creditor and a debtor, and not of a bailor and a bailee. The case of **Reg vs. MacDonald** is a case in point. In this case, it was held that bailment and give-and-take of money (or legal tender) are not the same because transfer, payment or deposit of money makes one party a debtor of the other and, as such, it is an index of the payment of a debt. It was held in the case of **Shankar Lal vs. Bhura Lal** that the money deposited in current, savings or other accounts in a bank is not bailment because the relationship between the bank and the depositor is one of a debtor and a creditor. On the other hand, if a person keeps some valuables, cash or jewellery in a bank locker for safe custody, it is a case of bailment.

Types of Contract of Bailment

Contracts of bailment are primarily classified as under:

1. Contracts from the point of view of rewards, and
2. Contracts from the point of view of object.

1. From Reward Point of view: Bailment from the reward point of view is further classified as under:

(a) Bailment for reward or non-gratuitous bailment: When some charge is specified for a bailment or a consideration passes between the bailor and the bailee, it is termed as a bailment for reward. Charge for hiring a locker in a bank, charge for repairing some gadget or for keeping baggage in the railway cloak room are examples where there is a reward for the bailee to keeping or doing something for the bailor.

(b) Gratuitous bailment: In gratuitous bailment, no consideration passes between the bailor and the bailee. For example, if A lends his bicycle to his friend B, he does not expect to be paid for it, and it will be a case of gratuitous bailment.

2. From Object Point of view: From the point of view of object, we can classify a contract of bailment as under:

(a) Bailment for use: When the owner of an item, of his free will, gives the item to another for his use, the contract is one of bailment for use, or *commodatum*. For example, if A lends his camera for a month for the use of B who is going on a holiday, it will be a contract of bailment for use.

(b) Bailment for safe custody: When the bailor hands over an item to the bailee for safe-keeping, it is a contract of bailment for safe custody. For example, if A deposits his suitcase and hold-all in the railway cloak room, A is the bailor and the railway authority is the bailee in a contract of bailment for safe custody. Likewise, if Ram keeps his valuables with Mohan for safety, it will a case of bailment for safe custody.

(c) Bailment for carriage: When a transport company is given charge of goods for transportation from one place to another, it is termed a bailment of carriage. Giving custody of goods to railways, transport companies or shipping companies are contracts of bailment for carriage.

(d) Bailment for alteration in shape: When one person hands over an item to the other with the object of getting the shape of the item altered, it is a contract of bailment for alteration in shape; for example, giving wheat to a mill to be turned in flour, or giving a piece of cloth to the tailor for stitching.

(e) Bailment for repair: If an item is handed over to a person for repair, it is termed as bailment for repair, like giving a piece of furniture to the carpenter for repair, or A giving his car to B for denting or painting.

(f) Bailment for pawn or pledge: When a debtor hands over a valuable to the creditor as a security for a loan, it is called bailment for pawn or pledge. For example, if A hands over his gold watch to B for the security of a loan given by B, it will be a bailment for pawn or pledge.

Duties and Responsibilities of a Bailor

The duties and responsibilities are as under:

(1) To disclose faults in the goods bailed: According to Section 150, it is the duty of the bailor to point out all the defects in the goods that he is delivering which are known to the bailor, or which can cause damage to the bailee if he is unaware of such defects. If the bailor does not make such disclosure, he is responsible for any damage caused to the bailee by such faults. If the goods have been given on rent, the person giving the goods on rent is responsible for all the faults even if he is not aware of them. That is to say that, in the case of bailment for rent, the responsibility of the bailor is much greater than in other contracts of bailment.

Example 1. Ram lends his horse to Shyam. Ram knows that the horse is vicious, but he does not disclose it to Shyam. The horse runs very fast, and Shyam is thrown off and injured. Ram will be held responsible for the damage sustained by Shyam.

Example 2. Ramesh hires a car from Mahesh. The brakes of the car are not working properly, but Mahesh does not know about it because he has not driven the car lately. Ramesh meets with an accident and suffers injuries. Mahesh will be liable for damages even if he was unaware of the defect in the car.

(2) To repay the necessary expenses: According to Section 158, when the terms of the contract require the bailee to keep some goods in bailment and transport such goods, or when he has to do any repair of goods for which there is a charge, the bailor is bound by law to pay all the necessary expenses incurred by the bailee on behalf of the bailor. For example, Ravi leaves his horse with Mukesh for some time because he is leaving town temporarily, and Mukesh is not to be paid for taking care of the horse. But the horse needs to be fed and taken care of. In this case, Ravi is liable for all expenses incurred by Mukesh for feeding and otherwise looking after the horse. It should also be noted that, even if the expenses are extraordinary, the bailor is liable to pay such expenses. In the above case, if the horse were to fall sick or be injured, Ravi would be liable for all expenses incurred by Mukesh on its treatment.

(3) To indemnify the bailee: If the bailor gives custody of goods that do not belong to him to the bailee, or there is a flaw in the ownership of goods by the bailor, and the bailee has to suffer some damage because of it, the bailor is liable for such damage. According to Section 164 of the Indian Contract Act, the bailor is liable to indemnify the bailee for any loss suffered by him for any act, or failure to act, on the part of the bailor for which he does not have the right. In other words, the bailor is responsible for any loss or damage that is suffered by the bailee because of some defects in the ownership or other rights of the bailor. For example, A gives a car to an auctioneer C. The real owner of the car is B. C auctions the car to a third party, and B files a suit against C. In this case, A will be responsible for all damages that B might have to pay to C.

(4) Liability on premature breach of bailment: If the bailor demands and takes possession of the goods before the expiry of the bailment, and the bailee has to suffer a loss greater than the profit he has made during the period of bailment of such goods, the bailor is responsible to pay to the bailee for the difference in the amounts of the expected gain and the loss suffered by the bailee. According to Section 159, *"A gratuitous bailment can be terminated by the bailor at anytime even though the bailment was for a specified time or purpose. But in such a case, the loss accruing to the bailee from such premature termination should not exceed the benefit he has derived out of the bailment. If the loss exceeds the benefit, the bailor shall have to indemnify the bailee."*

Rights of Bailor

As per the provisions of the Indian Contract Act, the bailor has the following rights:

(1) Right of indemnity for losses due to negligence by bailee: According to Section 152, it is the duty of the bailee to take proper care of the goods kept with him by the bailor. If the bailee does not take proper care of the goods as an owner of such goods would do under normal circumstances, or is careless or negligent in the proper maintenance of goods, the bailor has the right to be compensated for the damage caused by the bailee's negligence. For example, if the goods are stolen or damaged during bailment, the liability rests with the bailee.

(2) Termination of bailment on inconsistent use by the bailee: According to Section 153, the bailor can terminate the bailment if the bailee does, with regard to the goods bailed, any act which is inconsistent with the terms of the bailment. For example, if Satish lets out a horse to Suresh for his personal riding, and Suresh uses the horse to drive a carriage, the contract, in such a situation, can be terminated by Satish and he can get back the horse.

(3) Compensation for unauthorised use by the bailee: According to Section 154, if the bailee uses the goods in bailment in a manner which are contrary to the terms of the contract of bailment and not authorised by the bailor, as a result of which the bailor is subjected to some loss, the bailor is entitled to damages from the bailee for the loss that he has suffered by the unauthorised use of goods by the bailee.

For example, Satish lets out a horse to Suresh only for the latter's personal use, and Suresh gives permission to another member of the family Ramesh to go for a ride. When Ramesh, who is very fat, tries to mount, the horse falls and is injured. Here Satish has the right to claim damages from Suresh for the injury to his horse.

Here, it is necessary to clarify that Sections 153 and 154 describe different solutions for the breach of a contract for bailment. The courts consider such cases keeping in view the circumstances of the case to decide which section applies to a particular case. If the conduct of the bailee is deemed to be inconsistent or contrary to the terms of the case, the bailor has the right to terminate the contract. And if the conduct of the bailee falls under unauthorised usage of the goods in bailment, the bailor is only entitled to damages, and cannot terminate the contract.

(4) Compensation when the bailee mixes the goods bailed with his own goods: According to Section 155, when the bailee mixes the good bailed with his own goods, the right of the bailor in such mixture of goods is to the extent of the goods kept under bailment.

According to Section 156, if the bailee, without the consent of the bailor, mixes the goods bailed with his own goods, and the goods bailed can be identified and separated, both parties will be entitled to their respective goods, but the bailor will have the right to claim damages for the expense of such separation of goods and the loss suffered by him as a result of such mixing.

According to Section 157, if the bailee, without the consent of the bailer, mixes the bailor's goods with his own, and it is not possible to identify and separate such goods, then the bailor is entitled to receive compensation of the total goods kept by him in bailment.

(5) Right of return of goods in case of gratuitous bailment: According to Section 159, when the goods are lent gratuitously, the bailor can demand their return whenever he pleases, even though the goods were lent for a specified time or purpose. But if the bailee suffers a loss that exceeds the benefit derived by him from the use of such goods because of premature return of goods, the bailor shall have to indemnify the bailee.

(6) Right to get the goods back: According to Section 160, on the expiry of the agreed duration of bailment or when the objective of bailment has been fulfilled, the bailor is entitled to get back the goods under bailment.

(7) Right to increase or profit from goods bailed: According to Section 163, if there is an increase in the goods under bailment or there is a profit because of any contract

other than that of bailment, the bailor is entitled to such increase or profit. For example, if Ram leaves his cow with his friend Raj, and the cow gives birth to a calf during the period of bailment, Ram is entitled to get back the cow with the calf on the expiry of bailment.

Duties and Responsibilities of Bailee

The duties of a bailee are as under:

(1) Taking proper care of the goods bailed: Under the provisions of Section 151, in all cases of bailment, gratuitous or non- gratuitous, it is the duty of the bailee 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 similar quality, bulk and value. Under Section 152, if the bailee has taken reasonable care of goods, and there is a loss, destruction or deterioration of goods inspite of it, the bailee cannot be held responsible for such loss, destruction or deterioration. Normally, the bailee is not responsible for such loss or damage caused by fire, flood, of circumstance beyond the control of the bailee—e.g. a loss or damage which is the result storm or lightening, or an enemy attack. What is the normal prudence that a bailee is supposed to exercise depends on the circumstances of the case. If a bailee keeps his own goods under lock and key and the bailed goods in the open, he presumably would be guilty of not taking proper care of the bailed goods.

For example, Ramesh delivers some goods under bailment to Dinesh's godown. Dinesh accepts the goods and keeps them in the godown. Because of a leaking roof, rain water seeps in and destroys the goods kept there for Ramesh. If Dinesh had used normal prudence, he would have got the roof repaired and saved the goods. Therefore, Dinesh is guilty of negligence.

In this regard, an important illustration is the case of **Boseck & Co. vs. Mandlestan.** In this case, a jeweller of Lahore used to despatch jewellery by post to a Calcutta craftsman without getting the jewellery insured. This kept on happening, and once the craftsman also sent the repaired jewellery without getting it insured. But the parcel did not reach Lahore and was lost on the way. It was held that the practice that was being followed in the circumstances dictated that, and the craftsman had used his normal prudence in sending the parcel as he did.

It would be important to mention here that a bailee cannot forego his commitment under any circumstances. A bailee can only increase his commitment by undertaking to protect the goods from theft or damage by any occurrence.

(2) Not doing any act inconsistent with the terms of bailment: According to Section 153, if the bailee does any act with respect to the goods in bailment which is inconsistent with the terms of the contract, the bailor, if he so desires, can terminate the contract of bailment and recover the goods under bailment. For example, if A gives a horse to B for riding, and B uses it to drive a carriage, the contract for bailment can be terminated at the desire of A.

(3) Not making unauthorised use: According to Section 154, if the bailee uses the goods under bailment in manner which is not authorised under the contract, then he is liable to pay damages to the bailor for the deterioration of the goods by such usage. For example, A lends his horse to B for his personal riding, and B lets another person use the horse for riding resulting in an accident that injures the horse. In this case, A would be entitled to claim damages from B for the unauthorised use of his horse by the latter.

Here, it is important to note that Sections 153 and 154 deal with remedial measures in two different situations in a contract of bailment. If the conduct of the bailee is inconsistent with the terms of the bailment contract, the bailor has the right to terminate the contract. But, in case of unauthorised usage of goods under bailment, the bailor cannot terminate the contract—he can only claim damages for the misusage of goods.

(4) Not mixing bailor's goods with his own: It is the duty of the bailee not to mix the goods under bailment with his own goods. Sections 155 to 157 cover the obligations of the bailee in such situations.

(a) Section 155 stipulates that, if the bailee mixes the goods under bailment with his own goods with the consent and agreement of the bailor, the rights of the bailee and the bailor will be commensurate with the quantity of goods belonging to each of them.

(b) According to Section 156, if the bailee mixes his own goods with the goods held in bailment without the consent of the bailor, and if the goods are identifiable and can be separated, then both parties have the right to the goods belong to them. But, in such situation, the expense incurred will be borne by the bailee, who will also be responsible for any loss or damage that the bailor might suffer because of such mixing.

(c) According to Section 157, If the bailee mixes the goods under bailment with his own goods without the consent of the bailor, and it is not possible to identify or separate the goods, the bailor has the right to claim reimbursement for any damage or loss to which he is subjected.

(5) Returning the goods bailed: According to Sections 160 and 161, after the expiration of the stipulated time period or the fulfilment of the objective of bailment, the bailee should return the goods to the bailor without the bailor having to demand their return. If the bailee fails to do that, he is responsible for any damage or loss suffered by the bailor after that period. If there are co-owners of the goods under bailment, the bailee can inform one of the co-owners and return the goods without informing the other co-owners.

(6) Returning any accretion or profit: According to Section 163, the bailee is liable to return any accretion in the goods under bailment or a profit that accrues therefrom because of any other contract to the bailor. For example, A gives a cow in bailment to B for a specific period. If the cow gives birth to a calf during this period, B is liable to return both the cow and the calf to A.

(7) Not setting up an adverse title: According to Indian Evidence Act, Section 147, it is the duty of the bailee not to do any act that has an adverse effect on the title of the bailor or on the goods under bailment. The bailee cannot sell or pledge the goods that are kept with him under the contract of bailment.

Rights of Bailee

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

(1) Right to compensation for loss on account of fault in goods bailed: According to Section 150, the bailee has the right to recover such loss from the bailor that he has incurred because of some fault or faults in the goods bailed that was not disclosed to the bailee at the time of bailment.

(2) Right to receive necessary expenses: According to Section 158, if the bailee has to keep something in his custody, to transport it or to do any repair on it, and does not receive any compensation for the expense incurred by him on such acts from anybody, he has the right to claim such expense from the bailor for acts done for the maintenance of goods under bailment. For example, if A leaves his horse with B, B is entitled to receive any expense he might have to incur on feeding the horse. The bailee is also entitled to receive extraordinary expenses that he might incur on the maintenance of goods. For example, if A's horse falls sick and B has to incur extraordinary expense on its treatment, he is entitled to recover such expenses from A.

(3) Right against premature termination of bailment: According to Section 159, when the goods are lent gratuitously, if the bailor demands the return of goods before the expiry of the period of bailment, and the bailee suffers a loss in such return that exceeds the benefit actually derived by him from the use of such goods, the bailee has the right to claim such expense from the bailor. The bailee has this right only when he has acted as per the directions of the bailor for the duration of bailment, and the loss to him by premature termination is greater than the profit he has made during the period the goods were in his custody.

(4) Right to compensation in case of defective title: According to Section 164, if the title of the bailor on the goods under bailment is defective, i.e. the bailor does not have the right to keep the goods in bailment, to receive them back or to give any directions of any kind about the goods, and the bailee is put to a loss on this account, the bailee has the right to damages from the bailor.

(5) Delivery of goods to one of the joint owners: According to Section 165, if the goods have been bailed by several joint owners, the bailee may deliver them back to, or according to the directions of, one joint owner without the consent of all, if there is no agreement to the contrary.

(6) Right to interplead: Under the provisions of Sections 166 and 167, if the title of the bailor to the goods is defective, and the bailee, in good faith, delivers them back to, or according to the directions of, the bailor, the bailee is not responsible to the owner of goods for such delivery. If a person other than the bailor claims the goods bailed, the bailee may apply to the court to stop the delivery of goods to the bailor and to decide the title of goods.

(7) Right of particular lien: According to Section 170, where the legal charges of the bailee in respect of the goods bailed have not been paid, the bailee may retain the goods. The right of the bailee to retain the goods is known as *'particular lien'*. It is important to point out here that the bailee can only retain the goods—he cannot sell the goods. For example, A gives a diamond to B to be cut, and B cuts it as per the directions, B can retain the diamond till such time that he is paid for his labour, but he cannot sell the diamand to realise his charges.

(8) Right to general lien: According to Section 171, some specific types of bailees have the right to the goods or property (which is in their possession) until all their claims are satisfied, even if the claims are not with respect to the goods or property being held under bailment. General lien is available only to banks, factors, wharfingers, attorneys of the High Court and brokers of insurance policies.

(9) Right against third parties: If a third person wrongfully deprives the bailee of the use or possession of the goods held under bailment, the bailee has the right to bring an action against that person. The bailor can also bring a suit in respect of the goods bailed. The damages received from such suit are shared by the bailee and the bailor according to their rights.

Responsibility of the railway company as Bailee:

In India, the Indian Railway Act 1890 covers the responsibilities of railways. According to Section 72 of this Act, the responsibility of the railways are enforceable under the provisions of Sections 151 and 152 of the Indian Contract Act. The Railways is presumed to be the bailee for the goods that are entrusted with it for transportation from one place to another. In other words, the railway company has the same responsibilities as other bailees, and is bound by law to take proper care of the goods given to its custody for transportation. According to Section 152, if the railway company has taken care of the goods as it would of its own goods, then it cannot be held responsible for any loss or damage of goods. But if it has defaulted to deliver the goods at the proper time, or within a reasonable time, then the company is responsible for any deterioration, damage or loss of goods after that time.

Liability of Inn-keepers and Hotel-keepers

When a traveller stays in a hotel or an inn, the keepers of the hotel or the inn are like bailees for the baggage of the traveller. Their responsibilities are also covered under Sections 151 and 152 of the Contract Act. According to Dinshaw Mulla, the responsibility of an inn—keeper is the same as that of a bailee under Indian law. The hotel management is responsible for any loss or damage to the baggage of the guest. But if the damage or loss is the result of negligence or carelessness of the guest himself, or by an act of God, the hotel management is not responsible for such damage or loss.

For example, A stays in an inn, and the inn-keeper knows that the room in which A is staying is not secure. If A's baggage is stolen, the inn-keeper would be held responsible because he failed to provide security for the room. The case of **Rampal Singh vs. Murray and Co.** is an important illustration. It was held in this case that inn-keeper or the hotel-keeper was liable to pay damages for any loss of the baggage of a traveller.

Termination of Bailment

Bailment can be terminated in the following circumstances.

(1) Doing an act inconsistent with terms of bailment: According to Section 153, if the bailee defaults in adhering to the terms of bailment or does an act which is against such terms, the bailor has the right to terminate the contract. For example, Mirdul lends his horse to Madur for riding and Madur uses the horse to drive a tonga (carriage). In this case, Mirdul can terminate the contract.

(2) At the desire of the bailor in case of gratuitous bailment: According to Section 159, in the case of gratuitous bailment, the bailor can demand the return of goods at any time he pleases and terminate the bail agreement. But if the bailee suffers any loss because of premature termination exceeding the benefit actually derived by him from the use of such goods, the bailor shall have to indemnify the bailee.

(3) On expiry of period: According to Section 160, if the contract of bailment stipulates the bailment to be for a specific period, it comes to an end at the expiry of such period. In such situation, the bailee should return the goods under bailment without the bailor's demanding their return.

(4) On accomplishment of object: According to Section 160, when the object for which the bailment was made is achieved, the bailment terminates.

(5) Death of the bailor or bailee in case of gratuitous bailment: In case of gratuitous bailment, according to Section 162, the death of bailor or bailee terminates the contract.

Finder of Goods

The Indian Contract Act does not define a finder of goods. But a finder of goods is a person who finds some goods belonging to another person. Bailment is specifically defined as a contract which is the result of an agreement between the parties to it. But there is no agreement between the finder and the owner of goods. In fact, the finder of goods is placed in such a position by law that he becomes more or less a bailee of the goods he finds. In other words, the finder of goods is assumed to have established such relationship with the owner of goods that has the implications of a contract of bailment between the two. We can very well say that there emerges an implied contract of bailment between the finder and the owner of goods.

If a person comes across by an article, he is not obliged to pick it up or take it under his charge. But, if and when he takes it in his charge, his position changes and he becomes a bailee, which entails some rights and some responsibilities for him. 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"*.

Rights of Finder of Goods

The finder of goods, when he takes the goods in his possession, assumes the following rights:

(1) Right of lien on the goods: Under Section 168, the finder of goods has the right to claim all such expenses that he has incurred on the maintenance and security of goods and in trying to find the owner of such goods. But he has no right to sue the owner of good for any such reimbursement because the trouble and expense were incurred by him voluntarily. For example, Anil finds a watch lying on the road. Anil has to spend Rs. 50 to get the watch repaired and find its owner. Anil has the right to keep the watch till he is paid Rs. 50 by the owner of the watch.

In the case of **Wilson vs. Anderson,** the learned Justice gave a verdict which said though the finder of goods cannot directly claim the expenses he has incurred, he can claim the same indirectly by holding on to the goods till he is paid.

(2) Right to sue for reward: Section 168 also lays down the rule that the finder is entitled to any reward which the owner of goods has offered for the return of goods. The finder can file a suit to claim such reward and may also retain the goods untill he receives the reward. But to do so, it is essential that he should have found such goods after the announcement of the reward. In this connection, the case of **Lalman Shukla vs. Gauri Dutt** is an important illustration.

(3) Right for sale of goods: According to Section 169, if, after reasonable effort and diligence on the part of the finder, he cannot find the owner of goods, or the owner of goods refuses to pay the expenses of the finder, the finder may sell the goods that he found, but his right to sell is dependent on the following conditions:

(a) If the goods are in the danger of perishing or of losing a greater part of their value, or

(b) If the lawful charges of the finder, in respect of the goods found, amount to two-thirds of the value of goods.

Duties of Finder of Goods

According to the Indian Contract Act, the position of a finder of goods is that of a bailee, and he has the same obligations as a bailee normally does. In brief, the duties of a finder of goods are as under:

(1) Taking due care of the goods: When the finder of goods takes the possession of such goods, it becomes his duty to take reasonable care of such goods as a prudent man would take care of the goods of the same value and quality. If, inspite of taking such care, the goods are damaged or destroyed, the finder cannot be held responsible for the loss.

(2) Finding the owner of goods: It is also the duty of the finder of goods that he makes reasonable effort to find the actual owner of the goods. If he does not do that, he will be held responsible of interfering with another person's property as a trespasser.

(3) Returning the goods to the owner: It becomes the duty of the finder of goods to return the goods to the actual owner of the goods.

Besides the above, it is the duty of the finder of goods:

— not to use the goods for his own purpose.

— not to mix the goods with his own goods.

Lien

'Lien' means the right of one man to retain that which is in his possession belonging to another until some debt or claim of the person in possession are satisfied.

As is clear from the above definition, possession is essential for exercising the right of lien. It is therefore also called 'possessory lien'. If the right to possession terminates, the lien also terminates. The right of lien arises by statute and not by contract. It implies that, under lien, the right is limited to the possession of some item or goods and does not extend to its sale, or making any change to such item or goods. For example, the owner of a suit gives it to the dry cleaner for cleaning and the later promises to return the same after two or three days. The dry cleaner cleans the suit and makes it ready for delivery, but he has the right to keep the suit till he is paid the charges, i.e. he has acquired the lien to the suit.

Characteristics of Lien

Following are the characteristics of lien.

1. Possession is essential for exercising the right of lien. Without possession, there can be no lien.
2. The right of lien arises from statute or law, not from a contract.
3. The possession must be rightful, and not obtained by force, fraud or misrepresentation.
4. The right of lien is a right to possess something, not to sell it.
5. The person holding the right of lien is not the actual owner—he is somebody other than the owner.
6. The right of lien is not transferable to a third person.
7. The lien terminates when the bailee's demands are met.
8. When the possession terminates, the lien also terminates.

Kinds of Lien

A lien can be of two kinds:

(1) Particular Lien (2) General Lien

(1) Particular Lien: A particular lien is one which is available to the bailee only against those goods in respect of which he has rendered a service involving labour and skill in terms of time and effort. Section 170 explains 'particular lien' as under:

"When the bailee has, in accordance with the purpose of bailment, rendered any service 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."

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

(a) Finders of Goods—Section 168
(b) Bailees—Section 170
(c) Pawnees—Section 173
(d) Agents—Section 221
(e) Unpaid Sellers—Section 71, Sale of Goods Act

(2) General Lien: A general lien implies the right to retain any item (which is in the possession of the holder) till the general balance of account of the holder is settled. In general lien, it is not essential that the demand is related to something which is in possession of the holder. It can be related to a past or a present liability of the person whose property is in lien. A general lien is a privilege which is available to selected categories of people by law. The Indian Contract Act specifies the following persons who are entitled by law to general lien as per Section 171:

(a) Bankers
(b) Factors
(c) Wharfingers
(d) Attornies of High Courts
(e) Insurance brokers
(f) Others who give such rights by a written contact.

The above mentioned persons, and some others, can avail of the general lien.

Differences Between Particular and General Lien

Basis of Difference	Particular Lien	General Lien
1. Scope	Is only operative in respect of goods on which skill and labour have been expended and can be used to realise the value of such skill and labour	Is the right to retain any property in respect of any payment lawfully due, provided the property is in the possession of the person exercising the right.
2. Operation	Is a right to retain the goods only for the charge for labour or expenses incurred on the goods in lien.	Is the right to retain any property for a general balance of account.
3. Entitlement	Can be claimed by all bailees, such as: - Finders of goods, - Bailees, - Unpaid sellers, - Pawnees, - Agents	Can be claimed by selected bailees,such as: - Bankers, - Factors, - Wharfingers (who care for,or own a structure along the shore for loading or unloading vessels), -Attornies of the High Court, -Insurance brokers.

Bailee's Particular Lien

From the above discussion, it is clear that a bailee has a particular, not a general, lien on goods kept in bailment. In this regard, the provisions of Section 170 are important. These dictate that if a bailee has done some act involving skill and labour with respect to the goods in bailment, he is entitled to retain such goods until he is adequately compensated for such service. According to this section, the right to particular lien is operative in the following situations:

1. When the bailee has performed a service which requires skill or labour, and which enhances the usage and value of the goods. The bailee cannot retain the goods without having done such act.
2. When the service or act has been performed at the direction of the bailor.
3. When the service or act is with respect to the goods under bailment.
4. When there is no agreement to the contrary.

Examples: A gives some cloth to a tailor B for stitching a coat, and B promises to deliver the coat in 15 days. B prepares the coat for delivery within 15 days, but he has the right not to deliver it till he has received the consideration for his skill and labour. But B does not have this right if he takes a month to stitch the coat.

A gives some cloth to a tailor B for stitching a coat. B promises that he will deliver the coat to A as soon as it is ready, and A can pay him the cost of stitching in three months. In this case, B has no right to keep the coat with him till he is paid because there exists a contract to the contrary which stipulates payment after three months.

Pledge

According to Section 172, the bailment of goods as security for payment of a debt or performance of a promise is called 'pledge'. The bailor is, in this case, called the 'pawnor' or 'pledger' and the bailee is called the 'pawnee' or 'pledgee'.

For example, Suresh delivers his jewellery to Ramesh as a security for a loan of Rs. 50,000. This is a contract of pledge. Suresh is the *pawnor* and Ramesh is the *pawnee*.

It is clear from what has been stated that a pledge is a bailment for security. If the purpose of bailment is to provide security for the payment of a loan or the peprformance of a promise, then such bailment is called a *pledge*. In a contract of pledge, the pawnor delivers the goods to the pawnee. Such delivery may be *actual* or *constructive*, but it can only be of movable property. A pledge for immovable property is called 'mortgage'.

It should be mentioned here that 'possession' in a contract of pledge is lawful transfer of goods. If a person is not the owner, he obviously cannot make such transfer and, therefore, cannot make a pledge. A pledge is not only giving 'physical' possession of goods, it implies giving a lawful, physical possession.

Essentials of a Valid Pledge

The essential features of a valid pledge are:

(1) Pledge is only of movable goods: Moveable goods are any movable item, like valuables or jewellery, shares of companies, documents or government securities. Immovable property is beyond the scope of a pledge.

(2) Pledge involves judicial possession of goods: Only a person who is the lawful owner of a movable property can pledge such property. Mere possession of goods does not give the possessor a right to pledge such goods. For example, an employee who is in possession of some goods of the employer cannot pledge the goods he possesses because he does not have judicial possession of the goods. Likewise, if a woman is in possession of some valuables that belong to her husband, she cannot pledge such valuables. If a person pledges some goods in which he has a limited ownership, the pledge will be valid only to the extent of his ownership.

(3) Pledge involves transfer of possession: In a contract of pledge, the goods pledged must be transferred from the pawnor (pledger) to the pawnee (pledgee). The transfer can be actual or constructive, but a pledge cannot be without a transfer. In the case of **Morvi Mercantile Bank vs. Union of India,** it was held that a transfer of the title document of goods that gives the right of possession to the pawnee would be deemed to be a transfer of possession in a pledge.

(4) Pledge can only be of a saleable commodity: This is an essential feature of a contract of pledge. The main reason for this is that, if the pawnor is not able to clear his debt, the pawnee can recover the amount of the loan by selling the goods that have been pledged to him. Therefore, anything that is not saleable cannot be pledged.

(5) Pledge involves return of goods: When the object of the pledge is accomplished, or after a stipulated time, the pawnee returns the goods in his possession to the pawnor, the contract is terminated.

Rights of Pawnor or Pledger

The rights of a pawnor are similar to the rights of a bailor. The important rights of a pawnor are as under:

(1) Right to get back the goods pledged: According to Sections 160 and 161, on the performance of the promise at the stipulated time or on payment of the debt, the pawnor has the right to get back the goods pledged with the pawnee.

(2) Right to increase or profit: According to Section 163, if there is any increase in the value of, or profit from, the goods in pledge, the pawnor has the right to such increase or profit.

(3) Right to compensation: If the goods under pledge are not taken care of, or are not used rightly, and are damaged or deterioted because of it, the pawnor has the right to claim compensation for such damage or loss.

(4) Right to get profit in case of sale: According to Section 176, in the case of default on the part of the pawnor, if the goods under pledge are sold by the pawnee and the amount received from such sale exceeds the amount of loan plus interest payable, the pawnor has the right to get back the surplus.

(5) Defaulting pawnor's right: According to Section 177, if there is a time limit fixed for the repayment of a loan or the performance of a promise, and the pawnor makes a default in doing that, then he has the right later, before the goods are actually sold, to get the goods released on the payment of the amount of loan plus the expenses incurred by the pawnee because of such default.

Duties of Pawnor or Pledger

The duties of a pawnor or pledger are as under:

(1) To pay the debt: It is the duty of the pawnor to pay his debt and the interest on it by the date and in the manner agreed to in the contract.

(2) To disclose the defects in goods: According to Section 150, the pawnor is obliged to disclose the defects, if any are in his knowledge that may cause inconvenience or harm to the pawnee, in the goods at the time of making the pledge.

(3) To repay the necessary expenses: According to Section 175, if the pawnee has, during the course of the contract, incurred any reasonable expense on the maintenance or upkeep of the goods in pledge, the pawnor is duty—bound to pay such expense to the pawnee.

(4) Duty after sale: In case of default in the payment of loan on the part of the pawnor, if the goods under the pledge are sold and the sale proceeds are less than the amount of loan plus interest payable, the pawnor is bound by law to pay such difference.

Rights of Pawnee or Pledgee

The rights of a pawnee or pledgee are as under:

(1) Right of retainer to goods: According to Section 173, the pawnee has the right to retain the goods till the amount of the loan and the interest payable is paid to him by the pawnor. But Section 174 clearly specifies that the pawnee is entitled to retain only such goods that have been pledged against a particular loan and the pawner cannot retain the goods against a loan other than that for which the goods were pledged.

(2) Right of retainer for subsequent advances: When the pawnee lends money to the same pawnor after the date of the pledge, it is presumed that the right of retainer over the pledged goods extends to subsequent advances also. This presumption can be rebutted by a contract to the contrary.

(3) Right to extraordinary expenses: According to Section 175, the pawnee is entitled to receive from the pawnor any extraordinary expenses incurred by him for the preservation of the goods pledged.

(4) Right in case the pawnor makes default: According to Section 176, if the pawnor defaults to redeem his pledge, the pawnee can file a suit against the pawnor for breach of promise and retain the goods in his possession as collateral security, or he can give a reasonable notice to the pawnor and sell the goods to realise the amount due to him. If the sale proceeds fall short of the amount due to him, the pawnee has the right to claim the remaining amount due to him. If the sale proceeds exceed the amount of loan and interest payable, the pawnee should return the surplus to the pawnor.

(5) Right against true owner in case the pawnor's title is defective: If the pawnee has obtained the possession of good pledged by him under a voidable contract, i.e. by fraud, undue influence or coercion, and the contract has not been rescinded at the time of the pledge, the pawnee acquires a good title to the goods provided he acts in good faith and is not aware of the pawnor's defect of title.

Duties of Pawnee or Pledgee

The duties of pawnee include the following:

(1) To take reasonable care of the goods pledged: The pawnee is bound under Section 151 to take reasonable care of the goods that are pledged with him.

(2) Not to make improper use of goods pledged: According to Section 154, the pawnee should not make improper use of goods under his control under a pledge.

(3) Not to mix the goods pledged with his own goods: It is the duty of the pawnee under Sections 156 and 157 not to mix his own goods with the goods of the pawnor pledged to him.

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

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

Who May Pledge?

As per the rule, only the owner of goods has the right to pledge the goods. A non-owner of goods cannot make a valid pledge. If a non-owner makes a pledge, it will be void. But there are exceptions to the rule when even a non-owner can make a valid pledge. These exceptions are:

(1) Pledge of goods by mercantile agents: According to Section 178, if a mercantile agent is in possession of goods or the documents of title to goods, with the consent of the owner, he may pledge such goods in the ordinary course of his business provided he is acting under the express authorisation of the owner of goods to make such pledge and the pledge is in the interest of the owner. It is important to note here that only a commission agent can make a valid pledge on behalf of the owner. Any other person who is not an agent and is in possession of another person's goods, or is a broker, cannot make a valid pledge. Section 2(9) of the Sale of Goods Act defines 'a mercantile agent' as *"an agent having, in the customary course of business as such agent, authority either to sell goods, or to consign goods for purposes of sale, or to buy goods, or to raise money on the security of goods"*.

(2) Pledge where pawnor has limited interest in goods: According to Section 179, where a person pledges goods in which he has only a limited interest, the pledge is valid to the extent of the limit of that interest. For example, A finds a watch belonging to B on the roadside. A spends Rs. 30 on its repair and pledges it for Rs. 100. In this case, A's pledge will be valid only to the extent of Rs. 30 and B can claim his watch by paying Rs. 30 to A.

(3) Pledge by a person in possession under a voidable contract: According to Section 178(a), where a person obtains possession of goods under a voidable contract, i.e. by fraud, undue influence or coercion, and pledges the goods before the contract is rescinded, the pledge created by him is valid if the pawnee acts in good faith and without notice of the pawnor's defect in the title.

For example, if Mohan pledges a radio set which is already sold to Vikas for Rs. 300, and Vikas does not know that the radio set has already been sold to Mahesh, the contract of pledge will be a valid contract.

(4) Pledge by co-owner in possession of goods: When the goods belong to more than one owner, and the goods are in the possession of one of the co-owners, and if the person in possession of goods pledges the goods with the consent of the other co-owners, the pledge so created will be deemed to be valid.

(5) Pledge by a buyer in possession before sale is completed: Sometimes, before the sale is completed, with the consent of the owner of goods, the goods are delivered to the buyer. The buyer in such case is not yet the owner of goods. But if the buyer makes a pledge of the goods and pawnee accepts the pledge, it is deemed to be a valid pledge. For example, Vijay buys a machine on hire-purchase. The transfer of ownership of the machine will only take place when he has paid all the instalments of the hire-purchase. If he pledges the machine before he has completed the payment due for it, and the pawnee accepts it in good faith, it will be a valid contract of pledge.

Right of Bailor and Bailee Against Third Party

According to Section 180 of the Indian Contract Act, if a third person wrongfully deprives the bailee of the use or possession of the goods bailed or causes any damage to such goods, the bailee may use such remedies as the owner might have used, and either the bailor or the bailee may bring a suit against the third person for having caused such deprivation or injury.

As per Section 181, the relief or compensation provided by law in such case shall, as between the bailor and the bailee, be divided between the bailor and the bailee according to their respective interests.

Differences Between Pledge and Bailment

A contract of pledge is a type of a bail contract. Both arise from an agreement between the parties to the contract and, after the object of the contract and the time period have been met, the goods handed over under the contract have to be returned. But, inspite of these similarities, there are important difference between the two, which are listed hereunder:

Basis of Difference	Pledge	Bailment
1. Object	The goods are delivered to the pawnee as a security for the payment of a debt or the performance of a promise.	The goods are generally delivered for care-taking or maintenance,or for a specific usage.
2. Right to use	The pawnee does not have a right to use the goods.	There is no restriction on the bailee from using the goods.
3. Consideration	The pawnee has the right to sell the goods in case of non-payment of a debt.	The bailee can get only particular or general lien on the goods in return for his lawful demands
4. Scope	Bailment is included in a pledge.	Pledge is not included in bailment.

Distinction Between Pledge and Lien

Basis of Difference	Pledge	Lien
1. Origin	The origin is a contract	The origin is a statute
2. Object	The object is to provide security for the payment of a loan or the performance of a promise.	The object is to retain the goods or property in possession of the holder until all the claims of the holder (of the lien) are satisfied.
3. Right to sale	On the non-payment of a debt or non-performance of a promise,the pawnee has the right to sell the goods.	The holder of a lien can only retain the goods till his demands are met. He cannot sell the goods that he retains.
4. Termination	Termination is only on the payment of a loan or the performance of a promise. Even if the pawnee returns the goods before the payment of a debt,his right does not terminate.	The lien terminates as soon as the holder releases the goods under his retention.

Distinction Between Pledge and Mortgage

In everyday language, pledge and mortgage are taken to mean the same but, from the legal point of view, there is a big difference between the two. The following table classifies the distinction between the two.

Basis of Difference	Pledge	Mortgage
1. Nature	Pledge is always of movable property.	Mortgage is only for immovable property.
2. Transfer	It involves physical transfer of goods, not the ownership of goods.	The ownership of property can be transferred under certain conditions.
3. Written Contract	The contract is not essential to be in written form.	It is essential for the contract to be written, testified by two witnesses and registered.
4. Right to Use	The pawnee cannot use the goods kept in pledge.	The mortgagee has the right to use the property mortgaged to him.
5. Number of Loans	An item can be kept in pledge for only one loan.	The mortgagor can take more than one loan not exceeding the value of the property mortgaged.
6. Re-loan	The pawnee cannot pledge the goods in his possession to another person against a loan.	The mortgagee can transfer his interest in the mortgaged property to another person by a sub-mortgage.
7. Right	The pawnee has the right, in the event of a default on the part of pawnor, only to sell the goods kept under pledge.	The mortgagee who has given the loan first, has the right to claim the amount of his loan first, in case the property is mortgaged to more than one mortgagee.
8. Restrictions	The pawnor cannot impose any restructions on the goods under pledge.	The mortgagee can, in some circumstances impose restrictions on the property mortgaged.

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CONTRACTS OF AGENCY

Agency Contract—And the Need for it

The word 'agency' refers to a legal contract between two parties whereby one party acquires the right to represent the other in the day-to-day affairs of business. The complexities of modern business make it beyond the physical and material capacity of a person to attend to the requirements of an expanding commercial enterprise—which gives rise to the need for a contract of agency. It is not possible for a person to personally perform all his business activities, especially if such activities cover diverse affairs and are spread over a wide range. The law, therefore, provides that a person can lawfully delegate his responsibilities to another in the performance of his day-to-day activities, and recognises such performance by the other person as equivalent to the act having been performed by the person himself. Such other person is called an agent.

Section 182 of the Indian Contract Act defines an 'agent' as "*a person employed to do an act for another, or represent another in dealings with third persons.*" The person for whom such act is done, or who is so represented, is called the 'principal'.

According to Warton, an agency is a contract by which one person accepts to represent another and uses his skill and labour to perform business-related activities on behalf of the other person. According to Spice and Pegler, an agent is a person who has an express or implied authorisation to act on behalf of the principal to establish business relations with a third party or to represent the principal in any business transaction.

According to English Law, the contract of agency implies one person appointing another person to establish lawful business relations with third parties. Thus essence of a contract of agency, as is clear from the above definition, is that agent is the person who helps establish contractual relations between the principal and a third party.

Rules of Agency

There are two essentials of a contract of agency.

1. Any act that a person who is capable of making a contract can do himself, he can get the same act done by an agent. But there are some exceptions where the agent cannot do what the principal can. For example, an agent cannot get married, paint a picture or give a song recital on behalf of the principal.

2. An act done by the agent is taken to be an act done by the principal. Barring some exceptions, any act done by the agent on behalf of the principal is deemed to be an act done by the principal himself.

Who Can Appoint an Agent?

According to Section 183, "Any person who is of the age of majority according to the law to which he is subject, and who is of sound mind, may employ an agent." In other words, the principal must have the capacity to make a contract. In this regard, there is an important provision of law which states "*qui facit per alium facit per se*", which means "he who acts through an agent is himself acting." This implies that when a person gets something done by an agent, he is deemed to have done it himself. It is clear, therefore, that a minor or a person with unsound mind cannot employ an agent. The reason for this is that an agent's performance of an act is deemed to be that of the principal, which makes it essential that the person employing the agent must, by law, be competent to perform an act. If the principal is not competent to make a contract, and any contract, made by him is void, third parties will not be willing to make any contract with the agent because such contract will be deemed to be made with the principal and would, as such, be void.

Who Can Become an Agent?

According to Section 184, any person can be appointed an agent. While the law stipulates that the principal must have the competancy to make a contract, it is not necessary that the agent should have contractual capacity because the agent does not make a contract on his own behalf—all contracts made by the agent are deemed to have been made by the principal. During the tenure of the agency, the principal (and not the agent) owes responsibility to the third party with whom the contract has been made. Even a minor or a man of unsound mind may be appointed as an agent because the responsibility for the performance of a contract is the principal's—not that of the agent. An agent is a medium between the principal and the third party and creates contractual obligations for the principal and, as such, is answerable to the principal. But no person who is not of the age of majority and of sound mind can be held responsible to his principal. It is, therefore, in the interest of the principal that the agent should have contractual capacity. For example, A appoints B, who is a minor, as his agent for selling a product he is manufacturing at Rs. 100 a piece. B sells 1000 pieces to C at Rs. 80 per piece, which entails a loss of Rs. 20,000 to A. A is bound by law to supply the product and the quantity stipulated in the contract to C because the contract has been made by his authorised agent B. But he cannot bring any proceedings against B for violating his instructions since B is a minor and cannot be held responsible for his actions. It therefore becomes obvious that, in the interest of the principal, it is important that the agent is a person who is competent to make a contract so that he can be held responsible for his actions.

Consideration For Agency

According to Section 185, consideration is not an essential element of an agency. It is no essential that the agent who is appointed is remunerated for his service. An agent who appointed by the principal and does something for the latter without any consideration has th same rights and obligations as an agent who acts for a consideration. There is no differen between the two. An agent who acts on behalf of his principal for a consideration is called 'non-gratuitous agent' while the one who works without a consideration is called a 'gratuit agent'. The only difference between the two is that a non-gratuitous agent is not duty-bound

start doing an act on behalf of the principal and can refuse to do it; but once he has started doing something for the principal, he is expected to use the skill and ingenuity of which he is capable in the performance of the act just as a gratuitous agent would, and has the same liability to the principal as the latter. A gratuitous agent, on the other hand, is duty-bound to do every act pertaining to the contract of agency on behalf of the principal.

Wife as Agent of the Husband

As a general rule, husband and wife are not the agents of one another. But they can be the agents of one another if it is expressly indicated and confirmed. Whether or not a married woman can do an act that is related to, or dependent upon, the goodwill or credit of her husband is a core issue. The liability of the husband for a debt of the wife is dictated by the law of agency. In general, husband and wife do not have the capability to act as agents for one another. But if the husband neglects to make adequate provision for the maintenance of his wife, the wife is entitled to pledge his credit to get the necessities of life. In such case, the wife acts as an agent of the husband. A husband, normally, can be held responsible for an action of his wife when it is proved that such action was taken with the husband's express or tacit approval. When a husband has expressly authorised his wife to take a loan, he is responsible for the liability. When the husband and wife live together, the wife is presumed to have the implied right to pledge the husband's credit for procuring the necessaries of life. Whether or not a relationship of agency exists between husband wife, and under what circumstances, is illustrated in the case of **Girdhari Lal vs. Crowford.** It was held in this case that the liability of the wife's debt on the husband arises out of the laws of agency. The husband can be held liable if it is proved that the wife had the express or implied approval of the husband. If the husband has authorised his wife to take a loan or do some act, the resulting liability rests with the husband. The problem arises when the authorisation from the husband for the wife to act as his agent is implied, and not express. When the husband and wife stay together, the wife has the implied right to buy the necessary goods on credit, and the husband is liable for the payment of the goods. The husband is only relieved of such liability if it can be proved that:

(a) the purchased goods are not the necessities of life.

(b) the husband had expressly forbidden his wife to make such purchase.

(c) the husband had expressly forbidden the supplier of such goods to give any credit to his wife.

When the husband and wife do not stay together, the wife has the right to pledge the husband's credit for the purchase of the necessities of life.

When a wife is deserted by her husband for no fault of hers, she has the right to pledge he husband's credit for procuring the necessities of life. Even if the husband has expressly orbidden the wife to pledge his credit or the traders to give credit to his wife, he is not absolved f his obligation. But the wife enjoys the right to pledge her husband's credit only if the husband oes not provide for her maintenance.

When a wife lives apart from the husband of her own accord, she is not deemed to be agent of the husband, and she cannot pledge the husband's credit even for the purchase the necessities of life. In such a case, the husband is not liable to provide for her maintenance.

Agent and Employee

It is important to understand the difference between an agent and a servant. An agent is a 'medium' who represents the principal in dealings with third parties and establishes contractual relationships between the principal and third parties. An agent has the express and tacit authorisation from the principal to act on his behalf. The touchstone of an agent's authorisation to act on behalf of the principal is that the latter is bound by law to the promises made by the agent. A servant acts at the direction of the employer and is expected to carry out the legitimate orders of the employer. A servant ordinarily does not create legal relationship between the employer and third parties. The master-servant relationship does have an element of agency in that the servant can interact with third parties on behalf of his employer but, because of there not being any legal, contractual relationship between the two, a servant does not become an agent. Likewise, an agent does not act as an employee of the principal. Even though an agent is bound by law to follow the directives of the principal, he is not directly or expressly ordered by the principal in his activity. An agent uses his own discretion or skill to perform the actions expected of him without any direct control or supervision on the part of the principal. In other words, an agent cannot be deemed to be an employee, but an employee can specifically be directed to act as an 'agent'. The differences between an agent and an employee are as follows.

1. An employee can be directed by the employer to do any act (within reason) for the employer, whereas an agent is appointed to bring the principal into legal relationships with third parties or to represent him in dealings with third persons.
2. An employee can be directed by the employer as to 'what to do' and 'how to do it', whereas an agent has only to be to told 'what to do'. How he does it is left to the discretion and skill of the agent.
3. An act done by an employee does not make the employer liable to a third party whereas an act done by an agent makes the principal liable to a third party.
4. An agent is not an employee of the principal, whereas an employee can be an implied agent of the employer.

Creation of Agency

The relationship of agency can be established in any of the following ways:

(1) By express agreement (oral or written): According to Section 186, an agency can be established by an oral or a written agreement. When an agent is appointed by a written or oral agreement, the agency is said to be established by an express agreement. When an agency is created by a written contract, the agent is bound by law to function according to the terms of such contract. If the agency is to be created with respect to the transfer of an immovable property, it can be created by a written agreement, and the agreement has to be registered. The usual form of a written contract of agency is the Power of Attorney on a stamped paper, which is a formal instrument by which one person empowers another to represent him, or act on his behalf, for a specific purpose. Such agency is also referred to as 'agency by precedent authority'.

(2) By implication or implied authority: According to Section 187, when the conduct, situation or action of the parties implies that a relationship of agency exists between the parties,

it is termed to be agency by implication or implied authority. The example, in a partnership concern, each partner is deemed to be an agent of the other partner(s).

In a situation of implied agency, the principal cannot limit the rights of the agent without giving an express intimation to the third party about such limitation. For example, if a person has given an implied consent to his wife to pledge his credit for buying any goods, he can limit the extent of her buying on credit only by specifically informing the tradesman of such limit. If he fails to do so, the wife is free to pledge his credit for any amount of goods purchased.

(3) By ratification: According to Section 196, if a person acts on behalf of another without the knowledge or consent of the other, and the person on whose behalf such act has been done later ratifies the act, it is deemed to be the establishment of an agency by ratification between the two.

As has been said earlier, an agent must be authorised by the principal to do some act on his behalf otherwise the principal will not be responsible for such act. In other words, if an act has been done or commitment is made on behalf of the principal without his knowledge or consent, the principal is at liberty to accept or reject such act or commitment. If the principal accepts a commitment made on his behalf, without his knowledge or consent, the implication of such acceptance will be the same as if it were made with his knowledge and approval. In fact, an agency created under the principle of ratification is called an *ex-post facto agency*.

According to Section 197, the ratification of an act or a commitment can be express, or it can be implied from the conduct of the person on whose behalf it has been done. For example, A gives some money belonging to B as a loan to C without A's knowledge or authorisation. Later B receives the interest on the loan from C. B's conduct in this case implies his acceptance of A's action.

(4) By estoppel or holding out: The principle of 'estoppel' is stated in Section 115 of the Indian Evidence Act and an explanation of its application in a contract of agency is given in Section 237 of the Indian Contract Act. According to this section, when one person indicates to another, by words or conduct, that a third person is his agent, when he actually is not, then the person making such insinuation cannot be absolved of his obligations arising out of the dealings or commitment that the so-called agent makes with the other person. In other words, he is estoppled or precluded from denying the truth of his statement—which means that the principal is stopped from denying or withdrawing his statement made to the third party even if it is not true. If the third party, believing the statement originally made by the principal, does or contracts to do some act with the person he believes is the agent of the principal and suffers a loss, then the principal is liable to compensate him of such loss. Estoppel or holding out is mainly of three kinds.

(i) A person can declare another to be his agent when he actually is not, and never was, the agent of the person making such statement. For example, A, in the presence of C and with his knowledge, tells B that he (meaning A) is C's agent. C listens to the statement made by A and does not contradict it. Later B, in the belief that A is an agent of C, makes a deal with A. In such a case, C is bound to the terms of the deal and cannot later say that A was not his agent—which, in fact, he was not.

(ii) A similar situation crops up when a person (the principal), lets another believe that the rights of an agent are wider than they actually are. For example, in one case the manager of a hotel was authorised by the owner to buy certain goods for use in the hotel. The manager also bought some other goods which he was not authorised to buy. It was held that the owner was responsible for the payment of these items because he had indicated by his behaviour that the manger was authorised to buy all items for the hotel.

(iii) A person may presume someone to be the agent of another when he is no longer an agent. For example, in one case, A used to work as an agent for B. After some time, he was no more the agent, but B failed to inform his customers of the fact that A had ceased to be his agent. When A made a contract with C, B was held liable for the contract.

(5) By necessity: Sometimes the circumstances are such that a person becomes helpless and has to act on behalf of another without an express authorisation. Such situation gives rise to what is called 'agency out of necessity'. In these situations, a person is deemed to be the agent of another without his concurrence. According to Section 189, to act in an emergency and save a possible loss to the principal by doing something which a person with foresight would do to save himself from such loss is called an 'agency by necessity'. In other words, in unforeseen circumstances or in an emergency, a person who looks after the goods of another, or saves the other from some loss is an agent by necessity, and the owner of goods or the one who is saved from loss would be responsible for the act of the agent. For example, a horse was sent by rail, but was not received by the buyer at destination. The station master, as a result, had to feed and look after the horse. The court held the station master to be an agent by necessity of the owner and directed the owner of the horse to reimburse the station master of the expense he had incurred.

In the case of **Baron Park in Hawlayern vs. Bourne**, it was held that a captain of a ship had the right to pledge the ship on behalf of the company to get the ship repaired at a port enroute to avoid an accident on the high seas, and bring it safely to the destination port.

Agency by necessity is operative in all such cases where the agent acts beyond his right provided the following conditions are met:

(a) The agent was not in a position to establish a contact with the principal.
(b) The agent had taken all reasonable precautions to protect the interests of the principal.
(c) The agent had acted in good faith.
(d) The need for action was real and urgent.

Authority of an Agent

According to Section 186, the authority of an agent "may be express or implied". Section 187 gives an explanation of 'express or implied' authority as follows: "An authority is said to be express when it is given by words, spoken or written. An authority is said to be implied when it is inferred from the circumstances of the case, and things, spoken or written, in the ordinary course of dealing, may be accounted as the circumstances of the case."

Extent of Agent's Authority

The next question that arises is 'what is the extent of the authority of an agent?' The following situations clarify the extent of an agent's authority.

(1) Normal Extent of Agent's Authority: Under the provisions of Section 188, an agent, in the performance of his duty on behalf of the principal, can do all such acts which are lawful and necessary for such performance. In other words, an agent who has been authorised by the principal to operate a business, can do all such acts related to the business that are necessary for running the business efficiently. The following examples illustrate the point.

(i) A, who lives in America, appoints B as his agent in Bombay to realise some debts on his behalf. B, in this case, has the authority to employ all such means that are within law to realise such debts.

(ii) A appoints B as his agent to manage a shipyard. Here B would have the authority to purchase the necessary raw materials for ship-building and employ the requisite labour and technicians for the job.

In normal circumstances, an agent is not authorised to borrow money on behalf of the principal, unless he has a specific authority from the principal to do so. But if the agent has been entrusted with managing a business where such activity is a normal part of the business—like banking or financial businesses—the agents has the authority to do so. Or if the nature of business is such that, to carry out the directions of the principal and perform his obligations under the contract of agency, it is necessary to take a loan, the agent has the implied authority to take a loan.

(2) Agent's Authority in an Emergency: According to Section 189, to protect the interests of the principal and save him from loss in an emergency, the agent has the authority to do all such acts that a prudent man would do to protect his interests in similar circumstances. For example:

(a) A selling agent can get the goods repaired in case of need.

(b) A consigns some goods to his agent B in Calcutta to be forwarded to C in Cuttack, and the goods reach Calcutta in a state in which they are likely to be spoiled by further transportation or storage. In this case, B has the implied authority not to send the goods to Cuttack, but sell them in Calcutta itself.

(3) Delegation of Authority: In normal circumstance, an agent cannot delegate his authority to another person, which implies that he cannot appoint another person to do something which is incumbent upon him for performance. There is a maxim in French which says *"delegatus non potest delegare"*, which means that a delegated authority cannot be further delegated. If we go by this, an agent does not have the right to delegate his authority to another agent. In other words, an agent who himself is acting on behalf of the principal, cannot further transfer his authority. A contract of agency is built on trust and confidence, which the principal makes because he relies upon the agent's skill, integrity and competence. For the principal to have the same trust and confidence in somebody appointed by the agent may always not be possible. In other words, the agent is restricted to appoint another person to perform what the principal expects of him. But in some circumstances, the agent may delegate some of his responsibilities to another peprson. The person who is transferred such authority by the agent is called a 'sub-agent' or a 'substituted agent'.

Sub-Agent

Section 191 of the Contract Act defines a sub-agent as "a person employed by, and acting under the control of the original agent in the business of agency." If a appoints B as his agent for a particular activity, and B further appoints C to perform such activity, C will be the sub-agent. The relation of the sub-agent to the original agent is, as between themselves, that of the agent and the principal.

Section 190 provides that an agent may appoint a sub-agent and delegate an authority to him if:

— the normal practice of trade is to that effect, or

— the nature of work is such that it requires the services of a sub-agent.

Conditions of Appointment

Under the principle that 'a delegate cannot further delegate', Section 190 does not allow the appointment of a sub-agent. But some exceptions are recognised by law which are based on the circumstances of a case and the verdicts given by various courts from time to time. These exceptions are listed hereunder:

1. Where the principal has given his express approval to the agent to appoint a sub-agent.
2. Where the normal practice of the trade is to have a sub-agent.
3. Where the principal is aware of the agent's intention to keep a sub-agent and does not object to it.
4. When the performance is of clerical nature and does not require any particular skill or knowledge.
5. When the nature of business is such that it is necessary to have a sub-agent, and the performance becomes difficult without a sub-agent.
6. When there is an unforseen emergency that calls for the appointment of a sub-agent.

Legal Obligations Between Principal, Agent and Sub-Agent

The relations between the principal, agent and sub-agent depend, to a very large extent, on whether or not the sub-agent has been appointed in a legitimate and proper manner. The obligations of the parties are elaborated in Sections 192 and 193, and are as under:

(1) Where a sub-agent is properly appointed: According to Section 192, the legal obligations of the parties would be:

(a) The principal is liable to the third party: Section 192 provides that "*where such an agent is properly appointed, the principal is, so far as regards third persons, represented by such agent and is bound by, and responsible for, his acts as if he were an agent originally appointed by the principal.*"

(b) The agent is liable to the principal: When an agent appoints another person as a sub-agent, his responsibility to the principal is in no way diminished or transferred—he remains liable to the principal for the acts of the sub-agent.

(c) The sub-agent is liable to the agent: Except in case of fraud or wilful default, the sub-agent is liable to the agent. Section 192 provides that "Such agent is responsible for his acts to the agent but not to the principal, except in case of fraud or wilful wrong." The sub-agent is appointed by the agent, and acts on the direction of the agent. There is not direct relationship between the principal and the sub-agent. As such, the sub-agent cannot intiate any proceedings

against the principal for any compensation that may be due to him, nor can the principal start proceedings against the sub-agent for realising any amounts due from the sub-agent. The principal and the sub-agent both can only initiate proceedings against the agent because both the parties, i.e. the principal and sub-agent, make a contract with the agent, and come in contact with each other only through the agent. It is important to mention here that, in case of fraud or wilful default on the part of the sub-agent, the principal is entitled to initiate proceedings against both the agent and the sub-agent.

(2) Where the sub-agent is not properly appointed: According to Section 193, if an agent has appointed a sub-agent without having the authority to do so, i.e. the sub-agent has been **Unauthorisedly appointed**, the implications of such appointment will be as under:

(a) The principal, in such a situation, will cease to be liable for any act of the sub-agent.

(b) The principal cannot hold the sub-agent liable for fraud or wilful default in the performance of his obligations.

(c) The agent who has **unauthorisedly** appointed the sub-agent will be liable to the principal and the third parties.

(d) If the principal ratifies the appointment of the sub-agent after such appointment has been made, then he (the principal) will become liable to third parties for all acts of the sub-agent.

Substituted Agent

At times, the agent appointed by the principal cannot perform certain obligations on behalf of the principal himself and gets it done by some other person with the express or implied authority of the principal. Such other person is called a substituted agent.

According to Section 194, *"where an agent holding an express or implied authority to name another person to act for the principal in the business of the agency has named another person accordingly, such person is not a sub-agent, but an agent of the principal for such part of the business of agency as is entrusted to him."*

A substituted agent represents the principal in such acts as have been entrusted to him. When a substituted agent has been appointed, he acts on the directions of the principal for such part of the business of agency as is entrusted to him, and is liable only to the principal.

For example, Ram directs his solicitor Panna Lal to employ an auctioneer to auction his estate. Panna Lal appoints Roop Lal for this purpose. Here, Roop Lal is not a sub-agent but a substituted agent and is liable to Ram.

Agent's duty in naming a substituted agent: An agent needs to use as much discretion in the selection of a substituted agent as a normal and prudent man would in the conduct of his personal affairs; and if he does this, he is not responsible to the principal for any act or negligence of the substituted agent.

Example: Umesh directs his agent Mahesh to buy a ship for him. Mahesh appoints a reputed specialist in the field, Naresh to purchase the ship. Naresh is not very careful and neglects to examine the ship properly before purchase. The ship is not sea-worthy and is sunk. In these circumstances, the person liable to Umesh is not Mahesh—the liability rests on Naresh.

Difference Between Sub-Agent and Substituted Agent

Basis of Difference	Sub-Agent	Substituted Agent
1. Appointment	A sub-agent is appointed when the practice in a particular trade demands it, or when it is essential for the efficient functioning of the agency, or it is not possible for the agency to function without a sub-agent.	A substituted agent is appointed with the tacit or express approval of the principal for performing some specific function or functions in the agency.
2. Control	A sub-agent does his work under the control of the agent.	A substituted agent works under the direction of the principal.
3. Remuneration	The responsibility for the remuneration of a sub-agent is that of the agent, i.e. he cannot demand his remuneration from the principal.	A substituted agent, like an agent, works under the direction of the principal, and can demand his remuneration from the principal.
4. Responsibility	A sub-agent is responsible to the agent, not to the principal. Only in case of fraud or wilful default, he is also responsible to the principal.	A substituted agent is responsible only to the principal, not to the agent.
5. Holding Responsible by Principal	The principal cannot hold a sub-agent responsible for his performance.	The principal can hold a substituted agent responsible for his performance.

Co-Agent

At times, two or more persons are appointed as agents in a business enterprise. Such persons who are the agents of the same principal are called co-agents, and share joint and several liabilities. If the liabilities of the co-agents are not specified when the agency is established, their liabilities are deemed to be joint, and the agents need to consult one another in the performance of their obligations. When the authority of a co-agent has been defined in the contract of agency, the co-agent does not need to consult the other agent(s) in the performance of his obligations.

Classification of Agents

Agents are generally classified in the following types.

(1) Special Agent: A special agent is one who is appointed to do a specific job, like an agent who is appointed to sell a property. A special agent, as such, has a limited authority that pertains to a particular job, and the authority terminates when the job is done. A special agent does not represent the principal, and is not liable to him, for any deal other than for which he is appointed.

(2) General Agent: A general agent is appointed to do all acts pertaining to a business or industry. Thus, a general agent for a textile or commodity business would be authorised to do all acts concerning such business. The authority of a general agent is extensive and continuous, and the agent continues to have the authority till it is terminated by the principal. Even if the

principal has limited the authority of a general agent by a confidential communication to the agent, and the agent crosses the limits and does something beyond his authority, the principal is responsible to the third party. But if the parties with whom the agent has dealings are aware of his limitation, then this does not happen.

(3) Non-mercantile Agent: A non-mercantile agent is one whose performance does not involve the establishment of relations between a buyer and a seller. Such agent operates on behalf of the principal in doing such acts which are not concerned with business but are connected to the rights and obligations of the principal. For example, a law agent advises his principals on legal matters, or an estate agent is concerned with matters of immovable property. Other examples of non-mercantile agents are an attorney, a solicitor or pleader, etc. A wife is also a non-mercantile agent of the husband.

(4) Mercantile Agent: An agent who represents the principal in commercial transactions is called a mercantile agent. Mercantile agents are of the following types.

(a) Factor: A factor is a mercantile agent who is entrusted by the principal with the possession of goods in order to sell them. He has the authority over the goods and sells the goods in his own name, and is remunerated for his service in selling the goods. He has the authority to issue receipts of payment for the goods in his own name, and can initiate legal proceedings against defaulters in payment. He has the right of *lien* on the goods in his possession for any consideration he might have to receive from the principal.

(b) Broker: A broker is an agent who is employed to buy or sell goods on behalf of another person. He is employed on a commission basis to bring about a contractual relationship or striking a bargain. A broker is an agent for both—the buyer and the seller. He is not given the possession of goods and, as such, does not have a lien. A broker cannot initiate any legal proceeding in his own name.

(c) Auctioneer: An auctioneer is an agent appointed by a seller to sell his goods by auction for a commission on the price of goods sold. An auctioneer is primarily the agent of the seller, but after the sale has been made, he also becomes the agent of the buyer. He is like a factor except that he has only a particular lien on the goods for his charges. An auctioneer has the right to sue in his own name for the price of goods sold.

(d) Commission Agent: A commission agent is one who is employed to buy and sell goods, transact business generally for others. For such activity, he receives his remuneration or reward in the form of a 'commission'.

(e) Del Credere Agent: A del credere agent is one who, for an extra commission called del credere commission, guarantees the principal that, if the person buying goods on credit defaults in his payment, he would make the payment himself.

(f) Banker: Normally, the relation between a banker and his customer is one of debtor and creditor. But a banker can also be the agent of his customer. A banker is obliged to return the money deposited with him on the demand of the depositor, but there are added services that he provides. He acts as the depositor's agent in collecting amounts on his behalf deposited through drafts or cheques, issues and encashes pay orders and provides other services—e.g. with respect to sale and purchase of shares, or keeping the valueables of a customer in safe custody. A banker has a general lien on the depositor's assets with respect to its commission or loan given to a customer.

Ratification—An Introduction

Ratification implies the acceptance or approval, at a later date, by the principal of an act done by the agent without his knowledge or consent. An express or implied consent of the principal is essential when an agent acts on behalf of the principal, otherwise the latter can refuse to be liable for such act on the part of the agent.

According to Section 196 of the Indian Contract Act, *"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 effect will follow as if they had been performed by his authority."*

In the case of ***Wilson vs. Tumman,*** Justice Tindal observed 'when a person does something for another, and does not have any such right to do it, and if the person on whose behalf the act has been done ratifies the act, the act would be deemed to have been done by the principal'.

According to Section 197, ratification can either be express, or it can be implied by the subsequent behaviour of the person on whose behalf the act has been performed.

For example, if A gives B's money as a loan to C without B's authorisation, and later B accepts the interest on the loan from C, it would amount to an implied ratification of A's action by B.

Rules Governing Ratification

The rules governing ratification are based on the provisions of the Indian Contract Act and the verdicts of various courts from time to time. These are briefly discussed hereunder.

(1) The act must be in the name of the principal: For a legal ratification, it is essential that the act of the agent is for, and on behalf of, the principal—and not in the name of the agent. In other words, the agent must act as an agent. If the agent has acted for himself and on his own account, the principal cannot be held responsible to ratify such action.

(2) Ratification must be made by the person on whose behalf the act was done: Ratification implies that the act is ratified by the person on whose behalf it was done. Ratification by a third party has no legal significance. If A has given a loan of B's money to C, and D ratifies A's action, the ratification would not be valid. The ratification would have to be from B to be valid.

(3) The principal must be in existence when the contract is made: Ratification is only possible when the principal exists. A company, for example, cannot ratify the contracts entered into by the promoters on its behalf before its incorporation.

(4) The principal must have contractual capacity: It is essential for ratification that the principal has contractual capacity both at the time of contract and at the time of ratification. It is necessary because ratification by the principal implies his acceptance of the contract at the time the agent makes it. If the principal was not competent to enter into a contract at the time the contract was entered into, he cannot later validate the contract by varifying it. In other words, if the principal himself is not competent to make a contract, he cannot ratify a contract made by the agent. For example, a person cannot ratify the contracts made by him when he was a minor even when he becomes a maj

(5) Only lawful acts can be ratified: Acts which are void from the legal standpoint cannot be ratified. For example, a contract made under forged signature of a party cannot be ratified. All acts which are against the law, and are punishable by law, cannot be ratified.

(6) Ratification must be with full knowledge of facts: According to Section 199, it is essential that the person doing the ratification has full knowledge of what he is ratifying, otherwise the ratification will not be valid. If the principal proves that he was not aware of the facts when he made the ratification, and such knowledge was vital for him to ratify the contract, the principal will not be bound by such ratification.

(7) The whole transaction can be ratified: As per Section 199, if an agent makes a commitment without the authority of his principal, and the latter ratifies only a part of what the agent has committed on his behalf, the ratification will not be valid. There can only be ratification of an act *in toto*, i.e. of the whole act, or its rejection *in toto*.

(8) Ratification should not put a third party to damages: According to Section 200, if a person, on behalf of another and without his authority, does an act which, even if it was done with the authority of the other person, puts a third party to damage, or terminates any right or interest of a third party, such act of the person cannot be ratified. For example, Hari holds a lease to some land from Mohan which can be terminated at a month's notice. Shekhar, without being authorised by Mohan, gives notice to Hari of the termination of lease. The notice cannot be ratified by Mohan so as to be binding on Hari.

(9) Ratification must be within reasonable time: If a time limit is stipulated for ratification, it must be done within that time. If the limit has expired, the ratification is not valid. In case there is no time limit, the ratification should be done within a reasonable time. What is a reasonable time is a core issue which depends upon the circumstances of the case.

(10) Ratification may be express or implied.

(11) Ratification must be communicated: The communication of ratification must be to the party who is sought to be bound by the act done by the agent.

Effects of Ratification

The principal becomes liable for the act of the agent after he ratifies the act. The effect of ratification is retrospective, which means that the liability of the principal is deemed to commence from the date when the act was done. In other words, when an agency is established by ratification, it is deemed to start from the time when some act was done by the agent, and not when such act was ratified. This is referred to as 'ex-post acts agency'. Consider an example. Madan, without any authority, makes a contract to buy a car for Vasudev from Rajinder on 20 August. Vasudev gives his ratification on 28 August. In such case, the contract between Vasudev and Rajinder would deem to have been made on 20 August. Besides, once the principal has given his ratification, he is liable for all consequences of the contract made on his behalf, irrespective of the fact whether such consequences mean a gain or a loss to him. Once the principal has given his ratification, the liability of the agent terminates and he is deemed to have acted within his authority. The principal's ratification estblishes a contract between him and the third party which releases the agent from his liability, and he becomes entitled to receive his commission and other benefits that he would normally receive as an agent.

Termination of Agency

Like all contracts, a contract of agency may also be terminated. According to Section 201, a contract of agency may be terminated in the following two ways:

(1) By an act of the parties

(2) By operation of law.

(1) Termination by Act of Parties: The contract of agency may be terminated by an act of the parties in the following situations.

(a) By mutual agreement: Agency is a contract between the principal and the agent which is made by the consent of both. And just as it is made, the contract can be terminated by the mutual agreement between the principal and the agent at any time and in any situation.

(b) Revocation by the principal: The principal can, at any time, revoke the authority he has vested in the agent by informing the agent of such revocation. According to Section 203, the principal may revoke the authority of the agent at any time before the agent has exercised his authority so as to bind the principal unless the agency is irrevocable, but the principal must notify the third parties of his revocation of the agency. The principal cannot, however, revoke the authority of the agent in the following circumstance:

(i) Where the agent has personal interest in the agency: According to Section 202, if the agent has a personal interest or right in the subject matter of the agency, in the absence of a contract to the contrary, the principal cannot revoke the agency when such revocation will result in harming the agent's interest. In such circumstances, the contract does not end even if the principal dies or becomes a lunatic. Such agency is called 'agency coupled with interest'. Examples are:

—A authorises B to sell his land and realise the amount of a loan that A had taken from the latter. A cannot revoke his authorisation in this case and, even if A dies or becomes a lunatic, B's authority does not terminate.

—A sends 1,000 bags of sugar to B, and tells him to sell the sugar. He also authorises B to keep an amount of money that he (i.e. A) owes him and remit the balance to A. In such case, A cannot later revoke this authority.

(ii) Where the agent has incurred personal liability: According to Section 203, if the agent, before the revocation of his authority, has exercised his authority in a manner that holds the principal liable, the agency cannot be terminated. The implication here is that, if the agent has incurred a personal liability in the agency before the revocation of his authority, the agency cannot be terminated. Consider an example.

A directs B to buy 1,000 bags of sugar for him and pay for the same out of an amount of A's money that he already has. B contracts to buy the sugar but has yet to pay for it. In this manner, B has become liable to the third party for the cost of 1,000 bags of sugar. A, in this case, cannot revoke his authorisation and cause a loss to B.

In the above example, if B has contracted with the third party on behalf of A so that the liability of payment devolves on A, then A can revoke the contract of agency.

(iii) Where the agent has exercised his authority partially: According to Section 204, the agency cannot be terminated when the agent has partially exercised his authority. For example, Ram instructs his agent Shyam to buy 1,000 tons of coal from Hari and make the payment in three equal instalemnts. If Shyam has made the payment of one instalment, Ram cannot terminate the contract.

(c) Renunciation by the agent: Just as the principal can revoke his authority and terminate the contract of agency, the agent can renunciate his authority by serving a notice to the principal. According to Section 205, if the agency is for a fixed duration, and the principal is put to a loss by the agent's renunciation before the expiry of the period, the agent is liable to compensate the principal for such loss. Section 206 stipulates that both the principal and the agent must give adequate notice to one another before a revocation or renunciation of authority. In the absence of such notice, the aggrieved party will be entitled for the compensation of any loss resulting from such action from the other party. The notice of revocation or renunciation also needs to be given to third parties who may be dealing with the agency.

According to Section 207, revocation or renunciation may be express or it may be implied by the conduct of the principal or the agent. For example, A authorises B to let out his house on rent, and later lets it out himself. This is an implied revocation of B's authority.

(2) Termination by Operation of Law: An agency is terminated by the operation of law in the following circumstances.

(a) Performance of the contract: The most obvious method of terminating the agency is for the agent to perform what he has undertaken to perform. Where the agency is for a specific object, it terminates when the object is achieved. This is the simplest method to terminate an agency. If the achievement of the object of an agency is, or becomes, impossible, the agency terminates of its accord.

(b) Expiry of time: If the agent is appointed for a fixed duration of time, the agency terminates at the expiry of that duration even if the object of the agency is not achieved.

(c) Death or insanity of the principal or agent: According to Section 209, the relationship between the principal and the agent is a personal relationship which comes to an end in the event of death or insanity of either of the two. When the agency terminates by the death or insanity of the principal, it become the duty of the agent to take all steps to protect the interests of the principal (in case of insanity) or his representatives (in case of his death).

(d) Insolvency of the principal: Under the provisions of Section 201, the insolvency of the principal terminates the agency. Though this section does not say anything about the insolvency of an agent, the courts have recognised the agent's insolvency also terminates the agency.

(e) Destruction of the subject-matter: An agency which is created to deal with a specific subject-matter comes to an end when the subject-matter is destroyed. For example if an agent is appointed to insure a building, and the building is destroyed by fire before the agent can get it insured, the agency terminates.

(f) Principal becoming alien enemy: When the agent and the principal are aliens, a contract between the two is valid so long as the principal's and the agent's countries have peaceful relations. If a war breaks out between the two countries, the contract of agency terminates.

(g) Dissolution of a company: When a company which is functioning as the principal or the agent is dissolved, the agency contract comes to an end.

Irrevocable Agency

Even though, under the provisions of Section 201, the principal may revoke the authority of an agent and terminate the agency contract at any time, there are some exceptions to the rule. In the under-mentioned situations, the principal does not have such right. In other words, the agency contract is irrevocable in the following situations.

(1) Agency coupled with Interest: According to Section 202, when the agency is coupled with the interest of the agent, i.e. when the subject-matter of the contract involves an interest of the agent, the principal cannot abrogate such agency because, if the principal has the right to abrogate, the interest of the agent is damaged. For example, A owes some money to B, and authorise B to sell some land that belongs to him and realise his debt. A cannot, in this case, revoke his authorisation, and the authorisation by A will be valid even if he dies or becomes a lunatic because the interest of the agent (in this case B) is involved in the contract. In this connection, the case of **Ram Chandra vs. Chinubhai** is an illustration. In this case, it was held that, if an agency is made to protect the interest of the agent, it cannot be termianted by the principal revoking his authorisation to the agent.

(2) Where the agent has incurred a personal liability: According to Section 203, if the agent, before his authorisation is revoked by the principal, has exercised his authority for such acts as he is expected to perform under the contract, the agent's authority cannot be revoked by the principal. The object of such provision is that, if the agent has undertaken a liability for his performance, he is liable for it and, as such, the agency cannot be terminated. For example, A authorises B to purchase 1,000 bales of cotton for him, and pay for it out of A's money that is already lying with B. B buys the cotton in his own name from C, for which he is personally liable to C. In this case, A cannot later revoke his authorisation because B has already incurred a personal liability. But if B has not personally committed himself and made the contract on behalf of A (where the liability for payment is A's), then A might revoke his authorisation because the agent (B, in this case) has not incurred a personal liability.

(3) Where the agent has partially exercised his authority: According to Section 204, the agency cannot be terminated in case the agent has partially exercised his authority. For example, A authorises B, who is his agent, to make a contract with C to buy coal on his behalf and make the payment in instalments. B makes a contract with C and pays the first instalment. A cannot, in this case, terminate the agency.

When Does Termination Take Effect?

According to Section 208, the agent's authority terminates when he has received notice from the principal terminating his authority—i.e. his authority does not terminate till he receives such notice, and, till such time, he can contract with third parties on behalf of the principal. For example, A makes an agency contract with B to sell goods on his behalf and agrees to pay B a commission at 5 per cent of the value of the goods sold. Later, A revokes his authority by a letter. After A has posted his letter, but before B has received it, B sells goods worth Rs. 10,000. For this sale, A is liable to pay Rs. 500 to B.

So far as third parties are concerned, the agent's authority to negotiate and make a contract on behalf the principal ends only when they receive information about such termination and not before.

Termination of Sub-Agent's Authority

According to Section 210, the termination of an agent's authority puts an end to the authority of all sub-agents appointed by him. In other words, if there does not exist any authority

of the agent, there is no authority for the sub-agent. A substituted agent is not affected by the revocation of the agent's authority.

Rights and Duties of Agent as Against Principal

Duties of an Agent

The duties of an agent include the following:

(1) To follow the instructions of the principal: According to Section 211, the agent is duty-bound to follow the instructions of the principal. If the principal has not given any specific instructions, the agent is expected to act according to the customs and usages of trade at the place where the agent conducts his business. If the agent acts contrary to such practices, and the principal is put to a loss—even if the act was done in good faith and in the interest of the principal—the agent must make good such loss. If there is a profit because of such action, the profit is the principal's. In this connection, the case of **Lilley vs. Doubleday** is an important illustration. In this case, the principal directed the agent to store some drapery goods at a particular warehouse. The agent stored the goods at another warehouse which had better storage facility. But the warehouse caught fire and the goods were destroyed. The Honourable Justice held the agent responsible for the loss because he had not acted according to the principal's direction, even though he had done so in good faith, and in the interest of the principal, and the loss was not because of any negligence on his part.

(2) To work with reasonable care, skill and diligence: According to Section 212, an agent is bound to conduct the business of the agency with as much skill, care and diligence as he would use in his own business. In other words, an agent is expected to operate the agency with the same skill and diligence as is practised by other operators in the trade. If the agent fails to do that, and the principal is put to a loss because of carelessness or misconduct on the part of the agent, the latter is liable to compensate the principal for such loss. But the agent cannot be held responsible for an indirect or remote loss.

Example: A has appointed B as his agent in Calcutta to sell goods on his behalf on credit. B sells some goods to C without investigating C's credit worthiness. C was insolvent at the time of purchase of goods. It was held that B had not been careful and diligent in the performance of his duties and, as such, was liable to compensate A for the loss.

If an agent acquires an authority to do something which requires skill or expertise that he does not possess, he is liable to the principal for the lack of such skill or expertise. The case of **Jenkins vs. Benthem** is an important illustration. In this case, a lawyer filed his client's suit in a court where he should not have done, and he followed it up under a law which was not applicable to the case, resulting in a dismissal of the case by the court. The court held the lawyer liable for damages to the client because he had taken up the case without having the knowledge of law and the expertise to pursue the case in court.

(3) To render proper accounts: According to Section 213, an agent is bound to render proper accounts to the principal about the agency. The relationship of the agent with the principal is similar to that of a bailor with the bailee, and the agent is deemed to be a trustee of the principal. And, like a trustee, he is expected to keep proper accounts and present them on demand of the principal.

If an agent does not keep proper accounts, or does not oversee the accounts of his employees, he is not only responsible for any loss to the principal but also for the defalcations and fraud which might be done by his employees.

(4) To communicate with the principal in case of difficulty: According to Section 214, in times of difficulty when the agency is facing problems, it is the duty of the agent to make every effort to keep in touch with the principal, and to seek his instructions. If the circumstances are such that he cannot communicate with the principal, then he is expected to use his intelligence and foresight to tackle the problems of the agency, for which he is liable to the principal.

(5) Not to deal in his own name or account: According to Section 215, the agent must not deal on his own account in the business of the agency unless it is necessary to do so, and he has obtained the prior consent of the principal. An agent is required by law to acquaint the principal with all the material circumstance that are in his knowledge. If the agent fails to do so, the principal reserves the right to terminate the agency. If it comes to light later that the agent has withheld important information from the principal or has operated on his own account without the principal's knowledge, the principal can hold the agent responsible for any loss that he has been subjected to or terminate the agency.

Example: A appoints B as an agent to sell his land. On examing the land, B finds that there is a mine in the land of which A has no knowledge. B makes an offer to A to buy the land himself, but does not reveal the discovery of the mine in A's land. After the sale has been made, when A comes to know of the mine, he has the right to repudiate the contract.

Section 216 stipulates that if the agent, without the knowledge of the principal, makes an unexpected profit in the agency which is the result of his authority from the principal, it is his duty to give such profit to the principal.

(6) To pay all amounts received for the principal: According to Section 218, it is the duty of the agent to pay to the principal all such amounts that are received by the agent on the principal's account. The agent is entitled, as per Section 217, to receive all moneys due to himself in respect of advance payments or other legitimate expenses incurred by him in conducting the business of the agency, and also such remuneration as may be due to him for acting as an agent.

(7) Not to earn secret profit: An agent must not make any secret profit in conducting the affairs of the agency besides what is due to him as commission or remuneration because the principal has the right to claim such profit. However, with the prior consent of the principal, the agent may receive a commission from the third party for an act performed under the terms of the agency contract.

(8) Not to set up an adverse title: An agent is not entitled to set up his own title, on the title of a third party to the goods he has received from the principal. If he does that, he would be responsible for the consequences for such conversion.

(9) Not to delegate authority: An agent must not delegate his authority to another person. He must himself perform the act for which he has been appointed as an agent. If the situation demands, or the practice of the trade is such, the agent may, with the consent of the principal, appoint a sub-agent or agents for the performance of the agency contract.

(10) To protect the interests of the principal in case of his death or insanity: It is the duty of the agent, according to Section 209, to protect the interest of his principal (or his representative) in the event of the principal's death or insanity.

(11) Not to use the information obtained in the course of business of agency against the principal: It is the duty of the agent to communicte all information about the business of the agency that is in his knowledge to the principal. If the agent does not communicate the information he has about the business of the agency to the principal, and the principal is put to a loss, the liability will be the agent's.

Rights of Agent

An agent has the following rights against the principal.

(1) Right of indemnification for premature breach of agency: According to Section 205, if the agency is for a fixed period and is terminated before the expiry of the period, the agent is entitled to be indemnified by the principal against any loss that he might suffer because of such premature breach of agency. Section 206 further explains that the agent must be given a notice of the termination of agency. In case such notice is not given, the agent has the right to claim damages from the principal.

(2) Right to retain money due to himself: Under the provisions of Section 217, the agent has the right to retain, out of any sums received on account of the principal, all moneys due to himself in respect of his remuneration, advances made or expenses incurred by him in conducting the business of the agency.

(3) Right to receive remuneration: The agent has the right to receive remuneration for conducting the business of agency as agreed to in the contract. In the absence of any agreement on the amount of remuneration, the agent is entitled to a reasonable remuneration. The agent can, according to Section 219, retain the amount that is due to him from the sale proceeds of the agency. But if he is guilty of misconduct, he is not entitled to receive any remuneration. On the other hand, if there is a default on the part of the principal and the agent is made to stop his work, he is entitled to receive his remuneration.

(4) Right of lien on goods: According to Section 221, in the absence of a contract to the contrary, the agent has the right to retain goods, documents, movable and immovable property of the principal that is in his custody till such time that he receives the payment for commission, disbursments and services paid or accounted for by him. This is a specific lien of the agent, and not a general lien.

(5) Right of stoppage of goods in transit: The right of stoppage of goods in transit is available to the agent when: (a) he has bought the goods for the principal by incurring a personal liability, or (b) he has personally guaranteed the payment of such goods.

(6) Right of indemnification: The agent has the right of indemnification in the following circumstances:

(a) Right to be indemnified for lawful acts: According to Section 222, the agent has the right to be indemnified against the consequences of all such acts that he has lawfully performed on behalf of the principal in the exercise of the authority that is conferred upon him. If he is put to a loss because of the performance of his lawful obligations under the contract

the agent has the right to claim compensation for such loss from the principal. For example, Madhur, who is a manufacturer of electrical goods in Delhi, appoints Amrit in Bombay to make a contract with Sudhakar for the sale of his goods. Amrit makes the contract of sale on behalf of Madhur, but Madhur fails to send the goods on time, and Sudhakar files a suit against Amrit, and gives a notice to Madhur. Madhur directs Amrit to fight the case, but Amrit loses and has to pay Rs. 10,000 as damages. Amrit, in this case, has the right to receive this amount from Madhur.

(b) Right to be indemnified for acts done in good faith: According to Section 223, if the agent has acted in good faith and, as a result, has been put to loss because of his act, he has the right to be indemnified for such loss, if it causes injury to the rights of a third party. But, for the agent to have the right of indemnification, the agent must act within the limit of his authority on behalf of the principal. For example, A appoints B as his agent to sell certain goods in his possession. B, acting in good faith and best intention, sells the goods and hands over the sale proceeds to A. Later, the actual owner of goods C files a suit against B, and B has to pay the amount of sale proceeds to C. B, in this case, is entitled to receive the money he has paid to C plus all expenses he has incurred from A because he had acted in good faith and the default was on the part of A in that his title to the goods was defective.

The principal, however, cannot be held liable for a criminal act on the part of the agent. When a person appoints somebody to do a criminal act, he does not become liable to the agent for the consequences of such act, even if he has expressly or tacitly promised to be liable for such consequences. For example, A appoints B to beat up C, and promises that he will indemnify B against the consequences of his act. On A's assurance, B beats up C and has to pay a heavy fine for his criminal act. B, in this case, cannot claim the amount from A if the latter refuses to pay it.

(7) Right for compensation for principal's neglect or want of skill: According to Section 225, if the agent sustains any injury or loss on account of the principal's neglect or want of skill, he has the right to be compensated for such loss or injury by the principal. For example, A appoints B as a bricklayer in the construction of a building. A is not careful in putting the scaffolding, as a result of which B falls and suffers an injury. A would be liable to compensate B for such injury.

Duties of Principal

As a matter of course, the rights of the agent are the duties of the principal. As such, the duties of the principal include:

(1) To indemnify the agent against the consequences of all lawful acts: According to Section 222, it is the obligation of the principal to indemnify the agent against the consequences of all lawful acts for which the agent has been authorised. If the agent suffers a loss as a result of such performance, it is the principal's duty to compensate him for the loss.

(2) To indemnify the agent against the consequences of acts done in good faith: According to Section 223, if the agent acts in good faith on behalf of the principal, and the interests of a third party or parties are damaged as a result thereof, it is the principal's duty to indemnify the agent against the consequences of his act.

Section 224 makes it clear that if the appointment of the agent is for the performance of an act which is unlawful or criminal, the principal is not liable to indemnify the agent against the consequences of such act even if there is an express or implied contract to the contrary.

(3) To indemnify the agent for injury: According to Section 225, if an injury is caused to the agent because of neglect or carelessness on the part of the principal, the latter is liable to compensate the agent for such injury.

(4) To pay remuneration and other expenses: Sections 217, 219 and 220 make it clear that the principal must pay the agent his remuneration and all such reasonable expenses that he might incur in his performance under the agency contract.

Rights of Principal

The principal can enforce all the duties of the agent which indirectly are the rights of the principal. In case of a default in performance on the part of the agent, the principal's rights are as under.

(1) To recover damages: If the agent defaults in following the directives of the principal, or following the established customs of trade in the absence of such directives, or if the agent does not employ the necessary skill, diligence and effort in his performance, and the principal is put to a loss, he has the right to recover damages accruing to him from the agent.

(2) To obtain an account of secret profits: If the agent, without the knowledge and consent of the principal, deals in his own name and makes secret profit from the agency, the principal has the right to demand an account of such profits and recover the same from the agent. Not only this, the principal can forfeit any remuneration due to the agent for such transactions. Where the agent makes a secret profit, the contract with a third party, however, is not rendered void.

(3) To resist the agent's claim for indemnity: If the agent is guilty of misconduct, and the principal can prove it, he can resist the agent's claim for indemnity against a liability incurred by him in such transaction.

Principal's Liability to Third Party

The general law stipulates *"qui facit per alium facit per se"*, which mans 'he who acts through an agent, acts himself'. So far as third parties are concerned, it makes no difference an act is done by the principal personally or through his agent. The principal is liable for all acts of the agent that are within the extent of the agent's authority, or are done by the agent with his knowledge and consent, or which the principal has ratified after they are done. The principal is deemed to be the party making the contract, and the agent only the medium through whom the contract is made.

The liability of the principal with regard to third parties can be classified as under:

(1) When the agent contracts on behalf of a named principal.

(2) When the agent contracts on behalf of an unnamed principal.

(3) When the agent contracts on behalf of an undisclosed principal.

(1) When the agent contracts on behalf of a named principal: In this case, the agent not only discloses the purpose of the agency to the third party but also discloses the name of the principal. It is a clear, straightforward contract in which the agent acts on behalf of a named principal under whose authority he makes a specific commitment pertaining to the function of the agency. When the name of the principal is disclosed to the third party, the following obligations devolve on the principal.

(a) When the agent has acted upon his authority: An act of the agent is an act of the principal. If the agent has acted within the limits of his authority and during the validity of the agency, the principal is liable to the third party for the agent's act. According to section 226, the principal's liability for such acts is the same as if the acts were done by the principal himself. For example, Ashok appoints Anil as his agent and gives him the authority to collect moneys due to him by his debtors. Shyam, who owes Rs. 5,000 to Ashok, pays this amount to Anil. If Anil does not give this amount to his principal Ashok, even then Shyam is absolved of his liability to Ashok.

The principal is not only liable for the acts of agents within the limits of his authority, he is also liable for such acts of the agent which are necessary for the proper execution of his authority. For example, if the principal has authorised the agent to manage a business, he is liable for all such acts of the agent which are necessary for running the business. Later, if the principal limits the agent's authority, he would still be liable for all acts of the agent till the parties who have dealings with the agent are not notified of the limitation of the agent's authority.

Example: A authorises B to sell his car for not less than Rs. 80,000, but B sells it to C for Rs. 75,000. Since C had no information about A's direction to B not to sell it for less than a specific price, A cannot terminate the contract.

(b) When the agent exceeds his authority: According to Section 227, when an agent exceeds his authority to do work for the principal, and if the work is such that it can be separated into what is within his authority and what is beyond it, the principal is bound by that part of the work which the agent has done within the limit of his authority. For example, A, who is the owner of a ship and its cargo, authorises B to procure an insurance policy for the ship. B gets the ship insured, and also gets the cargo on the ship insured under another policy. In this case, A is liable to pay the premium only for the policy for the ship, but not the premium for the policy on the cargo. It is possible because the two can be separated. If B had taken only one policy for the ship and the cargo, A would not be bound.

According to Section 228, when an agent exceeds his authority, and if what the agent does beyond the scope of his authority cannot be separated from what is within the agent's authority, the principal may repudiate the whole of the transaction. For example, A authorises B to buy 500 sheep for him. B buys 500 sheep and 100 lambs for a total price of Rs. 6,000. A can repudiate the transaction if he so desires.

(c) When the agent commits misrepresentation or fraud: According to Section 238, the principal is liable to the third party for any misrepresentation or fraud on the part of the agent. If the agent makes a misrepresentation or commits a fraud, from the legal point of view, the misrepresentation of fraud would deem to have been done by the principal. The law recognises the principal and the agent to be one. But if the misrepresentation or fraud is in such matters which are beyond the authority of the agent, the principal is not liable for such act.

(d) Consequence of notice given to the agent: According to Section 229, during the tenure of the agency, a notice given to the agent has the same legal effect as if it were given to the principal personally. If the agent receives some notice from a party, but does not

convey the same to the principal, the principal would be deemed to have received the notice and would be liable for consequences. This is so because, as per law, a notice given to the agent is deemed to have been given to the principal. But the liability of the principal arises only if the notice relates to the business for which the agent has been appointed.

(e) Liability on admission made by the agent: During the tenure of the agency, if the agent makes an admission of a fact or a deed, it will lawfully be deemed to be an admission by the principal, and he (the principal) would be liable for it. In one case, a passenger lost his baggage, and the station-master informed the police that a *coollie* has taken the goods and absconded. The Honourable Justice ruled that the information given by the station-master would be deemed to be given by the railway company and held that the railway company was liable for the loss of baggage.

(f) Agent's negligence and misconduct: The principal is responsible for the agent's negligence or misconduct. But if such negligence or misconduct is related to the agent's personal affairs, or he has done so with intention, the principal cannot be held liable.

Example: If A, who is agent of B, takes B's car on some agency business and has an accident because of rash and careless driving, the responsibility for the accident and the subsequent damages would be A's who has caused the accident.

(2) When the agent contracts on behalf of unnamed principal: When an agent makes a contract, and informs the party with whom he is making the contract that he is acting as an agent but does not disclose the identity of the principal, the principal is liable for the act of the agent, and the latter has no personal liability. The party with whom the contract is made can sue the principal in case of default, and not the agent. On the other hand, if the agent does not disclose the principal's name when queried by the third party, he can be held liable for the consequences.

(3) When the agent contracts for an undisclosed principal: When an agent contracts with a person who does not know whether he is contracting with the agent or the principal, and does not have a valid reason to know that; and the agent does not disclose that he is acting as an agent, the principal is called an 'undisclosed principal'. If the third party, in such case, files a suit and comes to know as to who is the principal before the court gives a verdict, the party is entitled to sue both—the agent and the principal. If the principal willingly discloses himself, he becomes liable to the third party.

Liability of the Agent to Third Party

As per rule, an agent functions on behalf of the principal, and the principal is liable for all acts of the agent on his behalf. In other words, the agent is not personally responsible for any act done by him in the business of agency which is within the scope of the authority vested in him by the principal. An agent is a medium of operation between the principal and the third party. According to Section 230, in the absence of a contract to the contrary, the agent can neither personally enforce a contract made by him, nor is he personally responsible for the performance in contracts made by him on behalf of the principal. Only the principal can sue a third party, and a third party can only sue the principal. For example, B is A's agent, and he contracts with C to sell a property that belongs to A. Later, if C does not buy the property, A can file a suit against C for defaulting his promise. Likewise, if A does not sell the property to C, C can initiate proceedings against A. B, in this case, cannot sue nor be sued against.

However, there can be a contract of agency under which the agent is authorised to file a suit. Such contract is valid in the scenarios mentioned hereunder where the agent can initiate proceedings against a party and can be held liable personally.

(1) When the contract expressly provides it: If the party making the contract with the agent expressly states that the agent personally will be liable for any default in performance, and the agent agrees to it, then the agent personally becomes liable to the party making the contract.

(2) When the agent acts for a foreign principal: Section 230 specifies that, when an agent operates on behalf of a foreign principal, the agent's liability is personal. The object of the party in such contract is to specify that it is making the contract because of the credibility of the agent. The agent, however, can disassociate himself from such responsibility by clarifying his position at the time of making the contract.

(3) When the agents acts for undisclosed principal: When the agent does not disclose the name of the principal, and the third party, without knowing the principal and acting on its confidence in the agent, makes the contract, the liability is personally the agent's.

On the other hand, if the third party knows that the person making the contract is an agent (and not the principal), or the party has the means to identify the principal, the agent is not held personally liable. In other words, in such situation, the liability is that of the principal.

(4) When the principal cannot be sued: If the agent is operating on behalf of a principal who cannot be sued, i.e. the principal is not competent to make a contract because he is a minor, of insane mind, an alien principal, or a person who enjoys diplomatic immunity, and the third party has not been notified of the fact, the third party cannot sue the principal and the agent is liable to the third party.

(5) When he causes injury to the body or property of a person: Acting beyond his authority, if the agent causes physical or financial harm to a person, he is personally liable. But if such damage is caused to a third party by the agent when he is acting within the scope of his authority, then the agent and the principal will be jointly and severally liable.

(6) When the agent signs the contract or negotiable instrument in his own name: When an agent makes a contract in his own name and does not disclose that he is acting as an agent, and signs a promisory note, bill of exchange or cheque without disclosing that he is doing so on behalf of his principal, he is personally liable for what he has promised or contracted for. If he has the authority to make a contract or sign a negotiable instrument on behalf of the principal, the liability for the agent signing such negotiable instruments or contract is the principal's, not the agent's.

(7) When the agent acts for a principal not in existence: When an agent acts on behalf of a principal who does not exist when the act is done, the agent becomes personally liable for the consequences of such act. In such case, the agent is deemed to have acted on his own behalf . For example, a company is not liable for the acts of its promotors before it is incorporated.

(8) When the agent exceeds his authority: When the agent acts beyond the limit of his authority, and the principal does not ratify his acts, he becomes liable to third parties for his acts.

18(I)

SALE OF GOODS ACT-1930

Introduction

The modern age is an age of trade and commerce. Tens of millions of commercial contracts are made every day, and sale of goods is invariably the core element of such contracts. All sections of society are concerned with the sale and purchase of goods. Not every one who agrees to buy or sell goods is fortunate enough that the transaction turns out as he had hoped. It, therefore, becomes important in the present scenario that one is conversant with the basic laws that govern the sale of goods. These laws are incorporated in the Sale of Goods Act, 1930.

Before 1930, the rules governing the sale of goods were a part of the Indian Contract Act, 1872, wherein Sections 76 to 123 incorporated the laws regarding the sale of goods. But these were not very comprehensive, and many questions remained unanswered. The Constituent Assembly of India, therefore, separated these laws from the Indian Contract Act in 1930, and incorporated them in a new act called the Indian Sale of Goods Act. The word 'Indian' was dropped by an Act of Parliament in 1963, and the law came to be known as the Sale of Goods Act. The Act covers the entire country, excluding only the State of Jammu and Kashmir, and is more or less similar to the act that governs the sale of goods in England.

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

Fundamental Definitions

Section 2 of the Sale of Goods Act provides the basic definitions, which are as under:

(1) Buyer: Section 2(1) of the Act defines a buyer as a "*person who buys or agrees to buy goods.*"

(2) Seller: According to Section 2(13), a seller "*is a person who sells or agrees to sell goods.*"

The connotation of the terms 'buyer' and 'seller' is much wider here than what they are normally understood to mean. A buyer is not only the person who buys goods but also the

person who agrees to buy goods. Likewise, a seller is not just the person who sells goods, he is also the one who agrees to sell goods.

(3) Delivery: Section 2(2) defines delivery as "the voluntary transfer of the right of possession from one person to another."

The words 'voluntary' and 'right of possession' are important in the definition of delivery. 'Voluntary' implies that the goods are transferred without coercion, fraud or undue influence. The right of possession' can be transferred, i.e. the delivery can be made in two ways: (a) by actual transfer and (b) by constructive transfer. Actual delivery is when the goods are handed over to the buyer or his agent by the seller. Constructive delivery, on the other hand, implies that goods remain with seller or with a third party, but the ownership of the goods is transferred to the buyer. Such delivery involves the transfer of title documents of goods to the buyer—like a railway receipt, a receipt from the warehouse or a bill of lading to confirm the transfer of ownership of goods.

(4) Deliverable State: According to Section 2(3), *"goods are said to be in a 'deliverable state' when they are in such state that the buyer would, under the contract, be bound to take delivery of them".*

If the goods are in a deliverable state, the buyer cannot refuse to take the delivery of goods. A deliverable state implies that the seller does not have anything more to do to make the goods acceptable to the buyer.

(5) Document of Title to Goods: According to Section 2(4), *"the document of title to goods includes a bill of lading, warehouse-keeper's certificate, dock warrant, wharfinger's certificate, railway receipt warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by endorsement or by delivery, the possessor of the document to transfer or receive the goods thereby represented."* Railway receipt, bill of lading, dock warrants, etc., are examples of document of title to goods.

(6) Fault: Section 2(5) defines fault as a "wrongful or default".

(7) Future Goods: According to Section 2(6), future goods are *"goods to be manufactured or produced or acquired by the seller after the making of the contract of sale."*

(8) Goods: According to Section 2(7), *"goods means every kind of movable property other than actionable claims and money; and includes stock and shares, growing crops, grass, and things attached to, or forming a part of the land which are agreed to be severed before sale or under the contract of sale."*

This definition of 'goods' makes it clear that 'goods' include all kinds of movable property excluding actionable claims and money. The point to be noted here is that goods imply not a capacity to procure them, but their possession and the capacity to use them by the owner of goods. Money, which is the prevailing legal tender, is not classified as 'goods' because it can only be used to purchase goods that are to be used. Current money—which is what is used to purchase goods—is the prevailing legal tender to procure goods and, as such, cannot be classified as 'goods'. But ancient money, coins, etc., are goods because these are no more used as currency and their value is much more now than what is was before. Goods can be: (1) existing, (2) future, or (3) contingent.

(9) Insolvent: According to Section 2(8), "a person is said to be 'insolvent when he has ceased to pay his debts in the ordinary course of business, or cannot pay his debts as they become due, whether he has committed an act of insolvency or not

As per the law of insolvency, to be declared an insolvent, a person has to commit 'a black act of insolvency', but to be an insolvent under the Sale of Goods Act, there is no such requisite.

(10) Mercantile Agent: As per Section 2(9) a mercantile agent is an agent who, "in the customary course of business as such agent, has the authority to sell goods, or to consign goods for the purpose of sale, or to buy goods, or to raise money on the security of goods."

(11) Price: Section 2(10) of the sale of Goods Act defines price to be "the money consideration for a sale of goods." The price is mandatory in terms of money. If goods are exchanged for goods, it is not deemed to be a sale, and the transaction is not covered by the Sale of Goods Act.

(12) Property: According to Section 2(11), 'property' "means the general property in goods, and not merely a special property."

(13) Quality of Goods: As per Section 2(12), "quality of goods includes their state and condition."

(14) Specific or Ascertained Goods: According to Section 2(14), "specific goods means goods identified and agreed upon at the time the sale is made".

According to Section 3, the provisions under the Indian Contract Act, 1872 that are not contrary to those of the Sale of Goods Act are also mandatory in a sale transaction.

18(II)

CONTRACT OF SALE

Introduction

With reference to the formation of the contract of sale of goods, it is important to clarify the following:

1. What is a contract of sale?
2. How is it legally made?
3. What is the subject-matter of the contract?
4. What is the price of goods.

What is Contract of Sale?

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

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

A contract of sale can be absolute or conditional. When a person buys something outright, it is an 'absolute' sale, but if he takes it for approval or trial, the sale contract is conditional. 'Contract of sale' is a wide term, and includes a 'sale' and an 'agreement to sell'. According to Section 4(3), when the right of ownership of goods is transferred from the seller to the buyer under a contract, the transaction is called a sale; but when the transfer of ownership is to be made at some future date, or is to be made on the fulfillment of some condition, the contract is called an 'agreement to sell'. When the condition in such agreement has been fulfilled, or the transfer of ownership of goods has occurred, the *agreement to sell* becomes a *sale*.

Characteristics of a Contract of Sale

The following are the characteristics of a contract of sale:

(1) Buyer and Seller: Like in other contracts, a contract of sale also has two parties who make the contract. The parties in a contract of sale are the *buyer* and the *seller*. The person who buys the goods or makes an agreement to buy is called the *buyer*, and the person who sells goods or makes an agreement to sell is called the *seller*. The two parties, i.e. the buyer and the seller, are two different persons. A person obviously cannot buy something from himself. Such verdict has been given in the case of **Bell vs. Lever Bros.** But where, in law, one person has the right to sell another's goods, the owner may himself buy such goods to stop the transfer of ownership of goods to the other. According to Section 4(1), in circumstances where the seller has acquired the right to sell some goods, even though he is not the owner of such goods, such sale is lawful and the owner of goods can also be a buyer. A pawnee, if he is not paid the amount he has advanced against some goods, has the right to sell the goods. The pawnor—who is the owner of the goods—can buy the goods himself. A partner of a firm can also be a buyer of goods belonging to the firm. An agent can be a buyer of goods that belong to the principal. A part-owner of goods may be a buyer of the other owner's share or a seller of his own share. For example, if Ram and Shyam are equal co-owners of a stock of wheat, Ram can make a contract to sell his share of stock to Shyam.

(2) Goods: The subject-matter of the contract of sale is essentially the goods. Goods, as per the Sale of Goods Act, are movable property other than actionable claims and money. Under the definition of goods laid down in the Act, stocks and shares, growing crops, grass or other things attached to, or being a part of, land which are seperated from land before the sale, or have been agreed to be separated under the contract of sale are classified as goods. Ancient and rare coins are also classified as goods.

(3) Price: Goods are always sold for a price. Price is a consideration in terms of money. There must be a consideration for the sale of goods, and the consideration must be in terms of money. Money is the prevalent legal tender of the country. In other words, in a valid contract of sale, the goods must be exchanged for money. Exchange of goods for goods—i.e. a barter—is not deemed to be a sale. But, in the case of ***Aldridge vs. Johnson***, it was held that a transaction partly for money and partly for goods was a sale.

(4) Transfer of Ownership: In a contract of sale, it is essential that the ownership of goods is transferred from the seller to the buyer. The transfer of ownership can be at the time of making the contract, or it can be at a future date. When the transfer takes place at the time of the contract, it is called a 'sale'. If the transfer is to take place at a future date, it is called an 'agreement to sell'.

(5) Elements of a Valid Contract: A contract of sale is a distinct type of contract, and must essentially have the basic elements of a valid contract. A contract of sale can be 'express' or it can be 'implied'. An express contract may be made by word of mouth, or it may be in a written form. There are no specific formalities to be observed in a contract of sale. When one party makes an offer to sell some goods that he owns to anoher, and the other party accepts the offer, a contract is made. It is also not essential that the price of goods is paid immediately. The price can also be paid later.

Sale and Agreement to Sell

Sale: According to Section 4(3), when the ownership of goods is transferred from the seller to the buyer under a contract of sale, a sale is said to have been made.

Examples: (a) Ashok pays Rs. 900 to Rajesh and buys a watch, or he promises to pay Rajesh Rs. 500 and buys a watch.

(b) Ashok pays Rs. 500 to Rajesh and buys a watch. He does not take the watch then and says he will take it later.

All these are contracts of sale. The transfer of ownership of goods becomes effective when the contract is made. For the transfer of ownership of goods, it is not essential that the price of goods be paid, or the goods be delivered to the buyer, at the time of making the contract.

Agreement to Sell: When the transfer of ownership of goods under the contract of sale is to take place at a future date or on the fulfillment of a condition, it is called an agreement to sell. At the agreed time, or when the agreed condition is fulfilled, when the transfer of ownership of goods takes place, the agreement to sell becomes a sale.

Example: Amit makes agreement with Rajan to buy his watch for Rs. 500 after 15 days. In this contract, it has been agreed that the transfer of ownership is to take place in future. The price of goods is to be paid, and the transfer of ownership is to be effective in 15 days time. Or Rajan might give his watch to Amit for approval or trial for 15 days and, if the latter likes it, he might pay the amount agreed to Rajan after that time. Both are examples of an agreement to sell and are not a sale.

Difference Between Sale and Agreement to Sell

'Sale' and 'agreement to sell' are generally taken to mean the same, but there are quite a few basic differences between the two—the transfer of ownership of goods is immediate in a 'sale' while it takes place at a later date in an 'agreement to sell'. There are also other differences between the two from the legal standpoint, which are discussed in what follows:

Basis of Difference	Sale	Agreement of Sell
1. Nature	The execution is complete in a sale, i.e. the contract is executed.	The execution is yet to take place, i.e. the contract is executory.
2. Transfer of Ownership	The ownership of godos is transferred to the buyer at the time the contract is made, i.e. the buyer becomes the owner when a sale is made.	The ownership of goods is not transferred at the time of contract. The transfer takes place at a later date or on the fulfillment of a condition.
3. Right of Usage	The buyer has the right to use the goods he buys, i.e. he becomes the sole owner of goods and can use them in any manner.	It is only a contract between the buyer and the seller, and does not give the buyer the right to use the goods till the ownership of good is transferred to the buyer.
4. Consequence of Breach	If the buyer defaults in making the payment for goods, the seller can sue the buyer for such payment.	If the buyers fails to take delivery of goods and pay for the same, the seller is entitled to sue the buyer for damages only—and not the cost of goods.
5. Risk of Loss	Unless there is a contract to the contrary, any loss or damage to the goods is the buyer's, even if he has not yet received the delivery of the goods.	Unless there is a contract to the contrary, any damage or loss to goods is the seller's.
6. Insolvency of Seller	If the seller is declared insolvent before the delivery of goods, the buyer can claim the goods from the official receiver of the seller because he (the buyer) is the legal owner of the goods.	The buyer has no right to claim the goods in the event of insolvency of the seller.
7. Insolvency of Buyer	The seller is required to deliver the goods to official receiver of the buyer in case of the latter's insolvency.	If the buyer is declared insolvent before making the payment for goods, the seller has the right to refuse to deliver the goods.
8. Default by Seller	If the seller defaults in delivering the goods to the buyer, the latter can not only claim damages from the seller but can also file a suit against a third party as the owner of goods.	The buyer can sue for damages only in case the seller defaults in delivering the goods because the owner of goods is the seller.

Contracts of Sale vs. Other Contracts

A contract of sale must essentially have all the basic elements listed in Section 4 of the Sale of Goods Act. In the absence of any such element, it is not deemed to be a contract of sale. The following types of contracts are deemed to be different from a contract of sale.

(1) Sale vs. Barter: When goods are exchanged for goods, it is termed to be a barter deal. A sale essentially implies reimbursement for goods sold in terms of money. The cost of goods in a contract of sale needs to be in money whereas, in a barter contract, goods are paid for in kind (in the form of other goods) and not in cash. In other words, a barter deal is not a sale. For example, if A exchanges his radio for B's transistor, it would be a barter deal. But, if A sells his radio to B for Rs. 500, it would be a sale. But if the consideration of transfer of ownership of movable property is partly in the form of money and partly in goods, it will deemed to be a contract of sale.

(2) Sale vs. Gift: In a contract of sale, the seller transfers the ownership of something to the buyer for a consideration in terms of money, i.e. a consideratio in money is essential in a sale; whereas, in the case of a gift, one person transfers the ownership of something to another without there being any consideration for such transfer. In the case of a gift, the transfer of ownership does not involve any expense on the part of the person receiving the gift, i.e. the receiver does not have to pay any price for acquiring the ownership of an object.

(3) Sale vs. Bailment: In a contract of sale, the buyer acquires the possession of goods from the seller in return for a consideration in money, and becomes the lawful owner of the goods. In a contract of bailment, on the other hand, one person (the bailor) hands over the possession of goods to another (the bailee) for a specific objective and, on the realisation of such objective, the bailee is bound to return such goods to the bailor. The ownership of goods in a bailment is not transferred and remains with the bailor, and the transfer is for a specific objective, at the completion of which the goods are returned to the owner. In contrast to this, in a contract of sale, the seller transfers the ownership of the goods to the buyer, who then has the right to use the goods in any manner.

(4) Sale vs. Pledge (or Mortgage): According to Section 58 of the Transfer of Property Act, a pledge is the transfer of movable property from one party to the other with the purpose of providing security for an existing loan or a loan to be given to the party making the pledge. As such, pledge is a security to the lender in the form of goods or valuables for a loan given to a party and does not transfer the ownership of the goods. A sale, on the other hand, implies the transfer of ownership of goods.

(5) Contract of Sale vs. Contract of Work and Labour: It is rather difficult to pinpoint the difference between a contract of sale and contracts of work and labour. The touchstone of distinction between the two is that when there is a transfer of goods to the buyer even though the seller has to do some work or labour to make such transfer, it is a contract of sale; but if the work or labour involved is excessively dominant, it is deemed to be a contract of work or labour.

Example: A dentist is required to transplant a new set of teeth for a person, and does not have to do much labour because he has artificial teeth that suit the patient. It will be deemed to be a contract of sale. On the other hand, if a printer has to print multiple documents on a printing press, it will be a contract of work or labour.

As a matter of fact, a contract of work or labour implies that a person has to use his skill and labour to modify or enhance some object that is given to him by the other party.

(i) In the case of **Lee vs. Griffin**, a dentist made a contract to make a false set of teeth for his patient. The court held it to be a contract of sale. In the case of **Marcel Furriers vs. Taper**, a contract to make a fur coat of a special design and specified colours of fur as per the instructions of a customer was held to be a contract of sale.

(ii) In the case of **Robinson vs. Greaves**, a artist made an agreement to make a painting for somebody. The court held it to be a contract of work and labour. To decide whether a contract is of sale or work and labour, the core issue is to determine what constitutes the essence of the contract—is it goods or is it work? All works of art—may they be the work of a goldsmith, a sculptor or an artist—do not involve any goods and, as such, are contracts of work and labour.

(6) Sale vs. Hire-Purchase: A hire purchase agreement is one in which the price of goods is agreed to be paid in instalments, and the buyer pays a part of the price to the seller at the time of making the contract, takes possession of the goods and promises to pay the rest in agreed instalments. The seller, on his part, promises to transfer the ownership of the goods to the buyer on the completion of the payment. The instalments, till such time that they all not paid, are deemed to be the hire charges for the goods. If the buyer defaults in the payment of instalments, the seller can take back the goods and is not bound to return the amount of instalments already paid to him. This is so because the ownership of goods is the seller's. The buyer is entitled to use the goods so long as he keeps on paying the instalments, and becomes the owner when he has paid all the instalments. But before such payment is made, the transfer of ownership from the seller to the buyer does not take place.

Whether a contract is one of sale or hire-purchase can be ascertained by a simple method. When the seller, in case of a default on the part of the buyer, can end the contract and is not bound to return the amount of money received in instalments, the contract is of hire-purchase. The buyer does not have the right to terminate the contract and is liable to pay the instalments due from him. If no instalments are to be paid, and it is on outright purchase of goods by the buyer with immediate transfer of ownership to him, then it is a contract of sale. The difference between the two are as follows.

Basis of Difference	Hire Purchase	Sale
1. Transfer of Ownership	The ownership of goods is not transferred to the buyer till such time that he pays the final instalment.	The ownership of goods is transferred to the buyer immediately on the completion of sale.
2. Right of the Seller	The seller has the right to take back the goods if the buyer defaults in the payment of an instalment.	The sale is complete and the seller has no right on the goods sold.
3. Position of the Parties	The buyer is the bailee of the goods till he has paid the final instalment. The ownership till then is the seller's.	The buyer is the owner of goods after sale.
4. Pledge or Sale by the Buyer	If the buyer fails to pay an instalment, he cannot pledge or sell the goods to pay the remaining instalments.	The buyer has the right to pledge or sell the goods.
5. Forfeiture of Instalments	If the buyer fails to pay an instalment, all instalments paid by him are forfeited and the goods are taken back by the seller.	The question, of forfeiture does not arise.

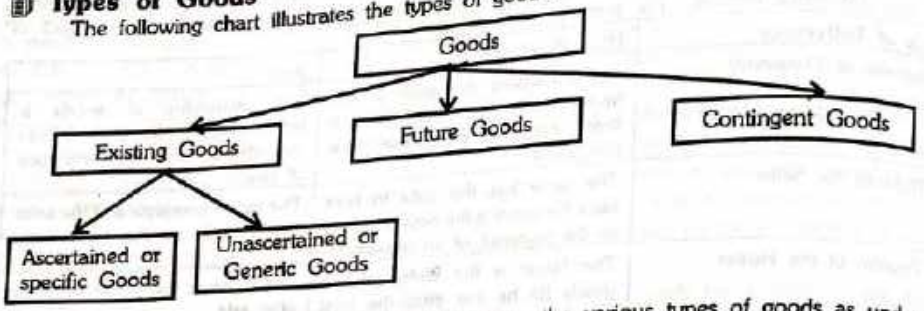
Subject-matter of Sale Contract

The subject matter of the contract of sale is essentially the goods for which the contract is made between the buyer and the seller. The transfer of ownership of goods is implied in the contract. According to Section 2(7) of the Sale of Goods Act, 'goods' means every kind of movable property other than actionable claims and money, and includes stocks and shares growing crops, grass and other such item attached to, or forming a part of the land, which are agreed to be separated before sale, or under the contract of sale. It is clear from the definition that all movable property can be classified as goods—except for actionable claims and money which are not included in the definition. An actionable claim is something which a person cannot use or enjoy, but which can be recovered by him by means of a suit or an action in the court of law. A debt due to a person from another is an actionable claim. It cannot be sold as 'goods' although it can be assigned. Money also is not deemed to be 'goods', but the reference to money here is the prevalent legal tender of a country. Ancient and rare coins can be termed as 'goods'. Goodwill, trade marks, patents or copyrights are all considered to be goods.

Only movable property can be called 'goods'. Immovable property does not come under the preview of this act, stock and shares are deemed to be goods. The English Law differs in this. According to English Law, stocks and shares are not classified as goods. Growing crops, grass and other such items can be called goods if the seller has separated them from the land or has agreed to do so (to sell them) in future.

Types of Goods

The following chart illustrates the types of goods.



Section 6 of the Sale of Goods Acts describes the various types of goods as under.

(1) Existing goods: Existing goods are the goods that are owned by or possessed by the seller at the time of making the contract, and the seller has the right to sell the goods. If the seller is the owner of the goods, he has the lawful right to sell the goods. If the seller is an agent, then he has the authority of the principal to sell the goods. Existing goods may further be classified as under:

(a) Ascertained goods: Existing goods that have been specified and identified by both parties to a contract of sale are called ascertained goods. For example, A has a stock of 100 bags of sugar and makes a contract to sell 10 bags to B. With the consent of B, he seperates 10 bags of sugar. The goods, in this case, are deemed to be ascertained existing goods.

(b) Unascertained goods: Such existing goods that have not been specifically identified by the parties to be the subject matter of a contract of sale are called unascertained goods. Such goods are defined and sold by description or sample. For example, in the above example, if the 10 bags of sugar are not identified by A and B—i.e. it is not made specific which 10 bags are contracted to be sold—the goods will be classified as unascertained existing goods.

Another example will clarify the distinction between ascertained and unascertained goods. Suppose a has 20 cows, and he promises to sell one cow to B, and identifies the particular cow to B at the time of making the contract. The contract, in this case, is for the sale of a specific cow and is for ascertained goods. If, on the other hand, A merely promises to sell one of the cows to B, the contract would be for unascertained goods.

(2) Future goods: Future goods refer to such goods that are not in the possession of the seller at the time of the contract, i.e. the seller has to procure the goods from somewhere or manufacture them to be delivered to the seller at a later date. For example, A makes a contract with B to sell some electronic equipment which he will receive from Japan after two weeks. The contract, in such case, will be for future goods.

(3) Contingent goods: Contingent goods are a type of future goods, the acquisition of which by the seller is dependent on a contingency which may or may not happen. For example, if the seller promises to the buyer that he will sell him the goods on a certain date if he receives the goods from the manufacturer before that date, the agreement is conditional and can only be practical on the happening or non-happening of an event. The goods, in this case, are called 'contingent goods' because the sale of goods depends on the seller receiving the goods by a certain date. A contract to sell such goods is not a sale; it is an agreement to sell.

Destruction of Goods

When goods that are the subject-matter of the contract of sale are destroyed, at or before the time of the contract, the effects of such destruction are dealt with in Sections 7 and 8 of the Sale of Goods Act, and are briefly discussed in what follows.

(1) Specific goods perishing before contract: According to Section 7, when specific goods are the subject-matter of the contract of sale and, without the knowledge of the seller, the goods are destroyed at or before the time of contract, or are so deteriorated that they do not match their description in the contract, the contract becomes void. For example, A agrees to buy a specific horse from B. It later comes to be known that the horse had died and the seller had no knowledge of it at the time of contract. The contract is void in this case.

As is clear from what has been said above, the contract is void not only in the case of destruction of goods, it is also void in case the goods have deteriorated to the extent that they no longer match their description in the contract. For example, wet or damp cement or salt, though not destroyed, loses its saleability. For this reason, such goods cease to exist in the commercial sense. Besides, if the goods are stolen or acquired by the state, or cease to exist for any reason beyond the control of the seller, the effect is the same as in the case of destruction of goods. It is important to note, however, that even if the goods are damaged but still conform to their description in the contract, the contract is not void . This rule applies only to ascertained goods, and not to unascertained goods.

(2) Destruction of part of goods sold: When the contract of sale is for ascertained goods, and a part of such goods has been destroyed, the performance of the contract will depend upon:

(a) whether the contract is divisible, or

(b) whether the contract is indivisible.

If the contract is divisible, it will not be void. On the other hand, if the contract is indivisible, it becomes void.

In the case of **Barrow Lane and Bailard Ltd. vs. Phillips and Co.**, one party contracted to buy a container containing 700 bags of ground nuts, and the seller could deliver only 591 bags because the remaining were stolen. The court held the contract to be void because the buyer had committed to buy a container, which was not divisible.

(3) Goods perishing before sale but after agreement to sell: According to Section 8, when an agreement is made for the sale of specific goods and if, after the agreement is made but before the transfer of goods, and without any default on the part of the parties to the contract, the goods are destroyed or damaged to the extent that they do not match the description in the contract, the contract becomes void. The case of **Ephrick vs. Barense** is an illustration. In this case, the seller gave a horse on trial for eight days, the price agreed being 40£. It was also agreed that the bargain would be complete if the buyer found the horse suitable. The horse died within eight days without the fault of either party. The court held that the intended buyer was not liable to pay for the horse. Likewise, in the case of **Howell vs. Coupland,** a contract was made to sell 200 tons of potatoes planted in a particular field. The crop was destroyed without any fault on the part of the seller and the delivery became impossible. The court held the seller not to be liable for delivery.

18(III)

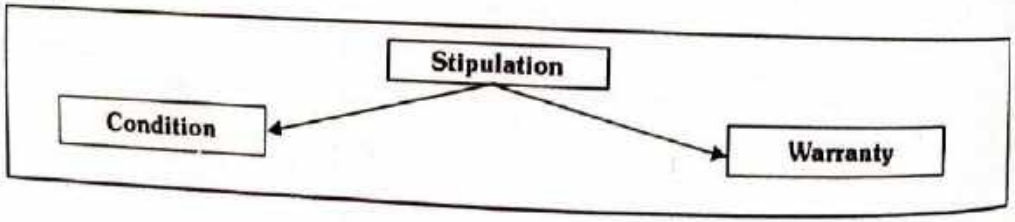
CONDITIONS AND WARRANTIES

Introduction

As a general rule, the doctrine of *caveat emptor* is applicable in the sale of goods, but each contract of sale is made under some stipulations. In such case, the doctrine of *caveat emptor* does not apply and the parties to the contract are bound by the conditions stipulated in the contract.

At times, the seller gives his estimation of the goods he is selling. His object in doing that is: (a) to give his opinion about the goods, and (b) to induce the buyer to purchase the goods. If the seller only gives his estimation of the goods, the buyer should, in his own interest, satisfy himself that the goods conform to what he wants to buy. But if the seller induces the buyer to purchase the goods, the buyer can set his conditions for the purchase. Such conditions, in a contract of sale, are the stipulations which lawfully bind the seller to whatever claims he has made about the goods. A mere commendation by the seller of the goods does not amount to a stipulation, and does not give any right of action to the buyer if the goods do not meet the seller's estimation.

Thus, any such claim that the seller makes with regard to the goods or any aspect of the contract of sale that reveals something which is not known to the buyer, and that induces the buyer to make the contract of sale is a stipulation that is binding on the seller. Such liability on the part of the seller becomes a part of the contract because the buyer makes the contract on the basis of such revealation, and the seller cannot refuse to perform his promise made in the contract. According to Section 12(1) of the Sale of Goods Act, a stipulation can be: (1) a condition or (2) a warranty.



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

(2) Warranty: According to Section 12(3), "*A warranty is a stipulation collateral to the main purpose of the contract, the breach of which gives rise to a claim for damages but not a right to reject the goods and treat the contract as repudiated.*" It is clear from what has been said that warranty is not an essential object of the contract; it only helps expedite the execution of the contract. If the warranty is violated, the contract does not terminate—only the aggrieved party can file a suit for damages. If a condition of the contract is violated, the contract terminates. A warranty, on the other hand, does not terminate the contract if it is violated because the buyer is not solely dependent on it in a contract of sale—he only recognises it as being related to the contract and being helpful in its execution.

For example, Ram goes to a horse-trader and says that he wants to buy a horse that can run at 40 km an hour. The trader gives him a horse and says that the horse will run as per Ram's requirement. Here, the horse being fast enough to run 40 km/hour is the essential condition of the contract. If the horse is not that fast a runner as Ram had stipulated and does only 20 km in an hour, Ram can not only file a suit for damages against the trader but also repudiate the contract.

Consider another example. Hari goes to a horse-trader and says that he wants to buy a good horse. The trader offers him a horse and says that it can run at 40 km an hour. Hari buys the horse. Later, he comes to know that the horse can only run 30 km in a hour. Here the commitment of the trader is only a warranty and is not an essential condition of the contract. Non-fulfillment of a warranty only entitles the buyer to receive damages from the seller, not to repudiate the contract.

Touchstone of Condition and Warranty

According to Section 12(4) of the Sale of Goods Act, whether a stipulation in the contract of sale is a condition or a warranty depends upon the structure of the contract. A stipulation that is deemed to be a warranty could, in fact, be a condition. This implies that the court has the right to enforce the implied condition or warranty in a contract on the ground that it infers from the circumstances of the case, and the intention of parties when they added such stipulation in the contract. For example, A sells a car to B and says that it will give him a mileage of 30 km to a litre. After buying the car, A realises that it does only 20 km to a litre. It is a case of breach of warranty on the part of A, and B is entitled to receive damages from A but is not entitled to recover the cost of the car that he has paid to A and return the car. In contrast to this, A says that the car will give him 30 km to a litre, and B specifies a condition that, if it does not do that, he is not buying it. Here A's statement is a condition on which he is prepared to buy the car, and the contract is dependent on this condition being fulfilled. If, after buying the car, A finds that it does not give the promised mileage, and does only 20 km to a litre, he has the right to return the car to B and get the cost he has paid for it. In addition, A has the right to claim damages from B.

In one case, a customer asked a dealer to offer him a car that he could use for long-distance travelling in hilly areas. The dealer proposed that he buy a 'Bugati' which he promised was a sturdy car. The customer accordingly bought the car, but found that it was totally not suitable for his requirement, and filed a suit against the dealer. He returned the car and wanted his money back. The court gave a verdict in his favour and held the suitability of the car as a condition to the contract.

Distinction Between Condition and Warranty

The following are the basic differences between a condition and a warranty.

Basis of Difference	Condition	Warranty
1. Nature	A condition is the main object of the contract.	A warranty is collateral to the object of the contract.
2. Remedies	If a condition is breached, the aggrieved party has the right to repudiate the contract, and is entitled to damages from the defaulting party.	A breach of warranty does not entitle the aggrieved party to repudiate the contract, it only entitles it to damages from the other party.
3. Legal Effect	The contract ceases to be legal on the breach of a condition.	A breach of warranty does not have any legal effect on the contract.
4. Treatment	The contract ceases to exist on the breach of a condition and the aggrieved party can only be compensated by damages it receives from the other party.	A breach of warranty is not deemed to be a breach of condition, and the aggrieved party cannot repudiate the contract on such ground.

When Does a Condition Become a Warranty?

According to Section 13(1) of the Sale of Godos Act, if the contract of sale has any condition that needs to be fulfilled by the seller, the buyer may, if he so desires, waive such condition, or treat the breach of condition as a breach of warranty and save the contract from becoming void. A breach of condition may be treated as a breach of warranty in the following situations:

(1) Waiver of condition: In a contract of sale, if the seller fails to fulfill a condition, and the buyer, of his own will, decides to waive such condition, i.e. does not insist on its fulfillment on the part of the seller, then the seller is absolved of his liability to fulfill such condition. If the buyer has waived a condition and accepted the breach of condition as a breach of warranty, he cannot later hold the seller responsible for non-performance of such condition. He can only claim damages for non-performance.

Example: Ram makes a contract to deliver 500 bales of cotton to Hari on 15 January, and the latter considers the delivery by that date to be a condition of the contract and says that he will not accept the goods after that date. But the goods are delivered to Hari on 18 January, and he accepts the delivery. If Ram had committed a breach of condition by not delivering the goods on the appointed day, Hari had the right to repudiate the contract. By accepting the goods on 18 January, he has accepted it as a breach of warranty and, as such, can only sue Ram for damages.

(2) Compulsory treatment of breach of condition as breach of warranty: According to Section 13(2), when a contract of sale is not divisible, and the buyer has accepted the delivery of a part of the goods, or when the contract relates to goods that have already been delivered to the buyer, unless there is an express or implied contract to the contrary, the breach of condition is deemed to be breach of warranty. The contract can only be repudiated when there is an implied or explicit provision in the contract for doing so.

Stipulation as to Time and Payment

According to Section 11 of the Sale of Goods Act, unless there is an understanding between the parties to the contrary, the time of payment is not deemed to be the core issue or the essence of a sale contract. Whether or not the time of payment is of essence depends upon the conditions laid down in the contract.

Implied Conditions and Warranties

The conditions or warranties of a contract of sale can be express or implied. Express conditions or warranties are the ones that have been specified by the parties at the time of making the contract. Implied conditions and warranties are the ones that are applicable in contracts that do not have specific warranties or conditions. In the case of implied conditions or warranties, the purpose of the law is to infer the intention of the parties when making the contract because, in the absence of a contract to the contrary, such warranties and conditions are deemed to be a part of the contract.

Implied Conditions

A contract of sale has the following implied conditions.

(1) Condition as to the title of goods: According to Section 14(a), in every contract of sale, unless the circumstances indicate otherwise, the implied conditions are that the seller has the right to sell the goods and that the ownership of goods will be transferred to the buyer at the time of sale. The seller must have the right to sell the goods, but it is not essential that the seller is the owner of such goods because an agent also has the right to sell goods on behalf of his principal. If the buyer comes to know, after a sale has been made, that the seller did not have the right to sell the goods, the law entitles him to receive back the price that he has paid for such goods. In the case of **Rowland vs. Divall**, A stole a car and sold it to B. After some days, B had to return the car to its actual owner, and he filed a suit against A. The court held A liable to pay back the money he had received from B. When a shopkeeper displays the goods for sale in his show windows, the implied condition is that he has a right to sell such goods.

(2) Sale by description: Where goods are sold by description, the implied condition is that the goods will conform to their description given by the seller, i.e. the goods must be what they are described to be. Section 15 elaborates this point and lays down that, if the goods are sold by description and sample, they must conform to the description and the sample both. If the goods conform to the sample and not to their description, the buyer has the right to refuse to accept such goods. In the case of **Bowes vs. Shand**, the learned judge commented: *"If you make a contract to sell peas, you cannot pass on beans and expect the other party to accept them."* If the goods, at the time of delivery, are in any way different than what has been

described, they cannot be considered as the subject-matter of the contract, and the buyer is not bound to accept the delivery of such goods. The case of **Warly vs. Whipp** is an important illustration. In this case, A promised to sell a machine to B which B had not seen. A had said that the machine was only a year old and had been sparesly used. The machine was found not to match its description after delivery. It was too old, and the buyer returned it. It was held that since the machine did not match its description, A had no right to receive a price for it from B. Likewise, in the case of **Nichol vs. Godts,** the oil delivered to the buyer matched the sample and not the description, and the court held that the buyer was entitled to refuse to accept it.

(3) Quality and fitness: According to Section 16(1), ordinarily there is no implied condition as to the quality and fitness for a particular purpose of the goods supplied under a contract of sale. Ordinarily the rule *caveat emptor* or *the buyer beware* is applicable to a sale, which implies that the buyer is expected to investigate the quality or the fitness of the goods he is buying. If the goods do not meet the quality expected by the buyer, he cannot return the goods. But if the buyer, expressly or by implication, makes known to the seller the specific purpose for which he requires the goods so as to show that he relies on the skill and judgement of the seller, and the goods are of the description the seller is dealing with in the course of his business—whether as a manufacturer or otherwise—there is an implied condition in such sale, and the doctrine of *the buyer beware* will not apply. If the goods are required for a specific purpose, and the buyer has indicated this to the seller at the time of making the contract, he can refuse to accept the goods if they do not conform to his specifications, But for this implied condition to be valid, the object for which the goods are intended must be, expressly or by implication, made known to the seller.

In the case of **Priest vs. Last**, a person bought a hot-water bottle from a chemist and when he tried to use it, the bottle burst and his wife received burn injuries from the boiling water. The court held the chemist liable for a damages because the implied condition of the buyer was that the bottle should withstand boiling water to be used for the purpose for which it was bought. In another case of **Bombay Burma Trading Corporation vs. Aaga Mohammed,** the buyer bought some timber to be turned into railway sleepers, but the timber turned out to be unfit for such use, and the court held that buyer had the right to return it.

However, when the goods are purchased under a patent or a tradename, there is no implied condition as to their fitness for the purpose for which they are purchased. For example, A asks B to give him 'Primes' stove for cooking, and B gives it to him. If the stove does not turn out to be fit for cooking, B cannot be held responsible for its non-performance.

(4) Condition as to merchantability of goods: Even if the goods purchased are as per their description and sample, according to Section 16(2) of the Act, the goods must be merchantilable. In this connection, the case of **Peer Mohammad vs. Doloogam** is an important illustration in which cement solidified into a rock (because it was wet) was declared to be non-merchantilable. But, if the buyer has examined the goods, and if such examination does not reveal any defect in the goods, there is no implied condition. If, however, the buyer's examination of goods does not reveal any defect, and the buyer accepts the goods, but finds that the goods are defective when they are put to work, it is deemed to be a breach of the merchantilable quality condition.

(5) Condition as to sale by sample: According to Section 17, a sale by sample has the following implied conditions:

(a) The entire lot of goods will correspond with the sample.

(b) The buyer will have a reasonable opportunity to compare the goods with the sample.

(c) There will be no latent defects in the goods which are not apparent or visible but which render the goods to be non-merchantilable. This implied condition is applicable only to non-apparent defects which are not visible to the naked eye. The seller cannot be held liable for such defects which can be spotted on an inspection of the goods. The case of **Modi vs. Gregson** is an example. In this case, there was a hidden or latent defect in the cloth supplied by the seller which made it unuseable for coats. The court held the seller guilty because, even after a thorough examination of the sample, it was not possible to pinpoint the defect in the material.

(6) Condition as to usage of trade: According to Section (16)3, an implied condition can relate to appropriate customs or usages of the trade. If an order for goods is placed with the manufacturer, it is an implied condition that the goods supplied must be manufactured by the seller and not procured from others.

(7) Condition as to wholesomeness: When the goods are eatables, an implied condition in their purchase stipulates that such goods are wholesome and are not injurious to the health of the consumer.

Example: A bought a bottle of milk. The milk had typhoid bacteria and A's wife fell sick and died. It was held that the milk was not wholesome and breached the implied condition of wholesomeness, and A was entitled to damages from the bottling company.

Implied Warranties

The following are the implied warranties in a contract of sale:

(1) Quiet and peaceful possession: According to Section 14(6), the contract of sale has an implied warranty that the buyer has the right to quiet and peaceful possession of the goods, which implies that, when the buyer has received the possession of goods, he has the right to use and enjoy them. If the right of the buyer of possession and enjoyment is in any way disturbed, he is entitled to file a suit against the seller for such disturbance and the latter is liable for damages to the buyer.

(2) Freedom from charge or encumberances: Another important implied warranty under Section 14(c) is that, in the absence of a contract to the contrary, the goods sold to the buyer must be free from encumberances. If it comes to light later that the goods are in pledge or mortgaged, or a third party already has the right to the goods, the seller is liable for damages to the buyer.

(3) Warranty as to specific care: If the goods are easily destroyable (e.g. inflammable), or dangerous to handle, it becomes the duty of the seller to forewarn the buyer of the danger in handling such goods so that the buyer takes specific care in their usage. That is the reason why some medicines come with labels warning the consumer to keep them in a cool dry place, or to use them only according to the advice of a registered medical practitioner.

In the case of **Clark vs. Army and Navy Cooperative Society,** the buyer purchased some insect killer powder. The seller, who was aware of the fact, did not warn the buyer that it was dangerous if the cane was not opened carefully and the powder was spilled on the body

18(IV)

TRANSFER OF PROPERTY OR OWNERSHIP

Introduction

A sale contract transfers the ownership of goods from one person to another in exchange for an agreed price. Without the transfer of ownership of goods, there cannot be a contract of sale. The transfer of ownership of goods from the seller to the buyer is the core of a contract of sale and, as such, it becomes important to know as to when the property in goods passes from the seller to the buyer. The issue assumes added importance because it is directly connected to the rights and obligations of the parties to the contract. The following sections discuss the issues related with the transfer of ownership of goods.

What is Transfer of Property?

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

It is important here to understand the difference between the transfer of ownership and the transfer of possession of goods. A person may be the owner of goods even if the goods are not in his possession. If a person who has the right of ownership of goods sells the goods (even if they are not in his possession), the right of ownership is transferred from the seller to the buyer of goods.

For example, Ram gives his watch to Shyam on 'approval or return' basis, and allows him to keep it for ten days, and buy it if he likes it; otherwise return the watch. Here Ram has only given the possession of the watch to Shyam; he has not transferred its ownership. If after ten days, Shyam wants to buy the watch and pays its price to Ram, the ownership will be transferred and Shyam will become the owner.

The point to be noted here is that a transfer of possession need not necessarily mean a transfer of ownership just as a transfer of owenrship may always not be in terms of a transfer of possession. Transfer of possession and transfer of ownership can occur at different times and may not always be simultaneous. But transfer of ownership from the seller to the buyer is important in a contract of sale for the following reasons:

(1) Risk follows ownership: The fundamental principle of law is that risk and ownership are co-existent—one follows the other even if there is no transfer of possession. If the goods are damaged or destroyed by any reason, the loss is the owner's even if he is not in possession of goods at that time. The transfer of ownership in a sale deal is vital because it defines the rights and obligations of the seller and the buyer. The rule of law is that risk *primo facie* passes with property, i.e. risk follows the ownership whether or not a transfer of possession of goods has taken place.

According to Section 26, unless there is an agreement to the contrary, the risk of damage of the goods is the seller's till such time as the ownership of goods is transferred to the buyer; but when the ownership of goods is transferred to the buyer, the risk of any damage to goods passes on to the buyer even if the goods have not been delivered to the buyer. If the goods are in the possession of the seller, but the transfer of ownership has been made to the buyer, the seller ceases to have any right on the goods and all such rights are transferred to the buyer. Even if a creditor of the seller has obtained a decree from the court in respect of some loan due to him, he cannot attach the goods that have their ownership transferred to the buyer. If the seller becomes insolvent before making the delivery of such goods to the buyer, the seller's Official Receiver also cannot retain the goods that have been sold because the ownership of goods has already been transferred to the buyer. In case of a delay in the delivery of goods because of a default on the part of the buyer or the seller, the goods are at the risk of the defaultor.

(2) Action against third parties: If the goods are destroyed or damaged by any action of a third party, only the owner of goods can initiate any proceedings against the third party.

(3) Insolvency of the seller or the buyer: In case of insolvency of the seller or the buyer, it becomes important to know if the Official Receiver can take over the goods. This depends on who becomes insolvent and who is the owner of the goods—the seller or the buyer.

The transfer of ownership from the seller to the buyer can be discussed under the following headings:

(a) Time when the property changes hands

(b) Reservation of the right of disposal

(a) Time when the property changes hands: When does the transfer of ownership pass from the seller to the buyer is an important issue in the contract of sale. Normally, it is agreed between the parties when such transfer will take place; but, in the absence of such agreement, the Act stipulates when the transfer of ownership will deemed to be affected in a sale contract. As per the provisions of the Act, the transfer of ownership depends on the type of goods sold, and each type has different rules governing such transfer. The types of goods are:

(i) Ascertained or specific goods

(ii) Unascertained or generic goods

(iii) Goods sent on approval, or sale or return.

(i) Passing of property in ascertained goods: Ascertained or specific goods refer to such goods that have been identified or specified by the parties at the time of making the contract, and the seller does not have to make any modification or addition to the goods. In this case, both parties, i.e. the seller and the buyer, know specifically what are the goods and

what is the quantity for which the transfer of ownership is to take place. For example, A says to B that he wants to buy the blue jar that is displayed in the show window of B's shop. In this case, both parties have clearly identified the 'goods' that is to be sold. Ascertained goods are available with the seller at the time of the contract.

According to Section 19, if the contract of sale is about ascertained or specific goods, and the parties to the contract have agreed on the terms of the sale, in the absence of a contract to the contrary, the transfer of ownership will be affected according to the following rules:

–When the goods are in a deliverable state: Goods are deemed to be in a deliverable state when the buyer agrees to accept the delivery of goods and the goods are in a condition that they can be delivered. According to Section 20 of the Sale of Goods Act, when the contract is about the sale of ascertained goods which are in a 'deliverable state', the ownership of goods is transferred to the buyer when the contract is made, if the contract is unconditional. Whether the payment of goods or the delivery thereof, or both, are postponed to a later date does not affect the transfer of ownership. For example, Parmod proposes to buy a machine from Prashant for Rs. 10,000, and the latter accepts the proposal. The machine is in perfect working condition and Prashant has nothing more to do on the machine to make it deliverable. The ownership of the machine will be deemed to be transferred at the date and time when Prashant accepts Parmod's proposal, even if it is agreed that the price will be paid later or the delivery will be made later. Consider another example. A offers to buy B's horse for Rs. 2,000, and B accepts the offer, but the horse dies before it is delivered from B to A. The loss in this case will be A's, and he will have to pay its price to B because the ownership of the horse was legally transferred to B when the contract was made.

–When specific goods need to be put in a deliverable condition: According to Section 21, when the contract of sale is for such ascertained goods which are not in a deliverable state, and the seller is required to do something to bring the goods into a deliverable state, the transfer of ownership is not affected till such time as the necessary work has been done on the goods, and the buyer has been informed about it. For example, A buys a gold ring from B which will be delivered to A only after it has been polished. The ownership of the ring will only be deemed to be transferred to A when it has been polished and B has informed A that the ring is in a deliberable state.

In the case of **Underwood Ltd vs. Burgh Castle Brick and Cement Syndicate,** a railway engine was bought on the condition that it will be placed on the railway track in London free of cost. It was held that the ownership of the engine was transferrable only when was safely put on the track as agreed in the contract.

—When the seller has to do something for ascertaining the price: According to tion 22, where the sale contract is about such ascertained goods which are in a deliverable but the seller needs to ascertain their price—by measurement, weightage or doing any other on the goods—the ownership cannot be transferred till such time that the seller has ascertained price of goods and communicated the same to the buyer. If anything remains to be done the goods, and till such thing has been done, the ownership of, and the risk of damage e goods remains the seller's. For example, A makes a contract to sell 200 books to B. ooks are stored in racks and A has to select the titles and separate them before they

can be delivered. If there is a fire and the books are destroyed, the loss will be A's because the ownership of the books has not yet been transferred. In the **Zagury vs. Furuele,** 289 bales of goat-skin were sold, and each bale was supposed to have 60 skins. The seller was required to count the skins, but before he could do that, the skins were destroyed by fire, and the seller had to bear the loss.

Even if the buyer has to do something for his satisfaction that the goods are in order—like measuring, weighing or testing the goods—the transfer of ownership is affected when the contract is made. But if the contract specifies and the practice of trade dictates that the sale is not complete till the buyer has satisfied himself about the weightage, quality and testing of the goods, the transfer of ownership is affected only when the buyer has satisfied himself.

(ii) Passing of property in unascertained goods: According to Section 18, if the contract is for the sale of unascertained goods, the transfer of ownership is not affected till the goods have been ascertained. Unascertained goods refer to such goods that have not been identified when the contract is made; only a description of the goods has been given in the contract. For example, A contracts to buy a sheet of glass of a particular size and thickness from B's godown. The ownership of the sheet is not transferrable to A until he selects or identifies the sheet that he wants to buy. The ownership of unascertained goods cannot be transferred till such time that the goods are ascertained. In the words of *Lord Loreburn, "A contract to sell unascertained goods is not a complete sale, but a promise to sell."* The rules governing the transfer of ownership of unascertained goods are as follows:

—Goods must be ascertained: According to Section 18, when a contract is made for the sale of unascertained goods, the ownership is not transferrable to the buyer till such time that they are ascertained. Ascertaining here implies that, if the goods have not been manufactured, they need to be manufactured; and if they have not been procured, they need to be procured.

—Goods must be appropriated: By appropriation is meant the seperation of goods to be sold from other goods. According to Section 23(1), "When there is a contract for the sale of unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in goods thereupon passes to the buyer." Such assent may be expressed or implied and may be given either before or after the appropriation is made.

In the case of **Laurie and Marwood vs. Dudin,** a contract was made to purchase a jar of wine out of many jars in a cellar. The court held that the ownership of the jar could only be transferred to the buyer when the jar was selected and appropriated.

—Goods must be delivered to the carrier: According to Section 23(2), "Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract."

Som seller may deliver the goods to the buyer but may not relinquish his right of owne ds. In such c ownership can only be transferred when the seller foregoes

It is important to note here that mere delivery of goods does not transfer the ownership of goods to the buyer. The seller may reserve his right of disposal with the intention that he receives his payment before he transfers his ownership to the goods. In such case, the Bill of Lading or the Railway Receipt is in the name of the seller or his agent so that ownership of the seller is secured and is not transferred to the buyer.

(iii) Passing of property in case of goods sent on approval, or on sale or return: According to Section 24, when the goods are delivered to the buyer for his approval on sale or return basis, or on some other normal condition in practice, the transfer of ownership to the buyer can be affected as under:

—When the buyer expressly communicates to the seller his acceptance of the goods or does something to indicate his acceptance, the transfer of ownership is completed.

—When the buyer does not indicate his acceptance of goods to the seller but retains the goods without communicating his disapproval to the seller or, if a time limit has been fixed for approval, at the expiry of the time, or within a reasonable time if no limit has been fixed, the ownership is deemed to be transferred to the buyer. What is reasonable time depends upon the circumstances of the case.

Example: Ram delivers his car to Shyam on 1 January on the condition that, if he likes the car, he should communicate his approval to Ram by 10 January or return the car. If Shyam does not communicate his approval even after that date, and does not return the car, his approval is implied and Ram is entitled to receive the payment for the car.

In the case of **Kirkham vs. Attenborough,** it was held that if the buyer pledges the goods delivered for his approval to a third party, such act would be deemed to be his acceptance of goods, and the seller will not be entitled to claim the goods from the pledgee.

(b) Reservation of the right of disposal: The Latin for 'the right of disposal' is *Jus disponendi*. When the goods are sold to a buyer who is far away and the goods are despatched to the buyer by public transport, in order to ensure that he receives the payment for the goods, the seller reserves the right of disposal.

Normally, if the goods are delivered to the carrier and the Bill of Lading or the Railway Receipt is taken in the name of the seller or his agent, it is presumed that the seller has reserved the right of disposal, and any damage to the goods in transit is borne by the seller. Section 25(1) lays down that, when a contract of sale is made for specific goods and the goods are delivered after the contract is made, under the terms of the contract of delivery, the seller is entitled to reserve the right of disposal till such time as such terms are met. In such case, even if the seller has despatched the goods to the buyer, he retains the right of ownership of goods till the conditions of the contract are satisfied. When the goods are delivered to shipping company or the railways, the seller sends the Bill of Lading or the Railway Receipt along with other documetns to the buyer through his agent or bank with instructions that these be delivered to the buyer only when he has made the payment for the goods. In this way, the seller reserves the right of disposal of goods.

Transfer of Title of Goods

The objective of transfer of the title of goods is the transfer of the right of ownership of goods and not merely the transfer of the possession. This raises the question as to who is entitled to transfer the title of goods.

The general rule is that only the owner of goods can sell the goods and transfer his title to the goods to the buyer. But there are situations when the goods are not sold by the owner of goods—like an agent sells goods on behalf of his principal, or a person who has stolen some goods that do not belong to him sells the goods. Another situation can be when an agent exceeds the authority of the principal in selling some goods. In case the goods are sold by an agent who is not authorised to sell them, or by a person who has no title to the goods, the question that arises is which party should bear the loss in such case. Should the owner of the goods lose his property for ever, or should an unsuspecting buyer who has bought the goods in good faith be made to suffer or loss. In such circumstances if the seller (who is not the owner of goods) has the capacity to pay for the goods, there is not much of a problem because the owner of goods can sue such person for unlawful sale of goods and claim damages. But, as often is the case, when the seller, who does not have the right to sell and does not have the capacity to make good the loss of the owner of goods, sells the goods, it becomes a difficult situation. The law has made some provisions for such situations.

The next question that arises is whether or not a person who is not the owner of goods, or who has no right to sell the goods, can transfer the ownership of goods to the buyer? The answer is simple—what we do not have, we cannot give—which means that the seller can only transfer the ownership of goods if he has such ownership in the first place.

According to Section 27, the general rule is that no one can give a better title to the buyer than the owner of goods. If the title of the seller of goods is clear, the title passed on to the buyer would be the same. On the other hand, if the title of the seller is defective or limited, the buyer's title would be the same, and he will have no right to the goods even if he has acted in good faith and paid the price of such goods. Take an example. Satish steals some goods and sells the same to Gopal. Since Satish is not the owner of goods, Gopal too would not be an owner, even if he has bought the goods in good faith. This general rule is based on the Latin doctrine *'neuro dat quad non habet'*, which means that 'no one can give or transfer what he himself does not possess". The law can, in other words, be expressed as "the buyer obtains no better title to the goods than the seller." Thus, if the seller has a good title to the goods, the buyer would also have a good title. The verdict in the case of **Cundy vs. Lindsay** is an important illustration, in which Blancurn who has acquired some goods under the name of Blancreen and Co was denied the right to sell the goods because his title to the goods was defective. In this way, the law protects the interests of the genuine owner of goods and harms the interest of innocent buyers, but the law is necessary for the interests of society and security of its property.

Exceptions

According to Section 27, the general rule that governs the transfer of the title to goods is that the buyer acquires no better title to goods than the seller had but, in the following situations, if a person, in good faith and by paying a reasonable price, buys goods from somebody who is not the owner of the goods, he has a good title to the goods as a buyer.

(1) Title by estoppel: If the owner of goods, by his actions, conduct or behaviour convinces the buyer that the seller is the owner of goods or has the authority of the owner to sell the goods, and induces the buyer to purchase the goods, he cannot later claim that the

seller had no right to sell the goods. For example, B sells A's bicycle to C. A is present when the sale is made, but he makes no comment, nor does he say that the bicycle belongs to him. Here, A's conduct convinces B that he is the owner of the bicycle. In such case, A, because of his conduct, cannot later say that B had no right to sell the bicycle, and B will have a good title to it.

(2) Sale by merchantile agent: When a merchantile agent has the possession of the goods or the documents of title to the goods with the consent of the owner of goods, and sells the goods in the ordinary course of business, a sale made by the merchantile agent is deemed to be as good as made by the owner of goods who has a good title to the goods. But, in such circumstances, the buyer must have acted in good faith, and must not have the knowledge that the seller has no authority to sell the goods.

In this connection, the case of **Folkes vs. King** can be cited as an example. In the case, A gave his car to B, who was his agent, with instructions not to sell the car below a certain price. B sold the car to C at a much lower price and kept the money with him. C had bought the car in good faith and had no knowledge of the directions that A had given to B. The court held that A could not get the car back from C, and recognised the title of C to its ownership.

(3) Sale by co-owner: According to Section 28, if a thing is owned by more than one persons, and is in the possession of one co-owner with the consent of the others, and the co-owner in possession of the thing sells it, the buyer gets the complete ownership of the thing. But this is only possible when the buyer has acted in good faith and paid a price for it, and had no prior doubt about the seller's right to sell the thing. For example, A and B are co-owners of some goods and B, with the consent of A, is in possession of the goods. After some time, B sells the goods to C, who buys them in good faith. In such case, C will have a good title to the goods.

(4) Sale by a person in possession of goods under a voidable contract: According to Section 29, if a buyer buys goods from a person who has obtained the goods by coercion, fraud or undue influence and if the contract under which the seller has obtained the goods is not rescinded, the buyer gets a good title to the goods. If the goods have been obtained under a voidable contract by the seller, the owner of the goods has the right to rescind the contract and take the possession of the goods. But, before the contract is rescinded, if the guilty party sells the goods to third party who is not at fault and has acted in good faith, then the owner of goods does not have the right to get the goods from the buyer; and the latter has a good title to the goods. But if the owner of goods has rescinded the contract he had made with the seller, the title of the buyer of goods will become defective.

Example: Ramesh buys Suresh's scooter for Rs. 2,000 by threatening the latter with a gun. Before Suresh can rescind the contract, Ramesh sells the scooter to Vijay. Vijay has no knowledge that the scooter was purchased by Ramesh by threatening the real owner of the scooter. In such case, Vijay will have a good title to the scooter.

For this exception to the law to be valid, it is necessary that the goods have been acquired by the seller under a voidable contract. If the contract under which the goods are acquired is unlawful or void *ab initio*, the buyer has no right to the title of goods.

(5) Sale by a seller in possession of goods after sale: According to Section 30(1), if the delivery of goods under a contract of sale is scheduled for a future date and the seller is in possession of the goods even though the ownership has been transferred to the buyer, and if another buyer, without knowing that the goods have been sold and paying a price for the goods, buys the goods in good faith, then the second buyer gets a good title to the goods. The real owner of the goods, i.e. the first buyer, does not have the right to get the goods; he can only file a suit against for the recovery of the price he has paid for the goods and the damages that he might claim from the seller.

Example: Sushil buys a TV from Om but does not take its delivery, i.e. the TV remains in the possession of Om, who later sells it to Mohan. Mohan buys the TV in good faith and has no knowledge that it has already been sold to Sushil. Mohan, in this case will have a good title to the TV.

The law is applicable only in circumstances where the seller has the possession of goooods as a seller, and not as a bailee or pawnee.

(6) Sale by a buyer in possession of goods: According to Section 30(2), when a buyer, with the consent of the seller, gets the possession of goods before the transfer of their ownership, and latter sells or pledges the goods to a third party, and if the third party acts in good faith and gets the possession of goods by paying a price and without having any knowledge of the right of the owner to the goods, he gets a good title to the goods.

(7) Sale by unpaid seller: Section 54(3) of the Act provides that when an unpaid seller exercises his right to stop the goods in transit or his right of lien to get the possession of the goods (of which the ownership has passed to the buyer), he can re-sell the goods. The buyer, is such re-sale gets an absolute title to the goods. Whether or not the original buyer has been informed of the re-sale has no effect on the title of the new buyer.

Sale in overt market: An overt market implies a market where goods are openly bought and sold according to the normal practices of the trade without any restrictions. According to the English law, if a buyer buys some goods in an overt market in good faith and according to the practices of trade in such market, he gets a good title to such goods, even if the seller is selling stolen goods. Indian law does not recognise this provision since it gives legitimacy to the sale of stolen property. In short, we can say that, for a buyer to have a good title, the following conditions must be met:

(a) The seller must be a merchantile agent, i.e. he must be a factor, broker or auctioneer.
(b) He must have the consent or letter of authority from the owner of goods.
(c) The sale must be made according to the normal, accepted practices of trade.
(d) The buyer must have acted in good faith.
(e) The buyer, at the time of making the contract, should have no knowledge that the agent has no authority to make the contract.

18(V)

PERFORMANCE OF THE CONTRACT—DELIVERY AND PAYMENT

Performance of a Contract of Sale

According to Section 31 of the Sale of Goods Act, the gist of a contract of sale is the performance of their obligations by the parties to the contract. It is the duty of the seller to deliver the goods and of the buyer to accept the delivery and pay for the goods. The contract is completed when both parties have carried out their obligations.

Payment and Delivery—Concurrent Conditions

According to Section 32, unless there is an agreement to the contrary, the delivery of goods and the payment of the price of goods are concurrent conditions, i.e. the seller must be willing and ready to deliver the goods, and the buyer must be willing and ready to accept the goods and pay the price to the seller.

The condition 'unless there is a agreement to the contrary' in the beginning of the section have a special importance. It implies that the payment and delivery need not always be concurrent and that parties can agree to other conditions with regard to 'payment of the price' and delivery of goods, i.e. the payment or the delivery can be non-concurrent and either may be done later as per the agreement between the parties, or it may be divisible and may be made in instalments.

Delivery

As per the terms of the contract, essentially the most important obligation of the seller is to deliver the goods. Section 2 of the Act defines delivery as the "*voluntary transfer of possession of goods from one person to another*". The goods must be in a deliverable state before the delivery can be made. Depending upon what the parties have agreed to, the delivery can be concurrent or at a future date, or in instalments.

The control of the seller on the goods terminates when he makes a delivery of goods, and that of the buyer commences. Besides the seller, the seller's agent can also transfer the

control of goods to the buyer. Goods here refer to the goods which are the subject matter of the contract. If the contract of sale is about future goods that need to be manufactured or procured, the seller cannot deliver other similar goods and be absolved of his obligation under the contract.

Types of Delivery

The delivery of goods is of three types. It can be:

1. Actual delivery
2. Constructive delivery
3. Symbolic delivery

(1) Actual delivery: An actual delivery is a physical delivery of goods, and refers to the physical delivery of goods by the seller to the buyer. Any act of the seller or his agent that results in delivering the goods in the possession of the buyer is deemed to be actual delivery.

(2) Constructive delivery: Such delivery is also referred to as fictitious delivery. In a constructive delivery, the goods remain in the possession of the seller or his agent, or in the possession of a third party on behalf of the buyer but are deemed to have been delivered to the buyer. Such delivery is deemed to have been made in the following situations:

(a) When the goods are in the possession of the seller and he agrees to keep them in his possession on behalf of the buyer.

(b) When the goods are in the possession of the buyer, and the seller gives his consent to the buyer to retain the goods as an owner.

(c) When the goods are in the possession of a third party, and the party confirms to the buyer that he is keeping the goods on behalf of the buyer.

(3) Symbolic delivery: When the goods are of such large quantity or weight that it is not possible to deliver the goods physically, the delivery of title documents of the goods, or any other document or thing that serves as a proof of the transfer of possession to the buyer is deemed to constitute delivery; for example, delivering the key of the warehouse where the goods are stored, or the Bill of Lading or Railway Receipt to the buyer constitutes what is called symbolic delivery of goods.

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

Effect of Partial Delivery

According to Section 34, if the seller has initiated the process of making the delivery of goods to the buyer and has made partial delivery, it has the same effect as that of complete delivery of goods. But if the delivery is in instalments, the delivery of one instalment does not have the effect of the total delivery being made. The partial goods delivered and the total goods to be delivered can be determined from the facts or circumstances of the case. For example, A sells 10 tons of coal to B. A's carrier has the capacity to transport one ton at a time. A, therefore, makes the first delivery of one ton. The effect of making the first delivery in this case would be the same as that of the total delivery. But if A expects to be paid for the one ton that he has delivered and then makes the next delivery, it will completely be a different scenario and such delivery does not have the effect of total delivery, because here A's intention is to separate the one ton of coal that has been delivered from what is yet to be delivered.

Buyer's Application for Delivery

According to Section 35, unless there is no specific contract, the seller is not lawfully bound to deliver the goods to the buyer till such time that the buyer applies for the delivery. This provision of law gives the right to the seller of goods that, if he so desires, he can deliver the goods without the buyer's request. The verdict in the case of **Alpaty Moorty vs. Polisetti Satyanaryana** held that the buyer was not only liable to pay the price of goods, he also was liable to ask for their delivery from the seller.

Rules Governing the Delivery of Goods

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

(1) Place of delivery: As a general rule, the contract of sale specifies where the goods have to be delivered, and it is the duty of the seller to deliver the goods at the place specified in the contract of sale. According to Section 36(1), if there is no agreement between the parties as to the place of delivery, then the goods sold will be delivered at the place where they were sold. If the goods are not in existence when they are sold, they will be delivered at the place where they are manufactured, unless there is an agreement to the contrary between the parties, in which case the goods will be delivered at the stipulated place.

(2) Time of delivery: If the time of delivery is specified in the contract, the seller should deliver the goods at the time specified. But, if the contract does not specify any time of delivery, according to Section 36(2), the seller should deliver the goods within a reasonable time. What is a reasonable time depends upon the circumstance of the case.

(3) Goods in possession of a third person: According to Section 36(3), when the goods sold are in the possession of a third person, delivery is only made when the party possessing the goods promises to keep the goods on behalf of the buyer. The title to the goods, in any case, has to be transferred to the buyer.

Example: Ashok buys a watch from Vijay which is in the posssession of Suman. Suman says that she will keep the watch with her on behalf of Ashok till such time as Ashok wants her to keep it, and Ashok agrees to it. This will be a case of delivery of goods in the possession of a third person.

(4) Expense of delivery: According to Section 36(5), unless there is an agreement to the contrary, all expenses on the delivery of goods will be born by the seller.

(5) Delivery of wrong quantity: Delivering an excess or a lesser quantity of goods is called a delivery of wrong quantity, but a marginal difference either way is not deemed to be delivery of wrong quantity unless the goods are very expensive, like gold, platinum or diamonds. If the difference in quantity is marginal, the buyer does not have the right to refuse to accept the delivery of goods. As a general rule, the quantity of the goods should be the same as agreed to in the contract. If the quantity of goods delivered is more or less, then the following rules are applicable.

(a) Delivery of goods in less quantity: According to Section 37(1), if the seller makes the delivery of goods to the buyer in a lesser quantity than agreed to in the contract, the buyer

is entitled to refuse to accept the goods. But, if the buyer accepts a lesser quantity of goods, he must pay for the goods at the rate agreed to in the contract.

(b) Delivery of goods in excess quantity: According to Section 37(2), if the goods delivered are in excess of the quantity agreed to in the contract, the buyer can: (i) accept the agreed quantity and return the surplus, (ii) refuse to accept the delivery or (iii) accept the total goods. If the buyer accepts all the goods, he has to pay for them at the rate agreed to in the contract.

(c) Delivery of specified goods mixed with others: According to Section 37(3), if the seller mixes the goods specified in the contract with other goods, and delivers the lot to the buyer, the buyer is at liberty to refuse to accept the delivery, or to accept the goods that conform to the specifications and reject the others.

For example, A places an order with B to send him two tea-sets of Gowalior Potteries, and B sends him one tea-set of Gowaliar Potteries and the other of Hitkari Potteries. In this case, A can reject both the sets, or he can keep the one from Gowalior Potteries and return the other.

(6) Instalment deliveries: According to Section 38(1), if there is no such agreement in the contract, the buyer is not bound to accept instalment deliveries. But if there is such a provision in the contract, the seller can make instalment deliveries.

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

(7) Delivery of goods to a carrier or wharfinger: According to Section 38:

(a) If the seller, according to the terms of the contract, has delivered the goods to the carrier or wharfinger, the delivery is deemed to have been made to the buyer.

(b) In the absence of a contract to the contrary, the seller is expected to deliver the goods to a carrier who is capable and has the infrastructure to transport the nature, size and weightage of the goods that are to be delivered so that the goods are not damaged in transit. If the goods are damaged because of the seller's neglect in selecting a proper carrier, the buyer can refuse to take the delivery of goods, and hold the seller liable for damages.

(c) In the absence of a contract to the contrary, if the goods are to be transported by sea, and the circumstances are such that the goods need to be insured, the seller must communicate the same to the buyer so that the goods are insured against damage in transit otherwise the seller will be liable for the damage.

(8) Risk where goods are delivered at distinct place: According to Section 40, when the goods are lying with the seller, the buyer, even in such case, is liable to any damage to the goods after the sale has been made but before the goods are delivered. But if the goods are destroyed before or during transit, the responsibility and risk are the seller's.

(9) Buyer's right of examining the goods:

(a) Section 41(1) specifies that, where the contract of sale is about goods that the buyer has not seen or examined, the buyer cannot be bound to accept their delivery till he has not had a reasonable opportunity to examine the goods and satisfied himself that they conform to the specifications.

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

Acceptance of Delivery

The receipt of goods and their acceptance are not the same. If the buyer has received the goods, it does not necessarily imply that he also has accepted the goods. Acceptance of goods by the buyer is different from the receipt or delivery of goods, and is much more important. Acceptance of goods means the assent of the buyer that he has received the goods under the contract of sale. If the buyer, by mistake, does not give such assent, or refuses to give it, he is liable for his action. According to Section 42, the buyer is deemed to have accepted the goods in the following circumstances:

1. When the buyer informs the seller that he has accepted the goods. If the buyer has had no earlier opportunity to examine the goods, the goods are not deemed to have been accepted by the buyer till such time he has examined the goods and informed the seller of his acceptance.
2. When the goods have been delivered to the buyer, and he commits an act which is against the seller's ownership of goods, such as:
   (a) The buyer sells the goods delivered to him.
   (b) He uses the goods as an owner would use them.
   (c) He makes some change in the goods delivered to him.

Example: A sold some grains to B by sample. B sold the same to C. When B received the delivery of the grains, he examined a sample of the grains and sent the stock to C. C rejected the grains saying that the stock did not conform to the sample shown to him. B also demanded the right to reject the stock that was received by him from A. It was held that since B had examined the sample, and sent the same to C, it amounted to his acceptance of the stock and, as such, he did not have the right to reject it.

Return of Rejected Goods

According to Section 43 of the Sales of Goods Act, in the absence of a contract to the contrary, if the goods have been delivered to the buyer, and exercising his right to reject the goods, the buyer rejects the goods, he is not bound by law to deliver the goods back to the seller. His responsibility is limited to inform the seller of his rejection of the goods since they do not meet his specifications.

Liability of Buyer for Neglecting or Refusing Delivery of Goods

Section 44 of the Sale of Goods Act specifies that, if, after having been informed by the seller of his having made the delivery of goods, the buyer refuses to accept the delivery of

goods, or neglects to do it, he is liable to the seller for any loss that the latter might suffer by his action. The buyer is also liable, in such a case, for the expense of looking after the goods and any damage that might be caused to goods as a result of the buyer's neglect. But if, on the other hand, such loss or damage to goods is caused by a default on the part of the seller, the buyer cannot be held liable for such loss or damage.

Rights of the Buyer

The buyer has the following rights:

(1) Right to receive delivery: The buyer has the right that he receives the delivery of goods according to the terms of the contract. The buyer, however, is not bound by law to accept the delivery of goods if such delivery is not made according to the terms of the contract.

(2) Right to repudiate the contract: In the absence of a contract to the contrary, the buyer is not bound to accept the delivery of goods in instalments; but, if the contract specifies the delivery to be in instalments and the payment to be made for each instalment separately and the seller defaults in delivering one or more instalments or delivers defective goods in an instalment, the buyer reserves the right to repudiate the total contract. However, if the buyer has accepted the delivery of goods that are defective or are not delivered as per the schedule, he has the right to claim damages.

(3) Right to examine the goods: If the buyer has had no opportunity previously to examine the goods, he has the right to examine the goods before delivery to satisfy himself that the goods meet the specifications of the contract.

(4) Right against the seller for breach of contract: These are as under:

(a) Suit for damages: If the seller defaults in making the delivery of goods, or neglects or refuses to deliver the goods, the buyer has the right to sue the seller for damages.

(b) Suit for price: If the buyer has paid the price of goods and has not received the delivery, he has the right to be refunded what he has paid.

(c) Suit for specific performance: The buyer can sue the seller for making a default in the specific performance of the contract. In a suit of a default in some definite or specific part of the contract, the law, at the request of the plaintiff, can direct the other party to specifically perform the contract. The defendant in such case, i.e. the seller, is not absolved of his responsibility for specific performance merely by paying damages to the buyer.

(d) Suit for breach of warranty: If the seller has committed a breach of any warranty under the contract, or if the buyer accepts the breach of a condition on the part of the seller to be a breach of warranty, and the buyer is bound by it, he does not have the right to reject to accept the goods. The buyer, however, has the right to reduce the price of goods and sue the seller for breach of warranty.

(e) Repudiation of contract: If, before the date of delivery of goods, the seller repudiates the contract, the buyer can wait till the date of the delivery of goods and file a suit against the seller for damages. This is referred to as the rule of premature repudiation of a contract.

(f) Suit for interest: If the price of goods is returned to the buyer on the repudiation of the contract by the seller, the buyer has the right to demand interest on the amount of price from the seller.

20

CONSUMER PROTECTION ACT–1986

Consumer is at the core of business world in the present day economy. Quantity and quality of goods are produced as per the needs of the consumer. Advancement of any business unit depends on the satisfaction of the consumer. That product will be in great demand which gives maximum satisfaction to the consumer and so will be produced on large scale. As a result, the concerned production unit will develop and earn large profit. Despite the fact that importance of the consumer is widely recognised, he is deprived of his rights and privilege and is subjected to diverse kinds of exploitation. For instance exploitation in the form of short weight and measure, poor quality of the product, adulteration, supply of fake goods, hoarding and black marketing of the goods,delivery of goods not on schedule. Not only that, even doubtful and false advertisements are indulged into by the producers to attract consumers.

With a view to protecting the consumers from such exploitation and making them aware of their rights, a method of consumer protection has been launched. Need for protection and satisfaction of the consumer is now being widely recognised across the world. India has also adopted the concept of consumer protection more seriously and vigoursly.

Meaning of Consumer Protection

Consumer protection means the protection of the consumers from their exploitation by the unfair trade practices of the producers/sellers. In fact, providing proper protection of the fundamental rights and interests of the consumers, freeing them from exploitation, creating consumer awareness, consumer providing the right to clean business environment to the consumers by means of legal amendments is all that protection means.

Consumer Protection Act in India

In India, Central and State Governments have passed various legislative enactments regarding Consumer Protection. Among them, main Acts are: Drug and Cosmetics Act 1940, Industries Development and Regulation Act 1951; Indian Standards Institution (Certification Marks) Act 1952; Prevention of Food Adulteration Act 1954; Essential Commodities (Supply) Act 1955; The Trade and Merchandise Marks Act, 1958; Monopolies and Restrictive Trade Practices Act 1969; Packaged Commodities Regulation Order 1975; Standards of Weights and Measures Act 1976; Prevention of Black Marketing and Maintenance of Supplies of Essential Commodities Act 1980; Standards of Weights and Measures (Enforcement) Act, 1985.

In spite of above Acts interests of the consumers were not being properly safeguarded. There are many reasons for it, but main among them are two. First,consumer in general had no knowledge about the authority to whom complaints under these acts were to be addressed. Second, to seek remedy under these various acts consumer had to take legal action involving lot of time and money. Need was therefore felt to enact such a legislative measure as provide quick and less expensive remedy to the aggrieved consumer. Consequently, to protect properly the interest of the consumers and to settle quickly their disputes, in December 1986 **Consumer Protection Act** was passed in India. It was enforced with effect from April 15, 1987. Last amendment in the Act was made in 2002.

Scope and Extent of the Act

1. Except Jammu and Kashmir state, this Act extends to whole of India. [Sec.1(b)]

2. Provisions of this Act are in addition to the provisions made previously in the context of the consumers. [Sec.1(3)]

3. This Act shall apply to all goods and services that come under the scope of this Act. [Sec. 1(4)]

Main Elements/Features of Consumer Protection Act 1986

Consumer Protection Act is the most progressive Act of Social welfare and is referred to as **Magna Carta** of consumer protection. It is a land mark event in the history of Acts in India.

Main features of the Act are as under

(i) It applies to all kinds of goods and services.

(ii) Provisions of this Act are in addition to the provisions of any other Act in force in the country. Thus, this Act does not limit or reduce the scope of any other Act.

(iii) Under this Act, there is a provision for the Centre and State Governments to set up Consumer Protection Councils composing of both official and non-official members. The objectives of the council are: to promote the rights and interests of the consumers, to educate and protect them.

(iv) This Act provides for the following rights to the consumer: (I) Right to safety, (II) Right to be heard, (III) Right to consumer education, (IV) Right to seek redressal, etc.

(v) This Act is based on the principle of compensation wherein fair compensation to the aggrieved party is provided for. To redress the grievence, there is provision for three-tier judicial machinery (I) District level (II) State level and (III) National Level.

(vi) This Act provides affective protection to the consumer from different types of exploitations, such as defective goods, adulteration, under-weight, excessive price, unsatisfactory or deficient services and unfair trade practices.

(vii) This Act, redresses in a simple, cheap and dynamic manner the grievance of the consumer in limited time.

(viii) All suppliers of goods and services belonging to private, public and co-operative sectors come under the purview of this Act.

Objectives of the Act

Main objectives of the Act are as follows:

1. To protect the consumers from immoral activities and unfair trade practices of the traders.

2. To protect and promote the rights of the consumers.

3. To set up "Consumer Protection Councils" to educate the consumers and to make them aware of their rights.

4. To redress disputes of the consumers, and matters connected with them, speedily.

5. To make provision for Quasi Judicial machinery to control marketing.

Some Important Definitions and Terminology

Under Article of the Act some special terms have been used. Definitions of these terms are given below:

(1) Appropriate Laboratory: It refers to the laboratory or organisation which is:

(i) recognised by the Central Government; or is

(ii) recognised by the State Government on the basis of guidelines as may be prescribed by the Central governments; or

(iii) any such laboratory or organisation set up under any law prevailing in the country for the purpose of testing or analysing defects of any goods. Such a laboratory or organisation is maintained, financed or aided by the Central or State Government. [Sec.2(1) (a) A mended Act 1993]

(2) Complainant: Any person or institute mentioned below who files complaint is called complainant:

(i) A consumer; or

(ii) Any voluntary consumer association registered under Indian Companies Act, 1956 or any voluntary consumer association registered under any other Act in force in the country.

(iii) The Central or State Government, who or which makes a complaint.

(iv) In case of numerous consumers having the same interest, one or more than one consumer.

(v) In case of death of a consumer, his legal heir or representative, who or which makes a complaint. [Sec 2(1)(b)]

(3) Complaint : "Complaint" means any allegation in writing made by a complainant with a view to securing help or relief available under this Act. Such an allegation may be any of the following types:

(i) Any unfair or restrictive trade practice adopted by any trader or service provider.

(ii) goods purchased or agreed to be purchased by him suffer from one or more defects;

(iii) services hired or availed or agreed to be hired or availed of by him suffer from any kind of deficiency;

(iv) a trader or the service provider, has charged for the goods or for the services mentioned in the complaint, a price in excess of the price;

(a) fixed by or under any law for the time being in force;

(b) displayed on the goods or any package containing such goods;

(c) displayed on the price list exhibited by him;

(d) agreed between the parties;

(v) goods which will be hazardous to life and safety when used are being offered for sale to the public in contravention of any standards relating to safety of such goods as required to be complied with, under any law for the time being in force; requiring traders to display information in regard to the contents, manner and effect of use of such goods.

(vi) services which are hazardous or likely to be hazardous to life and safety of the public when used are being offered by the service provider. [Sec.2(1)(c)]

4. Consumer: Consumer, under this Act has been divided into two categories:

(a) Consumer of Goods : Consumer of goods means a person who buys any goods for a consideration, and it includes the user of goods. According to this Act, consumer is one who buys goods for consideration which has been:

(i) paid or promised to be paid, or

(ii) partly paid and partly promised to be paid, or under deferred payment system such as instalment payment or hire-purchase system. But it does not include that person (trader or business man, who buys such goods for re-sale or for any commercial purpose.

According to an amendment in June 1993, the term 'trade purpose' will not be used for a consumer when he/she earns her/his livelihood as self-employed. For instance, if an unemployed person earns his living by purchasing computer, taxi, xerox machine, etc. he will be called 'consumer of goods'. [Sec 2(1)(d)(ii)]

(b) Consumer of Services : Consumer of services is that person who hires services for reward (consideration) or makes use of it and he

(i) has made payment for the reward or promised to do so; or

(ii) has made partial payment or promised to do so, or

(iii) Payment has been promised under deferred payment system i.e. instalment or hire-purchase system etc.

It includes the person who gets benefit from such services or makes use of them, if such a person makes use of these services by former's permission. [Sec2(d)(ii)]

5. Consumer Dispute means a dispute where the person against whom a complaint has been made, denies or disputes the allegations contained in the complaint.

6. Defect means any fault, imperfection or shortcoming in the quality, quantity, potency, purity or standard which is required to be maintained by or under any law for the time being in force or under any contract, express or implied or as is claimed by the trader in any manner whatsoever in relation to any goods. [Sec2(1)(f)]

7. Deficiency means any fault, imperfection, shortcoming or inadequacy in the quality, quantity, nature and manner of performance which is required to be maintained by or under any law for the time being in force or has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service. [Sec2(1)(g)]

8. Goods means goods as defined in the Sake of Goods Act, 1930 (3 of 1930). In the Sale of Goods Act goods refers to all kinds of moveable property but does not include actionable claims and money. However, it includes share, trunk of a tree, standing crops, grass and all such goods joined with the land that have been separated from land for purpose of sale under a contract or will be separated. [Sec2(1)(i)]

9. Service means services of any kind or description which are made available to prospective consumers. It includes banking, financial, insurance, transport, processing, electrical or other energy supply. Boarding or lodging or both, housing construction, entertainment, amusements or the purveying

of news or other information, **but does not include the rendering of any service free of charge or under a contract of personal service.** [Sec 2(1)(o)]

10. District Forum: District level legal machinery for the settlement of consumer disputes is called District Forum. [Article 2 (1)(h)]

11. Manufacturer means a person who:

(i) makes or manufacturers any goods or part there of; or

(ii) does not make or manufacture any goods but assembles parts thereof made or manufactured by others; or

(iii) puts or causes to be put his own mark on any goods made or manufactured by any other manufacturer;

12. Member includes the President and a member of the National Commission or a State Commission or a District Forum, as the case may be.

13. Notification: Information published in the Gazette is called notification. [Article 2(1)(1)]

14. National Commission means the National Consumer Disputes Redressal Commission established under Clause(C) of section for the redressal of consumers disputes at the national level. [Sec(1)(k)]

15. Person includes:

(i) a Registered or unregistered firm.

(ii) a Joint Hindu Family (a Hindu undivided family)

(iii) A co-operative society

(iv) every other association of persons whether registered under the Societies Registration Act, 1860 or not. [Sec 2(1)(m)]

16. Prescribed means prescribed by rules made by the State Government or as the case may be by Central Government under this Act. [Sec 2(1)(n)]

17. Restrictive Trade Practice means a trade practice which trends to bring about manipulation of price or conditions of delivery or to affect flow or supplies to the market relating to goods or services in such a manner as to impose on the consumers unjustified costs or restrictions and shall include:

(a) delay beyond the period agreed to by a trader in supply of such goods or in providing the services which has led or is likely to lead to rise in the price;

(b) any trade practice which requires a consumer to buy, hire or avail of any goods or as the case may be, services as condition precedent to buying, hiring or availing other goods or services; [Sec 2(1)(nnn)]

18. State Commission means a Consumer Disputes Redressal Commission established in a State under Clause(b) of Section 9. [Sec 2(1)(p)]

19. Trader in relation to any goods means a person who sells or distributes any goods for sale and includes the manufacturer thereof, and where such goods are sold or distributed in package form, includes the packer thereof. [Sec2(1)(q)]

20. Unfair Trade Practice means a trade practice which, for the purpose of promoting the sale, use or supply, adopts any unfair method or deceptive practice and includes any of the following practices, namely:

(1) Misleading or False Representation: The practice of making any statement, whether orally or in writing or by visible representation which:

(i) falsely represents that the goods are of a particular standard, quality, quantity, grade, composition, style or model;

(ii) falsely represents that the services are of a particular quality or grade;

(iii) falsely represents any re-built, second-hand, renovated, reconditioned or old goods as new goods;

(iv) represents that the goods or services have sponsorship, approval, performance, characteristics, uses or benefits which such goods or services do not have;

(v) represents that the seller or the supplier has a sponsorship or approval of affiliation which such seller or supplier does not have;

(vi) makes a false or misleading representation concerning the need for, or the usefulness of any goods or services;

(vii) gives to the public any warranty or guarantee of the performance, efficiency or length of life of a product or of any goods that is not based on an adequate or proper test thereof;

(viii) makes to the public a representation in a form that purports to be:

(a) a warranty or guarantee of a product or of any goods or services; or

(b) a promise to replace, maintain or repair an article or any part thereof or to repeat or continue a service until it has achieved a specified result, if such purported warranty, guarantee or promise will be carried out;

(ix) materially misleads the public concerning the price at which a product or like products or goods or services, have been or are, ordinarily sold or provided, and, for this purpose, a representation as to price shall be deemed to refer to the price at which the product or goods or services has or have been sold by sellers or provided by suppliers generally in the relevant market unless it is clearly specified to be the price of which the product has been sold or services have been provided by the person by whom or on whose behalf the representation is made;

(x) gives false or misleading facts disparaging the goods, services or trade of another person.

Explanation: For the purpose of clause (1) above, a statement that is :

(a) expressed on an article offered or displayed for sale, or on its wrapper or container; or

(b) expressed on anything attached to inserted in, or accompanying an article offered or displayed for sale, or on anything on which the article is mounted for display or sale; or

(c) contained in or on anything that is sold, sent, delivered, transmitted or in any other manner whatsoever made available to a member of the public,

shall be deemed to be a statement made to the public by, and only by, the person who had caused the statement to be so expressed, made or contained:

(2) Advertisement of bargain price or bait: Unfair Trade Practice also includes the publication of any advertisement whether in any newspaper or otherwise, for the sale or supply at a bargain price, of

goods or services, that are not intended to be offered for sale or supply at the bargain price or for a period that is, and in quantities that are, reasonable, having regard to the nature of the market in which the business is carried on, the nature and size of business and the nature of the advertisement.

(3) Offering gifts or prizes with intention of not providing them: The offering of gifts, prizes or other items with the intention of not providing them as offered or creating impression that something is being given or offered free of charge when it is fully or partly covered by the amount charged in the transaction as a whole, will be treated as Unfair Trade Practice.

(4) Conducting Contest, Lotteries, Game of Chance or Skill etc.: For the purpose of promoting, directly, or indirectly, the sale, use or supply of any product or any business interest, if any contest is organised or lotteries, game of chance or skill etc. are conducted these will be considered Unfair Trade Practices.

(5) Non-Compliance of Product Safety Standards: To prevent or reduce the risk of injury to the consumer using the goods, certain standards are prescribed by competent authority in respect of performance, composition, contents, design, constructions, finishing or packaging as are necessary, knowing or having reason to believe that the goods do not comply with prescribed standards, any sale or supply or goods will be an Unfair Trade Practice.

(6) Hoarding or Destructing of Goods: With the intension of raising the price of the goods, hoarding them or refusing to sell the goods or making them available for sale or destroying them wilfully so as to create their scarcity in the market will also be deemed Unfair Trade Practice.

(7) Manufacturing of Spurious Goods: Offering such goods for sale or adopting deceptive practices in the provision of service, also constitute Unfair Trade Practice, according to the Consumer Protection (Amendment) Act 2002 Sec 2(h)(ii) [Sec2(1(r)]

Causes/Types of Consumer Exploitation or Consumer Problems

Generally speaking consumers are exploited or they have got to face many problems everyday. It is because of illiteracy, poverty, lack of education, lack of information etc. Their outlook being traditional they tolerate. Silently all this. They fail to protect themselves from exploitation for want of legal protection. They remain ignorant of their rights.

Main Causes/Types of exploitation are as under

(1) Unfair Trade Practices: Trader community indulges itself in various trade activities to promote sales to supply certain goods and enhance their economic use or to provide some services. They may devise any unfair method, such as false and misleading advertisement, promotiaonal contests, offer free gifts or lucky draw schemes , etc. to manipulate the buyer. They make false statement that the goods sold by them are of a special standard, grade or composition. Unfair Trade Practices on the part of the traders are as under:

(a) Misleading and Deceptive Advertisements: Trader Community spends huge amount of money on advertisement of their goods and services. Most of these advertisements are misleading, exaggerated and unprovable claims. Quality of their products is poor and their claims are unsustainable.

(b) Offering Gifts and Prizes: In order to attract the customers, many business organisations give such advertisements as "Free Gifts", "Sale", "Discount Schemes", "Prizes or Lucky Draws" etc. The impression given to the public is that something is being given to it free of charge"

whereas in reality it may not be so. Many a time, some manufacturers marginally reduce the quantity, size, colors, weight, length or breadth or lower the quality of the product, prior to the announcement of "Gift Scheme".

2. Spiraling Prices: Producers unduly hike the prices of their products. These rising prices are generally followed by anti-social activities like hoarding, black marketing and creating of **artificial scarcity** of the products. It adds to consumer's **exploitation** and .

3. Adulteration: Another ground on which the consumers are exploited is the adulteration of goods which are sometimes dangerous to life or hazardous to health. The traders resort to many devices for making high profits. For example, mixing animal fat with Ghee, harmful seeds with grains and pulses, mustard oil with mineral oil, saw dust with chilli powder, dirty water with milk, etc.

4. Poor Quality Products: Consumers are also exploited by selling to them poor quality or sub-standard products. Mere declaration by the manufacturers that their products are "AGMARK" is not sufficient. There is no mechanism to verify that the goods sold to the consumers meet the specification of safety. The result is a large number of deaths or infuries chased by the use of sub-standard and unsafe domestic products- like pressure cookers, kerosene stoves, cooking gas, electrical gadgets etc.

5. Deceptive Packing: Many a time packages are used by manufacturers as a camouflage to deceive customers either by putting smaller quantity of the product in the packet or by slightly changing the spellings of a reputed brand so that the appearance of the wrapper is almost like the reputed brand.

6. Underweight Suppliers: Many manufacturers exploit the consumers by selling them on underweight goods. For instance, each LPG cylinder must contain 14.2 kg of gas but many a time underweight cylinders are supplied to the consumers.

7. Deficiency in Service: Consumers suffer a lot due to poor or deficient service. For instance: (i) Undue delay by the courier service, (ii) Wrong billing by the electricity and telephone departments, (iii) Undue delay in settling insurance accident claims, (iv) Undue delay in handing over the flats/houses by Housing Development Authority.

8. Negligence in Service: Negligence in service is another cause of consumer exploitation. For example, wrong operation by a surgeon. Many such incidents appear in the newspapers very often.

9. Monopolistic Trade Practices: Monopolist is the single producer or seller of a commodity. He is in a position to exploit the consumer in more than one way, viz. (i) unfair rise in price of the goods; (ii) excessive profit by the production, supply and distribution of the goods and services, (iii) Undue restrictive of competition in the market, (iv) lowering the quality of goods and services, (iv) unreasonable reduction or limitation on supply of goods to the consumers.

Right to Consumer

In a free market economy, consumer is sovereign. He has the right to buy or not to buy a product offered for sale, to expect the product to be safe; to expect the product sale, to be what ti is claimed to be; to be adequately informed about the most salient aspect of the product. He has a right to receive proper and efficient service and satisfaction. Under section 6 of Consumer Protection Act, consumer has following rights:

(i) Right to Safety: Consumer has the right to be protected against marketing of such goods and services as are hazardous to health, life and property. There are several fake, adulterated, inferio defective, ineffective and dangerous goods available in market. They are injurious to body and healt

Consumer therefore, has the right to safety from all such goods as well as are likely to cause harm to his body and health, besides causing loss of money.

(ii) Right to Choose: Under this right, consumer can choose any from among the variety of goods and services available in the market. One finds in the market goods of different brand, quality, shape, colour, size, design and price produced by different manufacturers. Under this right, the consumer must be assured access to variety of goods and services at competitive prices as far as possible. Misleading or false advertisement, wrong information or in any other way, if any person (manufacturer, seller) influences his preference, in an unfair or unnecessary manner, it will be treated as intervention in his right to choose.

(iii) Right to be informed: Consumer has the right to get all necessary information on the basis of which he may decide to buy the good or service. He has therefore the right to be informed about the quality, quantity, purity, potency, standard,price of goods, etc.

(iv) Right to be heard: Consumer has the right to present before the appropriate forum or authorities all those matters which effect his interests. This right includes the right to make protest and file complaints. This right implies that matters of interest to the consumer will receive due consideration at appropriate forums, so that he is encouraged to express his problems, complaints and unjust treatment meted out to him.

(v) Right to seek redressal: Consumer has the right to get his claims and complaints settled against the manufacturers and sellers. This right provides the consumer freedom from unfair trade practice or unscrupulous exploitation by the trader. Besides, it helps him secure compensation.

(vi) Right to Consumer Education: Under this right, consumer is entitled to get information or educated about those things which are necessary for him. Such an education creates awareness about his rights and he comes to know when to approach for the redressal of his grievance and exploitation. This helps a consumer protect himself against fraudulent, deceptive and misleading advertisement and poor or negligent services.

Need and Importance of Consumer Protection

The need and importance of consumer protection can be explained as under:

(1) Unfair and Deceptive Trade Practice: Unfair and deceptive trade practices like selling of defective or sub-standard goods, ignoring safety standards, charging exorbitant prices, misrepresenting the efficacy or usefulness of goods, etc. have to make producers/traders more accountable to consumers. It therefore becomes necessary for consumers to unite to face issues concerning consumer protection and having the grievances redressal satisfactorily.

(2) Lengthy Legal Process: An ordinary consumer has no other remedy than filing a civil suit for the solution of his complaints. Civil suit is a long legal process involving lot of time and expenses. Many a time, the time, cost and mental tension involved in the legal process is disproportionate to the compensation claimed and actually granted by the court to an individual consumer. It is therefore necessary that to safeguard the interests of the consumers and for their convenience such legislative enactments be initiated as are simple, accessible, quick and less expensive.

(3) Impact of other Countries: In countries like USA, European Union, Australia, etc. consumer protection measures are stringent and effective. Following their example, India has also felt the necessity of consumer protection.

(4) Welfare State: India is a welfare state. One of the Directive Principles enshrined in the Indian Constitution is that the state shall direct its policy towards securing that the operation of the economic system does not result in the concentration of wealth and means of production to the riment of the interest of the consumers. Keeping in view the interests of the consumers, government had passed **Monopolies and Restrictive Trade Practices Act in 1969**. Subsequently in 1984, provisions relating to Unfair Trade Practices were also incorporated in the Act. Under Act wide powers have been bestowed upon MRTP Commission (still more after the amendment in 1991) to enable it to central and prohibit monopolistic, restrictive and unfair trade practices.

(5) Economic Development: In India, as a result of development in the last 58 years, standard of living of the people has improved substantially. The structural and institutional changes in the economy subsequent to Economic Reforms 1991 clearly indicate that there has been and globalisation of the economy. Wants of the consumers have increased manifold. Hence, need for safeguarding the interests of the consumers has assumed great importance.

(6) Means of Transport and Communication: Rapid growth of means of transport and communication has brought the world consumers to one forum. Mass media of TV and Cable network has cast a strong spell of "demonstration effect" on the consumers. The latter are now well aware that they can no longer be exploited by the trader community nor can they lie isolated other countries in as much as their right to safety and health are concerned.

(7) Role of Judicial System: Consumer Protection Act 1986 (especially after amendments in 1993) has given vast powers to the Supreme Court, for the protection of consumers rights, their safety and health. Consequently, the remedies for consumer protection are now simpler, more accessible, quicker and less expensive.

(8) Lok Adalats: The concepts of Lok Adalats in India is gathering momentum. Lok Adalats have become part of speedy, effective and economical redressal system. Lakhs of cases concerning motor accidents, complaints against postal circles, Delhi Development Authority, Mahanagar Telephone Nigam, Delhi Electric Supply Undertaking have been settled involving crores of rupees. The concept of Lok Adalat has now been extended to other areas, as well.

(9) Concept of Public Interest Litigation (PIL): In the interest of consumers protection large number of petitions have been put before High Courts and Supreme Court by way of public interest litigation. The concept of PIL is gathering momentum complaint on post card to High Court will be treated as a writ petition. PIL is virtually consumer interest litigation which has helped a good deal the cause of Consumer Protection.

(10) Consumer's Awareness: With the spread of education people are now wide aware of their rights as consumers. The relief granted to the consumers and important judicial decisions regarding consumer protection or relief are often covered by newspapers. Consumers now expect better services for their durable goods. Legislative measures in respect of consumer protection have created an awareness among consumers about their rights and remedies available to them.

(11) Consumer : There exist more than 500 consumer organisation across the country. These have contributed much to spread and protect the interests of the consumers. Some of these are: (i) Consumers Guidance Society of India, Bombay; (ii) Common Cause, New Delhi; (iii) Consumers Action Forum, Calcutta, Delhi and Madras; (iv) Consumer Forum, Udipi.

These consumer organisation are performing number of functions, such as bringing out of monograph, etc., accelerating consumer awareness; collecting samples of different products and testing; convening seminars workshops and conferences for the purpose of focusing the problems of consumers and finding solutions thereof; filing complaints and writ petitions on behalf of the consumers; resisting price rigging; preventing adulteration; preventing hoarding and black marketing; checking under-weight selling; educating the consumer to help himself.

(12) National Awards on Consumer Protection: Government of India has been conferring awards since 1988 on individual as well as voluntary consumer organisations in of their contribution to the care of consumers. As a result, peoples' interest in consumer protection has been stimulated.

Consumer Protection Councils

To promote and protect the interests of the consumers and to advise the government in this respect, there is provision in this Act establish Consumer Protection Councils. Accordingly, there is provision to set up Consumer Protection Councils at the following two levels in the country:

I. Central Consumer Protection Council at the Central Level, and

II. State Consumer Protection Council at the State Level

I. Central Consumer Protection Council

Main provision regarding central consumer protection council or central council are as follows:

(1) Establishment: By issuing a notification, Central Government shall established Consumer Protection Council. Date of its setting up will also be announced in the notification. [Sec 4(1)]

(2) Composition: The composition of the council will be as follows:

(i) Minister incharge of consumer affairs in the Central Government who shall be its chairman.

(ii) Number of official and non-official members of the councils will be determined by the central government. [Sec 4(2)]

The Council will compose of 150 members. It will include Food and Civil Supplies Minister and Deputy Minister of Central Government; Food and Civil Supplies Ministers of all states; Members of Lok Sabha and Rajya Sabha, Commission of Scheduled Caste and Scheduled Tribe Commission, Secretary of Civil Supplies Ministry of the Central Government. Representative of Local Self Government and departments of Central Government concerned with consumers' interests; Representatives of consumer organisation, women, cultivators, traders and industrialists.

(3) Term: Duration of the Council will be 3 years,

(4) Filling the Vacancy: If there occurs a vacancy, it will be filled by the representative of the same class.

(5)Procedure of Meetings: (i) Any number of meetings can be convened according to the requirement of the Central Council, but one meeting, at least, in a year must be held.

(ii) The Central Council shall meet at such time and place as the chairman may think fit and shall observe such procedure in regard to the transaction of its bsiness as may be prescribed. [Sec 5 (1)]

(6) Object: Protection and Promotion of the rights of the consumers will be the objective of the council. These rights of the consumers, are similar to the rights mentioned in Consumer Protection Act. These are in brief as under:

(i) Right to secure protection from marketing of goods and services which are hazardous to life and property.

(ii) Right to be informal in respect of quality, quantity, potency, purity, standard and price of the goods and services, so that consumer is protected from unfair trade practices.

(iii) As far as possible right to be assured of access to a variety of goods and services at competitive prices.

(iv) Right to be heard and assured that sufficient attention will be paid to the interests of the consumers at the appropriate forums.

(v) Right to seek redressal against Unfair Trade Practices, or Restrictive Trade Practices or Unscrupulous Exploitation.

(vi) Right to Consumer Education. [Sec 6]

II. The State Consumer Protection Council or State Council

Provisions regarding state consumer protection council are as under:

(1) Establishment: State government shall by notification, establish a council to be known as the Consumer Protection Council. The notification will also announce the date of its establishment. [Sec 7(1)]

(2) Composition: State Council will compose of the following

(a)Minister in charge of Consumer affairs in the state government shall lie its chairman

(b) Number of official and non-official members wh represent specific interest, shall be determined by the State Government.

(c) Such member of other official or non-official members, not exceeding, ten as may be nominated by the Central Government. [Sec 7(2)(i)(c)]

(3) Meeting: As per requirement, State council can convene any number of meetings, but at least two meetings shall be held every years. [Sec 7(3)]

State council shall meet at such time and place as the chairman may think fit. Proceedings of the meetings will be conducted according to the procedure prescribed by the state government. [Sec 7(4)]

(4) Objects: Objective of the State Councils shall be to protect and promote the rights of the consumers of the state. Rights of the consumers have already been mentioned above under the heading "objects of Central Council". [Sec 8]

Redressal of Consumer Disputes

Consumer Protection Act provides for three-tier quasi-judicial machinery for the redressal of consumer complaints. This machinery is as under:

I. District Forum

II. State Commission

III. National Commission

I. District Forum

Main Provision regarding District Forum are as follows:

1. Establishment: State government by notification in the Gazette may establish a Consumer Disputes Redressal Forum in each district of the state, to redress the problems of the consumer. It will be called District Forum. [Sec 9(a)]

The state government may established more than one District Forum if it deems fit to do so. [Amended Act 1993]

2. Composition: District Forum will be composed of as follows:

(i) **A person** who is or has been or has the qualifications of District Judge is appointed as its President.

(ii) There shall be two other members including one woman member. These members shall be of sufficient integrity, repute, experience or knowledge or they will be from among those persons who have already proved their ability in settling matters relating to economic, commercial, accountancy, ministry, public affairs or administration problems.

Each appointment shall be based on the recommendation of the selection committee appointed by the state government. Selection committee will be composed as under:

(i) Chairman of the State Commission will be its President.

(ii) Secretary of the law department of the state will be its member.

(iii) Secretary of Consumer Affairs Department will be its member. [Sec 10(2)]

(3) Terms and Age of Members: Every members of the District Forum will hold office for 5 years or till the completion of 65 years of age, whichever is earlier; he cannot be re-appointed. [Sec10(2)]

(4) Resignation: Any member can submit his resignation in writing to the state Government. On its acceptance, the office will fall vacant. The vacancy will be filled by appointing a person holding the same qualification as the one held by the previous incumbent. [Sec 10(2)]

(5) Salaries, Allowances and Other Services Conditions: State Government will prescribe the salary or honorium and other allowances payable to, and the other terms and conditions of service of the members of the District Forum. [Sec.10 (3)]

Jurisdiction of District Forum

(1) Subject to the other provision of this Act, the District Forum shall entertain complaints where the value of the goods or services and compensation, if any claimed does not exceed rupees five lakhs. According to the consumer protection (Amendment) Act, 2002, this limit has been raised to rupees twenty lakhs.

(2) A complaint shall be instituted in a District Forum within the local limits of whose jurisdiction—

(a) the opposite party or each of the opposite parties, where there are more than one, at the time of the institution of the complaint, actually and voluntarily resides or carries or business or has a branch office personally works for gain or

(b) any of the opposite parties, where there are moire than one, at the time of the institution of the complaint, actually and voluntarily resides, or carries on business or has a branch office or personally works for gain, or provided that in such case either the permission of the District Forum is given,

or the opposite parties who do not reside, or carry on business or have a branch office or personally work for gain, as the case may be acquiesce in such institution; or

(c) the cause of action, wholly or in part,arises.

Manner in which complaint shall be made [Sec11]

A complaint in relation to any goods sold or delivered or agreed to be sold or delivered or any service provided or agreed to be provided may be filed with a District Forum by:

(a) the consumer to whom such goods are sold or delivered or agreed to be sold or delivered or such service provided or agreed to be provided.

(b) any consumer association whether the consumer to whom the goods sold or delivered or agreed to be sold or delivered or service provided or agreed to be provided is a member of such association or not.

(c) one or more consumers, where there are numerous consumers having the same interest, with the permission of the District Forum, on behalf of, or the benefit of, are consumers so interested or

(d) The Central or the State government, as the case may be, either in its individual or as a representation of interests of the consumers in general. [Sec 12]

consumer association means any voluntary consumer association registered under the Companies Act or any other law for the time being in force. [As per Amendment 1993]

There is a prescribed form for submission of complaint. However it should be written on any plain paper. Name and address of the complainant, name and address of the opposite party or parties, description of the facts of complaint, documentary evidence collaborating the complaint, relief expected as redresal of the complaint and signature of the complainant, etc. are these details must be given in the complaint. There is no fees for submission of complaint. But if, testing and analysis of the sample of any goods is obligatory, then necessary fees must be paid for the purpose.

A. Procedure of Grievance Redressal

Section 13 of Consumer Protection Act contains the following procedure of grievance redressal.

Procedure Regarding Goods: when a District Forum receives a written complaint regarding goods it redresses the same in the following manner:

1. A copy of the complaint is forwarded to the opposite party mentioned in the complaint directing him to give his version of the case within a period of 30 days. District Forum may extend this period not exceeding 15 days. [Sec13(1)(a)]

2. If the opposition part on receipt the complaint devices or disputes the allegations contained in the complaint, or omits or fails to take any action to represent his case within the time gain by the Distric Forum, the District Forum shall settle the dispute in the manner specified in clauses (c) to (g) Sec13(1)

3. If the complainant alleges a defect in the goods which cannot be determined without prop analysis or test of the goods, the District Forum shall obtain a sample of the goods from the complaina seal it and anthenticate it in the manner prescribed. The sample so sealed will be sent to the appropr laboratory along with a direction that laboratory make an analysis or test, whichever may be neces with a view to finding out whether such goods suffer from any defeat alleged in the complaint or fron other defect and to report its findings to the District Forum within a period of 45 days or within essential period as may be granted by the District Forum. [Sec 13(

4. If the goods are required to be tested or , the complainant is required to deposit a specified fees to the credit of the Forum, for payment to the appropriate laboratory for carrying out the necessary analysis or test of the goods in questions. [Sec 13(1)(d)]

5. The District Forum shall remit the amount deposited to its credit under the above clause to the appropriate laboratory and enable it to carry out the analysis or test. On receipt of the report from the appropriate laboratory, the District Forum shall forward a copy of the report along with such remarks as it may feel appropriate to the opposite party. [Sec13(1)(e)]

6. If any of the parties, disputes the correctness of the findings of the appropriate laboratory, ordisputes the correctness of the methods ofanalysis or test adopted by the appropriate laboratory, the District Forum shall require the opposite party or the complaintant to submit in writing his objections in regard to the report made by the appropriate laboratory. [Sec 13(1)(f)]

7. Thereafter, the District Forum shall give a reasonable opportunity to the complainant as well as the opposite party of being heard regarding written complaints as to the correctness or otherwise or the report made by the appropriate laboratory. [Sec 13(1)(g)]

8. If the District Forum is satisfied that the goods complained against suffer from any of the defects specified in the complaint, it shall issue an order to the opposite party directing him to do one or more of the following things:

(i) to remove the defect pointed out by the appropriate laboratory from the goods in questions;

(ii) to replace the goods with new goods of similar which shall be free from any defect;

(iii) to return to the complaintant the price paid by him;

(iv) to pay such amount as determined by the Forum as compensation to the consumer for any loss or injury suffered by the consumer due to the negligence of the opposite party.

(v) to remove the defects in goods or deficiencies in the services in questions;

(vi) to discontinue the unfair trade practices or the restrictive trade practice or not to repeat them;

(vii) not to offer the hazardous goods for sale;

(viii) to withdraw the hazardous goods from being offered for sale;

(ix) to provide for adequate costs to parties. [Sec 14(1)]

9. Proceedings of the District Forum will be conducted by the President of the District Forum and at least one member thereof sitting together IF a member, for nay reason, is unable to conduct a proceeding till it is completed, the President and another member shall continue the proceeding from the state at whichit was last heard by the previous member. [Sec14(2)]

10. Every order made by the District Forum shall be signed by its President and the member or rmembers who conducted the proceeding. [Sec14(2A)]

If the proceeding is conducted by the President and one member and they differ on any point or points, they shall state or point on which they differ and refer the same to the other member for hearing on such point or points and the opinion of the majority shall be order of the District Forum.

11. Any person aggrieved by a order made by the District Forum may prefer an appeal against such order to the **State Commission** within a period of **thirty days** from the date of the order. The appeal must be preferred in such form manner as may be prescribed. [Sec15]

The State Commission may entertain appeal after the expiry of the said period of thirty days if it is satisfied that there was sufficient cause for not filing it within that period. [Sec15]

B. Procedure Regarding Service

If the District Forum admit a written complaint relating to any services or it receives a written complaint relating to such goods in respect of which the above procedure cannot be followed, then for its redressal the following procedure will be followed:

1. When the Forum admits a written complaint relating to any services, a copy of such complaint is forwarded to the opposite party. [Sec 13(2)(a)]

2. District Forum directs the opposite party to give his version of the case within a period of 30 days. The Forum may extend this period by 15 days at the maximum. [Sec 13(2)(a)]

3. On receipt of a copy of the complaint, fi the opposite party denies the allegations contained in the complaint or fails to take any action to represent his case written the time given by the District Forum, the Forum shall proceed to settle the consumer dispute on the following basis:

(i) On the basis of evidence brought to its notice by the complainant and where the opposite party denies the allegation contained in the complaint; or

(ii) Ex-parte on the basis of evidence brought to the notice of the Forum by the complainant where the opposite party fails to take action to represent his care.

A special point in this respect is that no proceedings, complying with the procedure laid down in section 13(1) and 13(2) shall be called in question in any court on the ground that the principles of natural Justice have not been complied with. [Sec 13(3)]

Power/Rights of District Forum

For the purpose of hearing and redressal of consumer disputes, District Forum shall have the same power as are vested in a civil court under the code of civil procedure while trying a suit in respect of the following matters, namely:

(1) Right to Call Witness: Under the process of grievance redressal District Forum enjoys the right to summon and enforce the attendance of any defendant or witness and examining the witness on oath. [Sec 13(4)(i)]

(2) Right to Discovery and Production of Evidence or Document: Every District Forum has the right to discovery and production of any document or other material object producble as evidence. [Sec 13(4)(ii)]

(3) Right to Receive Evidence on Affidavits: Every District Forum has the right to receive evidence on affidavits. [Sec 13(4)(iii)]

(4) Right to Requisition Test Report: Every District Forum has the right to requisition the report the concerned analysis or test from the appropriate laboratory or from any other relevant source. [Sec 13)4((iv)]

(5) Right to Examine Witness: District Forum has the right to issue any summon for the examination of any witness. [Sec 13(4)(v)]

(6) Power in Other Prescribed Matters: Every District Forum will have the same powers in other prescribed matters as are vested in a civil court. [Sec 13(4)(vi)]

(7) Judicial Powers: Every proceeding before the proceeding written the meaning of Sections 193 and 228 of the Indian Penal Code and a civil court for the purpose of section 195 and chapter of the code criminal procedure. [Sec 13(5)]

(8) Rights in case of Complainants having Common Interest: If the complainants have common interest (or complaint against one subject) and collectively or any one consumer on their behalf or some consumers, present the complaint, then the District Forum can give its award on all such matters by a fixed date. [Sec 13(6)]

(9) Right to Requisition Books, Documents, Account etc.: If the District Forum deems it proper, then it can requisition any books, documents, amounts, or direct any person to present them. [Sec 10(1)(c)]

(10) Right to get Information: District Forum can obtain relevant information from any person to achieve the objects of this Act. [Sec 10(1)(b)]

(11) Right to Search and Seize Documents and Articles: If any document or article is required in any proceeding and there is possibility of its destruction deformed, changed or pilfered then the District Forum by issuing a direction to any officer to enter any complex to search and seize the same. [Sec 10(1)(a)]

(12) Right to Retain or Return the Seized Documents and Articles: After examining, the District Forum can order to retain or return document, papers account books or articles to the concerned party. [Sec 10(2)(b)]

II. The State Commission

Regarding State Commission,following provision have been made in Consumer Protection Act 1986.

(1) Establishment: In every state, the state government, by issuing a notification can establish **consumer Grievance Redressal Commission to be called "State Commission".** [Sec 19(b)]

(2) Composition: Each State Commission shall consist of:

(i) a person (member) who is or has been a judge of a High Court, appointed by the State Government, who shall be its President. But his appointment shall be made only after consultation with the Chief Justice of the High Court. [Sec 16(a)]

(ii) There will be two other members who shall be persons of ability, integrity and standing and have adequate knowledge or experience or have shown capacity in dealing with problems rebating to economics, law commerce, accounting, industry, public affairs or administration, one of whom shall be a women.

Every appointment shall be made by the State Government on the recommendation of the selection committee. The selection committee shall be composed of:

(i) President of the State Commission — Chairman

(ii) Secretary of the Law Department of the State — Member

(iii) Secretary Incharge of the Department dealing with Consumer Affairs in the State — Member

(3) Salary or Honorarium and other Allowances: The salary or honorarium and other allowances and the other terms and conditions of service of the member of the state commission shall be such as may be prescirbed by the State Government. [Sec 16(2)]

(4) Terms and Age: Every member of the State Commission shall hold office for a term 5 years, or upto the age of 67 years, whichever is earlier, and shall not be eligible for re-appointment. [Sec 16(3)]

(5) Jurisdiction of State Commission: Subject to the other provision of this Act, the State Commission Shall have Jurisdiction:

(a) to entertain:

(i) complaints where the value of the goods or services and compensation, if any claimed exceeds rupees twenty lakhs but does not exceed rupees one crore.

(ii) appeals against the orders of any District Forum within the State; and

(b) to call for the records and pass appropriate and pass appropriate orders in any consumer dispute which is pending before or has been decided by any District Forum within the State, where it appears to the State Government that such District Forum has exercised a jurisdiction not vested in it by law or has failed to exercise a jurisdiction so vested or has acted in exrecise on its jurisdiction illegally or with material irregularity. [Sec 17]

(6) Procedure for Settlement of Dispute: As regards disposal of disputes by the state government, it will follow the same procedure as laid down in sections 12, 13 and 14 of the Act, for the disposal of complaints by the District Forum. Besides it will follow al those rules which have been made by the state government for it.

(7) Vacancy with office of the President: When the office of the President of the District Forum or of the State Commission, as the case may be, is vacant or when any such President is, any person of absence or otherwise, unable to perform the duties of his office, the duties of the office be performed by such person, who is qualified to be appointed as President of the District Forum or, a the care may by the State Commission, as the State Government may appoint for the purpose. [Sec 18A]

(8) Appeal: Any person aggrieved by an order made by the State Commission may prefer an appeal against such order to the National Commission within a period of 30 days from the date of the order.

However, the National Commisson may entertain an appeal after the expiry of thiry-days if it is satisfied that there was sufficient cause for not filing it within that period. [Sec 19]

III. The National Commission

Followign are the provisions of the Consumer Protection Act in respect of the National Commission:

(1) Establishment: By issuing a notificaton Central Government can set up a National Commission This Commission has been established at New Delhi. [Sec 9(c)]

(2) Composition: The National Commission shall compose of:

(i) a person (member) who is or has been a judge of the Supreme Court, shall be appointed by the Central Governmetn. He shall be its President.

Provided that no appointment under this clause shall be made except after consultation with the chief justice of India.

(ii) There shall be four other members including one woman. They shall be persons of abilityn, integrity, experience of, or have shown capacity in dealing with problems relaing to economics, law, commerce, accountancy, industry, public affairs or Administration.

Every appointment shall be made by the Central Government on the recommendation of a Selection Committee consisting of the followign namely:

(i) a person who is a judge of the Supreme Court, to be nominated by the chief justice shall be its **Chairman.**

(ii) the secretary Department of Legal Affairs in the government of India shall be its **member.**

(iii) secretary of the Department dealing with consumer affairs inthe government of India shall be its other **members.**

(3) Salary or Honororium and other Allowances: The salary or honorarium and other allowances and the other terms and conditions of service of the members of the National Commission shall be such as may be prescribed by the Central Government. [Sec20(2)]

(4) Term of Members: Every member of the National Commission shall hold office for a term of five years or up to the age of seventy years, whichever is earlier. [Sec 20(3)]

(5) Jurisdiction of the National Commission: Subject to the other provisios of this Act, the National Commission shall have jurisdiction as under:

(i) to entertian complaints where the value of the goods or services and compensation, if any, claimed exceeds rupees one crore;

(ii) to entertain appeals against the orders of any State Commission;

(iii) to call for the records and pass appropriate orders in any consumer dispute which is pending before or has been decided by any state commission where it appears to the National Commission that such State Commission has exercised a jurisdiction not vested in it by law, or has failed to exercise a jurisdiction so vested, or has acted in the exercise of its jurisdiction illegally or with material irregularity. [Sec 2]

(6) Power/Procedure of Settling Disputes: In the dsiposal of the complaint put up before the Natioal Commission, it shall have all those powers of the civil court which are given in sub-section 4, 5 and of section 13.

National Commission adopts for the disposal fo complaits the procedure that confirms to the rules ade by the Central Government. [Sec 22]

The same procedure as followed by the District Forum under section 13(1) and 13(2) of the nsumer Protection Act in respect of redressal of grievance will also be followed by the National mmission. [Sec 14(2)]

(7) Appeal: In case any person is aggrieved by an order made by the National Commission, he may prefer an appeal against such order to the Supreme Court within a period of 30 days from the of the order. The Supreme Court may entertain an appeal after the expiry of the said period of 30 if it is satisfied there was sufficient cause for not filing it within that period.

Enforcement of the orders of District Forum State Commission or National Commission

Main provision regarding enforcement of the orders of the agencies (District Forum, State Commission or National Commission) established for redressal of grievance under Consumer Protection Act, are as under:

(1) Every order of a District Forum, the State Commission or the National Commission shall if no appeal has been preferred against such order under the provision of this Act, be final.

(2) The District Forum, the State Commission or the National Commission shall not admit a complaint unless it is filed withing two years from the date on which the cause of action has arisen. [Sec 24A(1)]

(3) A complaint may be entertained after the period specified above, if the complainant satisfied the the District Forum the, the State Commission or the National Commission, as the case may be, that he had sufficient cause for not filing the complaint within such period. [Sec 24A(2)]

It is worth mentioning that such delay can be condoned only when the reasons are recorded.

(4) Every order made by the District Forum, the State Commission or the National Commission will be executed in the same way as the court to which it is sent shall execute as if it were decree or order sent to it for execution. [Sec 25]

(5) If the District Forum, the State Commission or the National Commission fails to get its order executed then it will send the order to the court in whose jurisdiction the dispute falls for its execution. Then the said court shall execute the order as if it were a decree or order sent to it for execution. Jurisdiction is decided as under:

(i) of the order is against a company, the jurisdiction will be decided on the basis of the place wehre its registered office is situated.

(ii) if the order is against any person, the jurisdiction will be decided according to the place where the person concerned voluntary resides or carries on business or personally works for gain. [Sec25]

(6) When a complaint put up before the District Forum, the State Commission or the National Commission is found to be frivolous or vexations, it shall, for resons to be recorded in writing, dismiss th complaint.

It can also make an order that the complainant shall pay to the opposite party such cost, not exceeding **ten thousand rupees,** may be specified in that order. [Sec26]

Penalties

Where a trader or a person against whom a complaint is made, or the complainant, fails to comply with any order made by the District Forum, the State Commission or the National Commission, as the Case may be, such traders or person or complainant shall be punishable:

(i) with imprisonment for not less than one month but which may extend to three years; or

(ii) with fine which shall not be less than two thousand rupees but which may extend to ten thousand rupees;

(iii) with both.

In case, the District Forum, the State Commission or the National Commission, whosoever has given the order, is satisfied with the existing circumstances, it can reduce the minimum limits of both imprisonment or fine, mentioned above.

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FOREIGN EXCHANGE MANAGEMENT ACT (FEMA)-2002

Although Central Government formulates policy relating to foreign trade yet it is Reserve Bank of Indian that controls foreign trade practices through foreign exchange control Act, "Foreign Exchange Regulation Act 1947" was the first formal legislative measure to control foreign exchange. It was replace by Foreign Exchange Regulation Act, 1974, popularly known as FERA.

In the era of economic liberalization, it was felt necessary to have more efficacies management of foreign exchange. Accordingly, with a view to encouraging globalization and economic liberalisation, control government continued a Task Force to review FERA. On the recommendations of the Task Force. Foreign Exchange Management Bill 1994 was introduce in the Parliament. In November 1999, Lok Sabha and on December 8, 1999, Rajya Sabha passed this bill. having been passed by both the Houses of Parliament, the bill received the assent of the President on December 9, 1999. Thus, on June 1, 2000, in place of "FERA", the Foreign Exchange Management Act 1999 came into force. It is popularly addressed as FEMA. This Act is of great significance from the view point of foreign trade and foreign exchange.

Short Title and Extent of the Act

1. This Act may be called the Foreign Exchange Management Act, 1999.

2. It extends to the whole of India.

3. It shall apply to all branches, offices and agencies outside India owned or controlled by a person resident in India.

4. It shall come into force on such date as the Central Government may, by notification in the official Gezette, appoint. However, different dates may be appointed for different provisions of this Act.

This Act came into force on June 1, 2002 by a gazette notification of the Central Government.

Objects of the Act

1. It aims at Consolidating and amending the law reflating to foreign exchange with the objective of facilitating external trade and payments.

2. Promoting the orderly development and maintenance of foreign exchange market in India.

Important Terminology/Definitions

1. Adjudicating Authority means an officer authorised under sub-section (1) of section 16. [Sec 2(a)]

2. "Appellate Tribunal" means the Appellate Tribunal for foreign Exchange established under section 18. [Sec 2(b)]

3. "Authorised Person" means an authorised dealer, money changer, off-shore banking unit or any other person authorised under sub-section (1) of section 10 to deal in foreign exchange or foreign securities. [Sec 2(c)]

4. "Bench" means a Bench of the Appellate Tribunal. [Sec 2(d)]

5. "Capital Account Transaction" means a transaction which alters the asserts or liabilities, including contingent liabilities, outside India of person resident in India or assets or liabilities in Indian or persons resident outside India. It also includes transactions referred to in sub-section (3) of section 6. [Sec 2(e)]

6. "Chairperson" means the chairperson of the Appellate Tribunal. [Sec 2(f)]

7. "Chartered Accountant" shall have the meaning assigned to it in clause (b) of sub-section (1) of section 2 of the Chartered Accountants Act, 1949. [Sec 2(g)]

8. "Currency" includes all currency notes, postal notes, postal orders, money orders, cheques, drafts, travellers cheques, letter of credit, bills of exchange and promissory notes, credit cards or such other similar instruments, as may be notified by the Reserve Bank of India. [Sec 2(h)]

9. "Currency Notes" includes cash in the form of coins and bank notes. [Sec 2(i)]

10. "Current Account Transactions" means a transaction other than a capital account transaction and generally includes:

(i) payments due in connection with foreign trade, other current business, services and short-term banking and credit facilities in the ordinary course of business;

(ii) payments due as interest on loans and as net income from investments;

(iii) remittances for living expenses of parents, spouse and children residing aboard, and

(iv) expenses in connection with foreign travel, education and medical care of parents, spouse and children. [Sec 2(j)]

11. "Director of Enforcement" means the Director of Enforcement appointed under sub-section (1) of section 36. [Sec 2(k)]

12. "Export" with its grammatical variations and cognate expressions, means:

(i) taking out of India to a place outside India any goods;

(ii) provision of services from India to any person outside India; [Sec 2(l)]

13. "Foreign Currency" means any currency other than Indian Currency. [Sec 2(n)]

14. "Foreign Exchange" means foreign currency and includes:

(i) deposits, credits and balances payable in any foreign currency.

(ii) drafts, travellers cheques, letters of credit or bills of exchange, expressed or drawn in Indian currency but payable in any foreign currency.

(iii) drafts, travellers cheques, letters of credit or bills of exchange drawn by banks, institutions or persons outside India, but payable in Indian currency. [Sec 2(n)]

15. "Foreign Security" means any security, in the form of shares, stocks, bonds, debentures or any other instrument denominated or expressed in foreign currency and includes securities expressed in foreign currency, but where redemption or any form of return such as interest or dividends is payable in Indian currency. [Sec 2(o)]

16. "Import" will its grammatical variations and cognate expressions, means bringing into India any goods or services. [Sec 2(p)]

17. "Indian Currency" means currency which is expressed or drawn in Indian rupees but does not include special bank notes and special one rupee notes issued under section 28A of the Reserve Bank of India Act, 1934. [Sec 2(q)]

18. "Legal Practitioner" shall have the meaning assigned to it in clause (i) of sub-section (1) of section (2) of the Advocate Act, 1961. [Sec 2(r]

19. "Member" means a member of the Appellate Tribunal and includes the chairperson thereof. [Sec 2(s)]

20. "Notify" means to notify in the official Gazettes. [Sec 2(t)]

21. "Person" includes

(i) an individual

(ii) a Hindu Undivided Family

(iii) a company

(iv) a firm

(v) an association of persons or a body of individuals, whether incorporated or not

(vi) every artificial judicial person, not falling within any of the preceding sub-clauses, and

(vii) any agency, office or branch owned or controlled by such persons [Sec 2(u)]

22. "Person resident in India" means

(i) a person residing in India for more than one hundred and eighty-two days during the course of the preceding financial year but does not include:

A. a person who has gone out of India or who stays outside India, in either case:

(a) for or on taking up employment outside India, or

(b) for carrying on outside India a business or vocation outside India, or

(c) for any other purpose, in such circumstances as would indicate his intention to stay outside India for an uncertain period;

B. a person who has come to or stays in India, in either case, otherwise than:

(a) for or on taking up employment in India, or

(b) for carrying on in India a business or vocation in India, or

(c) for any other purpose, in such circumstances as would indicate his intention to stay in India for an uncertain period;

(ii) any person or body corporate registered or incorporated in India;

(iii) an office, branch or agency in India owned or controlled by a person resident outside India.

(iv) an office, branch or agency outside India owned or controlled by a person resident in India; [Sec 2(v)]

23. "Person Resident Outside India" means a person who is not resident in India; [Sec 2(w)]

24. "Prescribed" means prescribed by rules made under this Act. [Sec 2(x)]

25. "Repatriate to India" means bringing into India the realised foreign exchange and includes:

(i) selling of such foreign exchange to an authorised person in India in exchange for rupees; or

(ii) holding of realised amount in an account with an authorised person in India to the extent notified by the Reserve Bank

(iii) using of the realised amount for discharge of a debt or liability denominated in foreign exchange. [Sec 2(y)]

26. "Reserve Bank" means the Reserve Bank of India constituted under sub-section (1) of section 3 of the Reserve Bank of India Act, 1934. [Sec 2(z)]

27. "Security" means shares, stocks, bonds and debentures, Government securities as defined in the Public Debt Act, 1944, saving certificate issued under Government Saving Certificate Act, 1959, deposit receipt in respect of deposits of securities and units of the Unit Trust of India established under the Unit Trust of India Act, 1963,or of any mutual fund and includes certificates of title to securities, but does not includes bills of exchange or promissory notes other than government promising notes or any other instruments which may be notified by the Reserve Bank as security for the purposes of this Act; [Sec 2(za)]

28. "Service" means service of any kind or description which is made available to potential users and includes the provisions of facilities in connection with banking, financing, insurance, medical assistance, legal assistance, chit fund, real estate, transport, processing, supply of electrical or other energy, boarding or lodging or both, building of houses, entertainment, amusement or the perveoing of news or other information, but does not include the rendering of any service free of charge or under a contract of personal service. [Sec 2(zb)]

29. "Special Director Appeals" means an officer appointed under section 18. [Sec 2(zc)]

30. "Specify" means to specify by regulations made under this Act and the expression "specified shall be construed accordingly. [Sec 2(zd)]

31. "Transfer" includes sale, purchase, exchange, mortgage, pledge, gift, loan or any other form of transfer of right, title, possession or lien, etc. [Sec 2(ze)]

Regulation and Management of Foreign Exchange

FEMA has the following provisions in respect of Regulation and Management of Foreign Exchange.

1. Dealing in Foreign Exchange, etc.

FEMA has imposed certain restrictions on dealing in foreign exchange security. Except as otherwise provided in this Act, rules or regulations made thereunder or with the general or special permission of the Reserve Bank, no person shall:

(i) deal in or transfer any foreign exchange or foreign security to any person not being an authorised person; [Sec 3(a)]

(ii) make any payment to or for the credit of any person resident outside India in any manner; [Sec 3(b)]

(iii) receive otherwise through an authorised person, any payment by order or on behalf of any person resident outside India in any manner; [Sec 3(c)]

(iv) enter into any financial transaction in India as consideration for acquisition or creation or transfer of a right to acquire, any asset outside India by any person. [Sec 3(d)]

2. Holding of Foreign Exchange

Except as otherwise provided in this Act, no person resident in India shall acquire, hold, own, posses or transfer any foreign exchange, foreign security or any immovable property situated outside India. [Sec 4]

3. Current Account Transactions

Any person may sell or draw foreign exchange to or from an authorised person if such sale or drawal is a current account transaction.

Provided that the Central Government may, in public interest and in consultation with the Reserve Bank, impose such reasonable restrictions for current account transactions as may be prescribed. [Sec 5]

4. Capital Account Transactions

(A) Subject to the provision of sub-section (2) any person may sell or draw foreign exchange to or from an authorised person for a capital account transaction.

(B) The Reserve Bank may, in consultation with the Central Government, specify:

(i) any class or classes of Capital Account transactions which are permissible;

(ii) the limit up to which foreign exchange shall be admissible for such transactions; [Sec 6(2)]

Provided that the Reserve Bank shall not impose any restriction on the drawal of foreign exchange for payments due on the account of amortization of loans or for depreciation of direct investment.

(C) Without prejudice to the generality of the provision of sub-section(2),the Reserve Bank may, by regulations prohibit, restrict or regulate the following:

(i) transfer or issue of any foreign security by a person resident in India.

(ii) transfer or issue of any security by a person resident outside India.

(iii) transfer or issue of any security or foreign security by any branch, office, or agency in India or a person resident outside India;

(iv) any borrowing or lending in foreign exchange in whatever form of by whatever name called;

(v) any borrowing or lending in rupees in whatever form or by whatever name called between a person resident in India and a person resident outside India;

(vi) deposits between persons residents in India and persons resident outside India;

(vi) export, import or holding of currency or currency notes;

(viii) Acquisition transfer of immovable property outside India, other than a lease not exceeding five years, by a person resident in India;

(ix) acquisition or transfer of immovable property in India, other than a lease not exceeding five years, by a person resident outside India.

(x) giving of a guarantee or surety in respect of any debt, obligation or other liability increased:

(a) by a person resident in India and owned to a person resident outside India; or

(b) by a person resident outside India.

(D) A person resident in India only hold, own transfer or invest in foreign currency, foreign security or any immovable property situated outside India, if such currency, security or property was acquired,held or owned by such person when he was resident outside India or inherited form a person who was resident outside India.

(E) A person resident outside India may hold, own, transfer or invest in India currency, security or any immovable property situated in India, if such currency, security or property was acquired, held or owned by such person when he was resident in India or inherited from a person who was resident in India.

(F) Without prejudice to the provisions of this section, the Reserve Bank may be regulation prohibit, restrict or regulate establishment in India of a branch, office or other place of business any activity relating to such branch, office or other place or business. [Sec 5]

5. Export of Goods and Services

Every exporter of goods shall:

(i) furnish to the Reserve Bank or to such other authority a declaration in such form and in such manner as may be specified, containing true and correct material particulars, including the amount representing the ful export value or, if the full export, value of the goods is not ascertainable at the time of export, the value which the exporter, having regard to the prevailing market conditions, expects to receive on the sale of the goods in a market outside India.

(ii) furnish to the Reserve Bank such other information as may be required by the Reserve Bank for the purpose of ensuring the realisation of the export proceeds by such exporter.

(2) The Reserve Bank may for the purpose of ensuring that the full export value of the goods or such reduced value of the goods as the Reserve Bank determines, having regard to the prevailing market conditions, is received without any delay, direct any exporter to comply with such requirements as it seems fit.

(3) Every exporter of services shall furnish to the Reserve Bank or to such other authorities a declaration in such form and in such manner as may be specified, containing the true and correct material particulars in relation to payment for such services. [Sec 7]

6. Realisation and Repatriation of Foreign Exchange

Save as otherwise provided in this Act, where any amount of foreign exchange is due or has accrued to any person resident in India, such person shall take all reasonable steps to realise and repatriate to India such foreign exchange within such period and on such manner as may be specified by the Reserve Bank. [Sec 8]

Exemption from Section 4 and 8

The provisions of sections 4 and 8 shall not apply to the following, namely:

(i) possession of foreign currency or foreign coins by any person up to such limit as the Reserve Bank may specify;

(ii) foreign currency account held ro operated by such person or class of persons and the limit up to which the Reserve Bank may specify;

(iii) foreign currency acquired or received before the 8th day of July 1947 or any income arising or accruing thereon which is held outside India by any person in pursuance of the general or special permission granted by the Reserve Bank.

(iv) Foreign exchange held by a person resident in India up to such limit as the Reserve Bank may specify, if such foreign exchange was required by way of gift or inheritance from a person referred to in clause (iii) including any income arising therefrom;

(v) foreign exchange acquired from employment, laziness, trade, vocation, services, honorarium, gifts, inheritance or any other legitimate means up to such limit as the Reserve Bank may specify; and

(vi) Such other receipts in foreign exchange as the Reserve Bank may specify. [Sec 9]

Authorised Person

1. The Reserve Bank may, on an application made to it in this behalf, authorise any person to be known as authorised person to deal in foreign exchange or in foreign securities as an authorised dealer, money changer or off-shore banking unit or in any other manner as it deems fit. [Sec 10(1)]

2. An authorisation under this section shall be in writing and shall be subject to the conditions laid down therein. [Sec 10(2)]

3. An authorisation granted under sub-section(1) may be revoked by the Reserve Bank at any time if the Reserve Bank is satisfied that :

(a) it is in public interest so to do; or

(b) the authorised person has failed to comply with the condition subject to which the authorisation was granted or has contravened any of the provisions of the Act or any rule, regulation, notification, direction or order made these under:

Provided that no such authorisation shall be revoke on any ground referred to in clause (b) unless the authorised person has been given a reasonable opportunity of making a representation in the matter. [Sec 10(3)]

4. An authorised person shall, in all his dealings, in foreign exchange or foreign security comply with such general or special directions or orders as the Reserve Bank may, from time to time, think fit to give, and except, an authorised person shall not engaged in any transaction involving any foreign exchange or foreign security which is not an conformity with the terms of his authorisation under this section. [Sec 10(4)]

5. An authorised person shall before, undertaking any transaction in foreign exchange on behalf of any person, required that person to make such declaration and to give such information as will reasonably satisfy him that the transaction will not involve, and is not designed for the purpose of any contravention or evasion of the provisions of this Act or of any rule, regulation, notification, direction or order made thereunder, and where the said person refuses to comply with any such requirement, or makes only unsatisfactory compliance therewith the authorised person shall refuse in writing to undertake the

transaction and shall, if he has reason to believe that any such contravention or evasion as aforesaid is contemplated by the person, report the matter, to the Reserve Bank. [Sec 10(5)]

6. Any person, other than the authorised person, who has acquired or purchased foreign exchange for any purpose mentioned in the declaration made by him to authorised person under sub-section (5) does not use it for such purpose or does not surrender it to authorised person within the specified period of use the foreign exchange so acquired or purchased for any other purpose for which purchase or acquisition of foreign exchange is not permissible under the provisions of the Act or the rules or regulations or direction or order made thereunder shall be deemed to have committed contravention of the Act for the purpose of this section. [Sec 10(6)]

Reserve Bank's Powers to Issue Direction to Authorised Person

(i) The Reserve Bank may, for the purpose of securing compliance with the provisions of this Act and of any rules, regulations, notifications, or directions made thereunder, give to the authorised persons any direction in regard to making or not making payment relating to foreign exchange or foreign security.

(ii) where any authorised person contravenes any direction given by the Reserve Bank under this Act or fails to file any return as directed by the Reserve Bank, the Reserve Bank may, after giving reasonable opportunity of being heard, impose on the authorised person a penalty which may extend to ten thousand rupees and in the case of continuing contravention with an additional penalty which may extend to two thousand rupees for every day during which such intervention continues. [Sec 11]

Power of Reserve Bank to Inspect Authorised Person

1. The Reserve Bank may, at any time, cause an inspection to be made by any officer of the Reserve Bank specially authorised in writing by the Reserve Bank in this behalf of the business of any authorised person for the purpose of:

(i) verifying the corrections of any statement, information or particulars furnished to the Reserve Bank;

(ii) obtaining any information or particulars which such authorised person has failed to furnish when called upon to do so;

(iii) securing compliance with the provisions of the Act or of any rules, regulations, directions or orders made thereunder.

2. It shall be the duty of every authorised person and where such person is a company or a firm, every director, partner or a other officer of such company or firm, as the case may be to produce to any officer making an inspection under sub-section(1) such books, accounts, and other documents in his custody or power and to furnish any statement or information relating to the affairs of such person, company or firm, as the said officer may require within such time, and in such manner as the said officer may direct. [Sec 12]

Contravention and Penalties

1. Penalties

In the event of contravention of the provisions of the Act, following penalties are provided:

(i) If any person contravences any provision of this Act, or contravenes any rule, regulation, notification, direction or order issued in exercise of the powers under this Act, or contravenes any condition subject to which an authorisation is issued by the Reserve Bank, he shall, upon adjudication, be

liable to a penalty upto thrice the sum involved in such contravention where such amount is quantifiable, or up to two lakh rupees where the amount is not quantifiable, and where such contravention is a continuing one, further penalty which may extend to five thousand rupees for every day during which the contravention continues. [Sec 13 (1)]

2. Any Adjudicating Authority adjudging any contravention under sub-section(1), may, if he thinks fit in addition to any penalty which he may impose for such contravention direct that any currency, security or any other money or property in respect of which the contravention has taken place shall be confiscated to the Central Government and further direct that the foreign exchange holdings, if any, of the persons committing the contraventions or any part thereof shall be brought back into India or shall be retained outside India in accordance with the directions made in this behalf. [Sec13(1, 2)]

"Property" referred to above shall include :

(a) deposits in to bank, where the said property is converted into such deposits;

(b) Indian currency, where the said property is converted into that currency; and

(c) any other property which has resulted out of the conversion of that property.

Enforcement of the orders of Adjudicating Authority

Provisions regarding enforcement of orders of Adjudicating Authority are as under:

(i) According to the provisions of section 19(2). If any person fails to make payment of the penalty imposed in him under section 13 within a period of ninety days from the date of service of notice, he shall be liable to civil imprisonment. [Sec 14(1)]

(iii) Order for the arrest and detention in civil prison of a defaulter shall not be made unless the Adjudicating Authority has issued and served a notice calling upon him to appear before him on the specified date and to show cause why he should not be committed to the civil prison. [Sec 14(2)]

Unless the Adjudicating Authority, for reasons in writing, is satisfied:

(i) that the defaulter, with the object of obstructing the recovery of penalty, has after the issue of notice by the Adjudicating Authority, dishonestly transferred, concealed or removed any part of his property,

(ii) that the defaulter has or has had since the issuing of notice by the Adjudicating Authority, the means to pay the penalty or some substantial part thereof and refuses or neglects or has refused or neglected to pay the same.

(iii) Notwithstanding anything contained in the above section if the Adjudicating Authority is satisfied, by affidavit or otherwise, that with the object of delaying, the execution of notice, the defaulter is likely to abcond or leave the limits of the jurisdiction of the Adjudicating Authority, a warrant for the arrest of the defaulter may be issued by the Adjudicating Authority. [Sec 14(3)]

(iv) The Adjudicating Authority may issue a warrant for the arrest of the defaulter, if the defaulter fails to appear in pursuance of a notice issued and served under sub-section 1. [Sec 14(4)]

(v) A warrant of arrest issued by the Adjudicating Authority under sub-section (3) or sub-section (4) may also be executed by any other Adjudicating Authority within whose jurisdiction the defaulter may, for the time being be found. [Sec 14(5)]

(vi) Every person arrested in pursunace of warrant of arrest under this section shall be brought before the Adjudicating Authority issuing the warrant as soon as practicable and in any event within twenty-four hours of his arrest (exclusive of the time required for the journey). [Sec 14(6)]

Provided that if the defaulter pays the amount entered in the warrant of arrest as due and the costs of teh arrest to the officer arresting him such officer shall at once release him.

Explanation: For the purpose of this sub-section, where the defaulter is a Hindu Undivided Family, the *karta* thereof shall be deemed to be the defaulter. [Sec 14(6) explanation]

(vii) When a defaulter appears before the Adjudicating Authority pursuant to a notice to show cause or is brought before the Adjudicating Authority under this section, the Adjudicating Authority shall give the defaulter an opportunity showing cause why he should not be committed to the civil prison. [Sec 14(7)]

(viii) Pending the conclusion of the inquiry, the Adjudicating Authority may, in his discretion, order the defaulter to be detained in the custody of such officer as the Adjudicating Authority may think fit or release him on his furnishing the security to the satisfaction of the Adjudicating Authority for his appearance as and when required. [Sec 14(8)]

(ix) Upon the conclusion of the inquiry, the Adjudicating Authority may make an order for the detention of the defaulter in the civil prison and shall in that event cause him to be arrested if he is not already under arrest.

Provided that in order to give a defaulter an opportunity of satisfying the arrears, the Adjudicating Authority may, before making the order of detention, leave the defaulter in the custody of the officer arresting him or of any other officer for a specified period not exceeding fifteen days, or release him on his furnishing security to the satisfaction of the Adjudicating Authority for his appearance at the expiration of the specified period if the arrears are not satisfied. [Sec 14(9)]

(x) When the Adjudicating Authority does not make an order of detention under sub-section (9), he shall, if the defaulter is under arrest, direct his release. [Sec 14(10)]

(vi) Every person detained in the civil prison in execution of the certificate may be so detained:

(a) where the certificate is for a demand of an amount exceeding rupees one crore, up to three years, and

(b) in any other case, up to six months:

Provided that he shall be released from such detention on the amount mentioned in the warrant for his detention being paid to the officer-in-charge of the civil prison. [Sec 14(11)]

(xii) A defaulter released from detention under this section shall not, merely by reason of this release, be discharged from his liability for the arrears, but he shall not be liable to be arrested under the certificate in execution of which he was detained in the civil prison. [Sec 14(12)]

(xiii) A detention order may be executed at any place in India in the manner provided for the execution of warrant of arrest under the Code of Criminal Procedure, 1973. [Sec 14(13)]

Power to compound contravention – (1) Any contravention under section 13 may, on an application made by the person committing such contravention be compounded within one hundred and eighty days from the date of receipt of application by the Director of Enforcement or such other officers of the Directorate of Enforcement and officer of the Reserve Bank as may be authorised in this behalf by the Central Government in such manner as may be prescribed. [Sec 15(1)]

(2) Where a contravention has been compounded under sub-section (1) no proceeding or futher proceeding, as the case may be, shall be initiated or continued, as the case may be, against the person committing such contravention under that section. [Sec 15(2)]

Adjudication and Appeal

Appointment of Adjudicating Authority

A main provision regarding the appointment of Adjudicating Authority are as under:

(i) For the purpose of adjudication under section 13, the Central Government may, by an order published in the Official Gazette, appoint as many officers of the Central Government as it may think fit, as the Adjudicating Authorities for holding an inquiry in the manner prescribed after giving the accused person alleged to have committed contravention under section 13.

Provided that where the Adjudicating Authority is of opinion that the said person is likely to abscond or is likely to evade in any manner, the payment of penalty if levied, it may direct the said person to furnish a bond or guarantee for such amount and subject to such conditions as it may deem fit. [Sec 16(1)]

(ii) The Central Government shall, while appointing the Adjudicating Authorities under sub-section (1), also specify in the order published in the Official Gazette their respective jurisdictions. [Sec 16(2)]

(iii) No Adjudicating Authority shall hold an enquiry under sub-section (1) except upon a complaint in writing made by any officer authorised by a general or special order by the Central Government. [Sec 16(3)]

(iv) The said person may appear either in person or take the assistance of a legal practitioner ro a chartered accountant of his choice for presenting his case before the Adjudicating Authority. [Sec 16(4)]

(v) Every Adjudicating Authority shall have the same powers of a civil court which are conferred on the Appellate Tribunal under sub-section (2) of section 28 and :

(a) all proceedings before it shall be deemed to be judicial proceedings writing the meaning of section 193 and 238 of the Indian Penal Code.

(b) shall be deemed to be a civil court for the purpose of sections 345 and 346 of the Code of Criminal Procedure, 1973. [Sec 16(5)]

(vi) Every Adjudicating Authority shall deal with the complaint under sub-section (2) as expeditiously as possible and endeavor shall be made to dispose of the complaint finally within one year from the date of receipt of the complaint: [Sec 16(6)]

Provided that where the complaint cannot be disposed of within the said period, the Adjudicating Authority shall record periodically the reasons in writing for not disposing of the complaint within the said period.

2. Appeal to Special Director (Appeals)

(i) The Central Government shall, by notification, appoint one or more Special Directors (Appeals) to hear appeals against the orders of the orders of the Adjudicating Authorities under this section and shall also specify in the said notification the matter and places in relation to which the Special Director (Appeals) may exercise jurisdiction. [Sec 17(1)]

(ii) Any person aggrieved by an order made by the Adjudicating Authority, being an Assistant Director of Enforcement or a Deputy Director of Enforcement, may prefer an appeal to the Special Director (Appeals). [Sec 17(2)]

(iii) Every appeal under sub-section (1) shall be filed within forty-five days from the date on which the copy of the order made by the Adjudicating Authority is received by the aggrieved person and it shall be in such form, verified in such manner and be accompanied by such fee as may be prescribed. [Sec 17(3)]

(iv) On receipt of an appeal under sub-section (1), the Special Director (Appeals) may after giving the parties to the appeal an opportunity of being heard, pass such order thereon as he thinks fit confirming, modifying or setting aside the order appealed against. [Sec 17(4)]

(v) The Special Director (Appeals) shall send a copy of every order made by him to the parties to appeal and to the concerned Adjudicating Authority. [Sec 17(5)]

(vi) The Special Director (Appeals) shall have the same powers of a civil court which are conferred on the Appellate Tribunal under sub-section (2) of section 28 and :

(a) all proceedings before him shall be deemed to be judicial proceedings within the meaning sections 193 and 228 of the Indian Penal Code (45 to 1860);

(b) shall be deemed to be a civil court for the purposes of sections 345 and 346 of the Code of Criminal Procedure, 1973 (2 of 1974). [Sec 17(6(a)(b)]

3. Establishment of Appellate Tribunal

The Central Government shall, by notification, establish an Appellate Tribunal to be known as the Appellate Tribunal for Foreign Exchange to hear against the orders of the Adjudicating Authorities and the Special Director (Appeals) under this Act. [Sec 18]

4. Appeal to Appellate Tribunal

(i) Same as provided in sub-section (2), the Central Government or any person aggrieved by an order made by an Adjudicating Authority other than those referred to in sub-section (1) of section 17, or the Special Director (Appeals), may prefer an appeal to the Appellate Tribunal:

Provided that any person appealing against the order of the Adjudicating Authority or the Special Director (Appeals) levying any penalty, shall while filing the appeal, deposit the amount of such penalty with such authority as may be notified by the Central Government:

Provided further that where in any particular case, the Appellate Tribunal is of the opinion that the deposit of such penalty would cause undue hardship to such person, the Appellate Tribunal may dispense with such deposit subject to such conditions as it may deem fit to impose so as to safeguard the realisation of penalty.

(ii) Every appeal under sub-section (1) shall be filed within a period of forty-dive days form the date on which a copy of the order made by the Adjudicating Authority or the special Director (Appeals) is received by the aggrieved person or by the Central Government and it shall be in such form, verified in such manner and be accompanied by such fee as may be prescribed: [Sec 19(2)]

Provided that the Appellate Tribunal may entertain an appeal after the expiry of the said period of forty-five days if it is satisfied that there was sufficient cause for not filing it within that period.

(iii) On receipt of an appeal under sub-section (1), the Appellate Tribunal may, after giving the parties to the appeal an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or setting aside the order appealed against. [Sec 19(3)]

(iv) The Appellate Tribunal shall send a copy of every order made by it to the parties to the appeal and to the concerned Adjudicating Authority or the Special Director (Appeals), as the case may be. [Sec 19(4)]

(v) The appeal filed before the Appellate Tribunal under sub-section (1) shall be dealt with by it as expeditiously as possible and endeavour shall be made by it to dispose of the appeal finally within one hundred and eighty days from the date of receipt of the appeal: [Sec 19(5)]

Provided that where any appeal could not be disposed of within the said period of one hundred and eighty days, the Appellate Tribunal shall record its reasons in writing for not disposing of the appeal within the said period.

(vi) The Appellate Tribunal may, for the purpose of examining the legality, propriety or correctness of any order made by the Adjudicating Authority under section 16 in relation to any proceeding, on its own motion or otherwise, call for records of such proceedings and made such order in the case as it thinks fit. [Sec 19(6)]

5. Composition of Appellate Tribunal

Main Provisions in respect of the composition of Appellate Tribunal are as under:

(i) The Appellate Tribunal shall consist of a Chairperson and such number of Members as the Central Government may deem fit. [Sec 20(1)]

(ii) Subject to the Provision of this Act:

(a) the jurisdiction of the Appellate Tribunal may be exercised by Benches thereof;

(b) a Bench may be constituted by the Chairperson with one or more Members as the Chairperson may deem fit;

(c) the Benches of the Appellate Tribunal shall ordinarily sit at New Delhi and at such other places as the Central Government may, in consultation with the Chairperson, notify;

(d) the Central Government shall notify the areas in relation to which each Bench of the Appellate Tribunal may exercise jurisdiction. [Sec 20(2)]

(iii) Notwithstanding anything contained in sub-section (2), the Chairperson may transfer a Member from one Bench to another Bench. [Sec 20(3)]

(vi) If at any stage of the hearing of any case or matter it appears to the Chairperson or a Member that the case or matter is of such a nature that it ought to be heard by a Bench consisting of two Members, the case or matter may be transferred by the Chairperson to such Bench as the Chairperson may deem fit. [Sec 20(4)]

(6) Qualification for Appointment of Chairperson, Member and Special Director (Appeals)

(1) A person shall not be qualified for appointment as the Chairperson or a Member unless he:

(a) in the case of Chairperson, is or has been or is qualified to be, a judge of a High Court; and

(b) in the case of a Member, is or has been or is qualified to be, a District Judge. [Sec 21(1)]

(2) A person shall not be qualified for appointment as a Special Director (Appeals) unless he:

has been a member of the Indian Legal Service and has held a post in Grade I of that service; or

(a) has been a member of the Indian Revenue Service and has held a post equivalent to a Joint

(b) Secretary to the Government of India. [Sec 21(2)]

7. Term of Office

The Chairperson and every Member shall hold office as such for a term of five years from the date on which he enters upon his office:

Provided that no Chairperson or other Member shall hold office as such after he has attained:

(i) in the case of the Chairperson, the age of sixty-five years;

(ii) in the case of any other Member, the age of sixty-two years. [Sec 22]

8. Terms and Conditions of Service

The salary and allowances payable to and the other terms and conditions of service of teh Chairperson, other Members and the Special Director (Appeals) shall be such as may be prescribed:

Provided that neither the salary and allowances nor the other terms and conditions of service of the Chairperson or a Member shall be varied to his disadvantage after appointment. [Sec 23]

9. Vacancies

If, for reason other than temporary absence, any vacancy occurs in the office of the Chairperson or a Member, the Central Government shall appoint another person in accordance with the provisions of this Act to fill the vacancy and the proceedings may be continued before the Appellate Tribunal from the Stage at which the vacancy is filled. [Sec 24]

10. Resignation and Removal

(i) The Chairperson or a Member may by notice in writing under his hand addressed to the Central Government, resign the office:

Provided that the Chairperson or a Member shall, unless he is permitted by the Central Government to relinquish his office sooner, continue to hold office until the expiry of three months from the date of receipt of such notice or until a person duly appointed as his successor enters upon his office or until the expiry of term of office, whichever is the earliest.

(ii) The Chairperson or a Member shall not be removed from his office except by an order by the Central Government on the ground of proved misbehaviour or incapacity after an inquiry made by such person as the President may appoint for this purpose in which the Chairperson or a Member concerned has been informed of the charges against him and given a reasonable opportunity of being heard in respect of such charges. [Sec 25]

11. Member to act as Chairperson in certain circumstances

(i) In the event of the occurrence of any vacancy in the office of the reason of his death, resignation or otherwise, the seniormost Member shall act as the Chairperson until the date on which a new Chairperson, appointed in accordance with the provisions of this Act to fill such vacancy, enters upon his office.

(ii) When the Chairperson is unable to discharge his functions owing to absence, illness or any other cause, the seniormost Member shall discharge the functions of the Chairperson until the date on which the Chairperson resumes his duties. [Sec 26]

12. Staff of Appellate Tribunal and Special Director (Appeals)

(i) The Central Government shall provide the Appellate Tribunal and the Special Director (Appeals) with such officers and employees as it may deem fit.

(ii) The officers and employees of the Appellate Tribunal and office of the Special Director (Appeals) shall discharge their functions under the general superintendent of the Chairperson and the Special Director (Appeals), as the case may be.

(iii) The salaries and allowances and other conditions of service of the officers and employees of the the Appellate Tribunal and the Special Director (Appeals) shall be such as may be prescribed.

13. Procedure and Powers of the Appellate Tribunal and the Special Director (Appeals)

(i) The Appellate Tribunal and the Special Director (Appeals) shall not be bound by the procedure laid down by the Code of Civil Procedure , 1908 but shall be guided by the principles of natural justice and, subject to the other provisions of this Act, the Appellate Tribunal and the Special Director (Appeals) shall have powers to regulate its own procedure.

(ii) The Appellate Tribunal and the Special Director (Appeals) shall have, for the purposes of discharging its functions under this Act, the same powers as are vested in the civil court under the Code of Civil Procedure, 1908 (5 of 1908), while trying a suit, in respect of the following matters, namely:

(a) summoning and enforcing the attendance of any person and examining him on oath;

(b) requiring the discovery and production of documents;

(c) receiving evidence on affidavits;

(d) subject to the provisions of sections 123 and 124 of the Indian Evidence Act, 1872 requisitioning any public record or document or copy of such record or document from any officer;

(e) issuing commissions for the examination of witnesses or documents;

(f) reviewing its decisions;

(g) dismissing a representation of default or deciding it *ex parte*;

(h) setting aside any order of dismissal of any representation for default or any order passed by it *ex parte*; and

(i) any other matter which may be prescribed by the Central Government.

(iii) An order made by the Appellate Tribunal and the Special Director (Appeals) under this Act shall be executable by the Appellate Tribunal and the Special Director (Appeals) as a decree of civil court and, for this purpose, the Appellate Tribunal and the Special Director (Appeals) shall have all the powers of a civil court.

(iv) Notwithstanding anything contained in sub-section (iii) the Appellate Tribunal and the Special Director (Appeals) may transmit any order made by it to a civil court having local jurisdiction and such civil court shall execute the order as if it were a decree made by that court.

(v) All proceedings before the Appellate Tribunal and the Special Director (Appeals) shall be deemed to be judicial proceedings within the meaning of section 228 of the Indian Penal Code 1860 and the Appellate Tribunal shall be deemed to be a civil court for the purpose of sections 345 and 346 of the Code of Criminal Procedure, 1973. [Sec 28]

14. Distribution of Business amongst Benches

Where, Benches are constituted, the Chairperson may, from time to time, by notification, made provisions as to the distribution of the business of the Appellate Tribunal amongst the Benches and also provide for the matters which may be dealt with by each Bench. [Sec 29]

15. Power of Chairperson to transfer cases

On the application of any of the parties and after notice to the parties, and after hearing such of them a he may desire to be heard, or on his own motion without such notice, the Chairperson may transfer any case pending before one Bench, for disposal to any other Bench. [Sec 30]

16. Decision to be by majority

If the Members of Bench consisting of two Members differ in opinion on any point, they shall state the point or points on which they differ, and make a reference to the Chairperson who shall either hear the point or points himself or refer the case for hearing on such points or points by one or more of the other Members of the Appellate Tribunal and such point or points shall be decided according to the opinion of the majority of the Members of the Appellate Tribunal who have heard the case, including those who first heard it. [Sec 31]

17. Right of Appellant to take assistance of legal practitioner or chartered accountant and of government, to appoint presenting officers

(i) A person preferring an appeal to the the Appellate Tribunal or the Special Director (Appeals) under this Act may either appear in person or take the assistance of a legal practitioner or a chartered accountant of his choice to present his case before the the Appellate Tribunal or the Special Director (Appeals), as the case may be.

(ii) The Central Government may authorise one or more legal practitioners or chartered accountants or any of its officers to act as presenting officers and every person so authorised may present the case with respect to any appeal before the Appellate Tribunal and the Special Director (Appeals), as the case may be. [Sec 32]

18. Members, etc. to be public servants

The Chairperson, Members and other officers and employees of the Appellate Tribunal, the Special Director (Appeals) and the Adjudicating Authority shall be deemed to be public servants witin the meaning of section 21 of the Indian Penal Code. [Sec 33]

19. Civil Court not to have jurisdiction

No civil court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which an Adjudicating Authority or the Appellate Tribunal or the Special Director (Appeals) is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act. [Sec 34]

20. Appeal to High Court

Any person aggrieved by any decision or order of the Appellate Tribunal may file an appeal to the High Court within sixty days from the date of communication of the decision or order of the Appellate Tribunal to him on any question of law arising out of such order:

Provided that the High Court may, if it is satisfied that the appellant was prevented by sufficient cause from filling the appeal within the said period, allow it to be filed within a further period not exceeding sixty days. [Sec 35]

Directorate of Enforcement

1. Establishment of Directorate of Enforcement

Establishment of Directorate of Enforcement will be as under:

(i) The Central Government shall establish a Directorate of Enforcement with a Director and such other officers or class of officers as it thinks fit, who shall be called officers of Enforcement, for the purposes of this Act. [Sec 36(1)]

(ii) Without prejudice to provisions of sub-section(1), the Central Government may authorise the Director of Enforcement or an Additional Director of Enforcement or a Special Director of Enforcement to appoint officers of Enforcement below the rank of an Assistant Director of Enforcement. [Sec 36(2)]

(iii) Subject to such conditions and limitations as the Central Government may impose an officer of Enforcement may exercise the powers and discharge the duties conferred or imposed on him under this Act. [Sec 36(3)]

2. Power of Search, Seizure, etc.

(i) The Directorate of Enforcement and other officers of Enforcement below the rank of an Assistant Director, shall take up for investigation the contravention referred on him under this Act. [Sec 37(1)]

(ii) Without prejudice to the provisions of the sub-section (1), the Central Government may also, by notification, authorise any officer or class of officers in the Central Government, State Government or the Reserve Bank, not below the rank of an Under Secretary to the Government of India to investigate any contravention referred to in section 13. [Sec 37(2)]

(iii) The officers referred to in sub-section (1) shall exercise the like powers which are conferred on income-tax authorities under the Income-tax Act, 1961 and shall exercise such powers, subject to such limitations laid down under that Act. [Sec 37(3)]

3. Empowering Other Officers

() The Central Government may, by order and subject to such conditions and limitations as it thinks fit to impose, authorise any officer of customs or any central excise officer or any police officer or any other officer of the Central Government or a State Government to exercise such of the powers and discharge such of the duties of the Directorate of Enforcement or any other officer of Enforcement under this Act as may be stated in the order. [Sec 38(1)]

(ii) The officers referred to in sub-section (1) shall exercise the like powers which are conferred on the Income-tax authorities under the Income-tax Act, 1961 (43 of 1961), subject to such conditions and limitations as the Central Government may impose. [Sec 38(2)]

Miscellaneous

1. Presumption as to documents in certain cases

Where any document:

(i) is produced or furnished by any person or has been seized from the custody or control of any person, in either case, under this Act or under any other law; or

(ii) has been received from any place outside India (duly authenticated by such authority or person and in such manner as may be prescribed) in the course of investigation of any contravention under this Act alleged to have been committed by any person,

and such document is tendered in any proceeding under this Act in evidence against, or against him and any other person who is proceeded against jointly with him, the court or the Adjudicating Authority, as the case may be, shall:

presume unless the contrary is proved, that the signature and every other part of such document which purports to be in the handwriting of any particular person or which the court may reasonably assume to have been signed by, or to be in the handwriting of, any particular person, is in that person's handwriting and in the case of a document executed or attested, that it was executed or attested by the person by whom it purports to have been so executed or attested; [Sec 39]

2. Suspension of operation of this Act

(i) If the Central Government is satisfied that circumstances have arisen rendering it necessary that any permission granted or restriction imposed by this Act should cease to be granted or imposed, or if it considers necessary or expedient so to do in public interest, the Central Government may by notification, suspend or relax to such extent either indefinitely or for such period as may be notified, the operation of all or any of the provisions of this Act. [Sec 40(1)]

(ii) Where the operation of any provision of this Act has under sub-section (1) been suspended or relaxed indefinitely, such suspension or relaxation may, at any time while this Act remains in force, be removed by the Central Government by notification. [Sec 40(2)]

(iii) Every notification issued under this section shall be laid, as soon as may be after it is issued before each House of Parliament, while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if before the expiry of the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the notification or both Houses agree that the notification should not be issued, the notification shall thereafter have effect only in such modified form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity or anything previously done under the notification. [Sec 40(3)]

3. Power of Cental Government to Give directions

For the purposes of this Act, the Central Government, may from time to time, five to the Reserve Bank such general or special directions as it thinks fit, and the Reserve Bank shall, in the discharge of its functions under this Act, comply with any such directions. [Sec 41]

4. Contravention by companies

(i) Where a person committing a contravention of any of the provisions of this Act ro of any rule, direction or order made there under is a company, every person who, at the time the contravention was committed, was in charge of, and was responsible to, the company for the conduct of the business of the company as well as the company, shall be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly:

Provided that nothing contained in this sub-section shall render any such person liable to punishment if he proves that the contravention took place without his knowledge or that he exercised all due diligence to prevent such contravention. [Sec 42(1)]

(ii) Notwithstanding anything contained in sub-section(1), where a contravention of any of het provisions of this Act or of any rule, direction or order made thereunder has been committed by a company and it is proved that the contravention has taken place with the consent or connivance of, or is attributable to any neglect on the part of any director, manager, secretary or other officer shall also be deemed to be guilty of the contravention and shall be liable to be proceeded against and punished accordingly. [Sec 42(2)]

Explanation: For the purposes of this section:

(i) **"company"** means any body corporate and includes a firm or other association of individuals; and

(ii) **"director"**, in relation to a firm, means a partner in the firm.

5. Death or insolvency in certain cases

Any right obligation, liability, proceeding or appeal arising in relation to the provisions of section 13 shall not abate by reason of death or insolvency of the person liable under that section and upon such death or insolvency such rights and obligations shall devolve on the legal representative of such person or the official receiver or the official assignee, as the case may be:

Provided that a legal representative of the deceased shall be liable only to the extent of the inheritance or estate of the deceased. [Sec 43]

6. Bar or Legal Proceedings

No suit, prosecution ro other legal proceeding shall lie against the Central Government or the Reserve Bank or any officer of that Government or of the Reserve Bank or any other person exercising any power or discharging nay functions or performing any duties under this Act, for anything in good faith done or intended to be done under this Act or any rule, regulation, notification, direction or order made thereunder. [Sec 44]

7. Removal of Difficulties

(i) IF any difficulty arises in giving effect to the provisions of this Act, the Central Government may, by order, do anything not inconsistent with the provision of this Act for the purpose of removing the difficulty:

Provided that no such order shall be made under this section after the expiry of two years from the commencement of this Act.

(ii) Every order made under this section shall be laid, as soon as may be after it si made, before, each House of Parliament. [Sec 45]

8. Power to make rules

(i) The Central Government may, by notification, make rules to carry out the provisions of this Act.

(ii) Without prejudice to the generality of the foregoing power, such rules may provide for:

(a) the imposition of reasonable restrictions on current account transactions under section 5;

(b) the manner in which the contravention may be compounded under sub-section (1) of section 16;

(c) e manner of holding an inquiry by the Adjudicating Authority under sub-section (1) of section 16;

(d)the form of appeal and fee for filing such appeal under sections 17 and 19;

(e) the salary and allowances payable to and the other terms and conditions of service of the Chairperson and other Members of the Appellant Tribunal under the Special Director (Appeals) under sub-section (3) of section 23;

(f)the salary and allowances payable to and the other conditions of service of the officers employees of the Appellant Tribunal and the officer of the Special Director (Appeals) under sub-section (3) of section 27;

(g)the additional matters in respect of which the Appellate Tribunal and the Special Director (Appeals) may exercise the powers of a civil court under clause () of sub-section (2) of section 28;

(h)the authority or person and the manner in which any document may be authenticated under clause (ii) of section 39; and

(i)any other matter which is required to be, or may be, prescribed. [Sec 46]

9. Power to make regulations

(i) The Reserve Bank may, by notification, make regulations, to carry our the provisions of this Act the rules made thereunder:

(ii) Without prejudice to the generality of the foregoing power, such regulations may provide for:

(a) the permissible classes of capital account transactions, the limits of admissibility of foreign exchange for such transactions, and the prohibition, restriction or regulation of certain capital account transactions under section 6;

(b) the manner and the form in which the declaration is to be furnished under clause (a) of ub-section (1) of section 7;

(c) the period within which and the manner of repatriation of foreign exchange under section 8;

(d)the limit up to which any person may possess foreign currency or foreign coins under clause (a0 of section 9;

(e) the class of persons and the limit up to which foreign currency account may be held or operated under clause (b) of section 9;

(f) the limit up to which foreign exchange acquired may be exempted under clause (d) of section 9;

(g) the limit up to which foreign exchange acquired may be retained under clause (e) of section 9;

(h) any other matter which is required to be, or may be, specified. [Sec 47]

10. Rules and regulations to be laid before Parliament

Every rule and regulation made under this Act shall be laid, as soon as may be after it is made, before each House of Parliament,while it is in session, for a total period of thirty days which may be comprised in one session or in two or more successive sessions, and if, before the expiry fo the session immediately following the session or the successive sessions aforesaid, both Houses agree in making any modification in the rule or regulation shall thereafter have effect only in such modification form or be of no effect, as the case may be; so, however, that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule or regulation. [Sec 48]

11. Repeal and Saving

(i) The Foreign Exchange Regulation Act, 1973 is hereby repealed and the Appellate Board constituted under sub-section (10) of section 52 of the said Act (hereinafter referred to as the repealed Act) shall stand dissolved.

(ii) On the dissolution of the said Appellate Board, the person appointed as Chairman of the Appellate Board and every other person appointed as Member and holding office as such immediately before such date shall vacate their respective offices and no such Chairman or other person shall be entitled to claim any compensation for the premature termination of the term of this office or of any contract of service.

(iii) Notwithstanding anything contained in any other law for the time being in force, no court shall take cognizance of an offence under the repealed Act and no adjudicating officer shall take notice of any contravention under section 51 of the repealed Act after the expiry of a period of two years from the date of the commencement of this Act.

(iv) Subject to the provision of sub-section (3) all offences committed under the repealed Act shall continue to be governed by the provisions of the repealed Act as if that Act had not been repealed.

(v) Notwithstanding such repeat,:

(a) anything done or any actions taken or purported to have been done or taken including any rule, notification, inspection, order or notice made or issued or any appointment, confirmation or declaration made or any licence, permission, authorization or exemption granted or any document or instrument executed or any direction given under the Act hereby repealed shall, in so far as it is not inconsistent with the provisions of this Act, be deemed to have been done or taken under the corresponding provisions of this Act;