LAW OF CONTRACT

(IMBA 3RD SEMESTER)

MODULE - I

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The Indian ContractAct, 1872

What is Law?

Law means a 'set of rules' which regulate our relation and behaviors with other individuals and with state. In the words of Salmond, `law is the body of principles recognized and by state in the administration of justice

Why Should One Know Law?
One should know the law to which he is subject because ignorance of law is no excuse.

Kinds of Indian law:

There are thousands of law in India and it may not be possible to strictly classify them .However, Indian law will be broadly be classified according to their purpose and objectives and then sub classified in to main categories.

For legal redressal, Indian law may be classified in to two main categories;

1. Procedural law; It is the guide which helps to know the process to present a matter
There are two main statutes in India which regulate the procedures followed in court in court of law for;

A. Code of criminal procedure-1973, for regulating procedure in criminal case.

B. Code of civil procedure -1908 for Commercial law that includes Indian contract- 1872, sale goods Act-1930 etc. regulating the procedure in civil case.

2. Substantive law- There are thousands of substantive law in India. These law defines rights, liability, obligation of citizen and non-citizens.

Various substantive laws according to their nature and objectives are:-

A. Commercial law that includes Indian contract Act-1872, Sale of goods Act-1930 etc.
B. Penal law- these law create, define and provide punishment for various offences according to Indian penal code-1860.
C. property law.
D. Taxation law.
E. Constitutional law.

F. Cyber law.
G. Intellectual property law.
H. personal law.
I. Environmental law.

The Indian Contract Act, 1872 codifies the legal principles that govern such 'contracts'. The Act basically identifies the ingredients of a legally enforceable valid

What is law of contract?
The law of contract is most important and basic part of business\ mercantile law. It is the foundation on which superstructure of modern business is built. It is not only merchant and traders but every person who lives in organized society, consciously or unconsciously enters in to contract from sunset io sunrise. When a person buys mobile or hires a taxi or go to cyber café or takes a credit card or he does booking for a orchestra for marriage party, he enters in to and performs contracts though he may be unaware of this fact. Such contracts create legal relations giving rise to certain rights and obligations.

Contract in addition to dealing with certain special type of contractual relationships like
1. -Indemnity,
2. -Guarantee,
3. -Bailment,
4. -Pledge,
5. -Quasi contracts,
6. -Contingent contracts.

✓ It is said on the back drop of Indian contract Act -1872 that, all contracts are agreements but all agreements are not contracts.

✓ The above observation would raise a question in our minds as to what is the exact meaning of the words 'agreements' and 'contracts' and `promise'.

✓ Contract; According to Sec 2(h) of Indian contract Act' 1872, 'an agreement enforceable by law is contract".

✓ Salmond defines; contract is an agreement creating and defining obligations between the parties.

✓ Agreement; An agreement is defined in sec 2 (e) as ``every promise or every set of promises forming the consideration for each other".

Agreement

Promise ; A promise is defined in sec 2 (b) as, ' proposal when accepted becomes a promise.
Agreement: Agreement is defined in sec 2 (e) as ``every promise or every set of promises forming the consideration for each other .

a) An agreement involves proposal or offer by one party and acceptance of the same by other party.

b) It requires existence of two or more persons because a person can not enter in to an agreement with himself.

c) It implies that the parties have common intention about the subject matter of there

agreement.

d) Two parties should be thinking of the same thing in same sense at the same time. Thus agreement is outcome of two consenting mind.

Agreement are of two types;

1. **Un-enforceable agreements.**

2. **Enforceable agreements.**

Agreement not enforceable by law	Agreement enforceable by law
Any essential of a valid contract is not available	All essentials of a valid contract are available

1- Un-enforceable agreement: All those agreements are said to be un-enforceable in which an aggrieved party can not go to a law court and that is left at the mercy of
the parties only

2- Enforceable agreements: parties only.It is simply a gentleman's promise which may or may not fulfilled by promiser. All these agreements remain only an agreements between parties and they never become a contract in the eyes of law,because they are merely social or domestic arrangements.

All those agreements are said to be enforceable in which an agrrieved party has a right to approach law court to get the agreement enforced and other party is held liable either to perform the agreement or face the consequences for breach of that agreements. All these agreements which are enforceable at law are ``CONTRACT".

Enforceable at law: An agreement to become a contract must give rise to a legal obligation. The common acceptance and communication between the parties must create legal relations and not merely the relation which are purely social or domestic in nature.

Example; Mr Rakesh invites Mr Bijoy to a dinner. Mr Bijoy accepts the invitation. It is purely asocial agreement. If Bijoy fails to arrive at dinner at dinner time due to important work, can not sue Bijoy for not fulfillig the promise, the reason being, there was no intention between two parties to create any legal obligation.

Contract

According to Sec 2(h) of Indian contract Act' 1872, 'an agreement enforceable by law is contract".
Salmond defines; contract is an agreement creating and defining obligations between the parties.

Basis	Contract Sec. 2(h)	Agreement Sec. 2(e)
1. Section :	Sec. 2(h)	Sec. 2(e)
2. Definition:	A contract is an agreement enforceable by law.	Every promise or every set of promises forming consideration for each other is an agreements
3. Enforceability:	Every contract is enforceable A contract includes an agreement.	Every promise is not enforceable..
4. Interrelationship	A contract includes an agreement	An agreement does not include a contract
5.Scope:	The scope of a contract is limited, as it includes only commercial agreements	Its scope is relatively wide it includes both social &commercial agreement

Types of Contract

Contract may be classified according to their (1) validity (2) Formation (3)Performance

Classification according to validity

a) Void contract :- A contract not enforceable by law is void.

Example- Mr. X agrees to write a book with a publisher. After few days, X dies in an accident. Here the contract becomes void due to the impossibility of performance of the contract .

b) Voidable contract 2(i):- An agreement is a voidable contract if it is enforceable by Law at the option of one or more of the parties there to (i.e. the aggrieved party), and it is not enforceable by option of the other or others.

Example-A promises to sell his car to B for Rs 20000.His consent is obtained by use of force. The contract is voidable at the option of A.He may avoid the contract or elect to be bound by it.

c) Illegal Contract: Illegal contract are those that are forbidden by law. All illegal contracts are hence void also. Because of the illegality of their nature they cannot be enforced by any court of law. In fact even associated contracts cannot

Express contract :- A contract made by word spoken or written. According to sec 9 in so for as the proposal or acceptance of any promise is made in words, the promise is said to be express.

Example : A says to B 'will you purchase my bike for Rs.20,000?" B says to A "Yes" without knowing that the bike was purchased by A from bike lifter.

Difference between Void and illegal Agreement		
Matter	**Void Agreement**	**Illegal Agreement**
What	Void agreement is not prohibited by law	It is prohibited by law.
Effect on collateral Transaction	Enforced	Not Enforced
Punishment	No	Yes
void ab initio	May not be void ab initio	Always void ab initio

Matter	Void contract	Voidable contract
Definition	It means contract which ceases to be enforceableby law	It is a contract which one of the parties may affirm or reject at his option.
Rights or remedy	No legal remedy.	Aggrieved party has remedy to cancel
Nature	Valid when made but subsequently becomes unenforceable.	It remains voidable until cancelled by party
Performance of Contract.	Party can't demand performance of contract	If aggrieved party doesn't cancel it Within reasonable time performance can be demanded.
compensation	There does not arise compensation for non-performance of contract	Person is entitled to com- pensation for loss or damages for non performance Of contract.

Classification according to formation

d) Implied contract:- An implied contract is one which is inferred from the act or conduct of parties or course of dealing between them. It not the result of any express promise or promise by the parties but of their particular acts.

Example:

A stops a taxi by waving his hand and takes his seat. There is an implied contract that A will pay the prescribed fare.

e) Quasi contract -Quasi Contracts are contracts which are created –

- Neither by word spoken
- Nor written
- Nor by the conduct of the parties.

But these are created by the law. In fact, these contracts depend on the principle that nobody will be allowed to become rich at the expense of other

Example:

If Mr. A leaves his goods at Mr. B's shop by mistake, then it is for Mr. B to return the goods or to compensate the price.

f) e – Contract: An e – contract is one, which is entered into between two parties via the internet.

Classification according to performance

-g) Unenforceable contract: - where a contract is good in substance but because of some technical defect , one or both the parties cannot sue upon but is described as unenforceable contract. Example: Writing registration or stamping.

Example: An agreement which is required to be stamped will be unenforceable if the same at all or is is not stamped under stamped.

h) Executed contract :- A contract in which both the parties have fulfilled their obligations under the contract.
Example: A contracts to buy a car from B by paying cash, B instantly delivers his car receving payment from A.

i) Executory contract:- A contract in which both the parties have still to fulfill their obligations.
Example : D agrees to buy V's cycle by promising to pay cash on 15th July. V agrees to deliver the cycle on 20th July.

j) Partly executed and partly executory:- A contract in which one of the parties has fulfilled his obligation but the other party is yet to fulfill his obligation.

Example : A sells his car to B and A has delivered the car but B is yet to pay the price. For Ait is excuted contract whereas it is executory contract on the part of B since the price is yet to be paid

Classification according to liability

k) Bilateral contract:- contract in which both the parties commit to perform their respective promises is called a bilateral contract.

Example : A offers to sell his fiat car to B for Rs.1,00,000 on acceptance of A's offer by B, there is a promise by A to Sell the car and there is a promise by B to purchase the car there are two promise.
L) Unilateral contract:- A unilateral contract is a one sided contract in which only one party has to perform his promise or obligation party has to perform his promise or obligation to do or forbear.

Example :- A wants to get his room painted. He offers Rs.500 to B for this purpose B says to A " if I have spare time on next Sunday I will paint your room". There is a promise by A to pay Rs 500 to B. If B is able to spare time to paint A's room. However there is no promise by B to Paint the house. There is only one promise.

M) Contract of Record: A contract of record derives its binding force from the authority of court. The authority of court is invariably through judgment of a court or by way of recognizance. The judgment of a court is technically not a contract as it is not based on the agreement between parties. However the judgment is binding on all the persons who are litigants. The judgment creates certain rights on certain persons and obligation on certain other persons. A recognizance, on the other hand is a written acknowledgement of a debt due to the state generally in the context of criminal proceedings.

(N) Contract under Seal: A contract under seal is one which derives its binding force from its form alone. It is in writing, duly signed and sealed and delivered to parties. It is also referred to as a deed or a specialty contract.

Essential Elements of Valid Contract

1. **Offer and Acceptance:** In the first place, there must be an offer and the said offer must have been accepted. Such offer and acceptance should create legal obligations between parties. This should result in a moral duty on the person who promises (called promisor) or offers to do something. Similarly this should also give a right to other party (called promisee) to claim its fulfillment. Such duties and rights should be legal and not merely moral.

Case law:

A husband promised to pay Rs5000 household allowance every month to his wife,. When husband failed to perform this promise, she brought an action to enforce it. As it is an agreement of domestic nature, it was held that it does not contemplate to create any legal obligation.

2. ***Free Consent:*** *The second element is the 'consent' of the parties. 'Consent' means 'knowledge and approval' of the parties concerned. This can also be understood as identity of minds in understanding the term viz consensus ad idem. Further such a consent must be free. Consent would be considered as free consent if it is not vitiated by coercion, undue influence, fraud, misrepresentation or mistake. Wherever the consent of any party is not free, the contract is voidable at the option of that party.*

Illustration:- A threatened to shoot B if he (B) does not lend him ` 2000 and B agreed to it. Here the agreement is entered into under coercion and hence voidable at the option of B.

3. **Capacity of the parties:** The third element is the capacity of the parties to make a valid contract. Capacity or incapacity of a person could be decided only after reckoning various factors. Section 11 of the Indian Contract Act,1872 elaborates on the issue by providing that a person who- should be considered as not competent to enter into any contract. Therefore a person is not eligible to enter in to valid contract ;

(a) who has not attained the age of majority,
(b) who is of unsound mind and
(c) who is disqualified from entering into a contract by any law to which he is subject,be considered as not competent to enter into any contract. Therefore law prohibits (a) Minors (b) persons of unsound mind [excluding the Lucid intervals] and (c should) person who are otherwise disqualified like an alien enemy, insolvents, convicts etc from entering into any contract.

4. **Consideration:** The fourth element is presence of a lawful 'consideration'. 'Consideration' would generally mean 'compensation' for doing or omitting to do an act or deed. It is also referred to as 'quid pro quo' viz 'something in return for another thing'. Such a consideration should be a lawful consideration.

Example:- A agrees to sell his books to B for 100, B's promise to pay 100 is the consideration for A's promise to sell his books . A's promise to sell the books is the consideration for B's .

5. **Lawful object:** The last element to clinch a contract is that the agreement entered into for this purpose must not be which the law declares to be either illegal or void. An illegal agreement is an agreement expressly or impliedly prohibited by law. A void agreement is one without any legal effects.

For Example: Threat to commit murder or making/publishing defamatory are statements or

entering into agreements which are opposed to public policy are illegal in nature. Similarly any agreement in re

been other hand voidable contract would remain valid until it is rescinded by the person who has the option to treat it as voidable. The right to treat it as voidable does On not invalidate the contract until such right is exercised. All contracts caused by coercion, undue influence, fraud misrepresentation are voidable. Generally, a contract caused by mistake is void.

OFFER AND ACCEPTANCE

OFFER

It has been explained in the previous paragraphs that a proposal or a promise backed by legal consideration is an agreement and such an agreement, if legally enforceable, becomes a contract. It would therefore be clear that the starting point of this chain is a proposal or a promise. It is proposed now to discuss as to what is a proposal/offer, what are the types of offer, etc.

The word 'proposal' and the word 'offer' mean one and the same thing and therefore are used interchangeably.

In terms of Section 2(a) of the *contract* Act-1872 "a person is said to make a proposal when he signifies to another his willingness to do or abstain from doing anything with a view to obtaining the assent of that other to such act or abstinence".

It must be appreciated that 'doing an act' and 'not doing an act' both have the same effect in the eyes of the law, though one is a positive act and the other is a negative act.

Hence there are two important ingredients to an offer;

Firstly, it must be expressions of willingness to do or to abstain from doing an act.

Secondly, the willingness must be expressed with a view to obtain the assent of the other party to whom the offer is made.

This can be illustrated as follows:

(a) Where "A" tells "B" that he desires to marry 'B' by the end of 2006, there is no offer made unless, he also asks "will you marry me?", conveying his willingness and tries to obtain the assent of 'B' in the same breadth.

(b) Where "A" offers to sell his car to "B" it conveys his willingness to do an act. Through this offer not only willingness is being conveyed but also an intention to obtain the assent can be seen.

Classification of offer: Offer can be classified as general offer, special/specific offer, cross offer, counter offer, standing/open/continuing offer. Now let us examine each one of them.

(a) General offer: It is an offer made to public at large with or without any time limit. Until the general offer is retracted or withdrawn, it can be accepted by anyone at any time as it is a continuing offer. Example-A issues a public advertisement to the effect that he will give Rs 1000 to anyone who brings back his missing dog amounts to general offer.

(b) Special/specific offer: Where an offer is made to a particular and specified person, it is a specific offer. Only that person can accept such specific offer, as it is special and exclusive to him.

(c) Cross offer: Two offers similar in respect, made by two parties to each other, in ignorance of each other's offer are termed as cross offer.

For example, if A makes a proposal to B to sell some goods at a specified price and B,

without knowing proposal of A, makes a proposal to purchase the same goods at the price specified in the proposal of A, it is not an acceptance, as B was not aware of proposal made by A. It is only cross proposal (cross offer). And when two persons make offer to each other, it can not be treated as mutual acceptance. There is no binding contract in such a case [Tin v. Hoffmen & Co. 1873]

(d) Counter offer: Upon receipt of an offer from an offeror, if the offeree instead of accepting it straightway, imposes conditions which have the effect of modifying or varying the offer, he is said to have made a counter offer. Counter offers amounts to rejection of original offer.

(e)Standing or continuing or open offer: An offer which is made to public at large and if it is kept open for public acceptance for a certain period of time, it is known as standing or continuing or open offer. Tenders that are invited for supply of materials and goods are classic examples of standing offer.

Rules relating to offer:

Following are the rules for a valid and legal offer:

(a)The 'offer' must be with intention to create a legal relationship. Hence if it is accepted, it must result in a valid contract. An invitation to join a friend for dinner is a social activity. This does not create a legal relationship or right or obligation.

(b) The offer must be certain and definite. It must not be vague. If the terms are vague, it is not capable of being accepted as the vagueness would not create any contractual relationship. For example, where 'A' offers to sell 100 litres of oil, without indicating what kind of oil would be sold, it is a vague offer and hence cannot create any contractual relationship. If however there is a mechanism to end the vagueness, the offer can be treated as valid. For example, in the above example if 'A' does not deal in any oil but only in gingilee oil and this is known to every one, the offer cannot be treated as vague offer. This is for the reason that the trade in which 'A' is, is a clear indicator providing a mechanism to understand the terms of offer.

(c)The offer must be express or implied.

(d) The offer must be distinguished from an invitation to offer-An offer must be distinguished from invitation to offer. In case to invitation to offer the aim is only to circulate information of readiness to negotiate business with anybody who on such infor mation comes to enter in to contract. So, a price list, display goods in shelves of show room are attempt to induce offer and not an offer itself.

(e)The offer must be either specific or general.

(f) The offer must be communicated to the person to whom it is made. Otherwise the offeree cannot accept the offer. He cannot accept the offer because he is not aware of the existence of the offer. Such a situation does not create any legal obligation or right on any one.

(g) The offer must be made with a view to obtaining the consent of the offeree.

(h) An offer can be conditional but there should be no term in the offer that non-compliance would amount to acceptance. Thus the offeror cannot say that if non-acceptance is not communicated by a certain time the offer would be treated as accepted.

Example;- T , who could not read , took an excursion ticket form railway on the front of the ticket was printed ' for condition see back". One of the condition was that the railway company will not be liable for personal injuries to passenger. T was injured by a railway accident.Held , T was bound by the condition the condition and could not recover any damage

LAPSE OF AN OFFER :

An offer should be accepted before it lapses (i.e. comes to an end). An offer may come to an end in any of the following ways stated in Section 6 of the Indian Contract Act:

1. **By communication of notice of revocation**: An offer may come to an end by communication of notice of revocation by the offeror. It may be noted that an offer can be revoked only before its acceptance is complete for the offeror. In other words, an offeror can revoke his offer at any time before he becomes before bound by it. Thus, the communication of revocation of offer should reach the offeree before the acceptance is communicated.
2. **By lapse of time**; where time is fixed for the acceptance of the offer, and it is not acceptance within the fixed time, the offer comes to an end automatically on the expiry of fixed time. Where no time for acceptance is prescribed, the offer has to be accepted within reasonable time. The offer lapses if it is not accepted within that time. The term 'reasonable time' will depend upon the facts and circumstances of each case.
3. **By failure to accept condition precedent**: Where, the offer requires that some condition must, be fulfilled before the acceptance of the offer, the offer lapses, if it is accepted without fulfilling the condition.
4. **By the death or insanity of the offeror**: Where, the offeror dies or becomes, insane, the offer comes to an end if the fact of his death or insanity comes to the knowledge of the acceptor before he makes his acceptance. But if the offer is accepted in ignorance of the fact of death or insanity of the offeror, the acceptance is valid.

This will result in a valid contract, and legal representatives ofthe deceased offeror shall be bound by the contract. On the death of offeree before acceptance, the offer also comes to an end by operation of law.

5. **By counter offer by the offeree**: Where, a counter – offer is made by the offeree, and then the original offer automatically comes to an end, as the counter offer amounts to rejections of the original offer.
6. **By not accepting the offer**, according to the prescribed or usual mode: Where some manner of acceptance is prescribed in the offer, the offeror can revoke the offer if it is not accepted according to the prescribed manner.
7. **By rejection of offer by the offeree**: Where, the offeree rejects the offer, the offer comes to an end. Once the offeree rejects the offer, he cannot revive the offer by subsequently attempting to accept it.The rejection of offer may be express or implied.
8. By change in law: Sometimes, there is a change in law which makes the offer illegal or incapable of performance. In such cases also, the offer comes to an end.

Acceptance

Meaning: In terms of Section 2(b) of the Act, "A proposal or offer is said to have been accepted when the person to whom the proposal is made signifies his assent to the proposal to do or not to do something". In short, act of acceptance lies in signifying one's assent to the proposal.

The significance of this is an offer by itself cannot create any legal relationship but it is the acceptance by the offeree which creates a legal relationship. Once an offer is accepted it becomes a promise and cannot be withdrawn or revoked. An offer remains an offer so long as it is not accepted, but becomes a contract as soon as it is accepted

Rules governing acceptance

(1)- Acceptance must be absolute and unqualified: As per section 7 of the Act, acceptance is valid only when it is absolute and unqualified and is also expressed in some usual and reasonable manner unless the proposal prescribes the manner in which it must be accepted. If the proposal prescribes the manner in which it must be accepted, then it must be accepted accordingly. The above view will be clear from the following example:

'A' enquires from 'B', "Will you purchase my car for ` 2 lakhs?" If 'B' replies "I shall purchase your car for ` 2 lakhs, if you buy my motorcycle for ` 50000/-, here 'B' cannot be considered to have accepted the proposal. If on the other hand 'B' agrees to purchase the car from 'A' as per his proposal subject to availability of valid Registration Certificate / book for the car, then the acceptance is in place though the offer contained no mention of R.C. book. This is because expecting a valid title for the car is not a condition. Therefore the acceptance in this case is unconditional.

(2) . The acceptance must be communicated: To conclude a contract between the parties, the ce with varying or too deviant conditions is no acceptance. Such conditional acceptance is a counter proposal and has to be accepted by the proposer, if the original proposal has to materialize into a contract. Further when a proposal is accepted, the offeree must have the knowledge of the offer made to him. If he does not have the knowledge, there can be no acceptance. The acceptance must relate specifically to the offer made. Then only it can materialize into a contract. The above points will be clearer from the following examples,

(a) M offered to sell his land to N for Rs 280000. N replied purporting to accept the offer but enclosed a cheque for Rs 80000 only. He promised to pay the balance of Rs 200000 by monthly installments of Rs 50000 each. It was held that N could not enforce his acceptance because it was not an unqualified one. [Neale vs. Merret [1930] W. N. 189]. acceptance must be communicated in some perceptible form Any conditional acceptance or acceptance

(b) A offers to sell his house to B for ` 1000/-. B replied that, "I can pay ` 800 for it. The offer of 'A' is rejected by 'B' as the acceptance is not unqualified. B however changes his mind and is prepared to pay ` 1000/-. This is also treated as counter offer and it is up to A whether to accept it or not. [Union of India v. Bahulal AIR 1968 Bombay 294]. A mere variation in the language not involving any difference in substance would not make the acceptance ineffective. [Heyworth vs. Knight [1864] 144 ER 120].

(3) Acceptance must be in the prescribed mode: Where the proposal prescribes the mode of acceptance, it must be accepted in that manner. Where the proposal does not prescribe the manner, then it must be accepted in a reasonable manner. If the proposer does not insist on the proposal being accepted in the manner in which it has to be accepted, after it is accepted in any other manner not originally prescribed, the proposer is presumed to have consented to the acceptance. Sometimes the acceptor may agree to a proposal but may insist on a formal agreement, in which case until a formal agreement is drawn up there is no complete acceptance.

(4) The acceptance must be given within a reasonable time and before the offer lapses.

(5) Mere silence is not acceptance. The acceptor should expressly accept the offer. Acceptance can be implied also. Acceptance must be given only by that person to whom it is made, that too only after knowing about the offer made to him.

Example A offers to B to buy his house for Rs.5 lakhs and writes "If I hear no more about it within a week, I shall presume the house is mine for Rs.5 lakhs. "B does not respond. Here, no contract is concluded between A and B.

However, following are the two exceptions to the above rule. It means silence amounts as acceptance of offer.

- Where offeree agrees that non – refusal by him within specified time shall amount to acceptance of offer.
- When there is custom or usage of trade which specified that silence shall amount to acceptance.

(6) Acceptance by conduct: As already elaborated above, acceptance has to be signified either in writing or by word of mouth or by performance of some act. The last of the method, namely 'by some act' has to be understood as acceptance by conduct. In a case like this where a person performs the act intended by the proposer as the consideration for the promise offered by him, the performance of the act constitutes acceptance. In other words, there is an acceptance by conduct.

For example, where a tradesman receives an order from a customer, and the order is executed accordingly by the trader, there is an "acceptance by conduct" of the offer made by the customer. The trader's subsequent act signifies acceptance.

Section 8 of the Act very clearly in this regard lays down that " the performance of the condition(s) of a proposal or the acceptance of any consideration of a reciprocal promise which may be offered with a proposal constitutes an acceptance of the proposal.

In case of acceptance by post

General Rules as to Communication of Acceptance

Where the acceptance is given by post, the communication of acceptance is complete as against the proposer when the letter of acceptance is posted.

Thus, mere posting of letter of acceptance is sufficient to conclude a contract. However, the letter must be properly addressed and stamped.

2. **Delayed or no delivery of letter** Where the letter of acceptance is posted by the acceptor but it never reaches the offeror, or it is delayed in transit, it will not affect the validity of acceptance. The offeror is bound by the acceptance.
3. **Acceptance by telephones telex or fax** If the communication of an acceptance is made by telephone, tele-printer, telex, fax machines, etc, it completes when the acceptance is received by the offeror. The contract is concluded as soon as the offeror receives not hears the acceptance.
4. **The place of Contract**

In case of acceptance by the post, the place where the letter is posted is the place of contract. Where the acceptance is given by instantaneous means of communication (telephone, fax, tele-printer, telex etc.), the contract is made at the place where the acceptance is received,

5. **The time of Contract** In case of acceptance by post, the time of posting the letter of acceptance to the time of contract. But in case of acceptance by instantaneous means of communication, the time of contract is the time when the offeror gets the communication, the time of contract is the time when offeror gets the communication of acceptance.
6. **Communication of acceptance in case of an agent.**

Where the offer has been made through an agent, the communication of acceptance is completed when the acceptance is given either to the agent or to the principal. In such a case, if the agent fails to convey the acceptance received from offeree, still the principal is bound by the acceptance.

7. **Acceptance on loudspeakers** - Acceptance given on loudspeaker is not a valid acceptance.

Particulars of Offer& Acceptance When Communication is complete [Sec.4]

- Communication of a , proposal is complete when it comes to the knowledge of the person to whom it is made.
- **Example** : A proposes by letter, to sell his Tonga to B at Rs.10,000. Communication of the proposal is complete when B receives the letter.
- As against the offerer/ Proposer: When it is put in a course of transmission to him so as to be out of the power of the Acceptor.
- As against the Offeree/Acceptor: When it comes to the knowledge of the Proposer.

When Revocation can be made [Sec.5]

- Offer/proposal may be revoked at any time before the communication of its acceptance is complete, as against the proposer, but not afterwards.
- **Example**: U sends a letter to Y proposing to sell his land. Y sends his acceptance by post. U can revoke the offer at any time before or at the moment when Y posts his letter of acceptance, but not after wards.
- **Acceptance may be revoked** at any time before the communication of acceptor, but not afterwards.
- Example: T sends to S by post, an offer to sell his cycle. S sends his acceptance via post, S could revoke his acceptance, up to any time before or at the moment when he posts his letter of acceptance, but not afterwards.

When communication of revocation is complete [Sec.4]

- As against the offeror: When it is put into a course of transmission to the person, to whom it is made,

So as to be out of the power of the person who makes it.

- **Example** :S proposes to H by letter. H sends his acceptance by letter. Suddenly, S sends a telegram revoking his offer. Revocation is complete as against S when the telegram is dispatched; H's revocation of acceptance is complete when S receives such telegram.
- **As against the Offeree**: When it comes to his knowledge. •

Example : Communication of revocation is complete only when H receives the telegram.

Consideration

Consideration is a term used in sense of Quid Pro Quo i.e. Something in return.

Meaning: Sec 2(d) defines consideration as "When at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing or promises to do or to abstain from doing something, such an act or abstinence or promise is called consideration for the promise"

it can be concluded that :

Consideration = Promise / Performance that parties exchange with each other.

Form of consideration= Some benefit, right or profit to one party / some detriment, loss, or forbearance to the other.

Whether gratuitous promise can be enforced?

The word "gratuitous" means 'free of cost' or 'without expecting any return'. It can therefore be

inferred that a gratuitous promise will not result in an agreement in the absence of consideration. For instance a promise to subscribe to a charitablecause cannot be enforced.

Rules of consideration

(i)Consideration must move at the desire of the promisor: Consideration must move at the desire of the promisor, either from the promisee or some other third party. But consideration cannot move at the desire of a third party. Where collector had passed an order that any one using the market constructed by the Zamindar, for the purpose of selling his goods should pay commission to the Zamindar, it was held that it was not a proper order as the desire to receive consideration had not emanated from the Zamindar but from a third party namely the collector [Durga Prasad Vs Baldev (1880) 3, All 221]

ii) Consideration can flow either from the promisee or any other person: The consideration for a contract can move either from the promisee or from any other person. This point is made clear even by the definition of the word "consideration", according to which at the desire of the promisor, the promisee or any other person, doing something is consideration.

That the consideration can legitimately move from a third party is an accepted principle of law in India though not in England.

Example: 'A' by a deed of gift made over certain property toher daughter(D) with condition that her brother(B) should be paid annuity by D. On the same day, D executed a document agreeing to pay annuity accordingly but declined to pay after sometime. B sued D. It was contended on behalf of D, that there was no consideration from B and hence there was no valid contract. This plea was rejected on the ground that the consideration did flow from B's Sister(A) to 'D' and such consideration from third party is sufficient to enforce the promise of D to pay annuity to A's brother (B) [Chinnaya Vs Ramaya(1881) 4.mad.137]

Thus a stranger to a contract can sue upon a contract in India and also in England, where as stranger to a consideration can sue under Indian law though not under English law.

iii) Executed and Executory consideration: Where consideration consists of performance, it is called "executed" consideration. Where it consists only of a promise, it is executory.

For example where A pays ` 5000/- to 'B' requesting 'B' to deliver certain quantity of rice, to which B agrees, then here consideration for B is executed by 'A' as he has already paid ` 5000/- whereas 'B's promise is executory as he is yet to deliver the rice.

Insurance contracts are of the same type. When A pays a premium of ` 5000/- seeking insurance cover for the year, from the insurance company which the company promises in the event of fire, the consideration paid by A to the insurance company is executed but the promise of insurance company is executory or yet to be executed. A forbearance by the promisor should however be considered as an executed consideration provided the forbearance is sufficient at the time of contract.

(iv) Past consideration: The next issue is whether past consideration can be treated as consideration at all. This is because consideration is given and accepted along with a promise concurrently. However the Act recognizes past consideration as consideration when it uses the expression in Section 2(d) 'has done or abstained from doing". But in the event of services being rendered in the past at the request or desire of the promisor the subsequent promise is regarded as an admission that the past consideration was not gratuitous. The plaintiff rendered services to the defendant at his desire during his minority. He also continued to render the same services after the dependant attained majority. It was held to be good consideration for a subsequent express promise by the defendant to pay an annuity to the plaintiff but it was admitted that if the services had not been rendered at the desire of the defendant it would be hit

by section 25 of the Act. [Sindia Vs Abraham (1985)Z. Bom 755]

(v) Consideration may not be adequate: Inadequacy of consideration is no ground for refusing performance of the promise, unless it is evidence of fraud. Inadequate consideration would not invalidate an agreement but such inadequate consideration could be taken into account by the court in deciding whether the consent of the promisor was freely given.consideration need not be material and may be even absent.

Example: A agreed to sell a watch worth Rs.500 for Rs.20, A's consent to the agreement was freely given. The consideration, though inadequate. Will not affect the validity of the contract. However, the inadequacy of the consideration can be considered in order to know whether the consent of the promisor was free or not .

(vi) consideration must be something which promisor is bound to do: The performance of an act by a person what he is legally bound to perform, the same cannot be consideration for a contract. Hence, `A' promise to pay money to a police officer to investigate in to crime is void as the officer is under duty to do so by law, for it is without consideration. Hence such a contract is void for want of consideration. Similarly, an agreement by a client to pay to his counsel, a certain sum over and above the fee, in the event of success of the case would be void, since it is without consideration.

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

There is a big difference between a third party to consideration and third party to a contract; while the first can sue, the second cannot sue. Thus a stranger / third Party to an Agreement lead to the doctrine of privity of contract. The doctrine says that only parties to a contract can enforce the contract. The parties stranger to a contract cannot sue and be sued. Example, a contract by the purchaser of a mortgaged property to pay off the mortgage cannot be enforced by the mortgagee who was not a party to the contract between vendor and vendee.

However there are exceptions to the above principle. These are:

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

In Khawja Mohammed Khan Vs Hussain Begum 371.A. 152, where, the father of the bridegroom promised to pay through a contract with the father of the bride, an allowance to the bride, if she married his son,the bride sued her father-in-law after marriage for the allowance which he did not pay as per the contract. It was held by the Privy Council that though the bride was not a party to the contract between her father and father in law, she could enforce her claim in equity.

2- In the case of family settlement, if the terms of settlement are reduced in writing, members of the family who were not a party to the settlement can (also) enforce their claim.

.3.In the case of certain marriage contracts a female member can enforce a provision for marriage expense based on a petition made by the Hindu undivided family.

4. Where there is an assignment of a contract, the assignee can enforce the contract for various benefits that would accrue to him on account of the assignment

5. In case of part performance of a contractual obligations or where there is acknowledgment of liability on account of estoppel, a third party can sue for benefits. Where for example 'A' gives ` 25000/- to 'B' to be given to 'C' and 'B' informs 'C' that B is holding it on behalf of C, but subsequently refuses to pay 'C' then 'C' can sue and enforce his claim.

6. Where a piece of land which is sold to buyer with certain covenants relating to land and the buyer is kept on notice of the covenants with certain duties, there the successors to the seller can enforce these covenants.

"No consideration. No contract".

We have all along learnt that an agreement without consideration is void. Not only that, even inadequate consideration would render the enforceability of the contract quite difficult as the free consent of the parties would become suspect. The Act however contains certain exceptions to this important rule. These are:

(i) On account of natural love and affection: A written and a registered agreement made between parties out of natural love and affection does not require consideration. Such an agreement is enforceable even without consideration. It is important that parties should be of near relation like husband and wife to get this exemption (Rajlukhee Devee Vs Bhootnath). **Example**:-An elder brother, on account of natural love and affection, promised to pay the debts of his younger brother. Agreement was put to writing and registered. Held, agreement was valid.

(ii) Compensation paid for past voluntary services: A promise to compensate wholly or in part for past voluntary services rendered by someone to promisor does not require consideration for being enforced. However the past services must have been rendered voluntarily to the promisor. Further the promisor must have been in existence at that time and he must have intended to compensate.

(iii) Promise to pay debts barred by limitation: Where there is a promise in writing to pay a debt, which was barred by limitation, is valid without consideration.

Example : A owes B Rs.10,000 but the debt is barred by Limitation Act. A signs a written promise to pay B Rs.8,000 on account of debt. This is a valid contract.

(iv) Creation of Agency: In term of section 185 of the Act, no consideration is necessary to create an agency

(v) In case of completed gifts, no consideration is necessary. This is clear from the Explanation (1) to section 25 of the Act which provides that "nothing in this Section shall affect the validity as between donor and donee of any gift actually made.

Free consent

We have earlier seen that in terms of section 10 of the Indian Contract Act,1872 a legally enforceable agreement should be made with the free consent of the parties who are competent to contract for a lawful consideration with a lawful object. .

In terms of section 13 of the Act, two or more persons are said to have consented when they agree upon the same thing in the same manner. This is referred to as identity of minds or "consensus-ad-idem".

Absence of identity of minds would arise when there is an error on the part of the parties regarding

a) nature of transaction or

(b) person dealt with or

(c) subject matter of agreement .

Consent is free when it is not caused by

a) coercion,

b)undue influence,

c) fraud,

d) misrepresentation or mistake (Section 14).

Now let us discuss each of these factors, which should not influence consent.

(a) **Coercion(Section 15):-** "Coercion" is the committing, or threatening to commit any act forbidden by the Indian Penal Code 1860, or the unlawful detaining, or threatening to detain any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement.

For example, X says to Y 'I shall not return the documents of title relating to your wife's property, unless you agree to sell your house to me for ` 5000'. 'Y' says, "All right, I shall sell my house to you for ` 5000; do not detain my wife's documents of title", X has employed coercion; he cannot therefore enforce the contract. But Y can enforce the contract if he finds the contract to his benefit. An agreement induced by coercion is voidable and not void. That means it can be enforced by the party coerced, but not by the party using coercion.

It is immaterial whether the Indian Penal Code,1860 is or is not in force at the place where the coercion is employed.

Where husband obtained a release deed from his wife and son under a threat of committing suicide, the transaction was set aside on the ground of coercion, suicide being forbidden by the Indian Penal Code. (Amiraju Vs. Seshamma (1974) 41 Mad, 33)

A person to whom money has been paid or anything delivered under coercion, must repay or return it.

(b) **Undue influence (Section 16):** 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 of the other. A person is deemed to be in a position to dominate the will of the other, when he holds authority, real or apparent over the other, or when he stands in a fiduciary relation to other.

The essential ingredients of undue influence are: One of the parties dominates the will of the other and

(i) he has real or apparent authority over the other;
(ii) he is in a position to dominate the will of the other and
(iii) the dominating party takes advantage of the relation.

Following are the instances where one person can be treated as in a position to dominate the will of the other.

(i) A solicitor can dominate the will of the client.
(ii) A doctor can dominate the will of his patient having protracted illness, and
(iii) A trustee can dominate the will of the beneficiary.

The burden of proof (in situations like the above) that there is no undue influence in an agreement would be on the person who is in a position to dominate the will of the other. For instance the 'father' should prove that he had not unduly influenced his son in the case of any given agreement. The stronger party must act in good faith and see that the weaker party gets independent advice.

The following two decisions would enable us to understand the law.

(a) Allahabad High Court set aside a gift of the whole of the property by an elderly Hindu to his spiritual advisor.

(b illiterate Muslim lady signing an agreement in favour of the manager herestate.

Difference between Coercion and Undue Influence: Having discussed in detail the concepts of coercion and undue influence, let us understand the difference between the two:-

(i) Nature of action: Coercion involves physical force and sometimes only threat. Undue influence involves only moral pressure.

(ii) Involvement of criminal action: Coercion involves committing or threatening to commit any act prohibited or forbidden by law, or detention or threatening to detain a person or property. In undue influence there is no such illegal act involved.
(iii) Relation ship between parties: In coercion there need not be any relationship between parties; whereas in undue influence, there must be some kind of relationship between parties, which enables to exercise undue influence over the other.
(iv) Exercise by whom: Coercion need not proceed from the promisor. It also need not be directed against the promisee. Undue influence is always exercised by one on the other, both of whom are parties to a contract.
(v) Enforceability: Where there is coercion, the contract is voidable. Where there is undue influence the contract is voidable or court may set aside or enforce it in a modified form.
(vi) Position of benefits received: In case of coercion, where the contract is rescinded by the aggrieved party any benefit received has to be restored back. In the case of undue influence, the court has discretion to pass orders for return of any such benefit or not to give any such directions.

(c) **Fraud(Section-17):** Fraud means and includes any of the following act committed by a party to a contract or with his connivance or by his agent with intent to deceive another party thereto or his agent or to induce him to enter into the contract.
(i) the suggestion, as to a fact, of that which is not true by one who does not believe it be true;
(ii) the active concealment of a fact by one, having knowledge or belief of the fact;
(iii) a promise made without any intention of performing it;
(iv) any other act fitted to deceive; and
(v) any such act or omission as to law specially declared to be fraudulent
It is important to note that 'fraud' that results in a contract alone is covered by section17 of the Act. If there is a 'fraud' but it does not result in a contract, it would not fall within the purview of the Act.
The following can be taken as illustration of fraud:
• A director of a company issues prospectus containing misstatement knowing fully well about such mis-statement. It was held any person who had purchased shares on the faith of such misstatement can repudiate the contract on the ground of fraud.
• B discovered an ore mine in the Estate of 'A' He conceals the mine and the information about the mine. 'A' in ignorance agrees to sell the estate to 'B' at a price that is grossly undervalued. The contract would be voidable of the option of 'A' on the ground of fraud.
• Buying goods with the intention of not paying the price is an act of fraud.
• A seller of a property should disclose any material defect in the property. Concealing the information would be an act of fraud. Any other act committed to deceive is fraud.
Mere silence would amount to fraud under certain circumstances.
Although a mere silence as to facts which is likely to affect the willingness of a person to enter into a contract is no fraud, where there is a duty to speak or where his silence is equivalent to speech, then such silence amounts to fraud.

(d) **Misrepresentation [Section 18]:** "Misrepresentation' does not involve deception but is only an assertion of something by a person which is not true, though he believes it to be true. misrepresentation could arise because of innocence of the person making it or because he lacks sufficient or reasonable ground to make it. A contract which is hit by misrepresentation can be avoided by the person who has been misled.
For example, A makes the statement on an information derived, not directly from C but from M. B applies for shares on the faith of the statement which turns out to be false. The

statement amounts to misrepresentation, because the information received second-hand did not warrant A to make the positive statement to B [Section 18 (1)]

Now let us analyse the difference between fraud and misrepresentation.

(i) Extent of truth varies: **One of the important difference between fraud and misrepresentation** is that in case of fraud the person making the representation knows it fully well that his statement is untrue & false. In case of misrepresentation, the person making the statement believes it to be true which might later turn out to be untrue. In spite of this difference, the end result is that the other party is misled.

(ii) **Right of the person concerned who suffers**: Fraud not only enables the party to avoid the contract but is also entitled to bring action. Misrepresentation merely provides a ground for avoiding the contract and not for bringing an action in court.

(iii) **Action against the person making the statement**: In order to sustain an action for deceit, there must be proof of fraud. As earlier discussed fraud can be proved only by showing that a false statement was made knowing it to be false or without believing it to be true or recklessly without any care for truth. One is for action against deceit and the other is action for recession of the contract. In the case of mis-representation the person may be free from blame because of his innocence but still the contract cannot stand.

(iv) **Defences available to persons**: In case of misrepresentation, the fact that plaintiff had means of discovering the truth by exercising ordinary diligence can be a good defence against the repudiation of the contract, whereas a defence cannot be set up in case of fraud other than fraudulent silence.

But, where it is possible to discover the truth with ordinary diligence, and though the consent might have been obtained by misrepresentation or silence, then the contract For instance where 'A' misrepresents to 'B' that his sugar factory can produce 500 tons of sugar and whereas it actually produced 300 tones of sugar and if 'B' had the opportunity to examine the accounts through which he could have found out the truth and if in spite of that he had entered into a contract, he can not repudiate it.

Difference between Fraud & Misrepresentation

	Fraud	**Misrepresentation**
Meaning	wrongful representation is made willfully to deceive the party.	Innocently made to deceive the other party.
Knowledge of falsehood	The person making the wrong statement does not believe it to be true. Right to claim damage	The person making the statement believes it to be true. Can't claim damage
Means of discovering of truth	In case of fraud the contract is voidable even though the aggrieved party had the means of discovering the truth with	In case of misrepresentation the contract is not voidable if the aggrieved contract is not

	ordinary diligence.	voidable if the aggrieved party had the means of discover truth with ordinary diligence

(e) Mistake- The fifth significant element that vitiates consent is 'Mistake'. Where parties to an agreement are under a mistake as to a matter of fact which is essential to the agreement, then the agreement is void. As we all know a void agreement cannot be enforced at all.

Example: 'A' agrees to sell certain cargo which is supposed to be on its way in a ship from London to Bombay. But in fact, just before the bargain was struck, the ship carrying the cargo was cast away because of storm and rain and the goods were lost. Neither of the parties was aware of it. The agreement is void. [Couturier vs Hasite 5 H.L.C.673]

Mistake must be a matter of fact and not of law. Where 'A' and 'B' enter into contract believing wrongly that a particular debt is not barred by law of limitation, then the contract is valid because there is no mistake of fact but of law only. However a question on foreign law would become a matter of question of fact. Similarly the existence of a particular private right though depends upon rules of law, is only a matter of fact. For instance where a man promises to buy a property which already belongs to him without him being aware of it, then such a promise is not binding on him. However a family arrangements or a compromise of doubtful rights cannot be avoided on the ground of mistake of law.

Yet another issue to remember in mistake is that it must be of an essential fact. Whether the fact is essential or not would again depend on how a reasonable man would regard it under given circumstances. A mere wrong opinion as to the value is not an essential fact.

While deciding whether a contract is hit by mistake or not it must be remembered that 'Mistake' is not unilateral. Both the parties should be under mistake. A unilateral mistake would not render the contract invalid. For example where 'A' agrees to purchase from 'B' 18 carat gold thinking it to be pure gold but 'B' was not instrumental for creating such an impression then contract between 'A' and 'B' should be treated as valid.

From the foregoing it is clear that:-

a. Mistake should be a matter of fact
b. Mistake should not be a matter of law
c. Mistake should be a matter of essential fact
d. Mistake should not be unilateral but of both the parties, and
e. Mistake renders agreement void and neither party can enforce the contract against each other

Key Points

- When two or more persons agree upon the same thing in the same sense,they are said to have consent. Consent is said to be free when it has not been obtained by coercion, undue influence, fraud, misrepresentation or mistake.
- Coercion –An act or threat of a person with an intention of causing any person to enter into an agreement by –(i) committing / threatening to commit any act forbidden by IPC, or (ii) unlawfully detaining or threatening to detain any property of another. Such a contract is voidable.

o Undue influence –It is used by a dominant party on a weaker one to get an unfair advantage in a contract. In the following circumstances, the party stand in a dominant position-

- Where party holds real/apparent authority over the others, or party stands in a fiduciary relationship to the other,or where the party make a contract with a party in mental or bodily distress.
- A contract caused by undue influence is voidable. Even court is also empowered to set aside such contract absolutely or conditionally.

o Fraud-Intentional misrepresentation or concealment of material facts of a contract with an intention to deceive and induce the other party to enter into an agreement.

- Silence merely not amount to fraud, except-it's duty to speak,or silence is equivalent to speech, or stating half truth.

o Misrepresentation- An innocent/ unintentional false statement/ assertion of fact in the making of an agreement.

- Remedies in the above cases are same, except the right to claim damages in case of fraud.

o Mistake- An erroneous belief about something. It may be either of fact or of law. Mistake renders the contract void. Unilateral mistake made by one of the parties. It is a valid contract, unless it is caused by misrepresentation or fraud. Even unilateral mistakes as to fact renders the contract void.

Capacity of parties

The next issue for consideration is, who is competent to contract?

Every person who

(a) has attained the age of majority

(b) is of sound mind and

(c) is not otherwise disqualified from contracting, is competent to contract. Now let us discuss each one of these requirements.

Age of majority:-According to section 3 of **Indian majority Act-1875** every person domiciled in Indian attains majority on the completion of 18 years of age.

Excetipon:- 21 years- in the following cases.

a. **Where a guardian of a minor's person or property** is appointed under the Guardian and wardsAct, 1890.

b. **Where minor's property has passed under the superintendence of the court of words.**

Position of Agreements by Minor:-1. Validity: - An agreement with a minor is void-ab-initio **Example :** Mr. D, a minor, mortgaged his house for Rs.20000 to a money – lender, but the mortgagee, i.e. the money – lender, paid him a sumof Rs.8000. Subsequently, the minorsued for setting aside the mortgage. Held that the contract was void, as Mr. D was minor **and** therefore he is not liable to pay anything to the lender.

RULES GOVERNING MINOR'S AGREEMENT.

1) A minor's has received any benefit under a void contract, he cannot be asked to return the same.
2) If a minor has received any benefit under a void contract, he cannot be asked to return the same.
3) Fraudulent representation by a minor- no difference in the status of agreement. The contract remains void.
4) A minor with the consent of all the partners, be admitted to the benefitsof an existing partnership.
5) Contracts entered into by minors are void-ab-initio. Hence no specific performance can be enforced for such contracts.
6) Minor's parent/guardians are not liable to a minor's creditor for the breach of contract by theminor.
7) A minor can act as an agent but not personally liable. But he cannot be principal.
8) A minor cannot become shareholder of a the company except when the shares are fully paid up and transfer by share.
9) A minor cannot be adjudicated as insolvent.
10) Can enter into contracts of Apprenticeship, Services, Education, etc:

i. A minor can enter into contract of apprenticeship, or for training or instruction in a special art, education, etc.
ii. These are allowed because it generates benefits to the Minor.

11. Guarantee for and by minor

A contract of guarantee in favor of a minor is valid. However, a minor cannot be a surety in a contract of guarantee. This is because, the surety is ultimately liable under a contract of guarantee whereas a minor can never be held personally liable.

12. Minor as a trade union member

Any person who has attained the age of fifteen years may be a member for registered trade union, provided the rules of the trade union allow so. Such a member will enjoy all the rights of a member.

(a) Age of majority: In terms of the Indian Majority Act, 1875, every domiciled Indian attains majority on the completion of 18 years of age. However where a guardian is appointed by a court to protect the property of a minor and the court takes charge of the property before the person attains 18 years, then he or she would attain majority on completion of 21 years.

Now let us analyze the position with regard to the minor's agreement –

(i) An agreement entered into by a minor is altogether void: An agreement entered into by a minor is void and the question of its enforceability does not arise.

(ii Minor can be a beneficiary: Though a minor is not competent to contract, nothing in the Contract Act prevents him from making the other party bound to the minor. Thus, a promissory note duly executed in favour of a minor is not void and can be sued upon by him, because he though incompetent to contract, may yet accept a benefit.

A minor cannot become partner in a partnership firm. However, he may with the consent of all the partners, be admitted to the benefits of partnership (Section 30 of the Indian Partnership Act,1932).

(iii) Minor can always plead minority: Any money advanced to a minor cannot be recovered as he can plead minority and that the contract is void. Even if there had been false representation at the time of borrowing that he was a major, the amount lent to him cannot be recovered. as it would amount to enforcing void contract.

(iv) Ratification of agreement not permitted: A minor on his attaining majority cannot validate any agreement which was entered into when he was minor, as the agreement was void. Similarly a minor cannot sign fresh promissory notes on his attaining majority in lieu of promissory notes executed for a loan transaction when he was minor, or a fresh agreement without consideration.

(v) Liability for necessaries: A person who supplied necessaries of life to a minor or his family, is entitled to be reimbursed from the properties of a minor, not on the basis of any contract but on the basis of an obligation resembling a contract. Necessaries of life not only include food and clothing but also education and instruction. They also include 'goods' and 'services'.

(vi) Contract by guardian are valid: Though an agreement with minor is void, valid contract can be entered into with the guardian on behalf of the minor. The guardian must be competent to make the contract and the contract should be for the benefit of the minor. For instance a guardian can make an enforceable marriage contract on behalf of the minor. Similarly father of bride can enter the contract with the father of bridegroom for payment of certain allowance to the bride.

But not all contracts by guardian are valid. A guardian cannot bind a minor in a contract to purchase immovable properties [Mir Sarwarjan vs. Fakharuddan (1912) 39. Cal. 232]. However, a court appointed guardian can bind a minor is respect of certain sale of property ordered by the court.

(b) **Sound mind:** The next important requirement by way of capacity to contract is "sound mind". A person will be considered to be of sound mind if he at the time of entering into a contract is capable of understanding it and forming a rational judgment as to its effect upon his interest.

A person of unsound mind (Lunatic Idiot Drunken and Intoxicated)

Person of Unsound Mind A person who is usually of unsound mind, but occasionally of sound mind can make a contract when he is of sound mind. Similarly, a person who is usually of sound mind, but occasionally of unsound mind, may not make a contract when he is of unsound mind.

At time of entering into a contract, a person must be sound mind. Law presumes that every person is of sound mind unless otherwise it is proved before court. An agreement by a person of unsound mind is void. The following are categories of a person considered as person of a unsound mind.

An idiot An idiot is a person who is congenital (by birth) unsound mind. His incapacity is permanent and therefore he can never understand contract and make a rational judgment as to its effects upon his interest. Consequently, the agreement of an idiot is absolutely void ab initio. He is not personally liable even for the payment of necessaries of life supplied to him.

Delirious persons A person delirious from fever is also not capable of understanding the nature and implications of an agreement. Therefore, he cannot enter into a contract so long as delirium lasts.

Hypnotized persons Hypnotism produces temporary incapacity till a person is under the effect of artificial induced sleep.

Mental decay There may be mental decay or senile mind due to old age or poor health.

When such person is not capable of understanding the contract and its effect upon his interest, he cannot enter into contract.

Lunatic is person who is mentally deranged due to mental strain or other personal experience.He does not suffer permanently of unsound mind. He can enter into contract during lucid intervals i.e., during period when he is of sound mind.

(c) Person Disqualified by law (Alien enemy , Foreign Sovereign ,Convict, Corporation and Company, Insolvent)

1- Body corporate or company or corporation

Contractual capacity of company is determined by object clause of its memorandum of association. Any act done in excess of power given is ultra – virus and hence void.

2- **Alien enemy** An 'alien' is a person who is a foreigner to the land. He may be either an 'alien friend' or an 'alien enemy. If the sovereign or state of the alien is at peace with the country of his stay, he is an alien friend. An if a war is declared between the two countries he is termed as an alien enemy.

- During the war, contract can be entered in to with alien enemy with the permission of central government.

3- **Convict** can't enter into a contract while he is undergoing imprisonment. But he can enter into a contract with permission of central government while undergoing imprisonment. After the imprisonment is over, be becomes capable of entering into contract. Thus the incapacity is only during the period of sentence.

4- **Insolvent -**When any person is declared as an insolvent, his property vests in receiver and therefore, he can't enter into contract relating to his property. Again he becomes capable to enter into contract when he is discharged by court.

5- Foreign sovereigns, diplomatic staff and representative of foreign staff can enter into valid contract. However, a suit cannot be filed against them, in the Indian counts without the prior sanction of the central Government.

Third party to a contract cannot sue or a stranger to a contract cannot sue.

Only those persons, who are parties to a contract, can sue and be **sued** upon the contract. This Rule is called "**Doctrine of privities of contract."**

Exception.

i. Trust:-In case of trust a beneficiary can sue upon the contract.

Example: A transferred certain properties to B to be held by him in trust for the benefit of C. In this case, C although not a party to the trust, can sue for the benefits available to him under the trust.

This exception to the rule of Privity of contract has been recognized.

ii. **Family settlement** / Marriage contract:-In case of family settlement members who were not originally party to the contract can also sue upon it.

A female members can enforce a provision for marriage expenses made on partition of HUF. **Example:** H sued her father – in – law K to recover Rs.15,000 being arrears of allowance called Pin money payable to her by K under an agreement between K and H's father, consideration being H's marriage to K's son D. Both H and D were minors at the time of marriage.

Held, the promise can be made enforceable by H.

Provision of marriage expenses of female members of a Joint Hindu Family, entitles the female member to sue for such expenses on a partition between male members.,

Two brothers, on partition of family joint properties, agreed to invest in equal shares for their mother's maintenance. Held, the mother was entitled to require her sons to make the investment.

iii. **Acknowledgement of liability**:-Where a person admits his Liability thereafter if he refused be will be stopped from denying his liability.

Example X receives money from Y for paying it to Z. X admits the receipt of that amount to Z. Z can recover the amount from X, even though the money is due from Y.

iv. **Assignment of contract** Assignee (the person to whom benefits of contract are assigned) can enforce upon the contract.

v. Contract entered into through an **agent.**

vi. **Covenants** running with land.

Stranger to consideration:-"Stranger to contract" must be distinguished from a stranger to consideration need not necessarily be provided by the promises it may flow from a third party also such a person is ' stranger to consideration.

Legalities of object

Now let us discuss two other important ingredients of a valid contract namely lawful object and lawful consideration. Speaking generally all persons enjoy freedom for entering into contracts of their choice. But this contractual freedom or their right to enter into agreements is not absolute. There is a limitation on such contractual freedom as they are bound by certain

general provisions of law. The above observation can be illustrated with the following example: suppose 'A' agrees to pay ` 100/- to B on 'B' stealing 'C's purse, then no Court can compel 'A' to pay 'B' even if he manages to steal 'C's purse because it would amount to encouraging these things.

Where consideration and object is opposed to public policy: Agreement, either because of their object or consideration being opposed to public policy are void and not enforceable. Therefore the meaning of the expression 'public policy' is very important. It can be interpreted in a narrow sense or in a broad sense. If it is understood in a narrow sense, it would cut into rights of people to enter into even genuine agreements. 'Public policy' as a concept is evolved basically to develop an orderly society and for good of the community. But framing public policy itself is a difficult exercise since a too restrictive approach would stifle the rights of people and a too liberal approach would open the gate for many illegal transactions. Therefore policy on 'public policy' has to be developed with circumspection. Public policy has been described as "an unruly horse, which if not properly bridled, may carry its rider he knows not where". Time immemorial following activities/ agreements have been identified as "opposed to public policy".

(a) **Trading with enemy:** Any trading or business activity with a person who owes allegiance to a Government of a country with whom India is at war without any license from Government of India is void. This is because such a trade would be against the interest of Government of India and people of India.

Any agreement made during peace time would be suspended automatically and cannot be carried on further until hostilities come to an end.

(b) **Stifling prosecution**: Any agreement to stifle or prevent illegally any prosecution is void as it would amount to perversion or abuse of justice. The principle is that one should not make a trade of felony. It must be understood however that under the Code of Criminal Procedure,1973 many offences are compoundable. Therefore any agreement towards compounding of an offence to avoid prosecution is not void but is very much enforceable. Thus, where 'A' agrees to sell certain land to 'B' in consideration of 'B' abstaining from taking any criminal proceeding against 'A' with respect to an offence which is compoundable, the agreement is not opposed to public policy.

(c) **Maintenance and Champerty:** Maintenance is promotion of litigation in which the litigant has no interest. Champerty is bargain whereby one party agrees to assist the other in recovering property with a view to sharing the profit of litigation. These agreements for maintenance and champerty are void in England but not in India. Hence these are not opposed to public policy. But where such advances are made by way of gambling in litigation, the agreement to share the subject of litigation is certainly opposed to public policy and therefore is void.

(d) **Interference with course of law and justice:** Any agreement with the object of inducing a judicial officer or administrative officer of the state to act corruptly or not impartially is void. Similarly an agreement to use influence in a litigation in a underhand manner is void. For instance through an agreement 'A' agrees to reward 'B' if he abstains from being a witness in a suit against 'A' is void. But an agreement to pay for to a holy man for prayers for success of a suit is valid.

(e) **Marriage brokerage contract:** An agreement to negotiate a marriage for reward is void. Such marriage brokerage contracts are opposed to public policy.

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The object of fowling agreements is opposed to public policy.

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(3) A, who is the manager of a firm, agrees to pass a contract to X if X pay to A ` 2000 privately; the agreement is void.

(g) Sale of public offices: While appointing a person to certain important and high public office, merit alone should be the criteria. Any attempt to influence or any agreement to influence anyone in this regard should be seen as an act 'opposed to public policy'.fina

Quasi Contract and contingent contract

Contingent contract

In terms of Section 31 of the Act contingent contract is a contract to do or not to do something, if some event collateral to such contract does or does not happen. Contracts of indemnity and contracts of insurance fall under this category.

For instance if 'A' contracts to pay 'B' ` 100000/- if B's house is destroyed by fire then it is a contingent contract.

Essentials of a contingent contract

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

(b) The event referred to is collateral to the contract. The event is not part of the contract. The event should be neither performance promised nor a consideration for a promise. Where 'A' agrees to deliver 100 bags of wheat and 'B' agrees to pay after delivery, this is a conditional contract and not a contingent contract. Similarly where 'A' promises to pay 'B' ` 10000/- if he marries 'C' is not a contingent contract but a conditional contract.

(c) The contingent event should not be a mere 'will' of the promisor. The event should be contingent in addition to being the will of the promisor.

For example if 'A' promises to pay 'B' ` 10000/- if 'A' left for Delhi from Mumbai on a particular day, it is a contingent contract because though 'A's leaving for Delhi is his own will, it cannot happen only at his will.

The rules relating to enforcement of a contingent contract are laid down in sections 32, 33, 34 and 36 of the Act.

(a) Contingency is the "happening of an event": Where a contract identifies happening of a future contingent event, the contract cannot be enforced until and unless the event 'happens'. If the happening of the event becomes impossible, then the contingent contract is void. For instance 'X' enters into a contract to buy 'Y's car provided 'Y' survives 'A'. Here 'Y' surviving 'A' or 'A' dying before 'Y' is the event on which the contract is contingent and they cannot be enforced until 'A' dies.

(b) Contingency is the non-happening of an event: Where a contingent contract is made contingent on a non-happening of an event, it can be enforced only when its happening becomes impossible. For example where 'P' agrees to pay 'Q' a sum of money if a particular ship does not return, the contract becomes enforceable only if the ship sinks so that it cannot return.

(c) Contingent on the future conduct of a living person: A contract would cease to be enforceable if it is contingent upon the conduct of a living person when that living person does some thing to make the 'event' or 'conduct' as impossible of happening. For example where 'A' agrees to pay 'B' a sum of money if 'A' marries 'C'. 'C' marries 'D'. This act of 'C' has rendered the event of 'A' marrying 'C' as impossible; it

is though possible if there is divorce between 'C' and 'D'.

(d) Contingent on an impossible event: A contingent agreement to do a thing or not to do a thing if an impossible event happens is void and hence is not obviously enforceable. The situation would not change even if the parties to the agreement are not aware of such impossibility. 'A' agrees to pay 'B' ` one lakh if sun rises in the west next morning. This is an impossible event and hence void.

Wagering agreement: Let us discuss wagering contract. We shall also distinguish wagering agreements from speculative transactions and mere 'gambling'.

Wagering agreement is one which involves payment of a sum of money upon the determination of an uncertain event. The essence of wagering agreement is where there are two parties, one wins, the other loses upon an uncertain event taking place in which neither of them has legitimate interest.

For example 'A' agrees to pay ` 500/- to 'B' if it rains and similarly 'B' agrees to pay 'A' if it does not. This is a classic case of a wagering agreement. But where one of the parties has control over the event, the agreement is valid. An agreement by way of a wager is void. A good definition of wagering agreement would be the one given by Anson: "A promise to give money or money's worth upon determination or ascertainment of an uncertain event".

For example 'A' agrees

Now let us see the position with regard to transaction of "purchase of lottery ticket" and "horse racing". Section 30 of the Act provides that an agreement [to buy lottery tickets] is one by way of wager and is void. However any subscription or contribution or agreement towards such subscription or contribution towards any plate or prize or sum of money, of the value of ` 500 or more to be awarded to a winner of a horse race is not unlawful.Speculative transactions: While as clearly seen, wagering contracts are void, speculative transactions are valid. It is often difficult to distinguish between the two. There are two bare elements of a speculative transaction. They are (a) mutual intention of parties to acquire or deliver goods or commodities and (b) undertaking of risk arising from movement of prices. In wagering contract, only the element of risk is seen.

Now let us take an example:

'A' enters into a agreement with 'B' to buy 100 bales of jute at ` 150/- per bale for forward delivery after six months. This is a proposed transaction of purchase @ ` 150/- per bale. What if the price at the time of delivery goes up to ` 200/- 'A' has the following two options:

(i) to take delivery of 100 bales at the contracted rate of ` 150/- and sell it to some other buyer and make a profit of ` 50/ -per bale or

(ii) to simply collect the difference of ` 50/- per bale from 'B'

Similarly what if the price at the time of delivery goes down to ` 125/- per bale. 'A' has the following two options:

(i) to take delivery of 100 bales at the contracted rate of ` 150/- [and perhaps sell it to some buyer and incur a loss of ` 25 per bale] or

(ii) to pay the difference of ` 25/- per bale to 'B' & close the contract.

In the above example if the original intention of the parties was only to settle the difference in price, than it would be a wagering contract which would be void. Thus by now it would be clear that wagering postulates only incurring of risk. It is void because it is opposed to public policy.

While gambling and wagering are prohibited by law, speculation is not.

Now let us consider other peculiar situations to see whether they are wagering contracts or speculative contracts or valid contracts.

Insurance policy: An insurance policy is a valid contract. But if an insurance policy is taken by a person who has no insurable interest, then it is void. For instance a person who has no insurable interest in a ship, takes a policy against it being sunk, then the contract is void.

Promissory notes on a wagering contract: While a wagering contract is void ab initio, it is but automatic that a promissory note given out of a wagering contract is not enforceable by way of a suit. A promissory note of this character is one without consideration and hence is null and void.

Suit to recover deposit: A winner of bet cannot recover the amount which he has won even if the amount is kept by way of deposit by the loser with the stakeholder. Such earmarking or identification of funds does not enhance the validity of the contract which is void. In the above example the loser can recover the amount from stakeholders as long as the amount has not been made over by the stakeholder to the winner.

Wager and collateral transactions: The validity of a collateral transaction cannot be challenged because the main contract is a wager and void. For instance in a wagering contract, the broker is entitled to collect his brokerage. Similarly the principal can recover the prize money from his agent received by him on account of a wagering transactions.

The acid test of validly of a collateral transaction is whether the main transaction is illegal or legal but void. If the main transaction is illegal, the collateral transaction cannot be valid. For example security given for regular payment of the rent of a house let out for the purpose of gambling cannot be recovered; the recovery of security being tainted with the illegality of original transaction cannot be enforced.

A promise made by the loser of a wager to pay the amount lost in consideration of the winners forbearance to sue him as defaulter can be enforced as a fresh contract, separate and distinct from original wagering contract though collateral to it.

Difference between a contingent contract and a wagering contract

1. A wagering agreement is a promise to give money or money's worth with reference to an uncertain event happening or not happening.
   A contingent contract is a contract to do or not to do something with reference to a collateral event happening or not happening.
2. A wagering agreement consists of reciprocal promises whereas a contingent contract may not contain reciprocal promises.
3. In a wagering contract the uncertain event is the core factor whereas in a contingent contract the event is collateral.
4. A wagering agreement is essentially contingent in nature whereas a contingent contract may not be wagering in nature.
5. In a wagering agreement, the contracting parties have no interest in the subject matter whereas it is not so in a contingent contract.
6. A wagering contract is a game, losing and gaining alone matters whereas it is not so in a contingent contract.
7. A wagering agreement is void where as a contingent contract is valid.

Quasi contract

Even in the absence of a contract, certain social relationships give rise to certain specific obligations to be performed by certain persons. These are known as quasi contracts as they create same obligations as in the case of regular contract.

Quasi contracts are based on principles of equity, justice and good conscience.

Salient features of quasi contracts are:

(a) In the first place, such a right is always a right to money and generally, though not always, to a liquidated sum of money.

(b) Secondly, it does not arise from any agreement of the parties concerned, but it imposed by the law; and

(c) Thirdly, it is a right which is available not against all the world, but against a particular person or persons only, so that in this respect it resembles a contractual right.

There are five circumstances which are identified by the Act as quasi contracts. These five circumstances do not result in regular contracts.

(a) **Claim for necessaries supplied to persons incapable of contracting:** Any person supplying necessaries of life to persons who are incapable of contracting is entitled to claim the price from the other person's property. Similarly where money is paid to such persons for purchase of necessaries, reimbursement can be claimed.
For example if 'A' supplies necessaries of life to 'B' a lunatic or to his wife or child whom 'B' is liable to protect and maintain, then 'A' can claim the price from the property of 'B'. For such claim to be valid 'A' should prove the supplies were to the actual requirements of 'B' and his dependents. No claim for supplies of luxury articles can be made. If 'B' has no property 'A' obviously cannot make his claim.
(b) **Right to recover money paid for another person:** A person who has paid a sum of money which another is obliged to pay, is entitled to be reimbursed by that other person provided the payment has been made by him to protect his own interest.
Here the person who makes the payment must honestly believe that his own interest demands payment. [Muni Bibi vs. Trilokinath].
In a case the plaintiff agreed to purchase certain mills and to save it from being sold to outsiders paid certain arrears of municipal dues. Here the payment made by the plaintiff was held to be recoverable as he had interest in the property as prospective buyer.
(c) **Obligation of person enjoying benefits of non-gratuitous act:** In term of section 70 of the Act "where a person lawfully does anything for another person, or delivers anything to him not intending to do so gratuitously and such other person enjoys the benefit thereof, the latter is bound to pay compensation to the former in respect of, or to restore, the thing so done or delivered.
The above can be illustrated by a case law where 'K' a government servant was compulsorily retired by the government. He filed a writ petition and obtained an injunction against the order. He was reinstated and was paid salary but was given no work and in the mean time government went on appeal. The appeal was decided in favour of the government and 'K' was directed to return the salary paid to him during the period of reinstatement. [Shyam Lal vs. State of U.P. A.I.R (1968) 130]
(d) **Responsibility of finder of goods:** In terms of section 71 'A person who finds goods belonging to another and takes them into his custody is subject to same responsibility as if he were a bailee'.

Thus a finder of lost goods has:
(i) to take proper care of the property as men of ordinary prudence would take
(ii) no right to appropriate the goods and
(iii) to restore the goods if the owner is found.

Where 'P' a customer in 'D's shop puts down a brooch worn on her coat and forgets to pick it up and one of 'D's assistants finds it and puts it in a drawer over the week end. On Monday, it was discovered to be missing. 'D' was held to be liable in the absence of ordinary care which a prudent man would have taken.

(e) **Liability for money paid or thing delivered by mistake or by coercion:** In terms of Section 72 of the Act, "a person to whom money has been paid or any thing delivered by mistake or under coercion, must repay or return it. Every kind of payment of money or delivery of goods for every type of 'mistake' is recoverable. [Shivprasad vs Sirish Chandra A.I.R. 1949
P.C. 297]
A payment of municipal tax made under mistaken belief or because of mis- understanding of the terms of lease can be recovered from municipal authorities. The above law was affirmed by Supreme Court in cases of Sales tax officer vs. Kanhaiyalal A.I.R.1959 S.C.835
Similarly any money paid by coercion is also recoverable. The word coercion is not necessarily governed by section 15 of the Act. The word is interpreted to mean and include oppression, extortion, or such other means [Seth Khanjelek vs National Bank of India].
In a case where 'T' was traveling without ticket in a tram car and on checking he was asked to pay ` 5/- as penalty to compound transaction. T filed a suit against the corporation for recovery on the ground that it was extorted from him. The suit was decreed in his favour. [Trikamdas vs. Bombay Municipal Corporation A.I.R.1954]
In all the above cases the contractual liability arose without any agreement between the parties.

While on the subject of 'object' and 'consideration'

it must be said that in practice it is difficult to distinguish between 'object' and 'consideration' especially when consideration consists of a promise to do or, not to do something. Sometimes both 'object' and 'consideration' are seen for evaluation. For example, where 'A' agrees to sell goods to 'B' who is insolvent and B assigns the benefit of the contract for ` 100/- with a view to defrauding creditors, the consideration for the assignment viz ` 100/- is lawful but the object namely defrauding creditors is unlawful as it is to defeat the provision of insolvency law.
Although 'object' and 'consideration' are sometimes intertwined we have to, where ever it is possible, separate them and identify whether they are lawful.
In terms of section 23 of the Act 'consideration' or 'object' is unlawful if it is forbidden by law; or it would if permitted, defeat the provisions of any law or is fraudulent or involves injury to the person or property of another or is immoral or opposed to public policy. Every agreement where the object or consideration is unlawful is void. Thus section 23 has set out the limits to contractual freedom. Following are examples of agreement which are void because the object is unlawful.
(i) Where A, B & C enter into an agreement to share equally among themselves certain gains acquired by fraud or loss acquired by fraud. The agreement is void because the object being commission of fraud, is unlawful.
(ii) A promises to return the stolen property of 'B' if 'B' would withdraw the criminal case filed against him, the agreement is void as its object namely withdrawing the case would mean stifling prosecution.
Now let us consider circumstances which would make consideration and the object as well unlawful. There are seven such circumstances namely -

(i) Agreement forbidden by law: Acts forbidden by law means acts that are punishable under any Statute or Rules or Regulations made under any Statute.
For instance a plantation company that is commenced, for growing, felling and selling

timber cannot enter into any agreement to grow and fell sandalwood trees as felling of sandalwood is prohibited by law viz the Forest Act.
Example: A license to cut grass is given to 'X' by Forest Department under the Forest Act. The license provides for imposition of penalty in the events of 'X' choosing to assign his right. However, if 'X' assigns his right, the agreement would still be valid since there is no prohibition for such assignment as the consideration stipulating penalty is only to regulate the matter as a matter of administrative measure.

(ii) Consideration defeats the provision of law: Where an agreement is entered into with the object of defeating any provision of law then it is prohibited. "Law" here should mean any Statute, Law, regulation etc, in force. This can be illustrated by the following-
(a) Where a debtor agrees not to plead limitation vis-à-vis his creditor, it is an agreement to defeat the Limitation Act.
(b) An agreement between owner of land who has to pay land revenue in arrears and a stranger that the stranger would purchase his estate for revenue's sake and reconveys it to the former on receipt of purchase money is void, as it would defeat the law relating to revenue, which apparently prohibits defaulting owners from purchasing back the same estate already sold due to his default.
(c) An agreement by a Hindu to give his son in adoption in consideration of annual allowance to natural parents would be in violation of Hindu Law and hence is unlawful.
(d) Any agreement by a Muslim with the wife before their marriage that the wife shall be at liberty to live with her parents after marriage is void as it would defeat the provisions of Muslim Law.

(iii) Consideration that would defeat any rule for the time being in force: This is a situation not very different from point (ii) discussed above. The issue covered by this point can be explained by following two examples:
(a) A 'will' must be proved in order to be probated by a court. A mere consent of parties by way of agreement to except this requirement of proof of genuineness or proper execution of will is not lawful and therefore cannot be enforced under C.P.C.
(b) A receiver is a court officer. Therefore his remuneration has to be fixed by the court. Parties to certain litigations cannot add or deviate of the power of the receiver. Similarly they cannot fix salary of a receiver without the leave of the court however unconditional it may be. Such an act would be in contravention of law.

(iv) Where consideration is a fraud: Following are illustrations to prove where the object or consideration of an agreement is unlawful on the ground of fraud -
(a) 'A' is an agent for Zamindar, the principal. He agrees for money to lease of land for 'B' from his principal, the Zamindar. The agreement between 'A' and 'B' is void as the consideration is fraudulent
(b) 'A' & 'B' are partners in a firm. They agree to defraud a Government department by submitting a tender in the individual name and not in the firm name. This agreement is void as it is a fraud on the Government department.

(v) Where object or consideration is unlawful because it involves or causing injury to a person or loss of property: The term 'injury' means criminal or wrongful harm. Following are the illustrations where the object or consideration is unlawful as it involves injury either to person or property.
(a) 'A' agrees to buy a property from 'B' although A knows 'B' had agreed previously to sell the property to 'C'. The intention of 'A' here is to cause injury to the property of

'C'

(b) 'A' agrees to print a book of 'B' which has clearly been published by "W" This agreement is void as it is not only in violation of Copyright Act but also with the intent to cause injury to the property of another.

(c) 'A' borrowed money from 'B'. He is unable to pay either the principal or interest. Therefore he agrees to render manual labour for certain period failing which he agrees to pay exorbitant interest. This agreement is void as rendering labour as consideration amounts to agreeing to be a slave. Slavery is opposed to public policy as well. In other words consideration involves 'injury' to 'A'. Hence the agreement is void.

(vi) Where consideration is immoral: Following are illustration where the agreement is void because the object or consideration is unlawful being immoral.

(a) Where 'A' agrees to let his house to a prostitute on rent, where with A's knowledge she carries on her vocation. 'A' cannot collect the rent as the agreement is void, the object being void.

(b) Where 'P' had advanced money to 'D' a married woman to enable her to obtain a divorce from her husband. He also promised to marry her after divorce. It was held that 'P' was not entitled to recover the amount from 'D' as the agreement was against good morals.

(vii) Where consideration is opposed to public policy: Agreement, either because of their object or consideration being opposed to public policy are void and not enforceable.

Time immemorial, following activities/ agreements have been identified as; "opposed to public policy".

The meaning of the expression 'public policy' is very important. It can be interpreted in a narrow sense or in a broad sense. If it is understood in a narrow sense, it would cut into rights of people to enter into even genuine agreements. 'Public policy' as a concept is evolved basically to develop an orderly society and for good of the community. But framing public policy itself is a difficult exercise since a too restrictive approach would stifle the rights of people and a too liberal approach would open the gate for many illegal transactions. Therefore policy on 'public policy' has to be developed with circumspection. Public policy has been described as "an unruly horse, which if not properly bridled, may carry its rider he knows not where".

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(g) **Sale of public offices:** While appointing a person to certain important and high public office, merit alone should be the criteria. Any attempt to influence or any agreement to influence anyone in this regard should be seen as an act 'opposed to public policy'. 'Public
policy' also demands that there should be no money consideration and if it is there, it could be opposed to public policy. This is for the reason presence of money consideration would convert the situation as sale of public office.

Following are illustrations in this regard.
(1) An agreement to pay money to public servant in order to induce him to retire from his office so that another person may secure the appointment is void.
(2) An agreement to procure a public recognition like Padma Vibhushan for reward is void.
(3) The sale of the office of a mutawali of wakf is opposed to public policy, because the office of mutawali is connected with matters of public interest.

(h) Agreement for the creation of monopolies: Agreements having for their object the establishment of monopolies are opposed to public policy and therefore void. It is also hit by the MRTP Act.

(i) Agreement in restraint of marriage (Section 26): Every agreement in restraint of

marriage of any person other than a minor, is void. So if a person, being a major, agrees for good consideration not to marry, the promise is not binding.

(j) Agreement in restraint of trade (Section 27): Any agreement through which a person is restrained from exercising a lawful profession, trade or business of any kind is to that extent void. The object of this law is to protect trade. The restraint, even if it is partial, will make the agreement void. Example: X, a shop keeper, in a particular locality agrees to pay 'Y' his rival in business certain compensation, if 'Y' close his business in that locality the agreement is void.

The principle of law however has a number of exceptions which are discussed hereunder.

(i) where a person sells his business along with the goodwill to another person, agrees not to carry on same line of business in certain reasonable local limits, such an agreement is valid.

(ii) In terms of Section 36 of the Indian Partnership Act,1932 an agreement through which an outgoing partner will not carry on the business of the firm for a reasonable time will be valid, though it is in restraint of trade.

(iii) Again in terms of Section 54 of the Partnership Act,1932 partners among themselves may agree that upon dissolution of the firm some of them may not carry on the business of the firm. Such an agreement is valid.

(iv) Section 55 of the Indian Partnership Act,1932 provides that where a full firm is sold by partners along with goodwill to a buyer, there can be an agreement that they would not carry on the business of the dissolved firm for certain period and within certain local limits and such an agreement will be valid.

(v) An agreement of service through which an employee commits not to compete with his employer is not in restraint of trade.

Example: 'B' is a Doctor and he employs 'A' a juniorDoctor as his assistant. 'A' agrees not to practice as Doctor during the period of his employment with 'B' as a Doctor independently. Such an agreement will be valid.

(vi) An agreement between manufacturer and a wholesale merchant that the entire production during a period will be sold by the manufacturer to the wholesale merchant is not in restraint of trade.

(vii) An agreement among sellers not to sell a particular product below a particular price is not an agreement in restraint of trade.

(k) Agreement in restraint of legal proceedings (Section 28): An agreement in restraint of legal proceedings resulting in restriction of one's right to enforce legal rights is void. Similarly any agreement which abridges the usual period for commencing the legal proceedings is also void. Further these agreement are also void in view of section 23 of the Indian Contract Act,1872 as the object of the agreements are to defeat the provision of law.

Nevertheless, a clause in an fire insurance policy stipulating that if the claim is made and rejected and if no suit is instituted within three months after such a rejection, all the benefits under the policy will be forfeited, is valid. However, there are certain exceptions to the above rule:

(i) A contract by which the parties agree that any dispute between them in respect of any subject shall be referred to arbitration and that only the amount awarded in such arbitration shall be recoverable is a valid contract. For instance, in agreement between the holder of a fire insurance policy and the insurance company that no suit shall be instituted until the question of the amount of damage sustained by the assured has first been ascertained by a reference to an arbitrator is a perfectly valid agreement.

(ii) Similarly, a contract by which the parties agree to refer to arbitration any question

between them which has already arisen or which may arise in future, is valid; but such a contract must be in writing.

We have already seen that certain agreements are void ab initio under the Contract Act, like agreements by incompetent persons [Section 11], agreement with unlawful object or consideration [Section 23], agreement made under mutual mistake of fact [Section 20], agreement without consideration [Section 25], agreement in restraint of marriage, trade or
legal proceedings etc., as they are opposed to public policy.
In addition to the above, there are also other agreements which are expressly declared as void.

(a) Where consideration is unlawful in part: By virtue of Section 24 of the Indian Contract Act, "If any part of a single consideration for one or more objects, or any one or any part of any one of several considerations for a single object is unlawful, the agreement is void". This Section is obviously a corollary to Section 23 of the Act. Where the consideration is unlawful, the entire agreement is void as the agreement has to be looked as a whole. The general principle of law is where the legal part of an agreement can be separated from the illegal part, then the legal part if it can be given effect by rejecting the bad part and retaining the good part, then the good part is given effect. But where no such separation is possible, the contract is altogether void.
Example: 'A' has business interest in Indigo, as a manufacturer. He also has interest in illegal traffic of other goods. Where 'A' employs 'B' for a salary of ` 2000/- to act as superintendent of A's entire business, the agreement is void as the object of A's promise unlawful in part.
(b) Agreement the meaning of which is uncertain (Section 29): Where the meaning of the terms of an agreement is uncertain or if it is not capable of being understood with certainty, then the agreement is void. But where the meaning is capable of being made certain, then the agreement is valid. For example where 'A' enters into an agreement to supply 100 tones of oil, the agreement is not valid as the meaning of it is uncertain since what type of oil that is promised to be supplied is not clear. But on the other hand if 'A' is a dealer of coconut oil only, then the meaning of the agreement would crystallize very easily and then the agreement would be valid.

Performance of contract

Performance of contract takes place when the parties to a contract fulfill there obligations arising under the contract within the time and in manner prescribed .Sec 37(para 1) lays down that the parties to a contract must either perform or offer to perform ,their respective promises, unless such performance is dispensed with or excused.

Offer to perform

Sometimes it so happens that the promisor offer to to perform his obligation under the contract at proper time and place but the promisee does not accept the performance . This is known as "attempted performance" or "tender" .It makes promisor not responsible for non performance , nor does he thereby lose his right under the contract .Thus , a tender performance is equivalent to real performance. And entitles him to sue the promisee for breach of contract.

A. **Tender or offer of performance to be valid must satisfy the following conditions:-**

(i) It must be unconditional

Ex :-'X' offers to 'Y' the principal amount of the loan. This is not a valid tender
since the whole amount of principal and interest is not offered.

(ii) It must be made at a proper time and place.

Ex:-If the promisor wants to deliver the goods at 1 am. This is not a valid tender unless it was so agreed;

(iii) Reasonable opportunity to examine goods.
Ex:-Delivery of something to the promise by the promisor promise must have reasonable opportunity of inspection.
(iv) It must be for the whole obligation :- goods and amount.
Ex:-'X' a debtor, offer's to pay 'Y' the debt due in installments and tenders the first installment. This is not a valid tender minor deviation – not invalid [Beharilal v ramgulam]
(v) It must be made to the promise or his duty authorized agent.
Ex:-It must be person who is willing to person his part of performance.
(vi) In case of payment of money, tender mustbe of the exact amount due and it must be in the legal tender.

Type of Tender
Tender of goods and services
When a promisor offers to delivery of goods or service to the promisee, it is said to be tender of goods or services, if promisee does not accept a valid tender, It has the following effects:
(i) The promisor is not responsible for non – performance of the contract.
(ii) The promisor is discharged from his obligation under the contract. Therefore, he need not offer again.
(iii) He does not lose his right under the contract. Therefore, he can sue the promise.

Tender of money
Tender of money is an offer to make payment. In case a valid tender of money is not accepted, it will have the following effects:
(i) The offeror is not discharged from his obligation to pay the amount.
(ii) The offeror is discharged from his liability for payment of interest from the date of the tender .
Basic principle of performance: In a contract where there are two parties, each one has to perform his part and demands the other to perform. Discharged of this obligation is the primary principle of performance of contract. The parties would be treated as having been free from obligation only under the provisions of any law after performance of respective promises. Until such time, the performance is neither excused nor dispensed with. Not only the promisor has a primary duty to perform, even the representative in the event of death of a promisor, is bound by the promise to perform, unless a contrary intention appears from the contract [Section 37].

The promise under a contract can be performed by any one of the following

(i) Promisor himself: Invariably the promise has to be performed by the promisor where the contracts are entered into for performance of personal skills, or diligence or personal confidence, it becomes absolutely necessary that the promisor performs it himself.
(ii) Agent:Where personal consideration is not the foundation of a contract, the promisor or his representative can employ a competent person to perform it.
(iii) Representatives: Generally upon the death of promisor, the legal representatives of the deceased are bound by the promise unless it is a promise for performance involving personal skill or ability of the promisor. However the liability of the legal representative is limited to the value of property inherited by him from the promisor.
(iv) Third Person: The question here is whether a total stranger to a contract who is identified as a third person can perform a promise. Where a promisee accepts performance from a third party he cannot afterwards enforce it against the promisor.Such a performance, where accepted by the promisor has the effect of discharging the promisor though he has neither authorized nor ratified the act of the third party.

(v) Joint promisors: Where two or more persons jointly promise, the promise must be performed jointly unless a contrary intention appears from the contract.
Where one of the joint promisors dies, the legal representative of the deceased along with the other joint promisor(s) is bound to perform the contract.
Where all the joint promisors die, the legal representatives of all of them are bound to perform the promise.

The law set out above can be illustrated with the following examples:
1. A promises B to pay ` 1000/- on delivery of certain goods. A may perform this promise either himself or causing someone else to pay the money to B. If A dies before the time appointed for payment, his representative must pay the money or employ some other person to pay the money. If B dies before the time appointed for the delivery of goods, B's representative shall be bound to deliver the goods to A and A is bound to pay
` 1000/- to B's representative.
2. A promises to paint a picture for B for a certain price. A is bound to perform the promise himself. He cannot employ some other painter to paint the picture on his behalf. If A dies before painting the picture, the contract cannot be enforced either by A's representative or by B.
3. A delivered certain goods to B who promise to pay ` 5000/-. Later on B expresses his inability to clear the dues. C, who is known to B, pays ` 2000/-to A on behalf of B. Before making this payment C did tell B nothing about it. Now A can sue B only for the balance and not for the whole amount.
This discussion arises in the context of the observation that the obligations of a promisor would bind the legal representative also (only) to the extent of value of property inherited by them. This became the law that legal representatives are successors.
Succession: When the benefits of a contract are succeeded by a process of law, both the burden and the benefit would some times devolve on the legal heir. For example 'B' is the son of 'A'. Upon A's death 'B' will inherit all the assets and liabilities of 'A' [These assets and liabilities are also referred to as debts and estates]
Thus 'B' will be liable to all the debts of 'A', but if the liabilities inherited are more than the value of the estate [assets] inherited it will be possible to pay only to the extent of assets inherited.

Joint promisor -In terms of Section 43 of the Act,
(i) when two or more persons make joint promise, the promisor can compel any one of the joint promisors to perform the whole of promise.
(ii) in the above situation, the performing promisor can enforce contribution from other joint promisors, in the absence of express agreement to the contrary.
Example: Where A,B and C have jointly signed a promissory note for ` 3000/-, and where 'A' is compelled to pay the entire amount of ` 3000/- , he is entitled recover by way of contribution of ` 1000/- each from the other two joint promisors namely B and C unlessagreed to otherwise mutually.
In the above situation again, if one of the joint promisors namely 'B' is unable to contribute ` 1000/-, 'A is entitled to recover ` 1500/- from 'C' who is the remaining joint promisor instead of
` 1000.
From the above, it is clear that the liability of joint promisors is joint and several and in the absence of any special contract to the contrary, the amount due can be recovered from any one of the joint promisors.
For example X,Y and Z jointly borrow from P, ` 3000/-, Because the liability of the borrower is

joint and severed, 'P' can recover the amount either from X or from Y or from Z or from all of them jointly. A joint promisor cannot claim that he be sued along with all other joint promisors only. If, however the promisee sues one of the promisors and obtains a decree against him, he is precluded from bringing a fresh suit against the remaining borrowers.

In the matter of release of one of the joint promisors, by another joint promisor, it must be understood that such a release does not discharge other joint promisors nor does the released joint promisor would stand released to other joint promisor or promisors. [Section 44 of the Act].

Joint promisee-The rights of two or more promisees who are known as joint promisees is discussed in Section 45 of the Act. In terms of the said section "When a person has made a promise to two or more persons jointly, then unless a contrary intention appears from the contract, the right to claim performance rests, as between him and them, with them during their joint lives, and after the death of any of them with the representatives of such deceased person jointly with the survivor or survivors, and after the death of the last survivor, with the representatives of all jointly".

For example, A, in consideration of ` 5,000 lent to him by B and C, promises B and C jointly to repay the sum with interest on a specified day but B dies. In such a case right to demand payment shall rest with B's legal representatives, jointly with C during C's lifetime and after the death of C, with the legal representatives of B and C jointly as 'B' and 'C' both are joint promisees". The above principle of joint promises is applicable for partners, joint mortgagees and members of a Hindu Undivided Family. In all these cases there is no single promisee. Therefore in is mentioned, then it can be performed any time on that day but during business hours only.

A promisee may refuse to accept delivery (of goods), if it is delivered after business hours. For example if the promisor wishes to deliver goods at a time which is beyond business hours, the promisee can refuse.

As regards the place of performance, where no place is fixed for the performance of a promise, it is the duty of the promisor to ask the promisee to fix a reasonable place. No distinction is made between an obligation to pay money and an obligation to deliver goods or discharge any other obligation. But generally the promise must be performed or goods must be delivered at the usual place of business.
Where the promisor has not undertaken to perform the promisee without an application by the promisee and the promise is to be performed on a certain day, it is the duty of the promisee to apply for performance at a proper place and with in usual hours of business.

If promisor refuses to perform his promise

Where a party to a contract has refused to perform the promise he has made or had disabled himself from performing his promise in its entirety, the promisee may put an end to the contract, unless his acquiescence in the continuance of the contract has been conveyed either by words or by deeds [conduct] [Section 39]. Thus from the above it could be seen that the following two rights accrue to the aggrieved party- (i) to terminate the contract and (ii) to indicate by words or conduct that he is interested in its continuance.

In case the promisee decides to continue the contract, he would not be entitled to put an end to

the contract on this ground immediately. In either case, the promisee would be able to claim damages that he suffers as a result of the breach for it is not incumbent on the promisee to decide immediately in case of an anticipated breach that the contract may be ended. He may, however, choose to do so. In that event, the loss (if any) suffered by him will have to be made good by the promisor. On the other hand, if he indicates that he is interested in the performance of the contract, then he would be entitled to claim damages which accrue on the date the contract is due to be performed. It would, therefore, be clear that the rights that we have just stated above accrue to a promisee when the promisor decides not to perform the promise.

The above law can be illustrated with the following example. Where 'A', 'B' and 'C' jointly borrow a sum of money from 'X' all of them are jointly liable to repay the amount. Where in the above example, 'A' dies, his legal representative, 'L' would be liable to repay the loan along with 'B' and 'C', the remaining joint borrowers.

Now let us consider the position whether the promisee can enforce his right against any one of the joint promisors and if so what are the rights and duties of the other promisors to make contribution

Effect of one party preventing another from performing promise [Section 53]: When in a contract consisting of reciprocal promises one party prevents the other from performing his promise, the contract becomes voidable at the option of the party so prevented. The person so prevented is entitled to get compensation for any loss he may have sustained for the non-performance.

The above can be illustrated with the following illustrations by way of two case laws.

(a) Where there is a contract for sale of standing timber and as per the terms seller is expected to cut and cord the standing timber before the buyer takes delivery but seller cords only a part of it, but neglects to cord the rest of it, then the buyer has a right to avoid the contract and claim compensation for any loss sustained.

(b) In the well known case of O 'Nell vs. Armstrong, an Englishman was engaged by the Captain of a Japanese ship to act as fireman on a voyage from England to Japan. During the course of the voyage Japan declared war against China. The Englishman had to leave service because had he continued in service he would have incurred penalties under Foreign Enlistment Act. In effect because of the war, the Englishman was prevented from discharging his part of the contract. The suit filed by him was decreed in his favour in spite of being opposed by the Japanese shipping company. It should be appreciated that the Captain of Japanese ship could not have brought a case against the Englishman for non-performance as the Japanese themselves were responsible for preventing the Englishman from performing his part of the contract.

Sometimes the parties would be prevented from discharging a part of the contract but not the entire contract. In such a case, the party so prevented need not avoid the full contract but perform the rest of it.

Alternative promise one branch being illegal: "In the case of the alternative promise, one branch of which is legal and the other illegal, the legal branch alone can be enforced".

For example, in the nearest reversionary heir of B, agreed to transfer his inheritance to C, if he succeeded to B; and he did not transfer his own estate to C. It was held that first promise was not enforceable, as it amounted to an agreement to transfer an estate on the mere chance of succession prohibited by Section 6 of the Transfer of Property Act, but the second promise was enforceable under Section 58 as an alternative promise. [Mahadeo Prasad Singh vs. Mathura 132 L.C. 321 A]

whether time is essence of a contract?

Section 55 of the Act regulates the position of performance of contract where time is of essence. In terms of this Section, where it is understood between parties that time is an essential element, and where one party is unable to perform his part of the promise either in full or in part within the time specified, then the contract is voidable at the option of the party either in full or in part to the extent of non performance of the contract within the time. In these cases the contract is not voidable if time is not of essence of the contract, but the promisee is entitled for compensation for loss if any suffered on account of such failure.

In a contract where time is of essence and promisor is unable to perform his part within the time, as already stated the contract becomes voidable at the option of the other party. However the other party agrees that the promisor would perform his part subsequently after the time fixed, the promisee cannot claim any compensation for loss or damage or injury unless he gives any notice to the promisor of his intention to do so.

Ordinarily from a plain examination of a contract it would be difficult to ascertain from the terms of the contract whether time is essence of the contract. A promisee may have failed to perform his contract within the specified time. Yet time may not be treated as essence of the contract in that case. Whether time is essence of a contract has to be decided from the terms of the contract.

In mercantile contracts, as business world is ruled by 'time' and 'money' any stipulation as to 'time' and 'money' is an essential condition.

The general principles that are followed can be enunciated as under.

(i) In transaction on sale of gold, silver, blue chip shares, time of delivery is of essence. Here time will be treated as essence of contract.

(ii) In transaction involving sale of land, redemption of mortgages, though certain time frame is fixed, any delay is not valued seriously provided justice can be done to parties. Of course even in sale of land, time can be made as on essence of contract by express words.

Contract cannot be avoided where time is not of essence: When there is delay in performing promise on executing a contract where the time is not of essence, parties concerned cannot avoid the contract. However in such cases promises must be performed with in a reasonable time other wise it becomes voidable at the option of the promisee.

Effect of acceptance of performance out of time: Even where time is of essence, the party who is entitled to avoid the contract can waive the condition relating to "performance within time"; but in such cases he cannot claim any compensation for loss if any suffered unless he has put the other party on notice.

Discharge Of Contract

Discharge of a contract means termination of contractual relation between the parties to a contract in other words a contract is discharged when the rights and obligations created by it are extinguished

Mode of discharge of contract

1. **By performance**- Actual, & Attempted
2. **By mutual agreement-** . Novation – Sec 62, Rescission –Sec 62, Alteration – Sec62,Remission –Sec 63, Waiver, Merger
3. **By Operation of law-** Death 2. Merger3. Insolvency 4. Unauthorized alteration
4. **By lapse of Time**

5. **By breach of contract-** Actual& Anticipatory
6. **By impossibility of performance**

Discharge by performance-
Fulfillment of obligations by a party to the contract within the time and in the manner prescribed in the contract.
(a) Actual performance –no party remains liable under the contract. Both the parties performed.
(b) Attempted performance or tender.:-Promisor offers to performhis obligation under the contract but the promise refuses to accept the performance. It is called as attempted performance or tender of performance. But the contract is not discharged.

Discharge by mutual agreement
(a) **Novation** [Sec 62] –Novation means substitution of a new contract in the place of the original contract new contract entered into in consideration of discharge of the old contract. The new contract may be.
Between the same parties (by change in the terms and condition)
Between different parties (the term and condition remains same or changed)

Following conditions are satisfied :-
(1) All the parties must consent to novation
(2) The novation must take place before the breach of original contract.
(3) The new contract must be valid and enforceable.

Example: A owes B Rs.50,000. A enters into an agreements with B and gives B a mortgage of his estate for Rs.40,000 in place of the debt of Rs.50,000. (Between same parties)
A owes money Rs.50,000 to B under a contract. It is agreed between A, B & C that B shall henceforth accept C as his Debtor instead of A for the same amount.
Old debt of A is discharged, and a new debt from C to B is contracted. (Among different parties)
(b) **Rescission [62]:-**Rescission means cancellation of the contract by any party or all the parties to a contract. X promises Y to sell and deliver 100 bales of cotton on 1stoct his go down and Y promises to par for goods on 1stNov. X does not supply the goods. Y may rescind the contract.
(c) **Alteration [62]** :-Alteration means a change in one or more of the terms of a contracts with mutual consent of parties the parties of new contracts remains the same.
Ex:-X Promises to sell and delivers 100 bales of cotton on 1stoct. and Y promises to pay for goods on 1st
Nov. Afterwards X and Y mutually decide that the goods shall be delivered in five equal installments at is godown . Here original contract has been discharged and a new contract has come into effect.
(d) **Remission [63**]:-Remission means accepting a lesser consideration than agreed in the contract. No consideration is necessary for remission. Remission takes place when a Promisee-
(a) dispense with (wholly or part)the performance of a promise made to him.
(b) Extends the time for performance due by the promisors
(c) Accept a lesser sum instead of sum due under the contract
(d) Accept any other consideration that agreed in the contract
A promise to paint a pictured for B. B after words for himto do so. A is no longer bound to perform the promise.
(e) Waiver:-Intentional relinquishment of a night under the contract.
(f) Merger :- conversion of an inferior right into a superior right is called as merger.

(Inferior right end)

The main difference between the ;

Novation	Alteration
Novation involves changes in the terms of contract. It also sometimes means change in the parties to contract. It in fact operates as a substitution of the old contract.	In alteration there are only changes in the term of contract by mutual consent. The no substitution of old terms; only some terms and conditions change.

Discharge by operation of law

(a) Death :-involving the personal skill or ability, knowledge of the deceased party one discharged automatically. In other contract the rights and liability passed to legal represent.

Example : A promises to perform a dance in B's theatre. A dies. The contract comes to an end.

(b) **Insolvency**:- when a person is declared insolvent. He is discharged from his liability up to the date of insolvency.

Example: A contracts to sell 100 bags of sugar to B. Due to heavy loss by a major fire which leaves nothing to sell, A applies for insolvency and is adjudged insolvent. Contract is discharged.

(c) **By unauthorized material alteration** –without the approval of other party – comes to an end – nature of contract substance or legal effect.

Example : A agrees upon a Promissory Note to pay Rs.5,000 to B. B the amount as Rs.50,000. A is liable to pay only Rs.5,000.

(d) **Merge**r: When an inferior right accruing to a party in a contract mergers in to a superior right accruing to the same party, then the contract conferring inferior right is discharged.

Example: A took a land on lease from B. Subsequently, A purchases that land. A becomes owner of the land and ownership rights being superior to rights of a lessee, the earlier contract of lease stands terminated.

5. **Rights and liabilities** vest in the same person: Where the rights and liabilities under a Contract vest in the same person, the contract is discharged.

Example: A Bill of Exchange which was accepted by A, reaches A's hands after being negotiated and endorsed through 4 other parties. The contract is discharged.

Discharge by Lapse of time

Where a party fails to take action against the other party within the time prescribe under the limitation Act, 1963. All his rights come end.Ex;- Recover a debt – 3 Years recover an immovable property – 12 years

Ex.:-On 1st July 20X1 ,X sold goods to Y to Rs 1,00,000 and Y had made no payment till August 20X4. state the legal position on 1st Aug 20X4 .

(a) If no. credit period allowed

(b) If 2 month credit period allowed.

Discharge by Breach of contract Failure of a party to perform his part of contract

(a) **Anticipatory Breach of contract** :-Anticipatory breach of contract occurs when the party declares his intention of not performing the contract before the performance is due

.

(i) **Express repudiation**: -5 agrees to supply B 100 tunes of specified category of

iron on 15.01.2006 on 31.12.2005. 5 express his unwillingness to supply the iron toB.
(ii) Party disables himself: -Implied by conduct.
Ex.:-5 agrees to sell his fiat car to B on 15.01.2006 on 31.12.05 5 sells his fiat car to T.
(b) **Actual Breach of contract** :-If party fails or neglects or refuses to perform his obligation on the due date of performance or during performance. It is called as actual breach.
During performance – party has performed a part of the contact.

Consequences of Breach of contract:- The aggrieved party (i.e. the party not at face it) is discharged from his obligation and get rights to proceed against the party at fault. The various remedial available to an aggrieved party.

Discharge by Impossibility performance
(a) Effect of Initial Impossibility
(b) Effect of supervening Impossibility
(a) Initial Impossibility – at the time of making contract, if both parties know from beginning about impossibility of performance of contract, the contract is void. Ex; put life into dead body.
If both don't know about impossibility of performance – the contract becomes void.
If one party knows about impossibility of performance ,he is entitled to compensate to other party.
(b) **Effect of supervening Impossibility:-**
Where an act becomes impossible after the contract is made, contract becomes void. When contract becomes unlawful, beyond the control of promisor, contract becomes void.
When Promisor alone knows about the Impossibility , he has to compensate loss of other party.
When an agreement is discovered to be void or where a contract becomes void

Cases when a contract is discharged on the ground of supervening Impossibility;-
(a) Distraction of subject matter - Failure of the ultimate purpose of contract –
(b) Death or personal Incapacity
(c) Declaration of **war**
(d) change of Law
(e) Destruction of subject-matter or Non occurrence of a particular state of thing necessary for performance.
Supervening Impossibility which does not make contract void are;-
Difficulty of performance due toCommercial Impossibility (due to natural calamities, delay in transport)
Default of a third party -Strikes, knockout and civil disturbance.
Partial Impossibility – coronation of king and to sailing around the lake by boat.

Agreements become void when it becomes impossible to perform them due to a variety of reasons. This is known as "impossibility of performance" and dealt with by section 56 of the Act
In terms of Section 56 of the Act "An agreement to do an act impossible in itself is void. A contract to do an act which, after the contract is made, becomes impossible, or, by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

Where one person has promised to do something which he knew, or with reasonable diligence, might have known, and which the promisee did not know to be impossible or unlawful, such promisor, must make compensation to such promisee for any loss which such promisee sustains through the non-performance of the promise".

(1) **Impossibility existing at the time of contract:** Even at the time of entering into the agreement, it may be impossible to perform certain contracts at the beginning or inception itself. The impossibility of performance may be known or may not be known to the parties

(i) If the impossibility is known to the parties : Where 'A' agrees to pay 'B' ` 5000/- to 'B' if he would swim from Bombay in Indian ocean to 'Aden' in 7 days time, this is an agreement where both the parties known that it is impossible to swim the distance between 'Bombay' to 'Aden' in 7 days time and hence is void.

(ii) If unknown to the parties: Even where both the promisor and the promisee are ignorant of the impossibility the contract is void.

(iii) If known only to the promisor: Where the promisor alone knows it is impossible to perform or even if he does not know but he should have known about the impossibility with reasonable diligence, the promisee is entitled to claim compensation for the loss suffered because of failure of the promisor to perform.

(2) **Supervening impossibility:** When performance of a promise becomes impossible on account of subsequent developments of events or change in circumstances, which are beyond the contemplation of parties, the contract becomes void. Supervening impossibility can arise due to a variety of circumstances as stated below.

(i) Accidental destruction of the subject matter of the contract : 'A' had agreed with 'B' to hire for rent his music hall for holiday concerts on certain specified dates. The music hall was destroyed before the specified dates and hence it became impossible to hold stage concerts. It was held that as the music hall ceased to exist; it is a case of supervening impossibility and both the parties were excused from the performance of the contract [Taylor vs. Caldwell 3B&S826].

(ii) Non-existence or non occurrence of a particular state of things: It was agreed to by the defendant through a contract to have from the plaintiff a flat for specified days for witnessing the coronation procession of King Edward VII. The said procession was cancelled and it did not take place. Therefore the defendant refused to pay the balance rent. It was held that the foundation of the contract had totally failed and here the balance of rent amount cannot be recovered from the defendant. [Krell vs. Henry 2 KB. 740]

(iii) Incapacity to perform a contract of personal services: In case of contract of personal service, disability or incapacity to perform, caused by an Act of God e.g. illness, constitutes lawful excuse for non-performance of the contract [Robinson vs. Davison L.R.6Ex.269]

(iv) Change in law: Performance of a contract may also become impossible due to change in law subsequently. The law passed subsequently may prohibit the act which may form part as basis of contract. Here the parties are discharged from their obligations. For example 'A' and 'B' may agree to start a business for sale of lottery and contribute capital for the business. If the business of sale of lottery ticket is banned by a subsequent law, parties need not keep up their legal obligations.

(v) Outbreak of war: Out break of war may affect the enforceability of contracts in many ways like

(a) emergency legislations controlling prices

(b) relaxation of trade restrictions and

(c) prohibiting or restraining transaction with alien enemy.

Doctrine of Frustration: The idea of "supervening impossibility" is referred to as 'doctrine of frustration' in U.K. In order to decide whether a contract has been frustrated, it is necessary to consider the "intention of parties as are implied from the terms of contract".
However in India the 'doctrine of frustration' is not applicable. Impossibility of performance must be considered only in term of section 56 of the Act. Section 56 covers only 'supervening impossibility and not implied terms'. This view was upheld by Supreme Court in Satyabrata Ghose vs Mugneeram Bangur A.I.R.(1954) S. C. 44 and Alopi Prasad vs Union of India A.R. 1960 S.C.588.

What would not constitute ground of impossibility: Various decisions which have identified certain situations as not constituting grounds of impossibility -

(a) 'A' promised to 'B' that he would arrange for 'B's marriage with his daughter. 'A' could not persuade his daughter to marry 'B'. 'B' sued 'A' who pleaded on the ground ofimpossibility that he is not liable for any damages. But it was held that there was no ground of impossibility. It was held that 'A' should not have promised what he could not have accomplished. Further 'A' had chosen to answer for voluntary act of his daughter and hence he was liable.

(b) The defendant agreed to supply specified quantity of 'cotton' manufactured by a mill with in a specified time to plaintiff. The defendant could not supply the material as the mill failed to make any production at that time. The defendant pleaded on the ground of impossibility which was not approved by the Privy Council and held that contract was not performed by the defendant and he was responsible for the failure. [Hamandrai vs Pragdas 501A]

(c) The defendant agreed to procure cotton goods manufactured by Victoria Mills to plaintiff as soon as they were supplied to him by the mills. It was held by Supreme Court that the contract between defendant and plaintiff was not frustrated because of failure on the part of Victoria Mills to supply goods [Ganga Saran vs Finn Rama Charan, A.I.R 1952 S.C.9]

(d) A dock strike would not necessarily relieve a labourer from his obligation of unloading the ship within specified time.

(e) In Satyabrat Ghosh vs Mugneeram Bangur & Co. A.I.R 1954 S.C.44, Calcutta High court held in a context of impossibility of performance that "having regard to the actual existence of war condition, the extent of the work involved and total absence of any definite period of time agreed to the parties, the contract could not be treated as falling under impossibility of performance. In the given case the plaintiff had agreed to purchase immediately after outbreak of war a plot of land. This plot of land was part of a scheme undertaken by the defendant who had agreed to sell after completing construction of drains, roads etc. However the said plot of land was requisitioned for war purpose. The defendant thereupon wrote to plaintiff asking him to take back the earnest money deposit, thinking that the contract cannot be performed as it has become impossible of being performed. The plaintiff brought a suit against the defendant that he was entitled for conveyance of the plot of land under condition specified in the contract. It was held that the requisition order did not make the performance impossible.

While judging the impossibility of performance issue, the Courts would be very cautious since contracting parties often bind themselves to perform at any cost of events without regard to price prevailing and market conditions.

Where a person [Debtor] owes a number of debts to another person [Creditor], and when he releases certain payments, then the question arises as to how to adjust the receipt against so many dues. This issue is considered and answered in Sections 59, 60 and 61 of the Act under the heading 'Appropriation of payments'.

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

Where a debtor owes a number of debts and he pays an amount with express or implied instructions towards appropriation, the debtor is at will to appropriate to any debt and the creditor is bound by it. This is set out in the Latin Maxim of "quicquid sovitur, sovit sectionundum modum solventis" meaning that whatever is paid, is paid according to intention or manner of party paying. The right of debtor to decide the appropriation is also known as decision in Clayton's case.

What is the position if the debtor does not expressly state the method of appropriation? Then we have to go by the circumstances of the case. For example a debtor who owes among other debts ` 2000/- to a creditor and pays ` 2000/- on a given day when the debt of ` 2000/- falls due, then the amount must be accordingly applied and the debt be discharged accordingly.

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

From the above it can be seen that the creditor enjoys the right to appropriate even to a debt which is barred by limitation.

It was held by Lord Macnaughten in Cory Bros. & Co. vs. Owner of the Mecca (1817) A.C.286 & 293, that if the debtor does not make any appropriation, at the time of payment, the right devolves on the creditor. Creditors have a right to decide till the very last moment.

The abovedecision was followed in a number of important cases including in the famous case of Vinkatadri Appa Rao vs Parthasarthi Appa Rao [(1921) L.R. 48. I.A. 150; 44 Mad 570 and 573.. In the said case it was held that creditor can decide at his discretion on the appropriation of payment towards any lawful debt even if barred by limitation. If there is any debt carrying interest and if there are no express or implied instructions the amount paid should be appropriated towards payment of interest and then to capital.

(iii) Application of payment when neither party appropriates: In terms of section 61 of the Act, where neither party appropriates-

(a) the payment shall be applied in discharge of debts in order of time, and

(b) if the debts are of equal standing the payment shall be applied in discharge of each proportionately.

The above appropriation takes place whether or not the debt is barred by limitation.

For example where there are two debts one ` 500/- and another ` 700/- falling due on the same day, and if the debtor pays ` 600/- the appropriation shall be prorata of ` 250/- and ` 350/- for the two debts.

A contract would not require performance under circumstances spelt out in Sections 62 to 67 of the Act. These circumstances are (i) novation, (ii)

rescission,(iii) alteration and (iv) remission.

Section 62 of the Act provides that "if the parties to a contract agree to substitute a new contract for it or to rescind or alter it, the original contract need not be performed".

(a) Effect of novation: Novation means substitution. Where a given contract is substituted by a new contract it is novation. The old contract, on novation ceases. It need not be performed. Novation can take place with mutual consent. However novation can take place by substitution of new contract between the same parties or between different parties. Novation results in discharge of old contract. This can be illustrated as follows - A owes money to B under a contract. It is agreed between A, B and C that B shall thenceforth accept C as his debtor, instead of A. The old debt of A to B is at an end, and a new debt from C to B has been contracted.

(b) Effect of rescission: In case of rescission, the old contract is cancelled and no new contract comes in its place. A contract is also discharged by rescission. Some times parties may enter into an agreement to rescind the previous contract. Sometimes, the contract is rescinded by implication or by non- performance for a long time without each other complaining about it.

Difference between novation and rescission: While novation involves rescission, there is no novation in rescission. Both in novation and rescission the contract is discharged by mutual agreement. In both cases parties enter into a new contract to come out of the old contract.

The new agreement is the consideration for rescission.

(c) Effect of alteration: Where the contract is altered, the original contract is rescinded. Hence the old one need not be performed whereas the new one has to be performed. Alteration involves both rescission and novation. The line of difference between alteration and novation is very thin. While there can be very minor alterations, there can not be unilateral material alteration to a contract. If it is done it will be void.

Novation and alteration: Both in novation and in alteration the old contract need not be performed.

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Remission means waiver. Section 63 of the Act deals with remission. It provides that "every promisee may dispense with or remit wholly or in part, the performance of the promise made to him or may extend the time for such performance or may accept instead of it any satisfaction which it thinks fit". Thus the promisee can waive either in full or in part the obligation of the promisor or extend the time for performance.

For example where 'A' owes 'B' a sum of ` 1 lakh, 'B' may accept a part of it in full and final settlement of the due or waive his entire claim.

While granting the time to the promisor, the promisee cannot do so for his benefit but can do so only for the benefit of the promisor.

For example where 'A' promises 'B' that he would deliver certain goods by a certain date, 'B' can extend the time but he cannot take advantage to charge interest on the extended time.

Similarly a promisee can accept any other performance to his satisfaction instead of the specified stipulated performance.

For example where A promises to sell his horse for a consideration of ` 5000/- to 'B', 'A' may instead of cash consideration of ` 5000/-may accept jewellery worth Rs 5,000/-in full satisfaction of the consideration. In a situation like this the essential element of 'satisfaction' is that the promisee must accept the consideration unequivocally. If a promisor tenders some thing in full satisfaction but the promisee does not accept it or accepts in part performance, such satisfaction will fall outside the ambit of section 63 of the Act. [Shyamnagar tin Factory vs Snow White Food Products, A.I.R (1965) Cal 54]

It should be noted that novation, rescission or alteration cannot take place without consideration but in case of part or complete rescission no consideration is required. The promisee can dispense with performance without consideration and without a new agreement.

It has already been seen that certain contracts referred to in Sections 19, 19A, 39, 51, 54 & 55 are voidable. The question for consideration is what is the effect of recession of contract by that person at whose option the contract is voidable. The following are the effects of such an action-

(i) The other party need not perform the promise

(ii) Any benefit received by the person rescinding it must restore it to the person from whom it was received.

A voidable contract which is voidable either at its inception or subsequently comes to an end when it is avoided by the party at whose option it is avoided. In such a case, not only the contract need not be performed there is also restoration of benefit.

(a) the injured party on account of non performance of the contract is entitled to recover compensation for damages suffered and

(b) benefits received must be restored.

In Murlidhar vs. International Film Co. A.I.R 1943 P.C. 34, the plaintiff having wrongfully repudiated the contract, the defendants rescinded it u/s 39 of the Act. The plaintiff brought a suit to recover ` 4000/- paid to the defendant. Held defendant was bound to restore the amount after setting off such damages.

When an insurance company has rescinded the policy because the policy holder could not disclose material information, it should refund the premium after making necessary adjustments for expenses already incurred.

In terms of section 65 of the Act, where

(a) an agreement is discovered to be void or

(b) a contract becomes void

any person who received an advantage must (a) restore it or

(b) pay compensation for damages in order to put the position prior to contract.

In Dhuramsey vs. Ahgmedhai (1893) 23 Bom 15, the plaintiff hired a godown from the defendant for 12 months and paid the advance in full. After about seven months the godown was destroyed by fire, without any fault on the part of plaintiff. When the plaintiff claimed refund of the advance, it was upheld that he was entitled to recover the rent for the unexpired term.

The next issue is the benefit which has to be returned must have been received under the contract. Any benefit received which is ancillary to main contract need not be returned. For example, the deposit paid for a transaction of sale of house between parties, need not be returned just because the sale transaction could not take place. This was on the ground that the deposit is only a security and not part of main contract.

Breach of contract

Where there is a default by one party from performing his part of contract on due date then there is breach of contract.

Breach of contract can be actual breach or anticipatory breach.Actual breach of contract occurs at the time when the perfoermance is due , one party fails or refuses to perfofm his obligation under the contract.

Where a person repudiates a contract before the stipulated due date, it is anticipatory breach. In both the events, the party who has suffered injury is entitled for damages. Further he is

discharged from performing his part of the contract.

Let us now examine breach of contract and the methodology for estimation of compensation for such breach of contract.

1- Where the promisor refuses to perform his obligation even before the specified time for performance and signifies his unwillingness, then there is an anticipatory breach.

. illustration: 'X' agrees to sell 'Y' certain quantity of wheat at a certain price. viz @ ` 100/- per quintal by 3rd March. However on 2nd February X gives notice of his unwillingness to sell the given goods. Price of wheat on that date is ` 110/- per quintal. 'Y' has a right to repudiate the contract on the same day instead of waiting for the date of performance. On that day 2nd February, he is entitled to recover damages of ` 10/- per quintal this being the difference between market price and contracted price. If on the other hand, he chooses to wait till 3rd March and the price on that date is ` 125/-, he can recover damages @ ` 25/- per quintal. The third possibility is that if between 2nd February and 3rd March, Government prohibits sale of wheat, then the contract becomes void and Y will not be able to recover any damage whatsoever. Hence from this illustration it would be clear that when the promisee postpones his right to repudiate the promise, it would operate to the advantage of the promisor also depending on circumstances.

2- Where one of the parties breaches the contract by refusing to perform the promise on due date, it is known as actual breach of contract. In such a case the other party to contract obtains a right of action against the one who breached the contract.

In cases where there is a breach of contract, the promisor who breaches is liable to pay compensation for damages suffered by the promisee. The compensation can be classified as:

(i) those for damages that usually arise in the event of breach of contract and

(ii) those for damages which parties know and anticipated at the time of entering into the contract called special damages. This kind of special damages can be claimed only on previous notice.

However no compensation is payable for any remote or any indirect loss. While assessing the damage the inconvenience caused to the aggrieved party on account of non-performance should be assessed carefully, as the party entitled for compensation, he has a duty to take steps to minimise the loss.

REMEDIES FOR THE BREACH OF CONTRACT

Remedy means course of action available to an aggrieved party when other party breaches the contract.

1. Rescission of contract
2. Suit for damage
3. Suit for specific performance
4. Suit for Injunction
5. Quantum Meruit

(1) Rescission of contract.(sec-39.)

⇒ It means right to party to cancel contract.

⇒ In case of breach of contract, other party may rescind contract.

Effects of rescission of contract.

Aggrieved party is not required to perform his part of obligation under contract. Aggrieved party claims compensation for any loss.

Party is liable to restore benefit, if any.

When can Court Grant Rescind Contract?

Court can rescind the contract in the following situation:
-If Contract is voidable.
-If Contract is unlawful.

(2) Suit for damage

It means monetary compensation allowed for loss. Purpose is to compensate aggrieved party and not to punish party as fault.In India, rules relating to damages are based on English judgment of Hadley vs Baxendale.

The facts of case were – H's mill was stopped due to the breakdown of the shaft. He delivered the shaft to common carrier to repair it and agree to pay certain sum of repair it and agree to pay certain sum of money for doing this work. H has informed to B that delay would result into loss of profit. B delivered the shaft after reasonable time after repair. H filed suit for loss of profit. It was held that B is not liable for loss of profit. The court laid down rule that damage can be recovered if party has breach of contract.

(3) Suit for Specific Performance

It means, demanding an order from court that promise agreed in contract shall be carried out. When is specific performance allowed?

Where actual damages arising from breach is not measurable. Where monetary compensation is not adequate remedy.

When specific performance is not allowed? When damages are an adequate remedy.

Where performance of contract requires numbers of minute details and therefore not possible for court to supervise.

- Where contract is of personal in nature.
- Where contract made by company beyond its power. (ultra – vires)
- Where one party to contract is minor
- Where contract is inequitable to either party.

Example : A agree to sell B, an artist painting for Rs.30,000. Later on, he refused to sell it. Here B can file suit against A for specific performance of the contract.

(4) Suit for Injunction

⇒ It means stay order granted by court. This order prohibits a person to do particular act.

⇒ Where there is breach of contract by one party and order, of specific performance is not granted by court, injunction may be granted.

Example: Film actress agreed to act exclusively for W for a year and for no one else. During the year she contracted to act for Z.

Kinds of Damages

The liability to pay damages is of four kinds. They are:

(i) liability for special damages
(ii) liability for exemplary damages
(iii) liability to pay nominal damages and
(iv) liability to pay damages for deterioration caused by delay. Now let us discuss each one of them-

(i) Liability for special damages: Where it is understood between parties that in the event of breach of contract, there would be special damages also in addition to normal damages, then special damages would be payable. In our given example above if the tailor had informed about the special circumstances, special damages would have become payable.

(ii) Liability for exemplary damages: These situations may arise mainly in two cases namely (i) breach of promise to marry and (ii) wrongful dishonour of cheques of customer by bank.

In case of breach of promise to marry, the damages are awarded taking into account the injury or humiliation which the aggrieved person would have suffered.

In case of wrongful dishonour of cheques the damages would depend upon the loss of credit and reputation suffered by the customer. The damages could be very heavy if loss had been suffered by a businessman, when compared to a non-businessman customer.

For example Mrs. G, a non-trader paid a cheque for £90 and 16 shillings drawn on Westminster Bank to her landlord for rent. The cheque was dishonoured by the bank. But she was awarded damages of only 40 shilling as nominal damages. [Gibbons vs. Westminster Bank (1939) 2 K.B. 882]

Similarly where the value of cheque is small ,the damages could be very heavy in comparison to a situation where the value of cheque is heavy. This is on the theory that dishonour of a small value of cheque would cause more damages to the honour of the customer.

(iii) Liability to pay nominal damages: Nominal damages are awarded in those cases of breach of contract where no damage has been suffered. Such damages are awarded only to establish the right to decree for breach of contract. Such damages are for nominal amounts like ten rupees or even ten paise.

(iv) Damages for deterioration caused by delay: Compensation can be recovered even without notice for damages or 'deterioration' caused to goods on account of delay by carriers amounting to breach of contract. Here the word "deterioration" means not only physical damages but also loss of opportunity. In Wilson vs. Lancashire and Yorkshire Railway Company 50 LJCP 232, the plaintiff bought velvet with a view to making it into caps for sale during spring. But due to delay in transit, he was unable to use the velvet for making caps for sale during season.

It was held that the fall in value of sale of cloth in consequence of the same having arrived after the season amounted to deterioration. It was here held that the plaintiff is entitled for compensation without notice.

In case of a contract for sale of good-

(i) where the buyer breaks the contract, the damages would be the difference between contract price and market price as on the date of breach.

(ii) where the seller breaks the contract, the buyer can recover the difference between market price and contract price as on date of breach.

Where if the seller retains the goods after the contract has been broken by the buyer- there the seller cannot recover from the buyer any further loss even if the market falls. Again he is not liable to have the damages reduced if the market rises.

In Jamal vs. Mulla Dawood (1961) 43.I.A. 6, the defendant agreed to purchase from the plaintiff, certain shares on December 30, but wrongfully rejected them when tendered on date.

Quantum Meruit

The phrase 'quantum meruit' literally means "as much as earned" or "according to the quantity of work done". A person who has begun a civil contract work and has to later stop the work because the other party has made the performance impossible, is entitled to receive compensation on the principle of 'Quantum Meruit'.

Following are instances where 'quantum meruit' may arise:

(a) Where the work has been done and accepted under a contract which is subsequently discovered to be void. In such a case, the person who has performed his part of the contract is entitled to recover the amount for the work done and the party, who receives and accepts the benefit under such contract, must make compensation to the other party.

(b) Where a person does some act or delivers something to another person with the intention of receiving payment, the other person is bound to make payment if he accepts such services or goods or enjoys the benefits.

(c) Where the contract is divisible and where a party performs a part of the contract and refuses to perform the remaining part, the party in default may sue the other party who enjoyed the benefit of the part performance.

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

Sale of Goods Act 1930

Scope of the Act

The sale of Goods Act deals with „Sale of Goods Act,1930,". ThisAct is based on „Transfer of Property Act, 1882". This act extends to whole of India, except the State of Jammu and Kashmir. The word Indian was omitted from the title of the Act in 1963 (22 sept.) This Act does not deal with the sale of immovable property.

Contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price." „

Contract of sale" is a generic term which includes both

- Sale
- Agreement to sale.

Sale	Agreement to sale
Immediate transfer of ownership to buyer.	Ownership remains with the seller
It is a excuted contract	It is executory contract
It creates right in rem for buyer	It provides right in personam for buyer and seller
Seller can sue for price – if not buyer	Seller can sue for damages
Risk passes to buyer	Risk doesn"t passes to buyer
Buyer can get goods even if seller has becomes insolvent	Buyer can get proportionate share in Money but can"t get goods.
Delivery to official receiver if buyer becomes becomes insolvent	Delivery can be refused by seller if buyer become insolvent before the payment of price

Difference Between Sale and Agreement to Sell

Essential elements of Contract of sale

1. Seller and buyer

There must be a seller as well as a buyer."Buyer" means a person who buys or agrees to buy goods[Section 2910]."Seller" means a person who sells or agrees to sell goods [Section 29(13)].

2. Goods

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

- movable property other than actionable claims and
- money includes stock and shares, growing crops, grass and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale[Section 2(7)].

3. Transfer of property

Property means the general property in goods, and not merely a special property[Section 2(11)]. General

property in goods means ownership of the goods.

Special property in goods means possession of goods.

Thus, there must be either a transfer of ownership of goods or an agreement to transfer the ownership of goods. The ownership may transfer either immediately on completion of sale or sometime in future in agreement to sell.

4. Price

There must be a price. Price here means the money consideration for a slae of goods[Section 2(10)].When the consideration is only goods, it amounts to a „barter" and not sale.When there is no consideration ,it amounts to gift and not sale.

5. Essential elements of a valid contract

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

Types of Goods[Section 6]

1. Existing Goods

Existing goods mean the goods which are either owned or possessed by the seller at the time of contract of sale. The existing goods may be specific or ascertained or unascertained as follows:

a) Specific Goods[Section 2(14)]:

These are the goods which are identified and agreed upon at the time when a contract of sale is made- For example, specified TV,VCR,Car,Ring.

b) Ascertained Goods:

Goods are said to be ascertained when out of a mass of unascertained goods, the quantity extracted for is identified and set aside for a given contract.Thus,when part of the goods lying in bulk are identified and earmarked for sale, such goods are termed as ascertained goods.

c) Unsanctioned Goods:

These are the goods which are not identified and agreed upon at the time when a contract of sale is made e.g. goods in stock or lying in lots.

2. Future Goods[Section 2(6)]

Future goods mean goods to be manufactured or produced or acquired by the seller after the making of the contract of sale.There can be an agreement to sell only.There can be no sale in respect of future goods because one cannot sell what he does not possess.

3. Contingent Goods [Section 6(2)]

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

Price Of Goods

Meaning[Section 2(10)]

Price means the money consideration for a sale of goods.

Modes of determining Price [Section 9(1)]

There are three modes of determining the price as under:

- It may be fixed by the contract or
- It may be left to be fixed in an agreed manner
- It may be determined by the course of dealing between the parties.
- Thus, the price need not necessarily be fixed at the time of sale.

Consequences of not determining the Price in any of the Mode [Section

Where the price is not determined in accordance with Section 9(1),the buyer must pay seller a reasonable price. What is a reasonable price is a question of fact dependent on the circumstances of each particular case. It may be noted that a reasonable price need not be market price.

Consequence of not Fixing Price by third party[Section 10(1)]

The agreement to sell goods becomes void if the following two conditions are fulfilled.

- If such agreement provided that the price is to be fixed by the valuation of a third party, If such third party cannot or does not make such valuation.

Duty of buyer

A buyer who has received and appropriated the goods, must pay a reasonable price there-of.

Right of party not at fault to sue

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

Conditions and Warranties

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

Meaning of Conditions [Section 12(2)]

A condition is a stipulation, which is essential to the main purpose of the contract The breach of which gives the aggrieved party a right to terminate the contract.

Meaning of Warranty[Section 12(3)]

Breach of warranty gives rise to the aggrieved party right to claim damages but contract cannot be terminated.

Distinction between condition and warranty

Matter	Condition	Warranty
Stipulation	Essential to main purpose of contract	Subsidiary to main purpose of contract
If breach?	Buyer has right to cancel contract.	Buyer has no right to cancel the contract. But party can claim damage.
Treatment	Breach of condition treated as breach of warranty to claim damages.	Breach of warranty is not treated as breach of condition.

Conditions to be treated as Warranty[Section 13]

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

-Where the buyer waives a conditions; once the buyer waives a conditions, he cannot insist on its fulfillment condition e.g. accepting defective goods or beyond the stipulated time amount to waiving a conditions.

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

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

Express and Implied Conditions and Warranties

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

1. Express Conditions and Warranties.

These are expressly provided in the contract. For example, a buyer desires to buy a Sony TV Model No. 2020.Here,model no. is an express condition. In an advertisement for Khaitan fans,guatantee for 5 years is an express warranty.

2. Implied Conditions and Warranties

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

Implied Conditions

1. Conditions as to title [Section 14 (a)]

There is an implied condition on the part of the seller that;

i. In the case of sale, he has a right to sell the goods, and
ii. In the case of an agreement to sell ,he will have a right to sell the goods at the time when the property is to pass.

2. Condition in case of sale by description [Section 15]

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

i. Where the buyer has never seen the goods and buys them only onm the basis of description given by the seller.

ii. Where the buyer has seen the goods but he buys them only on the basis of description given by the seller.

iii. Where the method pf packing has been described.

3. Condition in case of sale by sample [Section 17]

A contract of sale is a contract for sale by sample when there is a term in the contract, express or implied, to that effect. Such sale by sample is subject to the following three conditions:

-The goods must correspond with the sample in quality.
-The buyer must have a reasonable opportunity of comparing the bulk with the sample.
-The goods must be free from any defect which renders them merchantable and which would not be apparent on reasonable examination of the sample. Such defects are called latent defects and are discovered when the goods are put to use.

4. Condition in case of sale by description and sample [Section 15]

If the sale is by sample as well as by description, the goods must correspond with the sample as well as the description.

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

There is no implied condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale. In other words, the buyer must satisfy himself about the quality as well as the suitability of the goods.

Exception to this rule:

There is an implied condition that the goods shall be reasonably fit for a particular purpose described if the following three conditions are satisfied:

The particular for which goods are required must have been disclosed(expressly or impliedly) by the buyer to the seller.
-The buyer must have relied upon the seller"s skill or judgement.
-The seller"s business must be to sell such goods.

6. Condition as to merchantable quality[Section 16(2)]

Where the goods are bought by description from a seller who deals in goods of that description, there is an implied condition that the goods shall be of merchantable quality. The expression „ merchantable quality" means that the quality and condition of the goods must be such that a man of ordinary prudence would accept them as the goods of that description. Goods must be free from any latent or hidden defects.

7. Condition as to wholesomeness

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

8. Conditions implied by custom [Section 16(3)]

Condition as to quality or fitness for a particular purpose may be annexed by the usage of trade.

Implied warranties

a) Warranty as to quiet possession [Section14(b)]

There is an implied warranty that the buyer shall have and enjoy quiet possession of the goods. The reach of this warranty gives buyer a right to claim damages from the seller.

b) Warranty of freedom from encumbrances [Section 14(c)]

There is an implied warranty that the goods are free from any charge or encumbrance in favour of any third person if the buyer is not aware of such charge or encumbrance.The breach of this warranty gives buyer a right to claim damages from the seller.

- Warranty as to quality or fitness for a particular purpose annexed by usage of trade[Section 16(3)]
- Warranty to disclose dangerous nature of goods

In case of goods of dangerous nature the seller fails to do so, the buyer may make him liable for breach of implied warranty.

Transfer of property in goods

Meaning of Passing of Property/Transfer of Property

Passing of property implies transfer of ownership and not the physical possession of goods. For example ,where a principal sends goods to his agent, he merely transfers the physical possession and not the ownership of goods. Here, the principal is the owner of the goods but is not having possession of goods and the agent is having possession of goods but us not the owner.

Significance of Transfer of Property

The time of transfer of ownership of goods decides various rights and liabilities of the seller and the buyer. Thus, it becomes very important to know the exact time of transfer of ownership of goods from seller to buyer to answer the following questions:

1. Who shall bear the risk?
It is the owner who has to bear the risk and not the person who merely has the possession.

2. Who can take action against third party?
It is the owner who can take action and not the person who merely has the possession.

3. Whether a seller can sue for price?
The seller can sue for the price only if the ownership of goods has been transferred to the buyer.

4. In case of insolvency of a buyer whether the official receiver or assignee can take the possession of goods from seller?
The Official Receiver or Assignee can take the possession of goods from seller only if the ownership of goods has been transferred to the buyer.

5. In case of insolvency of a seller whether the official receiver or assignee can take the possession of goods from buyer?
The official receiver or assignee can take the possession of goods from buyer on law if the ownership of goods has not been transferred to the buyer.

Rules relating to Passing of Property/Transfer of Ownership from seller to buyer

For the purposes of ascertaining the time at which the ownership is transferred from seller to the buyer, the goods have been classified into the following three categories:

a) Specific or ascertained goods

Specific goods mean goods identified and agreed upon at the time when a contract of sale is made.[Section 2(14)]

b) Unascertained goods

c) Goods sent 'on approval' or 'on sale on return' basis.

Performance of the Contract

It is the duty of the seller and buyer that the contract is performed. The duty of the seller is to deliver the goods and that of the buyer to accept the goods and pay for them in accordance with the contract of sale.

Unless otherwise agreed, payment of the price and the delivery of the goods and concurrent conditions, i.e., they both take place at the same time as in a cash sale over a shop counter.

Delivery (Sections 33-39) Delivery is the voluntary transfer of possession from one person to another. Delivery may be actual, constructive or symbolic. Actual or physical delivery takes place where the goods are handed over by the seller to the buyer or his agent authorized to take possession of the goods.

1. Constructive delivery takes place when the person in possession of the goods acknowledges that he holds the goods on behalf of and at the disposal of the buyer. For example, where the seller, after having sold the goods, may hold them as bailee for the buyer, there is constructive delivery.
2. Symbolic delivery is made by indicating or giving a symbol. Here the goods themselves are not delivered, but the "means of obtaining possession" of goods is delivered, e.g, by delivering the key of the warehouse where the goods are stored, bill of lading which will entitle the holder to receive the goods on the arrival of the ship.

Rules as to delivery

The following rules apply regarding delivery of goods:

(a) Delivery should have the effect of putting the buyer in possession.

(b) The seller must deliver the goods according to the contract.

(c) The seller is to deliver the goods when the buyer applies for delivery; it is the duty of the buyer to claim delivery.

(d) Where the goods at the time of the sale are in the possession of a third person, there will be delivery only when that person acknowledges to the buyer that he holds the goods on his behalf.

(e) The seller should tender delivery so that the buyer can take the goods. It is no duty of the seller to send or carry the goods to the buyer unless the contract so provides. But the goods must be in a deliverable state at the time of delivery or tender of delivery. If by the contract the seller is bound to send the goods to the buyer, but no time is fixed, the seller is bound to send them within a reasonable time.

(f) The place of delivery is usually stated in the contract. Where it is so stated, the goods must be delivered at the specified place during working hours on a working day. Where no place is mentioned, the goods are to be delivered at a place at which they happen to be at the time of the contract of sale and if not then in existence they are to be delivered at the place at which they are manufactured or produced.

(g) The seller has to bear the cost of delivery unless the contract otherwise provides. While the cost of obtaining delivery is said to be of the buyer, the cost of the putting the goods into deliverable state must be borne by the seller. In other words, in the absence of an agreement to the contrary, the expenses of and incidental to making delivery of the goods must be borne by the seller, the expenses of and incidental to receiving delivery must be borne by the buyer.

(h) If the goods are to be delivered at a place other than where they are, the risk of deterioration in transit will, unless otherwise agreed, be borne by the buyer.

(i) Unless otherwise agreed, the buyer is not bound to accept delivery in instalments.

Acceptance of Goods by the Buyer

Acceptance of the goods by the buyer takes place when the buyer:

(a) intimates to the seller that he has accepted the goods; or

(b) retains the goods, after the lapse of a reasonable time without intimating to the seller that he has rejected them; or

(c) does any act on the goods which is inconsistent with the ownership of the seller, e.g., pledges or resells.

If the seller sends the buyer a larger or smaller quantity of goods than ordered, the buyer may:

(a) reject the whole; or

(b) accept the whole; or

(c) accept the quantity be ordered and reject the rest. If the seller delivers with the goods ordered, goods of a wrong description, the buyer may accept the goods ordered and reject the rest, or reject the whole.

Where the buyer rightly rejects the goods, he is not bound to return the rejected goods to the seller. It is sufficient if he intimates the seller that he refuses to accept them. In that case, the seller has to remove them.

Installment Deliveries

When there is a contract for the sale of goods to be delivered by stated instalments which are to be separately paid for, and either the buyer or the seller commits a breach of contract, it depends on the terms of the contract

whether the breach is a repudiation of the whole contract or a severable breach merely giving right to claim for damages.

Suits for Breach of Contract

Where the property in the goods has passed to the buyer, the seller may sue him for the price.

Where the price is payable on a certain day regardless of delivery, the seller may sue for the price, if it is not paid on that day, although the property in the goods has not passed.

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

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

Where there is a breach of warranty or where the buyer elects or is compelled to treat the breach of condition as a breach of warranty, the buyer cannot reject the goods. He can set breach of warranty in extinction or diminution of the price payable by him and if loss suffered by him is more than the price he may sue for the damages.

If the buyer has paid the price and the goods are not delivered, the buyer can sue the seller for the recovery of the amount paid. In appropriate cases the buyer can also get an order from the court that the specific goods ought to be delivered.

Anticipatory Breach

Where either party to a contract of sale repudiates the contract before the date of delivery, the other party may either treat the contract as still subsisting and wait till the date of delivery, or he may treat the contract as rescinded and sue for damages for the breach.

In case the contract is treated as still subsisting it would be for the benefit of both the parties and the party who had originally repudiated will not be deprived of:

(a) his right of performance on the due date in spite of his prior repudiation; or

(b) his rights to set up any defense for non-performance which might have actually arisen after the date of the prior repudiation.

Measure of Damages

The Act does not specifically provide for rules as regards the measure of damages except by stating that nothing in the Act shall affect the right of the seller or the buyer to recover interest or special damages in any case were by law they are entitled to the same. The inference is that the rules laid down in Section 73 of the Indian Contract Act will apply.

Unpaid seller and his rights

Meaning of an Unpaid Seller [Sec 45(1)(2)]

The seller of goods is deemed to be an „unpaid seller"-

- When the whole of the price has not been paid or tendered

- When a bill of exchange or other negotiable instrument(such as cheque) has been received as conditional payment, and it has been dishonored [Section 45(1)].

- The term „seller" includes any person who is in the position of a seller(for instance ,an agent of the seller to whom the bill of lading has been endorsed, or a consignor or agent who has himself paid, or is directly responsible for the price) [Section 4592)].

Rights of an Unpaid Seller [Section 46-52,54-56,60-61]

The rights of an unpaid seller can broadly be classified under the following two categories:
-Rights against the goods
-Rights against the buyer personally

I Rights against the goods where the property in the goods has passed to the buyer

a) Right of Lien [Section 47,48 and 49]

Meaning of Right of Lien:
The right of lien means the right to retain the possession of the goods until the full price is received.

Three circumstance under which right of lien can be exercised[Section 47(1)]
1. Where the goods have been sold without any stipulation to credit;
2. Where the goods have been sold on credit, but the term of credit has expired;
3. Where the buyer becomes insolvent.

Other provisions regarding right of lien[Sections 47(2),48,49(2)]

1. The seller may exercise his right of lien, even if he possesses the goods as agent or bailee for buyer[Section 47(2)]
2. Where an unpaid seller has made part delivery of the goods, he may exercise his right of lien on the remainder ,unless such part delivery has been made under such circumstances as to show agreement to waive the lien[Section 48].
3. The seller may exercise his right of lien even though he has obtained a decree for the price of the goods[Section 49(2)].

Circumstances under which right of lien in the following cases:

- When he delivers the goods to a carrier or other bailee for the purpose of transmission to the buyer without reserving the right of disposal of the goods
- When the buyer or his agent lawfully obtains possession of the goods

- When the seller waives his right of lien[Section 49(1)(c)].

- When the buyer disposes of the goods by sale or in any other manner with the consent of the seller[Section 53(1)].

- Where document of title to goods has been issued or lawfully transferres to any person as buyer or owner of the goods and that person transfers the document by way of sale,to a person who takes the document in good faith and for consideration.[Proviso to Section 53(1)].

b) Right of Stoppage of Goods in Transit

The right of stoppage of goods means the right of stopping the goods while they are in transit,to regain possession and to retain them till the full price is paid.

Conditions under which right of stoppage in transit can be exercised [Section 50]

The unpaid seller can exercise the right of stoppage in transit only if the following conditions are fulfilled:

1. The seller must have parted with the possession of goods,i.e. the goods must not be in the possession of seller.
2. The goods must be in the course of transit.
3. The buyer must have become insolvent.

c) Right of Resale[Section 46(1) and 54]

An unpaid seller can resell the goods under the following three circumstance:

1. Where the goods are of a perishable nature.
2. Where the seller expressly reserves a right of resale if the buyer commits a default in making payment.
3. Where the unpaid seller who has exercised his right of lien or stoppage in transit gives a notice to the buyer about his intention to resell and buyer does not pay or tender within a reasonable time.

II Rights against the goods where the property in the goods has not passed to the buyer

Right of withholding delivery[Section 46(2)]

Where the property in the goods has not been passed to the buyer, the unpaid seller, cannot exercise right of lien, but get a right of withholding the delivery of goods, similar to and co-extensive with lien and stoppage in transit where the property has passed to the buyer.

Rights of Unpaid Seller against the Buyer Personally

The unpaid seller, in addition to his rights against the goods as discussed above, has the following three rights of action against the buyer personally:

1. Suit for price (Sec. 55). Where property in goods has passed to the buyer; or where the sale price is payable „on a day certain", although the property in goods has not passed; and the buyer wrongfully neglects or refuses to pay the price according to the terms of the contract, the seller is entitled to sue the buyer for price, irrespective of the delivery of goods. Where the goods have not been delivered, the seller would file a suit for price normally when the goods have been manufactured to some special order and thus are unsaleable otherwise.

2. Suit for damages for non-acceptance (Sec. 56). Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may sue him for damages for non-acceptance. The seller"s remedy in this case is a suit for damages rather than an action for the full price of the goods.

3. Suit for Interest[Section 61(2)]

In case of breach of the contract on the part of seller, the buyer may sue the seller for interest from the date on which the payment was made.

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MODULE-II

(LAW OF AGENCY)

In the modern world conduct of business is not possible without the help of agents. Therefore it is necessary to know the law relating to agency. The law of agency is contained in sections 182 to 238 of the Indian Contract Act,1872.

The Indian Contract Act,1872 does not define the word „Agency". However the word „Agent" is defined as "a person employed to do any act for another or to represent another in dealings with third persons". The third person for whom the act is done or is so represented is called "Principal".(Section 182)

Thus „Agency" is a comprehensive word used to describe the relationship between one person and another, where the first mentioned person brings the second mentioned person into legal relation with others.

The Rule of Agency is based on the maxim "Quit facet per alium, facit per se:" means, he who acts through an agent, can act himself.

Salient features of agency: Following are the four salient features of agency

(i) **Basis**: The basic essence of „agency" is that the principal is bound by the acts of the agent and is answerable to third parties.

(ii) **Consideration not necessary:** Unlike other regular contracts, a contract of agency does not need consideration. In other words, the relationship between the „principal" and „agent" need not be supported by consideration.

(iii) **Capacity to employ an agent:** A person who is competent to contract alone can employ an agent. In other words, a person in order to act as principal must be a major and of sound mind.

(iv) **Capacity to be an agent:** A person in order to be an agent must also be competent to contract. In other words, he must also be a person who has attained majority and is of sound mind.

There are five general methods of creating agency. These are;

(i) agency by Express agreement
(ii) agency by Implied agreement
(iii) agency by Ratification
(iv) agency by necessity and
(v) agency by actual authority and apparent authority.

Modes of creation of agency:

(1) Agency by Express agreement

A person may employ another person as his agent by entering into an express agreement with him. The agreement may be either oral or written.

(2) Agency by Implied agreement –The relationship of principal and agent need not be expressly constituted and can arise by implication of law as well. Authority to act as agent can be inferred from nature of business, circumstances of case, the conduct of principal or the courses of dealing between parties. Thus, if a person realizes rent and gives it to landlord, he impliedly act for land- lord as an

agent.

Agency created by implied agreement are;-

Agency by estoppel – If a person makes a representation (by his words or conduct) to a third person that a certain person is his agent; and the third party believing such representation to be true, enters into a contract with the pretended agent.
Then – the person making the representation is prevented from denying the truth of agency. He may be held liable as a principal by such third party.

Agency of holding out Such an agency comes into existence when a person by his affirmative or positive conduct leads third persons to believe that person doing some act on his behalf is doing with authority.

(3) Agency by ratification
Meaning If – a person (viz., pretended agent) acts on behalf of another person (viz, the principal) the pretended agent acts without the knowledge or consent of the principal; and Afterwards, the principal accepts such act.
Then – Agency by ratification comes into existence.
Effects of ratification
- The principal is bound by the acts ratified by him as if such acts had been performed by his authority.
- Ratification relates back to the actual date of the act that is ratified and not from the date when the act ratified.

ESSENTIALS OF A VALID RATIFICATION (Sec. 197 to 200)

Full knowledge No valid ratification can be made by a person whose knowledge of the facts of the case is materially defective. In other words, the principal must have full knowledge of all the material facts.
Whole transaction It must be done for whole transaction in fact; ratification of the part of a transaction operates as a ratification of the whole transaction.
Act on behalf of another person The acts done by a person (i.e. pretended agent) on behalf of another person (i.e. pretended principal) can only be ratified.
By the principal Ratification can be made by only such person for whom the act was done. **Existence of principal** The principal must be in existence at the time when the act was done in his name
Contractual capacity The principal must have contractual capacity both at the time of entering into the contract and at the time of ratification.
Lawful acts. Only those acts which are lawful can be ratified. Void, illegal, or ultra vires acts cannot be ratified.
Acts within principal's power Ratification can be made only for such acts which principal had the power to do.
Communication Ratification must be communicated to the third party so as to bind him .
Within reasonable time Ratification must be made within reasonable time of the act purported to be ratified.
(4) Agency by necessity: Sometimes circumstances would compel and a relation of agency would fall in place. This is often out of necessity. For example a captain of a ship can borrow money at other ports where there are no agent to act on behalf of the owner, to carryout repairs. The captain becomes an agent by necessity. To constitute an agency by necessity following conditions must be fulfilled.
(i) agent should be in a position of not being able to communicate in time with the principal
(ii) there must have been an actual and definite commercial necessity
(iii) the agent must have acted bonafide and for the benefit of principal
(iv) the agent must have adopted most reasonable and practicable course of action.

(5) Actual authority and apparent authority: Actual authority to act as agent stems from a consent. The consent to act may be oral or in writing. Some time the authority can also be „implied authority". The implied authority is incidental or usual or customary. It would depend on the circumstance of the case.

The authority of the agent is „apparent" where the principal represents or is regarded by law as having represented that another has, authority. Under the doctrine of „apparent authority", the „principal" is bound to third parties by the acts of that person though he had not given such authority or had limited the authority by instructions not made known to third party. The notion of apparent authority is essentially confined to relationship between the principal and third party.

The agent's authority is governed by two principles namely (a) in normal circumstances and(b) in emergency.

Let us examine these two situations -

(i) Agent"s authority in normal circumstances: An agent has the power and authority to do all acts lawful and necessary in the normal circumstances in discharge of his functions. For instance, where „A" who lives in Andamans employs „B" as his agent to collect his debts in Kanyakumari, „B" has all the authority including the authority to pursue legal proceedings. Similarly „B" can also give valid discharge. Again for example, where „A" executes a power of attorney in favour of „B" in running a silk factory, but the power of attorney did not authorize „B" to borrow and if „B" borrowed, it was stated to be an act in excess of his authority

(ii) Agent"s authority in emergency: An agent has the authority in an emergency to do all such acts as a man of ordinary prudence would, for protecting his principal from losses under similar circumstances.

A typical case is where the „agent" who handles perishable goods like „mangoes" can decide the time, date and place of sale, not necessarily as per instructions of the principal but with the intention of protecting the principal from losses. Here the agent acts in an emergency and acts as a man of ordinary prudence.

Notice to an agent: Any notice given to an agent or information obtained by agent will be deemed to be given to the principal. Thus where the agent of an insurance company negotiates with a customer who had lost an eye in an accident, the insurance company is deemed to have knowledge of the fact.

Duties of Agent

(i) Duty in conducting principal's business: The agent should conduct the business of the principal as per directions of the principal or in the absence of any directions as per the custom prevalent in the business

(ii) The agent is liable to the principal for any loss if he deviates from the above duty/ obligation where he did not act according to instruction of the principal. It was held by the Supreme Court in a case that the agent had to compensate the principal where the agent did not act according to the instructions of the principal. In the given case the agent was under instruction to insure the goods of the principal but he did not. There was an explosion in the Bombay dock and as a result all the goods of the principal, along with others, was destroyed. The Government passed an ordinance that where ever there was a fire insurance policy, full amount would be paid to the owners and where there was no insurance cover, half the amount would repaid. The principal was paid half the losses and he sued the agent for the balance loss and the agent was ordered by court to pay the balance amount to compensate him for loss.

(iii) Requirements as to skill and diligence: Agent must act always as a person with diligence and skill normally exercised in the trade. He would otherwise be responsible to compensate the principal for any loss suffered by the principal for want of his skill.

Where „A" acts as an agent for „B" and sells rice to „C" in the usual course of business without verifying about C"s solvency and if „C" goes insolvent, then „A" is responsible for losses arising to „B".

(iv) Agents duty to account: The agent has to maintain and render proper accounts to principal whenever demanded. He is bound to pay the principal all sums received. He is bound to maintain accounts even if the contract is illegal or void.

(v) Duty to communicate: The agent must in order to obtain instruction, communicate and contact the principal as a man of ordinary diligence.

Rights of an agent

(i) Right of lien on principal's property: An agent is entitled to retain the goods, properties and books for any remuneration, commission etc due to him. The possession of such property should be however lawful.

(ii) Right of indemnification for lawful acts: The principal is bound to indemnify the agent against all consequences of lawful acts done in exercise of his authority. For example „A" of Delhi appoints „B" of Mumbai as agent to sell his merchandise. As a result „B" contracts to deliver the merchandise to various parties. But „A" fails to send the merchandise to „B" and „B" faces litigations for non-performance. Here „A" is bound to protect „B" against the litigations and all costs, expenses arising out of that.

(iii) Right of indemnification against acts done in good faith: Where the agent acts in good faith on the instruction of principal, agent is entitled for indemnification of any loss or damage from the principal. Where „P" appoints „A" as his agent and directs him to sell certain goods which in fact
turned out to be not those belonging to „P" and if third parties sue „A" for this act, „A" is entitled for reimbursement and indemnification for such act done in good faith.

However the agent cannot claim any reimbursement or indemnification for any loss etc arising out of acts done by him in violation of any penal laws of the country.

(iv) Right of retention: The agent can retain, out of the sums received from the principal, such amounts towards reimbursement of expenditure, remuneration and advances paid by him on account towards the business and render accounts only for the balance.

(v) Right of remuneration: The agent in the normal course is entitled for remuneration as per the contract. In the absence of any agreed amount of remuneration, he is entitled for usual remuneration which is customary in the business. However he is not entitled for any remuneration for acts done through misconduct/negligence.

We have already seen that basic principle of agency is that agent acts on behalf his principal and therefore cannot personally enforce the contract. Similarly he is also not personally bound for any act.

Personal liability of agent

However under certain circumstances like, where the agent exceeds his authority, or has no authority or the principal does not ratify the act of the agent, the agent is personally liable . This is known as **doctrine of implied warranty of authority.** The rules with regard to personal liability of an agent are set out hereunder.

(i) where the contract expressly provides for personal liability of the agent

(ii) where the agent signs the negotiable instrument without indicating that he is signing it for the principal

(iii) where the agent works for a foreign principal

(iv) where the agent acts for a principal who cannot be sued viz Ambassador of a country etc.

(v) where a Govt. servant enters into a contract on behalf of Union of India in disregard of Article 299(1)

(vi) where according to usage in trade in certain kinds of business agents are personally liable.

(vii) where the agency is coupled with interest. An agency will be treated as such where the agent himself has interest in the subject matter. The „interest" of the agent to come under this category should not be an ordinary „interest" like towards remuneration etc., but should be a special interest.

An 'undisclosed principal' comes into play where an agent having the authority to contract, does not disclose the fact, concealing not only the name of the principal but also the fact that there is a principal; here the agent gives an impression that he acts on his own.
In „undisclosed principal", the mutual rights, of principal, agent and third party are as follows:
(a) the liability of the agent is his own since he has not disclosed that there is a principal
(b) where the third party comes to know about the existence of the principal he can sue the agent or the principal.
(c) the third party"s interest would stand protected evenly, and would not suffer even if the principal surfaces and intervenes at a later date.
(d) third party has a right to refuse, if the principal discloses himself, on the ground that had he known about the principal he would not have entered into the contract.

The Duties and liability of the principal

(a) When agent acts within the scope of his authority: The principal is liable for the acts of the agent done within the scope of his actual or apparent authority. Where there are specific restrictions on the authority of the agent, then the principal is not bound by act of agent.
(b) Principal is bound by notice given to agent: The principal is bound by the notice given to the agent. Knowledge of the agent is knowledge of the principal. Knowledge of a bank manager is knowledge of the bank. Therefore the principal is bound except where the agent does acts that are fraudulent.
(c) Liability by estoppels: Where the agency is by the doctrine of estoppel, the principal is bound by the same doctrine.
(d) Liability for misrepresentation: The principal is liable for any fraud or misrepresentation done by the agent within his authority regardless of the fact that the act has resulted in benefit to the agent or the principal.
But, the principal is not liable for acts of agent done in excess of authority. Some times the acts can be separated as „within the authority" and „beyond the authority". Principal is bound for those acts which are within the authority. But where acts are not separable, the principal may repudiate the entire transactions.
(e) Unnamed principal: Where the existence of the principal is known but his name is not known, the principal is liable for the acts of the agent. Third parties can sue the principal for the acts of the agent, unless agent refuses to disclose the identity of the principal.
(f) To pay agent commission or remuneration as agreed.
(g) To indemnify (compensate) agent for injury caused by principal"s neglect.

Rights of principal

(1) To recover damages. If the principal suffers any loss due to disregard of agent of direction of principal or does not follow the custom of trade in absence of direction of principal and the principal suffers due to lack of requisite skill, care or diligence on the part of agent , principal can recover damages from agent .
(2) To obtain an account of secrete profit. If the agent, without the knowledge and assent of principal, makes a secrete profit out of agency, the principal has right to recover them from agent. Not only this ,the agent also forfeits his right to any commission in respect of transaction.
(3) To resist agent"s claim for compensation against liability incurred. When the principal can show that the agent has acted as principal himself and not merely as agent, he can resist the agent"s claim for compensation against liability incurred by him in such transaction.

The termination / Revocation of agency..

In terms of Section 201 of the Act, following are the circumstances when the authority conferred on

the agent gets terminated:

The bailor must disclose all defects/faults in the goods bailed. If the bailor does not disclose, he would be responsible for any loss or damage suffered by the bailee while keeping the goods in his custody. The bailor is particularly responsible for defects in goods hired to bailee whether bailor was aware of such defects or not.

(i) Where the bailment is gratuitous, the bailor must reimburse the bailee for any expenditure incurred in keeping the goods.

(ii) the bailor should reimburse any expense which the bailee may incur by way of loss in the process of returning the goods or complying with other directions for returning the goods.

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

(iv) the bailor is bound to accept the goods after the purpose is accomplished. If bailor fails, he is responsible for any loss or damage to the goods and has to reimburse for expenses incurred by the bailee for keeping the goods safely.

Rights of Bailor: The following are the rights of bailor:

(1) Bailor has a right to enforce the duties of the bailee such as -

(a) right to claim damages for loss caused to the goods by the negligence of bailee;

(b) right to claim compensation for loss caused by an unauthorized use of the goods bailed;

(c) right to claim damages arising out of mixing the goods of the bailor with his own goods.

(2) Bailor has a right to terminate the contract if the bailee does anything which is inconsistent with the conditions of bailment. For example „A" lets on hire his horse to „B" for his own riding but „B" uses the horse for driving his carriage. „A" has a right to terminate the contract of bailment.

(3) Bailor in the case of gratuitous bailment has a right to demand the goods back even before the expiry of the period of bailment. If in the process, loss is caused to the bailee, bailor is bound to compensate.

(4) Bailor has a right to claim the increase or profit from the goods bailed which may have occurred from the goods value. For example where „A" bails his cow to „B" and if the cow gives birth to a calf, „B" is bound to return the cow and the calf to „A".

The bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence with regard to quantity, bulk and value would take.

In such a case he will not be responsible, in the absence of special contract, for any special loss or destruction or deterioration of the goods bailed, since he has taken as much care as a man of ordinary prudence.

For example if X bails his ornaments to „Y" and „Y" keeps these ornaments in his own locker at his house along with his own ornaments and if all the ornaments are lost/stolen in a riot „Y" will not be responsible for the loss to „X". If on the other hand „X" specifically instructs „Y" to keep them in a bank, but „Y" keeps them at his residence, then „Y" would be responsible for the loss [caused on account of riot].

Bailee has right to terminate: The bailee has the right to terminate a contract of bailment if the bailor does any thing inconsistent with bailment conditions.

Duty In addition to the two important duties of having to take care of the goods bailed and being responsible for loss/injury/damage to goods, bailee has other following duties under the Act.

(i) Bailee has no right to make unauthorized use of goods bailed

(ii) Bailee has no right to mix the goods bailed with his own goods without the consent of the bailor.

(iii) Bailee has to return the goods on expiration of period of bailment

(iv) Bailee has a duty to return any extra profit accruing from goods bailed. Where A bails his

cow to „B" and if the cow gives birth to a calf, „B" must return both the cow and the calf to „A"

(v) Bailee has duty not to do anything inconsistent with the condition of bailment.

Rights of bailee: The bailee has the following rights [These rights are also the duties of the bailor]-

(i) to claim compensation for any loss arising from non-dislosure of known defects in the goods

(ii) to claim indemnification for any loss or damage as a result of defective title.

(iii) to deliver back the goods to joint bailors according to the agreement or directions

(iv) to deliver the goods back to the bailor whether or not the bailor has the right to the goods

(v) to exercise his „right of lien". This right of lien is a right to retain the goods and is exercisable where charges due in respect of goods retained have not been paid. The right of lien is a particular lien for the reason that the bailee can retain only these goods for which the bailee has to receive his fees/remuneration.

(vi) to take action against third parties if that party wrongfully denies the bailee of his right to use the goods

Suit by bailor & bailee against wrong doers

Both bailor and bailee have right to sue a third party who has deprived the bailee to the use or possession of goods bailed. Any relief obtained against such deprivation or injury can be shared between the bailor and bailee according to their respective interest.

We have already seen in an earlier study unit, that the duties of „finder of lost goods" are that of the bailee. Such a „finder of lost goods" is as good as a bailee and he enjoys all the rights and carries all the responsibilities of a bailee.

Apart from the above, the „finder of lost goods" can ask for reimbursement for expenditure incurred for preserving the goods but also for searching the true owner. If the real owner refuses to pay compensation, the „finder" cannot sue but retain the goods so found.

Further where the real owner has announced any reward, the finder is entitled to receive the reward. The right to collect the reward is a primary and a superior right even more than the right to seek reimbursement of expenditure.

Lastly the finder though has no right to sell the goods found in the normal course, he may sell the goods if the real owner cannot be found with reasonable efforts or if the owner refuses to pay the lawful charges subject to the following conditions:

a) when the article is in danger of perishing and losing the greater part of the value or
b) when the lawful charges of the finder amounts to two-third or more of the value of the article found.

General lien

A general lien is the right to retain the property of another for a general balance of account. In contract the particular lien is the right to retain the particular goods bailed for non-payment of Charges/remuneration.

Bankers, factors, wharfingers, policy brokers and attorneys of law have a general lien in respect of goods which come into their possession during the course of their profession.

For instance a banker enjoys the right of a general lien on cash, cheques, bills of exchange and securities deposited with him for any amounts due to him. For instance „A" borrows ` 500/- from the bank without security and subsequently again borrows another ` 1000/- but with security of say certain jewellery. In this illustration, even where „A" has returned ` 1000/- being the second loan, the banker can retain the jewellery given as security to the second loan towards the first loan which is yet to be repaid.

Under the right of general lien the goods cannot be sold but can only be retained for dues. The right of lien can be waived through a contract.

Interestingly, Chartered Accountants have a general lien against the books of their clients which come into their possession against professional fees not paid to them by those clients.

Particular lien

Particular lien: In accordance with the purpose of bailment if the bailee by his skill or labour improves

the goods bailed, he is entitled for remuneration for such services. Towards such remuneration, the bailee can retain the goods bailed if the bailor refuses to pay the remuneration. Such a right to retain the goods bailed is the right of particular lien. He however does not have the right to sue.

Where the bailee delivers the goods without receiving his remuneration, he has a right to sue the bailor. In such a case the particular lien may be waived. The particular lien is also lost if the bailee does not complete the work within the time agreed.

Difference between general lien and particular lien: The difference between the two can be summarized as follows:

(G) It is a right to detain/retain any goods of the bailor for general balance of account outstanding

(P) It is a right exercisable only on such goods in respect of which charges are due.

(G)A general lien is not automatic but is recognized through on agreement. It is exercised by the bailee only by name It is automatic

(P) It can be exercised against goods even without involvement of labour or skill. It comes into play only when some labour or skill is involved

(G) Bankers, factors, wharfingers, policy brokers etc. are entitled to general lien

(P) Bailee, finder of goods, pledgee, unpaid seller, agent, partner etc are entitled to particular lien

Pledge

Pledge is a variety or specie of bailment. It is bailment of goods as security for payment of debt or performance of a promise. The person who pledges [or bails] are known as pledgor or also as pawnor, the bailee is known as pledgee or also as pawnee. In pledge, there is no change in ownership of the property. Under exceptional circumstances, the pledgee has a right to sell the property pledged. Section 172 to 182 of the Indian Contract Act,1872 deal specifically with the bailment of pledge.

For example: A lends a money to B in lieu of a jewellary deposited by B as security to

A. This bailment of jewelry is a pledge as security for lending the money. B is a pawnor and the A is a pawnee.

Let us now examine the essentials of pledge and rights of pawnee and pawnor. Essentials of contract of pledge:

There must be bailment for security for payment of debt/ performance of a promise. Goods must be the subject matter of the contract of pledge.

The goods pledged must be in existence.

There must be a delivery of goods from pawnor to pawnee.

Consumer Protection Act.1986

Consumer Rights, Consumerism and Business

Consumer Rights

Every year, March 15 is observed as "World Consumer Right Day". Its significance is that in 1962 on this day, John Fitzgerald Kennedy, the then president of the US declared four consumer rights. Later, International Organization of Consumers Union (IOCU) added three more rights to the list. The government of India too included these rights in its 20-point programme. These have also been incorporated in the United Nations Charter of Human Rights. These are:

Some of the rights of consumers are:

- Right against exploitation by unfair trade practices.
- Right to protection of health and safety from goods and services that are available to the consumer.
- Right to be informed about the quality and performance standards, ingredients of the products, possible adverse effects etc.
- Right to be heard if there is any grievance or suggestion.

- Right to get genuine grievances redressed.
- Right to a physical environment that will protect and enhance the quality of life.

Consumerism:

Consumerism is a movement directed to protect the consumer and ensure that the consumer gets the best return in exchange for the money he spends. Consumer education for our country is a must for the:

Creation of critical awareness,

- Active consumer involvement,
- Imbibing social responsibility
- Realizing ecological responsibility ,
- Consumer Solidarity.

Objective of consumerism

- To assist countries in achieving or maintaining adequate protection for their population as consumers.
- Facilitate production and distribution patterns responsive to the needs and desires of consumers.
- Encourage high levels of ethical conduct for those engaged in the production and distribution of goods and services.
- Assist countries in curbing abusive business practices by all enterprises which adversely affect consumers.
- Facilitate development of independent consumer groups.
- To further international cooperation in the field of consumer protection
- Encourage the development of market conditions which provide consumers with greater choice at lower levels.

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Utility of Consumerism

Producers and sellers will not take the consumer for granted.

Consumerism will provide feedback for businesses and enable producers to understand consumer grievances, needs and wants.

Consumerism will make the Government more responsive to consumer interests, prompt it to take necessary measures to protect the rights of consumers.

Help consumer and producer to get together and co-operate to get rid of unscrupulous traders.

Role of consumerism.

Consumerism has the following roles to play:

- **Consumer Education**: Consumer is given information about various consumer goods and services in relation to prices, standard trade practices etc.
- **Product Rating:** Agencies such as **Consumer Education and Research Society (CERS), Ahmedabad;**
- carry out tests and report the result of such tests. Liaison with Government and with Producers.

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Responsibility of consumers

- Consumer should not make vague or general complaints and should also have supporting information and proof such as a bill.
- Consumer should try to understand the viewpoint of the seller.
- Consumers in asserting their rights should not inconvenience or hurt other sections of the public ie resort to rasta roko movements, bandh etc.Consumers should complain against a system and not attack individuals.

In India, the Government has taken a number of measures to protect consumer interests: Statutory Regulation:
Government of India is empowered to regulate the terms and condition of sale, nature of trade and commerce etc. Important legislation in this respect include the Competition Act,

- Essential Commodities Act,
- Prevention of Food Adulteration Act,
- Prevention of Black marketing and Maintenance of Supplies of Essential Commodities Act,
- Consumer Protection Act etc.

Growth of Public Sector was designed to enhance consumer welfare by increasing production and making available goods and services at fair prices, curbing private monopolies and reducing market imperfections.

The Consumer Protection Act 1986

The Consumer Protection Act 1986 is a social welfare legislation which was enacted as a result of widespread consumer protection movement. It is an important landmark in consumer protection endeavors in India, which provides for a system for the protection of consumer rights and the redressal of consumer disputes.
This Act extends to the whole of India except the State of Jammu and Kashmir, and save as otherwise expressly provides by the Central Government by notification, it applies to all goods and services.

The objective of the Act is to provide for the better protection of the interests of consumers and for that purpose to make provision for the establishment of consumer councils and authorities for the settlement of consumer disputes and for matters connected therewith.

Objects of the Act

1. Promoting and protecting the rights of consumers.
2. Providing for the establishment of consumer councils and other authorities.
3. Providing speedy and simple redressal machinery at district, state and central levels for settling consumer disputes and matters connected therewith.

Salient Features of the Act

1. The Act applies to all goods and services unless specifically exempted by the Central Government.
2. It covers all the sectors whether private, public or cooperative.
3. The Act envisages the establishment of the Consumer Protection Councils at the central and state levels, whose main objects will be to promote and protect the rights of the consumers.
4. The Consumer Protection Act extends to whole of India except the State of Jammu and Kashmir and applies to all the goods and services unless otherwise notified by the Central Government.
5. The provisions of this act are in addition to and not in derogation of the provisions of any other law for the time being in force.
6. The provisions of the Act are compensatory in nature.

(a) Revocation of authority by the principal

(b) Renunciation of agency by the agent
(c) Completion of business of agency
(d) Death or insanity of principal or agent and
(e) Insolvency of the principal

The rights of the principal to revoke the authority of the agent and the right of the agent to renounce are each exercised at their will and pleasure.

Following are the general principles in this regard:

(a) Even where the agent gets interested in the subject matter, that would not be a ground for the principal to terminate the agency. The agency becomes an agency coupled with interest.
(b) The principal cannot revoke the authority after the authority has been exercised.
(c) The agent"s authority cannot be revoked if the agent has partially exercised the authority.
(d) Where there is an implied or express contract, agency may continue for a period of time. The agency cannot be terminated without compensation.
(e) Reasonable notice must be given for termination, otherwise the agent is entitled for compensation.
(f) Revocation and Renunciation must be express or implied.

Where the agency cannot be terminated, it is called irrevocable agency.

(a) Where agency is coupled with interest then it is a case where the agent has interest in the subject matter of agency. In this case, agency cannot be terminated except where there is an express provision, to cause prejudice to the interest of the agent. For the agency coupled with interest does not come to an end on the death, insanity, or the insolvency of the principal.
(b) Where the agent has incurred personal liability, principal cannot revoke the agency leaving the agent to face the liability. For instance where „A" appoints „B" as his agent and „B" purchases as per orders of „A" some rice in his personal name, A cannot revoke the authority
(c) Where the agent has partly exercised the authority, the authority cannot be revoked, where „A" appoints „B" as his agent to procure 10 bags of rice and „B" procures in the name of „A" then „A" cannot revoke his authority.

Sub agency refers to case where an agent appoints another agent. The appointment of sub agent is not lawful, because the agent is a delegatee and a delegate cannot further delegate. This is based on the Latin principle “delegatus non potest delegare”.

The appointment of a sub agent would be valid if the terms of appointment originally contemplated it. Sometimes customs of the trade may provide for appointment of sub agents. In both these cases the sub agent would be treated as the agent of the principal.

Position of sub agent vis a third parties where the sub agent is properly appointed

(a) Where the sub-agent is properly appointed: Where a sub agent is properly appointed, the principal is bound by his acts and is therefore responsible to third parties as if he were an agent originally appointed by the principal.
(b) In the case of appointment without authority: In case where the appointment of sub agent takes place without authority, the principal is not bound by the acts of sub agent and sub agent is not bound to the principal. It is the agent who is the principal of sub agent. Where the sub-agent purportedly acts in the name of first principal, that first principal may ratify the act of sub agent. However if the sub agent acts in his own name or in the name of the agent who has without authority delegated to the sub agent the business which is in fact of the principal, the principal cannot ratify such acts of sub agent.

Substituted agents are not sub agents. They are agents of the principal. Where the principal appoints an agent and if that agent identifies another person to carry out the acts ordered by principal, than the second person is not to be treated as a sub agent but only as an agent of the original principal.

For example, „A" directs „B" his solicitor to sell his property by auction and „B" appoints „C" an auctioneer. In this regard, „C" is an agent of „A" and not a sub agent.
While selecting a "substituted agent" the agent is bound to exercise same amount of diligence as a man of ordinary prudence and if he does so he will not be responsible for acts or negligence of the substituted agent.
For example „X" consigns goods to „Y" a merchant for sale. „Y" in due course employs an auctioneer in goods to sell goods of „X" and also allows him to receive the proceeds of sale. The auctioneer becomes insolvent afterwards without handing over the proceeds. Here „Y" will not be responsible to
„X" as he has discharged his duties as a man of ordinary prudence and diligence.

Bailment

Bilment means „handing over" or „change of possession". As per Section 148 of the
Act, bailment is an act whereby goods are delivered by one person to another for some purpose, on a contract, that the goods shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them. The person who delivers the goods is the bailor and the person to whom the goods are delivered is the bailee.
For example where „X" delivers his car for repair to „Y", „X" is the bailor and „Y" is the bailee.

The essential characteristics of bailment are-

(a) Bailment is based upon a contract. Sometimes it could be implied by law as it happens in the case of finder of lost goods.
(b) Bailment is only for moveable goods and never for immovable goods or money.
(c) In bailment possession of goods changes. Change of possession can happen by physical delivery or by any action which has the effect of placing the goods in the possession of bailee.
(d) In bailment bailor continues to be the owner of goods as there is no change of ownership.
(e) Bailee is obliged to return the goods physically to the bailor. The bailee cannot deliver some other goods, even not those of higher value.

General issues:

1- In bailment both custody and possession must change but not the ownership. But where a person is in custody without possession he does not became a bailee. For example servants of a master who are in custody of goods of the master do not become bailees.
2- Possession and custody do not however mean physical delivery of goods. Constructive delivery could also create a bailor and bailee relationship. This arises in situations where the bailee is already in possession of goods but agrees to be a bailee through a contract.
3- Deposit of money in a bank is not bailment since the money returned by the bank would not be identical currency notes.
Similarly depositing ornaments in a bank locker is not bailment, because ornaments are kept in a locker whose key are still with the owner and not with the bank. The ornaments are in
Possession of the owner though kept in a locker at the bank.

Different forms of Bailment: Following are the popular forms of bailment

(2) Delivery of goods by one person to another to be held for the bailor"s use.
(3) Goods given to a friend for his own use without any charge
(4) Hiring of goods.
(5) Delivering goods to a creditor to serve as security for a loan.
(6) Delivering goods for repair with or without remuneration.
(7) Delivering goods for carriage.

Duties of Bailor: The duties of bailor are spelt out in a number of Sections. These are enumerated hereunder:

promised, or under any system of deferred payment. Consumer also includes any beneficiary of such services other than the person who hires or avails of such services. The beneficiary must acquire the use of such services with the approval of the hirer for consideration paid or promised, or partly paid and partly promised, or under any system of deferred payment. A patient hiring services of doctor for consideration has been held to be consumer.

1. **Disputes** (According to Section 2(1) (e)

Consumer Dispute means a dispute where the person against whom a complaint has been made, denies or disputes the allegations contained in the compliant.

2. **Defect** (According to Section 2(1) (f))

A defect mean 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.

3. **Deficiency** (According to Section 2 (1) (g))

Deficiency means any fault, imperfection or shortcoming or inadequacy in the quality, 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.

In order to promote and protect the rights and interests of consumers, quasi judicial machinery is sought to be set up at district, state and central levels.

The main object of these bodies is to provide speedy and simple redressal to consumer disputes. It is one of the benevolent pieces of legislation intended to protect the consumers at large from exploitation.

Consumer protection council:

The Act provides for the establishment of a Central Consumer Protection Council by the Central Government and a State Consumer Protection Council in each State by the respective State Governments.

Central Council shall consist of the Minister in charge of consumer affairs in the Central Government who shall be its Chairman .

Objective of Council:

- Right to be protected against marketing of goods and services which are hazardous to life and property.
- Right to be informed about the quality, quantity , purity, standard and price of goods and services so as to protect the consumer against unfair trade practices.
- Right to be assured access to a variety of goods at competitive prices.
- Right to be heard and assured that consumers interests will receive due consideration at appropriate forums.
- Right to seek redressal against unfair trade practices
- Right to consumer education.

Grounds for Appeal for the Jurisdiction to Redressal Forums

Consumers can appeal for jurisdiction to the consumer redressal forums upon any of the five grounds:

Consumer Act and Unfair Trade Practices

False Offer or Bargain Price

Offering of Gifts, Prizes etc., and Conducting Promotional Contests Product Safety Standards

Hoarding or Destruction of Goods Act

Who can File a Complaint [Section 2 (b) & 12]

A complaint in reference to any goods sold or delivered or services rendered may be filed by any of the following:

1-**Consumer (**According to Sec. 2(1) (d) :

Consumer means any person, who : Buys any goods for a consideration:

- **Which has been paid or promised or partly paid promised, or**
- **Under any system of deferred payment.**

'Consumer' also includes any user of such goods other than the buyer himself. The use of such goods must be with approval of the buyer for consideration paid or promised or partly paid or partly promised, or under any system of deferred payment. But consumer does not include a person a person who obtains goods for resale or for any commercial purpose.

Commercial purpose does not include use by a consumer of goods bought and used by him exclusively for the purpose of earning his livelihood, by means of self-employment.

ii. Hires or avails of any services for a consideration which has been paid or promised or partly paid and partly.

- By the consumer himself to whom such goods have been sold or delivered or such service rendered;
- Any voluntary consumer association registered under Companies Act, 1956 or under any other law for the time being in force; or
- One or more consumers, where there are numerous consumers having the same interest.

In addition to the above, the following are also considered as a consumer and hence they may file a complaint:

- Beneficiary of goods/services, legal representative of the deceased consumer, legal heirs of the deceased consumer, spouse of the consumer, a relative of consumer, and insurance company.

Consumer Protection Rules (1987).

Consumer Disputes Redressal Agencies

Under the Consumer Protection Act, 1986 Consumer Disputes Redressal Agencies (CDRA), have been established.

The Consumer Protection Act provides for a **3-tier approach** in resolving consumer disputes. **These three tiers are:**

- A Consumer Disputes Redressal Forum to be known as the "**District Forum**".

This is to be established by the state government in each district of the state by means of a notification.

- A Consumer Disputes Redressal Commission to be known as the "**State Commission".**

This has also to be established by the state government in the state by means of a notification.

- A consumer Disputes Redressal commission to be known as the "**National commission'** is to be established at Central Government level.

I -District Forum

A District Forum deals with cases where the value of claim is upto **Rs.20 lakhs.**

Territorial Jurisdiction: A case is supposed to fall within the purview of District Council when, at the time of the

institution of the complaint:

The party against whom the claim is made actually and voluntarily resides or carries on business, or has a branch office or personally works for gain in that area, or

Where there are more than one opposing or contesting parties , each such party actually and voluntarily resides or carries on business or

Where there are more than one opposing or contesting parties, and any such party actually and voluntarily resides or carries on business or has a branch office, Or personally works for gain in that area; provided the other parties not so residing or working agrees.

The cause of action, wholly or in part, arises in that area.

Every complaint shall be accompanied with such amount of fee and payable in such manner as may be prescribed.

On receipt of a complaint, the District Forum may, by order, allow the complaint to be proceeded with or rejected. However, a complaint shall not be rejected unless an opportunity of being heard has been given to the complaint.
The admissibility of the complaint shall ordinarily be decided **within 21 days** from the date on which the complaint was received.

Where a complaint is allowed to be proceeded with, the District Forum may proceed with the complaint in the manner provided under this Act. However, where a complaint has been admitted by the District Forum, it shall not be transferred to any other court or tribunal or any authority set up by or under any other law for the time being in force.

Complaint relating to goods. Reference of complaint to opposite party. The District Forum shall, on admission of a complaint, if it relates to any goods, refer a copy of the complaint to the opposite party mentioned in the complaint. Further it shall direct the opposite party to give his version of the case within a period of **30 days**. This period may be extended by a further period not exceeding **15 days** as may be granted by the District Forum.

- **Denial of allegation etc. *by opposite party*.**
- ***Where the opposite party on receipt of a complaint referred to him denies or disputes the allegations contained in the complaint, or omits or fails to take any action to represent his case within the time given by the Direct Forum***,

The District Forum shall proceed to settle the consumers dispute in the following manner :

Reference of sample to laboratory where the complaint alleges a defect in the goods which cannot be determined without proper analysis or test of the goods.

In such a case the District Forum shall obtain a sample of the goods from the complainant, seal it and authenticate it and refer the sample so sealed to be appropriate laboratory for an analysis or test whichever may be necessary. The direction for such analysis or test shall be made with a view to finding out whether such goods suffer from any defect alleged in the complaint or suffer from any other defect. The laboratory shall report its findings to the District Forum within a period of **45 days** of the receipt of the reference or within such extended period as may be granted by the District Forum.

- ***Deposit of fees :*** Before any sample of the goods is referred to any appropriate laboratory for analysis or test, the District Forum may require the complainant to deposit to the credit of the Forum such fees as may be specified. Such fees are meant for payment to the appropriate laboratory for carrying out the necessary analysis or test in relation to the goods in questions.

- ***Remission of fees to laboratory and forwarding of report to apposite party***. The District Forum such fees as may be specified. Such fees are meant for payment to the appropriate laboratory for carrying out the necessary analysis or test in relation to the goods in question.

- ***Objections by any of the parties***. If any of the parties disputes the correctness of the findings of the appropriate laboratory, or disputes the correctness of the methods of analysis or test adopted by the appropriate laboratory, the District Forum shall require the opposite party or the complaint to submit in writing his objections in regard to the report made by the appropriate laboratory.
- ***Reasonable opportunity to parties of being heard and issue of order***. The District Forum shall give a reasonable opportunity to the complainant as well as the opposite party of being heard as to the correctness or otherwise of the report made by the appropriate laboratory and also as to the objection made in relation thereto. Thereafter, it shall issue an appropriate order under Sec.14.

Complain relating to service

If the complaint admitted by the District Forum relates to any services (or to goods in respect of which the procedure specified above cannot be followed), the District Forum shall refer a copy of such complaint to the opposite party directing him to give his version of the case within a period of 30 days or such extended period not exceeding **15 days** as may be granted by the District Forum.

Denial etc. of allegation by the opposite party. The opposite party may, on receipt of a copy of the complaint, deny or dispute the allegations contained in the complaint, or omit or fail to take any action to represent his case within the time given by the District Forum.

Settlement of dispute.

In case of denial etc. of the allegation by the opposite party, the District Forum shall proceed to settle the consumer dispute ------

- *Ex parte* on the basis of evidence brought to its notice by the complainant and the opposite party, where the opposite party *denies or disputes* the allegations contained in the complaint, or

- *Ex parte* on the basis of evidence brought to its notice by the complainant where the opposite party *omits or fails to take any action* to take any action to represent his case within the time given by the Forum.

- Where the complainant fails to appear on the date of hearing before the District Forum, the District Forum may either dismiss the complaint for default or decide it on merits.

***Proceedings of the District Forum final*.** The proceedings complying with the procedure laid down above cannot be called in question in any Court on the ground that the principals of natural justice have not been completed with.

***Death of a complainant*.** In the event of death of a complainant who is a consumer or of the opposite party against whom the complainant has been filed, the provisions of Order XXII of the First Schedule to the Code of Civil Procedure. 1908 shall apply subject to the modification that every reference therein to the plaintiff and the defendant shall be construed as reference to a complainant or the opposite party, as the case may be.

***Period*.** Every complaint shall be heard as expeditiously as possible and endeavor shall be made to decide the complaint within a period of **3 months** from the date of receipt of notice by opposite party where the complaint does not require analysis or testing of commodities and within **5 months**, if it requires analysis or testing of commodities.

No adjournment shall be ordinarily granted by the District Forum unless sufficient cause is shown and the reasons for grant of adjournment have been recorded in writing by the Forum.

The District Forum shall make such orders as the costs occasioned by the adjournment as may be provided in the regulations made under this Act.

In the event of a complaint being disposed of after the period so specified, the District Forum shall record in writing, the reasons for the same at the time of disposing of the said complaint.

Where during the pendency of any proceedings before the District Forum, it appears to it necessary, it may pass such interim order as is just and proper in the facts and circumstances of the case.

***Proceedings of the District Forum final*.** The proceedings complying with the procedure laid down above cannot be called in question in any Court on the ground that the principals of natural justice have not been completed with.

Relief Available Against Complaint [Section 14 & 22]

If the firm is convinced that the goods were really defective or that the complaint about the service is proved, the forum shall have to order any of the following things to be done by the opposite party:

- To remove the defect pointed out by the appropriate laboratory for the goods in question.
- To replace the goods with new goods of similar description that shall be free form any defect.
- To refund to the complainant the amount paid as price, or as the case may be, the charges paid by the complainant.
- To pay such amount as may be awarded by it as compensation to the consumer for any loss or injury suffered by the consumer due to the negligence of the opposite party.
- To remove the defects or deficiencies in the services in question.
- To discontinue the unfair trade practice or the restrictive trade practice or not to repeat it.

State Consumer dispute Redressal Commission

Subject to the other provisions of this Act, the State Commission shall have jurisdiction:-

A) To entertain 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; and**

B) Appeals against the orders of any District Forum within the State; and

C) To call for the records and pass appropriate orders in any con-sumer dispute which is pending before or has been decided by any District Forum within the State, where it appears to the State Commission 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 exercise of its jurisdiction illegally or with material irregularity.

2- National Consumer Disputes Redressal Commission

It is established by the Central government by means of a notification. The Act thus envisages a hierarchy of three redressal forums:

District Forum , State Forum, & National Forum

Jurisdiction of National Council Subject to the other provisions of this Act, the National Commission shall have jurisdiction—

(I)complaints where the value of the goods or services and compensation, if any, claimed exceeds **rupees one crore**; and

ii) appeals against the orders of any State Commission

b) – 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.

Limitation

(1) The District Forum, the State Commis-sion or the National Commission shall not admit a complaint unless it is filed **within two years from the date on which the cause of action has arisen.**

1) Notwithstanding anything contained in sub-section (1), a complaint may be entertained after the period specified in sub-section (1), if the complainant satisfies the District Forum, 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: Provided that no such complaint shall be entertained unless the

National Commission, the State Commission or the District Forum, as the case may be, records its reasons for condoning such delay.

Module-3

THE INDIAN PARTNERSHIP ACT, 1932

The law of partnership is contained in the Indian Partnership Act, 1932, which came into force on 1st Oct., 1932.This is based on the English Law on the subject as contained in the Partnership Act, 1890. The main principles are the same. The most important change is regarding provision for registration of firms.

Definition and Nature of Partnership: Section 4 of the Partnership Act defines Partnership as "the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all". The English Partnership Act defines Partnership as "the relation which subsists between persons carrying on business in common with a view of profit".

If we elaborate we find this definition points out the following essential elements of partnership:

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

1. Association of at least Two Persons: In order to constitute a partnership legally there must be an association of at least two persons. Regarding the maximum number of Partners in a firm Sec. II of the Companies Act provides that the number of partners in a firm carrying on banking business should not exceed 10 and in any other business 20.

2. Agreement: According to Section 5 a partnership is created by contract and not by status. It is however, not necessary that there should be a very formal or written agreement. The agreement to create partnership may as well arise from the conduct of the parties concerned. Where, the parties agree to enter into partnership at some future date, the relation of partnership does not arise until that date.

3. Business: A partnership can be formed only for the purpose of carrying on business. Business includes every trade, occupation and profession. The word business generally conveys the idea of running business involving numerous transactions. The business to be carried on by the firm must be legal.

4. Sharing of Profits: The word Partnership is derived from the word "to part" which means "to divide". Thus division of profits is an essential condition of the existence of a partnership. The object of partnership should be to make profits and distribute among the partners.

5. Mutual Agency: The business of partnership may be carried on by all or anyone of them acting for all. Thus, if a person carrying on the business acts not only for himself but for others

also, so that they stand in the position of principles and agents, they are partners. It is not necessary that all of them should actively participate in the affairs of business. The necessary element is that the business must be carried on, on behalf of all the partners.

Test of Partnership: In a partnership, all the elements mentioned above must be present. Thus, although sharing of profits is a strong evidence of the existence of partnership, yet the true test is the element of agency. For this reason, creditor who advances money on the understanding that he would have a share in the profits of business in lieu of interest is not a partner. Similarly, an employee getting a share of profits as a part of his remuneration, or the seller of goodwill of the business receiving a portion of the profits, is not a partner. In all these cases the third element of partnership, namely, agency is absent. A creditor or an employee or the seller of the goodwill cannot bind the firm by their actions, can be called partners. Thus, in the absence of definite partnership agreement the Court, in order to determine the existence of partnership, must take into account all the relevant circumstances, such as, the conduct of parties; the mode of doing business; who controls the property; the mode of keeping accounts; the manner of distribution of profits; evidence of employees and correspondence.

To sum up, for determining the existence of partnership, the following must be considered: (1) there must be an agreement-oral or written;
(2) The agreement must be to share the profits; (3) those profits must arise from a business; and
(4) That business must be carried on by all or anyone of them acting for all.

REGISTRATION OF A FIRM

Effect of Non-registration of a Firm: Unlike English law registration is optional under Indian Partnership Act, but it becomes indirectly necessary, so that if a firm is not registered, the following consequences will ensue:

1. **A partner of an unregistered firm cannot file a suit** against the firm or any partner to enforce a right arising from a contract or conferred by the Partnership Act [S.69(1)] Where A, B, C and Dare partners in an unregistered firm. D is wrongfully expelled from the firm by the rest of partners. D cannot file a suit for his wrongful expulsion, the only remedy available to him is to file a suit for the dissolution of firm.

2. **An unregistered firm cannot file a suit against any third party** to enforce a right arising from a contract. [S. 69(2)]. This clause does not prohibit an unregistered firm to enter into contract with third parties; the bar is only against taking action against third parties. However, the third parties are free to take action against unregistered partnership.

3. **An unregistered firm cannot claim a set off above Rs.100 in a suit** [S.69 (3)]. According to Section 69of the Partnership Act the non-registration of a firm does not affect the following:

1. The right of a third party to sue the firm or any partner.
2. The right of a partner to sue for dissolution of the firm or for settlement of accounts if the firm is already dissolved or for his share of the assets of the dissolved firm.
3. The right of an unregistered firm to sue to enforce a right arising otherwise than out of contract, e.g., for an injunction against a person wrongfully using the name of t

4. The power of an Official Assignee or Official Receiver to realise the property of an insolvent partner.
5. A suit or set-off not exceeding Rs. 100 in amount.
6. The rights of firms or partners of firms having no place of business in India.

Registration Time: An unregistered firm can get itself registered at any time before it is actually dissolved. But in any case it should be registered before filling a suit in the court; otherwise the court will reject such suit. In order to institute a suit, not only the firm must be a registered one, but all the partners suing must also be shown as partners in the register of firms.

Example: A partnership firm consisting of A, Band C as partners was formed and it commenced its business before getting itself registered. The firm filled a suit against X for a claim of Rs.5000 for goods supplied to him and immediately after filling the suit, the firm was registered. The court will dismiss the suit because the firm was unregistered at the time of filling the suit. But where a suit is dismissed because of the non-registration of a firm or it is with-drawn before it is dismissed by the court, the firm can subsequently get it registered and file the suit again provided the suit has not become time barred.

Firm and Firm Name: Persons who have entered into partnership with one another are called individually "partners" and collectively "a firm", and the name under which their business is carried on is called the "firm name" (Sec. 4).A firm is not an artificial and legal person like a company. It is merely a collective name for the partners. It is just a convenient way of describing the partners. The rights and obligations of the partnership firms are really the rights and obligations of the partners constituting it.

Duration of Partnership: The parties may fix the duration of the partnership or say nothing about it. Where the partners decide to carry on the business for a certain period of time, it is called a "partnership for a fixed period". When the period is over, the partnership comes to an end. Where the partnership is formed for the purpose of carrying on particular venture, it is called a "particular partnership". It comes to an end on the completion of the venture. It is also open to partners to say nothing about the duration or to agree that the business shall be carried on not for a fixed period, but so long as the partners are inclined to carry it on. Such a partnership is called "Partnership at will". It is dissolved by notice by a partner to his copartners.

Partnership Property: The property of the firm includes (i) all property and rights and interests in property originally brought into the stock of the firm, or subsequently added thereto; (ii) the property acquired in the course of the business with money belonging to the firm; (iii) the goodwill of the business, the property of the firm is acquired to be used by the partners for the exclusive use of the firm.

Examples of Partnership Property
(a) A partnership is formed with A, Band C as partners. A contributes to the stock of the firm a plot of land. B A motor lorry and C the sum of Rs.10, 000. Subsequently, the firm purchases, out of its earnings, a house. All these properties and the goodwill of the business are properties of the firm.
(b) A colliery owned by A was taken on lease by a firm consisting of A and B as partners and was worked. The profits were shared by the partners. The colliery was taken to be property of the firm for the time being. But if the colliery were only worked in partnership by A and B who

shared profits of the venture, the colliery remained the property of A, and did not become the property of the firm.

Partnership Deed.
The agreement creating partnership may be express or implied, and the latter may be concluded from the conduct or the course of dealings of the parties or from the circumstances of the case. But it is in the interest of the partners that the agreement must be in writing. The document which contains this agreement is called Partnership Deed. It contains provisions relating to the nature and principal place of business, the name of the firm, the names and addresses of the partners, the duration of the firm, profit-sharing ratio, interest on capital and drawings, valuation of goodwill on the death or retirement of a partner, management, accounts, arbitration, etc. The Indian Stamp Act, 1889, requires that the Deed must be stamped.

Who can become a partner?

Any person who is competent to contract can enter into partnership agreement. The position of following persons need special consideration :

1. Minor: A minor is not competent to contract; hence he cannot enter into partnership contract. However he may be admitted to the benefits of partnership, if all the partners agree to do so.

2. Alien: An alien enemy cannot be partner in an Indian firm.

3. Person of unsound mind: A person of unsound mind, not being competent to contract cannot enter into a partnership contract.

4. Company: A company, if authorised by its articles of association can enter into partnership because it is a person competent to contract in the eyes of law.

5. Firm: A firm cannot enter into partnership contract. If a firm, at all enters into partnership in that case, the members become partners in the other firm in their individual capacity.
Position of a Minor admitted as a partner to the Benefits of Partnership

We have seen earlier that partnership results from a contract. Consequently, a minor cannot enter into a contract of partnership as an agreement by a minor is void. It follows that a minor cannot become a partner, nor can a partnership be created with a minor as a partner. But if all the partners agree a minor may be admitted to the benefits of an already existing partnership firm. It should be remembered that even after such admission the minor does not become one of the group of persons called the firm.

Section 30 of the Partnership Act lays down the rights and liabilities of a minor admitted to the benefits of partnership as follows:
1. The minor has a right to such share of the property and of the profits of the firm as may be agreed upon by the partners.

2. The minor has access to and inspect and copy any of the accounts of the firm.

3. The minor is not personally liable for the debts and obligations of the firm although his share in the profits and of the assets of the firm will be liable for the same.

4. So long as the minor continues to be in the firm, he cannot file a suit against the other partners for an account or for the payment of his share of the property or profits of the firm. He can file such a suit only when he wants to severe his connection with the firm.

5. At any time within six months of his attaining majority, or of his obtaining knowledge that he had been admitted to the benefits of partnership, whichever date is later, the minor has to elect either to become or not to become a partner in the firm. Such election may be made by a public notice. If he gives no notice to this effect he shall become a partner in the firm on the expiry of the said six months.

6. A minor who thus becomes a partner will become personally liable for all debts and obligations of the firm incurred since the date of his admission to the benefits of partnership.

7. Where the minor elects not to become a partner the following rules will apply:

(a) His rights and liabilities continue to be those of a minor up to the date on which he gives public notice to not to become its partner.
(b) His share will not be liable for any act of the firm done after the date of the notice.
(c) He can sue the partners for his share of the property and profits of the firm.

Classes of Partners

A person who deals with a firm would like to know who are the partners, and to what extent they are liable to him for his claim against the firm. The position of different classes of partners may be examined as follows :

Actual Partner: A person who has by agreement become a partner and who takes actual part in the conduct of partnership business is an actual and working partner. He is the agent of other partners for the purposes of the business. All his acts in the ordinary course of the business bind him and the other partners to third parties.

Partner by Holding Out: A person may, under certain circumstances, be liable for the debt of the firm although he is not a partner. If a person by words spoken or written, or by conduct represents himself or knowingly permits to be represented, to be a partner in a firm, he is liable as a partner in that firm to anyone who has, on the faith of such representation, given credit to the firm (Sec. 28), So, where a person conducts himself as to lend another to believe that he is a partner, although really he is not, and on that belief the other person gives credit to the firm, he is deemed to be a partner by holding out.

(a) A, B and C carry on a business for profit. C contributes neither labour nor money, and does not receive any share of the profits, but his name is used as a partner in the firm. He is liable to every outsider who gives credit relying on his being there as partner.

(b) Suresh carried on business in the name of the business as Ram Saran and Co., employed a person named Ram Saran to act as manager of the business. Ram Saran was regarded as partner by holding out or estoppel.

The position of a partner by holding out is peculiar. He is liable to make good the loss which the person giving credit to the firm may suffer, but he has no claim upon the firm. A partner who has retired from the firm but allows the use of his name to continue with the firm may become liable to third parties by the principal of holding out. Example: Pretired from a firm consisting of PX and R as its partners. He failed to give notice of his retirement. After his retirement S joined the firm and the firm continued its business under the old name. One creditor filed a suit for the recovery of his debt after the retirement of P. It was held the creditor could make P and his co- partners and R liable for his debt on the principle of estoppel. But he can not file a suit against P, X, Rand S, all of them together.

Dormant or Sleeping Partner: A person who is in reality a partner but whose name does not appear in any way as partner, nor does he take part in the management of the business, and is not, therefore, known to outsiders as partner in the firm, is called a dormant or sleeping partner. Such a partner is liable to third parties who gave credit to the firm even without knowing of his being partner but subsequently discovering the fact. A sleeping partner"s liability rests on his being in the position of an undisclosed principal. One important distinction exists between a sleeping and active partner with regard to liability towards third parties. A sleeping partner is responsible for the debts of the firm taken during the tenure of his partnership like an active partner. But his liability ceases immediately on retirement and he is not supposed to give a notice on his retirement like other active partners.

Partners in Profits only: A partner may stipulate with his co-partners that he will be entitled to a certain share of the profits without being liable for losses. But he will be liable to outsiders for all debts and obligations of the firm.

Sub-partner: Where a member of a firm agrees to share the profit derived by him from the firm with a stranger, there arises a sub-partnership between him and the stranger. Such stranger is said to be a sub-partner, although he is in no way a partner in the original firm, has no rights against it, nor he is liable for its debts.

Incoming Partner: A person who is admitted as a partner into an already existing firm with the consent of all the partners is called an incoming or new partner. The incoming partner does not become liable for any act of the firm done before he becomes partner, unless he agrees to be so liable. His liability commences from the date of admission as a partner.

Retired or Outgoing Partner: A partner who goes out of a firm in which the remaining partners continue to carry on the business is called retired or outgoing partner; A retired partner continues to be liable for all debts and obligations of the firm incurred before his retirement. A, B and C are partners and D is the creditor of the firm. A retires from the firm. Remains liable to D. Two years after A"s retirement the firm becomes insolvent. A wil1 be liable for the debts existing at the time of his retirement. A retired partner will be liable for all debts incurred after his retirement if he fails to give proper notice of his retirement. In that case he is deemed to be a partner by holding out. A retiring partner will also be liable to third parties for all transactions of the firm began but unfinished at the time of his retirement, even though notice of his retirement is given to third party. A retiring partner may, however, be discharged from the liability by the consent of the creditors. The remaining partners will be liable in such a case. This rule is the application of the general rule of the law of contract known as “Novation”.

Rights of Partner

1. Subject to any contract to the contrary, every partner has a right to take part in the management of the business.

2. Every partner has a right to be consulted and heard in all matters affecting the business of the firm. In all matters of importance and those affecting the policy and nature of the business or any change in the constitution of the firm, all the partners must agree, mere majority will not be sufficient. But in ordinary routine matters the majority rule may apply.

3. Every partner, active or dormant, has a right of free access to all records, books and accounts of the business and also to examine and copy them.

4. Every partner is entitled to equal share in the profits, unless different proportions are stipulated.

5. A partner who has contributed more than his share of the capital for the purposes of the business is entitled to interest at a rate agreed upon and where no rate is agreed upon, at6 per cent per annum. But a partner is not entitled to any interest on the capital subscribed by him unless there is an agreement or a trade custom to that effect exists.

6. Subject to a contract to the contrary, a partner is entitled to be indemnified by the firm for all acts done by him in the course of the partnership business, for all payments made by him to discharge the debts and liabilities of the firm and for expenses made by him in an emergency.

7. Every partner is joint owner of the partnership property and is entitled to have the property used exclusively for the purposes of the partnership.

8. A partner has power to act in emergency for protecting the firm form loss.

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

10. An incoming partner is not liable for any debts and obligations of the firm incurred before he joined it, excepting by his own consent.

11. Every partner has a right to retire from the firm.

12. Every partner has a right to continue in the partnership and not to be expelled from it unless power of expulsion is provided in the partnership agreement.

13. Every outgoing partner has a right to carry on competing business, but without using the firm‟s name and without soliciting the customers. He may, however, agree not to do so for a specified period and within specified local limits.

14. Where a partner dies or otherwise ceases to be a partner because of his retirement, expulsion, insolvency, insanity, and the other partners carry on the business with the property of the firm

without any final settlement of accounts, the estate of the deceased partner, or the partner himself, as the case may be, is entitled to share in the profit earned with the aid of the assets of the outgoing partner, or interest at 6 per cent per annum, if so desired by the legal representatives of the deceased partner, or by the partner himself.

Duties of Partners

The relation of partners is based on mutual confidence and the law required that a partner must act towards the other partners with the utmost good faith. In particular, the Partnership Act provides for the following duties:

1. Every partner must carry on the business of the firm to the greatest common advantage.

2. Every partner must be just and faithful to the other partners.

3. A partner is bound to keep and render true, proper and correct account of the partnership. He must permit the other partners to inspect such accounts and take copies of them. All money of the firm that may come to his hand must be handed over to the firm.

4. Every partner is an agent of the other partners and as such is bound to communicate full information relating to the business of the firm to the other partners.

5. Every partner is bound to indemnify the firm for any loss caused by his fraud in conduct of business. Also, if a partner commits a fraud on his co-partner, he must indemnify him for any loss caused to him.

6. Every partner who is guilty of willful neglect in the conduct of the business and the firm suffers loss inconsequence, is bound to make compensation to the firm and other partners.

7. Subject to a contract to the contrary, every partner is bound to share losses equally with the others.

8. Every partner is bound to attend diligently to the business of the firm and in the absence of an agreement to the contrary, he is not entitled for any remuneration; whether in the form of salary, commission, or otherwise, on account of his own trouble in conducting the business of the firm.

9. In the absence of an agreement to the contrary, every partner is bound to hold and use the partnership property for the firm.

10. A partner cannot make private gain by reason of his membership with the firm. Thus, where a partner in the course of the business has received information and uses it for his personal gain as against the interest of the firm, he must pay over any benefits he may have obtained by the use of this information. He cannot bargain for a private gain from the customers of the firm.

11. No partner can carry on any business which is likely to compete with the business of the partnership except with the consent of the other partners. If he does so, he shall have to account for the profits of such business to the firm, and also to compensate the firm for any loss sustained by his carrying on such competing business.

12. Every partner is bound to act within the scope of the actual authority conferred upon him. If he exceeds his authority, he shall have to compensate the other partners for any ensuing loss, unless they ratify his act.

13. No partner can assign or transfer his partnership interest to any other person so as to make him a partner in the business. But a partner may assign his share in the profits and assets of the firm. The assignee or transferee will have no right to ask for the accounts or to interfere in the management of the business. He can only share the actual profits. On dissolution he can ask for the share of the assets and also the accounts since the date of dissolution.

Use of property of the firm exclusively for the firm. According to Sec. 15, subject to contract between the partners, the property of the firm shall be held and used by the partners exclusively for the purposes of the firm"s business.

RELATION OF PARTNERS TO THIRD PARTIES

Power of partner to bind the firm: Every partner is the agent of the firm and his copartners for the purposes of the business of the firm. When two or more persons agree to carry on a partnership business and share its profits, each is a principal and each is an agent for the others. Each is bound by the other"s contract in carrying on the business, just as a single principal would be bound by the acts of an agent. The principal of agency governs the relationship between the partners. It is because of this that the law of partnership is said to be a branch of the law of agency. The authority of a partner to act on behalf of the firm may either be express or implied. Any authority which is expressly given to a partner by agreement of partnership is called Express Authority. The firm is bound by all acts done by a partner by virtue of any express authority given to him. Implied Authority means the authority to bind the firm which arises by implication of law-from the fact of partnership.

IMPLIED AUTHORITY OF A PARTNER

Section 19(1) and 22 read together provide that the act of a partner which is done to carry on, in the usual way, business of the kind carried on by the firm, binds the firm, provided that the act is done in the firm name or in any manner expressing or implying an intention to bind the firm. Such an authority of a partner to bind the firm is called the implied Authority of a partner. Therefore the test, to judge whether a transaction entered into by a partner comes within his implied authority is quite simple. For successful application of this test the following three conditions must be fulfilled. Absence of even one condition will vitiate the transaction and will not come under the ambit of implied authority of a partner. These conditions are:

1. The nature of the transaction—ls to carry on business of the kind carried on by the firm?
2. The manner in which the transaction has been transacted—Is it done in the usual way?
3. In whose name the transaction has been done-ls it done in the name of the firm ? Or is the intention to bind the firm clear?

Every partner has an implied authority to bind the firm by the following acts :

(1) He may sell the goods of the firm.

(2) He may purchase on the firm"s behalf goods of the kind usually employed in the firm"s business.
(3) He may receive payment of the firm"s debts and give receipt for them.
(4) He may engage servants for the partnership business.
(5) Accept, make and issue negotiable instrument (cheques, bills of exchange, promissory notes) in the firm"s name.
(6) Borrow money on the firm"s credit and pledge the firm"s goods to affect that purpose.
(7) Buy goods on credit for the firm.
(8) Engage and instruct an advocate in a suit by or against the firm for a trade debt. (A trading firm is one which carries on the business of buying and selling of goods).
Examples:
(a) A, the partner of a firm of confectioner, buys sugar on credit in the firm name. The firm is bound to pay for the sugar.
(b) A, the partner of a firm of bankers, accepts a bill of exchange on behalf of the firm does not inform the firm of this receipt and afterwards the money is appropriated by A for his own use. The firm is liable to make good the payment.

(c) A and B are partners. A, with the intention of cheating B, purchases on behalf of the firm. The goods were of the type used by the firm. He uses the goods for his personal use.
The firm is liable to pay for the price of the goods. If a partner pledges the credit of the firm for a purpose apparently not connected with the firm"s ordinary business the firm is not bound unless he was specially authorised by other partners. The partner is personally liable, although his act may subsequently be ratified by the firm.

(a) A, the partner of a firm of confectioners, buys a horse on credit in the firm"s name. The firm is not bound to pay the price of the horse, as this act does not fall within the scope of a confectioner"s business.

(b) B, the partner of a firm" of solicitors, accepts a bill of exchange on behalf of the firm. The firm is not bound to pay the bill, as it is no part of ordinary business of a solicitor to draw, accept or endorse bills of exchange.

Limitations of Implied Authority of a Partner:

Section 19 (2) of the Partnership Act expressly provides that in the absence of usage or custom of trade to the contrary the implied authority of a partner does not empower him to :

(a) Submit a dispute relating to the business of the firm to arbitration;
(b) Open a banking account on behalf of the firm in his own name;
(c) Compromise or relinquish any claim or portion of a claim by the firm;
(d) Withdraw a suit or proceeding filed on behalf of the firm;
(e) Admit any liability in a suit or proceeding against the firm;
(f) Acquire immovable property on behalf of the firm; or
(g) Transfer immovable property on behalf of the firm;
(h) Enter into partnership on behalf of the firm. According to S.20 of the Partnership Act, it is open to the partners by express agreement to extend or limit the implied authority. The third parties will be bound by express limitation only when they have notice of such limitation or curtailment of the implied authority.

According to sec. 21 a partner has authority to do all such acts during emergency which are necessary to protect the firm from loss. In such a case, the firm would be liable even for the unauthorized acts of a partner.

Liability of Partner for Acts of the firm:

Section 25 of the Act lays down the general rule that every partner is liable for all acts of the firm done while he is a partner and that the liability is joint and several. An act of the Firm is an act or commission by all the partners or by any partner or agent of the firm which gives rise to a right enforceable by or against the firm. It follows that all partners are liable jointly or severally for all acts or commissions binding on the firm. In order that an act done may be an act of the firm and, therefore binding on all and every partner, it is necessary that the partner or agent doing the act on behalf of the firm must have done that act in the name of and on behalf of the firm and not in his personal capacity, and the act must have been done in the ordinary course of the business of the firm.

Examples:
(a) A, the partner of a firm of cloth merchants, buys cloth from a mill on credit. This is an act of the firm and all partners are liable to pay the price jointly as well as severally.

(b) A, the partner in the above mentioned firm, orders on credit 5 cases of Kashmir apples on his own initiative, but sends the order on the firm"s letterhead and in the firm"s name. The firm is not liable to pay for the apples, as the order is not for the purpose of the business of the firm of cloth merchants. A is personally liable to pay.

Liability for Wrongful Acts of Partner: Every partner is liable for the negligence and fraud of the other partners in the course of the management of the business.

Examples:
(a) A, the partner of a firm, bribed the clerk of a rival firm and obtained certain confidential information. The firm was held liable for the wrongful act of A.
(b) A, the partner of a firm of taxi drivers, injures P by his negligent driving. The firm was held liable to pay damages to P.
(c) A, the partner of a firm of jewellers, misappropriates Rs.10,000 which P had deposited with him for buying gold and making ornaments. The firm is liable.

Dissolution of Partnership OR Reconstitution of the Firm

When there is a change in the relations of partners and the firm continues as a new firm, then it is called dissolution of the partnership or reconstitution of the firm. Reconstitution of the firm may take place in various ways, namely;

(1) by admission of a partner,
(2) by retirement of a partner
(3) by expulsion of a partner,
(4) by insolvency of a partner,
(5) by death of a partner and

(6) by transfer of a partner"s share.

1. Admission of a partner (31)

A new partner can be introduced in a firm with consent of all the existing partners of the firm. This is because the relations of partners are based on mutual trust and confidence, as such, only that person can be admitted as a new partner who enjoys the confidence of all the partners. A new partner can also be introduced in the firm if there is a contract between the partners in this regard. Therefore, it means that a new partner can be admitted either with the consent of all the partners or in accordance with the contract. A new partner is also called incoming partner.

(1) Liability of a new partner according to Sec. 31

(2) , "Subject to provisions of Sec. 30, a person who is introduced as a partner into a firm does not thereby become liable for any act of the firm done before he became a partner." This means the liability of a new partner starts from the date of his admission. However, the new partner may agree with his partners to be liable for the liability of the firm incurred by the firm before the date of his admission. But such an agreement is finding only between the new partner and existing partners, and does not give any right to the creditor to sue the new partner for part debts of the firm. But a new partner may be made liable to the creditors of the firm for the past debts of the firm only, if,

(a) The new partners or the reconstituted firm should have assumed the libility of the past debs.
(b) The creditors should be informed of the new arrangement. The new partner becomes liable to those of the creditors who expressly or impliedly accept the new arrangement.

2. Retiring partner

The retirement of a partner from a firm takes place when he leaves the firm. When a partner retires or withdraws from the firm and the remaining partners continue with the firm, reconstitution of the firm takes place. A partner may retire from the firm —

(a) Where all the partners give their consent to retirement.

(b) Where it is a partnership agreement that a partner might retire without seeking the dissolution of the firm.

(c) Where partnership is at will, by giving notice to all other partners of his intention to retire, Liability of a retiring partner. This may be discussed under two heads—

(i) Liability for the acts of the firm done before retirement. According to sec. 32 (2), a retiring partner remains liable to the creditors of the firm for all the acts of the firm done by the firm done before the date of retirement. In addition, he will also be liable for all the transactions of the firm begun but remain unfinished at the date of retirement. However, a retiring partner be discharged from such liabilities if there is an agreement in this connection between the retiring partner, the remaining partners and the creditors of the firm. This agreement is called „novation'. But in order to discharge him from the creditors by novation two things must be fulfilled—

(i) The remaining partners must have agreed with the retiring partner to release him from existing debts and liabilities.

(ii) The creditors must be informed of the retirement and the new arrangement. After this the retiring partner will be released from liability to the creditors who have expressely or impliedly agreed to release the retired partner and to accept the reconstituted firm as their debtor. An implied agreement arises when a creditor continues to deal with reconstituted firm after notice.

(iii) Liability for the Acts of the firm done after retirement (sec. 32 (3)—The retiring partner remains liable to third parties for the acts of the firm done after his retirement until a public notice of his retirement given. This liability of the retiring partner is based on the principle of holding out. But the act should be within the scope of the authority of the partner doing it. But the retiring partner is liable only to those persons who deal with the firm under the assumption that the retiring partner was still a partner. But he is not liable to the third parties who have no knowledge that he was a partner. However, a public notice is not required incase of a sleeping partner and he will not be liable for the acts of the firm done after his retirement. This is because such a partner is not known to the third parties.

3. Explusion of a partner (sec. 33)

Ordinarily a partner cannot be expelled from the firm by any majority of the partners. But the authority of expulsion can be given to the majority only by an express provision in the partnership agreement. But this power of expulsion can be exercised if three conditions are satisfied. These conditions are:

(a) the right of expulsion should be given to the partners by an express contract,
(b) the power of explusion should be exercised by a majority of partners,
(c) the power should be exercised in good faith. The test of good faith is that, first, the expulsion must be in the interest of the firm, two, that the partner to be expelled is served a notice and three, that he is given an opportunity to explain his position.

Where the expulsion of a partner takes place without satisfying any of the conditions mentioned above, the expulsion is irregular. In such a case, the expelled partner may either claim re- instatement as a partner, or sue for the refund of his share of capital and profits in the firm. An irregular expulsion is ineffective and inoperative and the expelled partner does not cease to be a partner. But while expelling a partner it must be ensured that all the three conditions have been satisfied to make it a proper and regular expulsion. Then the rights and liabilities of an expelled partner are the same as those of a retired partner.

4. Insolvency of a Partner (sec. 34)

Where a partner in a firm is declared insolvent, he remains no more a partner on the date on which the order of declaring him insolvent is made, whether the firm is thereby dissolved or not. The other effects resulting from the insolvency of a partner are:

(a) The firm is dissolved on the date of order of insolvency but the partners may specifically provide that on such an event the firm shall not be dissolved.
(b) The estate of the insolvent partner shall not be liable for the acts of the firm done after the date of the order. A public notice of the order of adjudicating insolvent is not required.
(c) the firm is not liable for the acts of the insolvent partner after the date of order.

5. Death of a partner (sec.s.35 and 42 (c).

A firm is dissolved, subject to contract between the partners, by the death of a partner. However, when under a contract between the partners the firm is not dissolved, the estate of the deceased partner is not liable for any act of the firm done after his death. Further, no public notice is required of the death of a partner.

6. Transfer of a partner's Interest (sec. 29).

A partner may transfer his interest in firm by sale, mortgage or charge. But the transfree is not entitled to interfere in the conduct of the business of the firm, to require accounts of the firm and to inspect the books of the firm. When the partner transfers the share, the transferee only becomes entitled to receive the share of profit of the partner who has transfered his share. But he has to accept the account of profits provided by the partners. [Sec. 29 (1)]If the firm is dissolved or if the transfering partner ceases to be a partner, the transferee is entitled to receive the transfering partner"s share in the assets of the firm. For knowing that share, he is entiled to an account from the date of dissolution. [sec. 29 (2)]

DISSOLUTION OF FIRM

Dissolution of a firm: Dissolution of a firm means the end of a firm by the break up of the relation of partnership between all the partners But where the relation between only some partner is broker it is called dissolution of partnership. For example, where A, B and C were partners in a firm and A died or retired or was adjudged insolvent, the partnership firm would come to an end. But if the partners had agreed that death, retirement or insolvency of a partner would not dissolve the firm, then on the happening of any of these contingencies the "partnership" would certainly come to an end, but the firm might continue under the same name. It would be a "reconstituted firm"; for where A had gone out of the firm on account of any reason; the relationship between A, B and C is broken up and a new relationship between B and Cis created. Therefore, "dissolution of partnership" involves a change in the relation of the partners, but it does not mean the end of the partnership firm. A firm may be dissolved on any of the following grounds:

1. By Agreement: A firm may be dissolved with the consent of all the partners of the firm, partnership is created by contract. It can be terminated by contract (S. 40).

2. By Notice: Where the partnership is at will, the firm may be dissolved by any partner giving notice in writing to all the other partners of his intention to dissolve the firm. The dissolution takes place from the date mentioned in the notice, or, if no date is mentioned then from the date of communication of the notice to the other partners (S. 43).

3. On the happening of certain contingencies: (S.42) : Subject to contract between the partners to continue the business in spite of the contingency, firm is dissolved

(a) if formed for a fixed term, by the expiry of that term;
(b) if formed to carry out one or more adventures or undertaking, by the completion thereof;
(c) by the death of partner; and
(d) by the insolvency of a partner.

(e) If all the partners of a firm or if all the partners except one become insolvent, there must necessarily be dissolution of the firm. When a partner is declared insolvent, then he ceases to be a partner from the date of such declaration, since, there must be at least two partners in a firm, if all partners or all the partners except one become insolvent then the firm is dissolved.

(f) By business becoming illegal : A firm is in every case dissolved if the business of the partnership is prohibited by law, i.e., the object for which the partnership was formed is unlawful, or becomes illegal as a result of some subsequent events. This is by operation of law. But if the firm is carrying on more than one business, if one business becomes illegal the firm is not dissolved.

4. **Dissolution through the Court (S.44) :** At the suit of a partner, the Court may dissolve a firm on anyone of the following grounds :

(a) If a partner becomes of unsound mind. The suit for dissolution may be filed by the next in kin of the insane partner or by any other partner.

(b) If a partner becomes permanently incapable, of performing his duties as a partner, e.g., he becomes blind, or paralytic, etc., The suit will be filed by a partner other than the partner who has become incapable.

(c) If a partner is guilty of misconduct which is likely to prejudice the business of the firm, the court may dissolve the firm at the instance of the other partners. The Court will order dissolution if the act complained of is likely to affect the credit and customers of the partnership business. Gambling by the partner, misapplication of clients money by a solicitor are the examples of misconduct.

(d) If a partner willfully and persistently commits breach of the partnership agreement regarding management, and the other partners find it impossible to carry on the partnership business, the Court may order dissolution of the firm at the instance of any of the other partners. For example, constant refusal to perform duties, or continuous, quarrels, or erroneous accounts by a partner are good grounds for dissolution.

(e) If a partner has transferred the whole of his interest in the firm to an outsider or has allowed his interest to be sold in execution of a decree, the other partners may sue for dissolution.

(f) If the business of the firm cannot be carried on except at a loss, the court may order dissolution.

(g) Where the court considers it just and equitable to dissolve the firm. It may do so at the instance of any partner. Dissolution has been granted under this clause in the following cases: deadlock in the management; complete destruction of confidence between the partners that they are not even on speaking terms anymore; the substance of the business gone, etc.

Dissolution of partnership and Dissolution of Firm

It is said that dissolution of partnership does not necessarily lead to dissolution of firm, whereas dissolution of firm does lead to dissolution of partnership. It is because:

(1) Dissolution of firm means the complete breakdown of partnership relation. Dissolution of partnership simply means a change in the relation or constitution of partners. Even after dissolution of partnership, the partners may agree among themselves to continue the business.

(2) Dissolution of a firm means closing down the business of the firm. But in dissolution of partnership, the business continues as before except the firm is re-constituted,

(3) In case of dissolution of partnership, a partner retires, dies or becomes insolvent but in case of dissolution of firm, there is complete termination of relation between partners.

(4) When the firm is dissolved, its assets are realised and distributed among partners. While in case of dissolution of partnership, only thing to be done is the ascertainment of the share of the outgoing partner, because the business continues as before.

Consequences of Dissolution

1. On the dissolution of a firm, it comes to an end and its affairs have to be wound up according to the rules laid down in the Act. The assets of the firm to be collected and applied in payment of the debt and liabilities. The deficit, if any is to be distributed among the partners according to their rights. The deficit, if any, is to be paid by the partners according to the terms of the agreement of partnership. These proceedings are called "winding up".

2. Until public notice is given of the dissolution, the partners continue to be liable to third parties for all acts done in connection with the affairs of the firm.

3. Notwithstanding the dissolution, the authority of each partner to bind the firm continues
(i) so far as may be necessary to wind up the affairs of the firm, and
(ii) to complete transactions begun but unfinished at the time of dissolution.

4. If any partner makes any profit from any transaction connected with the firm after its dissolution, he must share it with the other partners and the legal representatives of the deceased partners.

5. Where a partner has paid premium on entering into partnership for fixed term, and the firm is dissolved before the expiration of that term otherwise than by the death of a partner he shall be entitled to repayment of the premium or of such part thereof as may be reasonable, according to the terms of admission and the unexpired period of the term. But he will not get anything if the dissolution is due to his misconduct or it is in pursuance of an agreement containing no provision for the return for the premium or any part of it.
6. Where a contract creating partnership is rescinded on the ground of the fraud of any of the parties thereto, the party entitled to rescind it is entitled

(a) to a lien on the assets of the firm remaining after the debts of the firm have been paid, for any sum paid by him for the purchase of a share in the firm and for the capital contributed by him;
(b) to rank as a creditor of the firm in respect of any payment made by him towards the debts of the firm; and
(c) to be indemnified by the partner guilty of the fraud against all the debts of the firm (S.52).

7. After a firm is dissolved, every partner or his representative may, in the absence or a contract between the partners to the contrary, restrain any other partner from carrying on a similar business in the firm name or from using any of the property of the firm for his own benefits, until the affairs of the firm have been completely wound up. But partner who has purchased the goodwill of the firm, cannot be restrained from using the firm name (S. 53).

8. Partners may, upon or in anticipation of the dissolution of a firm, make an agreement that some or all of them will not carryon a business similar to that of the firm within a specified period or within specified local limits. Such an agreement will not be void on the ground of restraint of trade (S. 54).