BUSINESS LAW

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Definition of Law-Law means a 'set of rules' which governs our behavior's which related to a civilized society. So there is no need of Law in an uncivilized society.

Why Should One Know Law?

One should know the law to which he is subject because ignorance of law is no excuse.

Commencement and applicability:-

Short Title	Extent and	Commencement
Indian contract act 1872	Applicable to whole of India Except Jammu &Kashmir.	1st September 1872.

Prior to this English law of contract was followed in India.

It has XI chapter.

Law of contract **creates just in personnel and not in just in rem.**

The Indian Contract Act consists of the following two parts:

(a) General principles of the Law of Contract. (Section 1to 75)

(b) Special kinds of contracts. (124to238)

These special contracts are **Indemnity, Guarantee, Bailment, pledge and Agency.**

Note: In our discussion on this part of the book, unless otherwise stated, the sections mentioned are those of the Indian Contract Act, 1872.

Indian Contract Act. These principles apply to all kinds of contracts irrespective of their nature.

Contracts as Defined by

1. "Every agreement and promise enforceable by law is a contract." – Pollock
2. "A Contract is an agreement between two or more persons which is intended to be enforceable at law and is contracted by the acceptance by one party of an offer made to him by the other party to do or abstain from doing some act." – Halsbury
3. "A contract is an agreement creating and defining obligation between the parties" – Salmond

DEFINITIONS (Sec 2)

1. **Offer(**i.e. Proposal) [section 2(a)]:-When one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other person either to such act or abstinence, he is said to make a proposal.
2. **Acceptance 2(b):-**When the person to whom the proposal is made, signifies his assent there to , the proposal is said to be accepted.
3. **Promise 2(b**) :-A Proposal when accepted becomes a promise. In simple words, when an offer is accepted it becomes promise.
4. **Promisor and promisee 2(c) :-**When the proposal is accepted, the person making the proposal is called as promisor and the person accepting the proposal is called as promisee.
5. **Consideration 2(d):-**When at the desire of the promisor, the promisee or any other person has done or abstained from doing some thing or does or abstains from doing some thing or promises to do or abstain from doing something, such act or abstinence or promise is called a consideration for the promise.

Price paid by one party for the promise of the other Technical word meaning QUID PRO-QUO i.e. something in return.

6. **Agreement 2(e) :-**Every promise and set of promises forming the consideration for each other. In short, agreement = offer + acceptance.
7. **Contract 2(h)** :-An agreement enforceable by Law is a contract.
8. **Void agreement 2(g):-**An agreement not enforceable by law is void.
9. **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 thereto (i.e. the aggrieved party), and it is not enforceable by Law at the option of the other or others.
10. **Void contract :-**A contract which ceases to be enforceable by Law becomes void when it ceases to be enforceable.

ESSENTIALS OF A VALID CONTRACT "All agreements are contracts, if they are made – by **free consent** of the parties, competent to contract, for **a lawful** consideration and with a **lawful object,** and not hereby expressly declared to **be void."**

Offer + acceptance = Promise + consideration = Agreement + enforceability By Law= Contract

1. **Proper offer and proper acceptance** with intention to create legal relationship.

Cases;- A and B agree to go to a movie on coming Sunday. A does not turn in resulting in loss of B's time B cannot claim any damages from A since the agreement to watch a movie is a domestic agreement which does not result in a contract.

In case of social agreement there is no intention to create legal relationship and there is no contract

In case of commercial agreements, the law presume that the parties had the intention to create legal relations.

[an agreement of a purely domestic or social nature is not a contract]

2. **Lawful consideration**: - consideration must not be unlawful, immoral or opposed to the public policy.

3. **Capacity:**-The parties to a contract must have capacity (legal ability) to make valid contract.

Section 11:-of the Indian contract Act specify that every person is competent to contract provided.

(i) Is of the age of majority according to the Law which he is subject, and

(ii) Who is of sound mind and

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

Person of unsound mind can enter into a contract during his lucid interval.

An alien enemy, foreign sovereigns and accredited representative of a foreign state. Insolvents and convicts are not competent to contract.

4. **Free consent**:- consent of the parties must be genuine consent means agreed upon Same thing in the same sense i.e. there should be consensus – ad – idem. A consent is said to be free when it is not caused by coercion, undue influence, fraud, misrepresentation or mistake.

5. **Lawful object**

• The object of agreement should be lawful and legal.

• Two persons cannot enter into an agreement to do a criminal act.

• Consideration or object of an agreement is unlawful if it

(a) is forbidden by law; or

(b) is of such nature that, if permitted, would defeat the provisions of any law; or

(c) is fraudulent; or

(d) Involves or implies, injury to person or property of another; or

(e) Court regards it as immoral, or opposed to public policy.

6. **Possibility of performance:**

• The terms of the agreement should be capable of performance.

• An agreements to do act, impossible in itself cannot be enforced.

Example : A agrees to B to discover treasure by magic. The agreement is void because the act in itself is impossible to be performed from the very beginning.

7. The terms of the agreements are certain or are capable of being made certain [29]

Example: A agreed to pay Rs.5 lakh to B for ultra-modern decoration of his drawing room.

The agreement is void because the meaning of the term "ultra – modern" is not certain.

8. **Not declared as Void**

• The agreement should be such that it should be capable or being enforced by law.

• Certain agreements have been expressly declared illegal or void by the law.

9. **Necessary legal formalities**

• A contract may be oral or in writing.

• Where a particular type of contract is required by law to be in writing and registered, it must comply with necessary formalities as to writing, registration and attestation.

• If legal formalities are not carried out then the contract is not enforceable by law.

Example: A promise to pay a time. Barred debt must be in writing.

Agreement is a wider term than contract because

All Contracts are Agreements, but all Agreements are not Contracts

The various agreements may be classified into two categories:

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

Conclusion:

Thus we see that an agreement may be or may not be enforceable by law, and so all agreement are not contract. Only those agreements are contracts, which are enforceable by law.

Contracts =Agreement + Enforceability by Law

Hence, we can conclude "All contracts are agreement, but all agreements are not contracts."

Distinction between Contract & Agreement

Basis	Contract	Agreement
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	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 CONTRACTS

On the Basis of creation	On the Basis of Validity	On the Basis of execution	On the Basis of Liability
a. Express	Valid.	Executed	Unilateral
b. Implied	Void	Executory	Bilateral
c. Tacit	Voidable	Partly executed &	
d. Quasi	Unenforceable	partly executory	
e. E contract	Illegal		

(a**) Express contract** :-A contract made by word spoken or written. According to sec 9 in so far as the proposal or acceptance of any promise is made in words, the promise is said to be expressed.

Example : A says to B 'will you purchase my bike for Rs.20,000?" B says to A "Yes".

(b**) Implied contract**:-A contract inferred by

The conduct of person or The circumstances of the case.

By implied contract means implied by law (i.e.) the law implied a contract through parties never intended. According to sec 9in so for as such proposed or acceptance is made otherwise than in words, the promise is said to be implied.

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.

(c) **Tacit contract**: -A contract is said to be tacit when it has to be inferred from the conduct of the parties. Example obtaining cash through automatic teller machine,sale by fall hammer of an auction sale.

(d**).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.

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. In fact, these contracts depend on the principle that nobody will be allowed to become rich at the expenses of the other.

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

On the basis of creation

(a) **Valid contract**:- An agreement which satisfies all the requirements prescribed by law.

(b) **Void contract** (2(j)):-a contract which ceases to be enforceable by law becomes void

when it ceased to be enforceable

When both parties to an agreement are:- Under a mistake of facts [20]

Consideration or object of an agreement is unlawful [23]

Agreement made without consideration [25]

Agreement in restrain of marriage [26]

Restraint of trade [27]

Restrain legal proceeding [28].

Agreement by wage of wager [30]

(c**) Voidable contract 2(i)** :-an agreement which is enforceable by law at the option of one or more the parties but not at the option of the other or others is a voidable contract.(Result of coercion, undue influence, fraud and misrepresentation.)

(d) **Unenforceable contract**: -where a contract is good in substance but because of some technical defect. absence in writing barred by imitation etc 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 is not stamped at all or is under stamped.

(e) **Illegal contract**:-It is a contract which the law forbids to be made. All illegal agreements are void but all void agreements or contracts are not necessarily illegal.

Contract that is immoral or opposed to public policy are illegal in nature.

Unlike illegal agreements there is no punishment to the parties to a void agreement.

Illegal agreements are void from the very beginning but sometimes valid contracts may subsequently become void.

(a)**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.

(b)**Executory contract**:-A contract in which both the parties have still to fulfilled their obligations.

Example : D agrees to buy V's cycle by promising to pay cash on 15thJuly. V agrees to deliver the cycle on 20thJuly.

(c) **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 A, it is executed contract whereas it is executory contract on the part of B since the price is yet to be paid.

On the basis of liability

(a**) Bilateral contract**:-A 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.

(b**) 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.

Difference between Void and Voidable Contract

Matter	Void contract	Voidable contract
Definition	It means contract which cease to be enforceable.	It means agreement enforceable by law by one or more parties.
Nature .	Valid when made subsequently Becomes unenforceable	It remains voidable until cancelled by party
Rights or remedy	No legal remedy.	Aggrieved party has remedy to cancel . The contract.
Performance of Contract.	Party can't demand performance of contract.	If aggrieved party doesn't cancel it within reasonable time performance can be demanded.
Reason	Due to change in law or circumstances	If consent is not obtained freely.
Damages	Not available	Can demand in certain cases.

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

Contract of record:

It is either a judgment of a court of a Recognizance.

A Judgment is an obligation imposed by a Court upon one or more persons in favour of another or others. In real sense, it is not a contract, as it is not based upon any agreement between two parties.

Recognizance is a Bond by which a person undertakes before a Court of Magistrate to observe some condition e.g. to appear on summons.

Contracts of record derive their binding force from the authority of the Court.

Contract under Seal:

(a) A contract under Seal is one which derives its binding force from its form alone.

(b) It is in writing and signed, sealed and delivered by the parties.

(c) It is also called a Deed or a Specialty contract.

OFFER

Offer(i.e. Proposal) [section 2(a)]:-When one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other person either to such act or abstinence, he is said to make a proposal.

To form an agreement, there must be at least two elements – one offer and the other acceptance.

Thus offer is the foundation of any agreement.

"When one person signifies to another his willingness –

• to do or to abstain from doing anything,

• with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal."

The person who makes an offer is called "Offeror" or " Promisor "and the person to whom the offer is made is called the Offeree" or "Promisee".

Example Mr. A says to Mr. B, "Will you purchase my car for Rs.1,00,000?" In this case, Mr. A is making an offer to Mr. B. Here A is the offeror and B is the offeree.

Essentials elements of an offer:-

(1) There must be two parties.

(2) The offer must be communicated to the offeree.

(3) The offer must show the willingness of offeror. Mere telling the plan is not offer.

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

(5) A statement made jokingly does not amount to an offer.

(6) An offer may involve a positive act or abstinence by the offeree.

(7) Mere expression of willingness does not constitute an offer.

A tells B' that be desires to marry by the end of 2008, it does not constitute an offer of marriage by A' to B' A further adds will you marry me. Then it became offer.

Legal Rules as to valid offer:-

1. Offer must be communicated to the offeree: The offer is completed only when it has been communicated to the offeree. Until the offer is communicated, it cannot be accepted. Thus, an offer accepted without its knowledge, does not confer any legal rights on the acceptor.

Example: A's nephew has absconded from his home. He sent his servant to trace his missing nephew. When the servant had left, A then announced that anybody who discovered the missing boy, would be given the reward of Rs.500. The servant discovered the missing boy without knowing the reward. When the servant came to know about the reward, he brought an action against A to recover the same.

But his action failed. It was held that the servant was not entitled to the reward because he did not know about the offer when he discovered the missing boy.

2. **The offer must be certain definite and not vague unambiguous and uncertain.**

Example: A offered to sell to B. 'a hundred tons of oil'. The offer is uncertain as there is nothing to Show what kind of oil is intended to be sold.

3. **The offer must be capable of creating legal relation**. A social invitation is not create legal relation.

Example: A invited B to a dinner and B accepted the invitation. It is a mere social invitation. And A will not be liable if he fails to provide dinner to B.

4. **Offer may be expressed and implied** The offer may be express or implied; An offer may be express as well as implied. An offer which is expressed by words, written or spoken, is called an express offer. The offer which is expressed by conduct, is called an implied offer [Section 9].

5. **Communication of complete offer**

Example: A offered to sell his pen to B for Rs.1,000. B replied, "I am ready to pay Rs.950". On A's refusal to sell at this price, B agreed to pay Rs.1,000. held, there was not contract at The acceptance to buy it for Rs.950 was a counter offer, i.e. rejection of the offer of A.

Subsequent acceptance to pay Rs.1,000 is a fresh offer from B to which A was not bound to go & give his acceptance.

6. **Counter offer** –A counter offer amounts to rejection of the original offer
7. Cross offer do not conclude a contract
8. **An offer must not thrust the burden of acceptance on the offeree.**

Example: A made a contract with B and promised that if he was satisfied as a customer he would Favorably consider his case for the renewal of the contract. The promise is too vague to create a legal relationship.

The acceptance cannot be presumed from silence.

Acceptance is valid only if it is communicated to the offerer.

9. **Offer must be distinguished from invitation to offer.**

Example: Menu card of restaurant is an invitation to put an offer.

Price – tags attached with the goods displayed in any showroom or supermarket is also an invitation to proposal. If the salesman or the cashier does not accept the price, the or the cashier does not accept the price, the interested buyer can not compel him to sell, if he wants to buy it, he must make a proposal. **Example**: Job or tender advertisement inviting applications for a job or inviting tenders is an invitation to an offer.

Example: An advertisement for auction sale is merely an invitation to make an offer and not an offer for sale. Therefore, an advertisement of an auction can be withdrawn without any notice.

The persons going to the auction cannot claim for loss of time and expenses if the advertisement for auction is withdrawn.

10. Offerer should have an intention to obtain the consent of the offeree.
11. An answer to a question is not a offer.

Offer - Show his readiness to enter into a contract, it is called as an offer

Invitation to offer - Purpose of entering into contract Results in a contract

Example Application filled in by a prospective applicable to the Institution, a student seeking admission in educational Institution. Person invites offer to make an offer to him.

Purpose of entering into an offer & Results in offer.

Example Issue of prospectus by a Company, an education Institution.

KINDS OF OFFER

Express offer, Implied offer, Specific offer ,General offer, Cross offer Counter offer, Standing Open and Continuous offer.

I. **Express offer** -When the offeror expressly communication the offer the offer is said to be an express offer the express communication of the offer may be made by Spoken word or Written word

II**. Implied offer** –when the offer is not communicate expressly. An offer may be implied from:-

The conduct of the parties or The circumstances of the case .

III. **Specific offer**:-It means an offer made in

(a) a particular person or (b) a group of person: It can be accepted only by that person to whom it is made communication of acceptance is necessary in case of specific offer.

IV. **General offer:** -It means on offer which is made to the public in general.

- General offer can be accepted by anyone.
- If offeree fulfill the term and condition which is given in offer then offer is accepted.
- Communication of acceptance is not necessary is case of general offer

Example Company advertised that a reward of Rs.100 would be given to any person who would suffer from influenza after using the medicine (Smoke balls) made by the company according to the printed directions.

One lady, Mrs, Carlill, purchased and used the medicine according to the printed directions of the company but suffered from influenza, She filed a suit to recover the reward of Rs.100. The court held that there was a contract as she had accepted a general offer by using the medicine in the prescribed manner and as such as entitled to recover the reward from the company.

V. **Cross offer**:- When two parties exchange identical offers in ignorance at the time of placing offer the offers are called cross offer.

Two cross offer does not conclude a contract. Two offer are said to be cross offer if

1. They are made by the same parties to one another
2. Each offer made in ignorance of the offer made by the other party.
3. The terms and conditions contained in both the offers' are same.

Example : A offers by a letter to sell 100 tons of steel at Rs.1,000 per ton. On the same day, B also writes to A offering to buy 100 tons of steel at Rs.1,000 per ton.

When does a contract come into existence: -A contract comes into existence when any of the parties, accept the cross offer made by the other party.

VI **Counter offer** :-when the offeree give qualified acceptance of the offer subject to modified and variations in the terms of original offer. Counter offer amounts to rejection of the original offer.

Legal effect of counter offer:-

(1) Rejection of original offer (2) The original offer is lapsed (3) A counter offer result in a new offer.

In other words an offer made by the offeree in return of the original offer is called as a counter offer.

Example: A offered to sell his pen to B for Rs.1,000. B replied, " I am ready to pay Rs.950.

" On A's refusal to sell at this price, B agreed to pay Rs.1,000. Held, there was not contract as the acceptance to buy it for Rs.950 was a counter offer, i.e. rejection of the offer of A.

Subsequent acceptance to pay Rs.1,000 is a fresh offer from B to which A was not bound to give his acceptance.

VII Standing, open and continuous offer: - An offer is allowed to remain open for acceptance over a period of time is known as standing, open or continually offer. Tender for supply of goods is a kind of standing offer.

Example: When we ask the newspaper vendor to supply the newspaper daily. In such case, we do not repeat our offer daily and the newspaper vendor supplies the newspaper to us daily.

The offers of such types are called Standing Offer.

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

Legal Rules for the Acceptance

1. **Acceptance must be absolute and unqualified**

Example: A offers to sell his house to B for Rs. two lakhs. B accepts the offer and promises to pay the price in four installments. This is not pay the acceptance as the acceptance is with variation in the terms of the offer.

2. **Acceptance must be communicated**: Mere mental acceptance is no acceptance, But there is no requirement of communication of acceptance of general offer.

Example The manager of Railway Company received a draft agreement relating to the supply of coal. The manager marked the draft with the words "Approved" and put the same in the drawer of his table and forgot all about it. Held, there was no contract between the parties as the acceptance was not communicated. It may

however, be pointed out that the Court construed a conduct to parties as railway company was accepting the supplies of coal from time to time.

3. **Manner of acceptance** General rule say that it must be as per the manner prescribed by offeror. If no mode is prescribed in which it can be accepted, then it must be in some usual and reasonable manner.

4. **If there is deviation in communication** of an acceptance of offer, offeror may reject such acceptance by sending notice within reasonable time. If the offeror doesn't send notice or rejection, he accepted acceptance of offer.

Example: A offers B and indicates that the acceptance be given by telegram. B sends his acceptance by ordinary post. It is a valid acceptance unless A insists for acceptance in the prescribed manner.

5. **Acceptance of offer must be made by offeror**.

Example: A applied for the headmastership of a school. He was selected by the appointing authority but the decision was not communicated to him. However, one of members in his individual capacity informed him about the selection. Subsequently, the appointing authority cancelled its decision. A sued the school for breach of contract.

The Court rejected the A's action and held that there was no notice of acceptance.

"Information by unauthorized person is as insufficient as overhearing from behind the door".

6. **Acceptance must be communicated to offeror** .

7. **Time limit for acceptance**

• If the offer prescribes the time limit, it must be accepted within specified time.

• If the offer does not prescribe the time limit, it must be accepted within reasonable time.

Example: A applied (offered) for shares in a company in early June. The allotment (Acceptance) was made in late November. A refused to take the shares. Held, A was entitled to do so as the reasonable time for acceptance had elapsed.

Acceptance of offer may be expressly (by words spoken or written); or impliedly (by acceptance of consideration); or by performance of conditions (e.g.in case of a general offer)

9. **Mere silence is not acceptance of the offer**

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.

10. **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.

11. Acceptance subject to the contract is no acceptance

If the acceptance has been given 'subject to the contract" or subject to approval by certain persons, it has not effect at all. Such an acceptance will not create binding contract until a formal contract is prepared and signed by all the parties.

1. **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.

CAPACITY TO CONTRACT

Parties unable to Enter into a contract due to-

Minor	**A person of unsound mind**	**Person disqualified by law**
	Lunatic Idiot Drunken and Intoxicated	Alien enemy, Foreign Sovereign Convict Corporation and Company Insolvent

1. **Who is competent to make a contract**:-

Section 11. Every person is competent to contract who is of age of majority according to the Law to which he is subject, who is of sound mind and not is disqualified from contracting by any Law to which he is subject.

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.

Exception:- 21 years- in the following cases.

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

2. A minor's has received any benefit under a void contract, he cannot be asked to return the same.
3. If a minor has received any benefit under a void contract, he cannot be asked to return the same.
4. Fraudulent representation by a minor- no difference in the status of agreement. The contract remains void.
5. A minor with the consent of all the partners, be admitted to the benefitsof an existing partnership.

6. Contracts entered into by minors are void-ab-initio. Hence no specific performance can be enforced for such contracts.
7. Minor's parent/guardians are not liable to a minor's creditor for the breach of contract by theminor.
8. A minor can act as an agent but not personally liable. But he cannot be principal.
9. A minor cannot become shareholder of a the company except when the shares are fully paid up and transfer by share.
10. A minor cannot be adjudicated as insolvent.
11. Can enter into contracts of Apprenticeship, Services, Education, etc:
(a) A minor can enter into contract of apprenticeship, or for training or instruction in a special art, education, etc.
(b) These are allowed because it generates benefits to the Minor.
12. **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.
13. **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. **EXCEPTION**
• Contract for the benefit of a minor. • Contract by Guardian
Benefit of a minor by his guardian or manager of his estate.
a. within the scope of the authority of the guardian.
b. Is for the benefit of the minor.
• Contract for supply of Necessaries.
Example : Food, clothes, bed, shelter, shoes, medicines and similar other things required for the maintenance of his life or for the life ofhis dependents, expenses for instruction in grade or arts; expenses for moral religions or intellectual education, funeral expenses of his deceased family members, marriage expenses of a dependent female member in the family; expenses incurred in the protection of his property or personal liberty, Diwali pooja expenses, etc. have been held by courts to be necessaries of life.
However, the things like earrings fora male, spectacles for a blind person or a wild animal cannot be considered as necessaries.
• **Liability for tort:** A minor is liable for a tort, i.e., civil wrong committed by him.
Example : A, a 14 – year – old boy drives a car carelessly and injures B. He is liable for the accident i.e., tort.

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 the 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 not permanently of unsound mind. He can enter into contract during lucid intervals i.e., during period when he is of sound mind.
Person Disqualified by law (Alien enemy , Foreign Sovereign ,Convict, Corporation and Company, Insolvent)
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.

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.

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.

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.

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,.

CONSIDERATION

1(a) Consideration is a quid pro quo i,e something in return it may be –

MEANING (i) some benefit right, interest, loss or profit that may accrue to one party or,

(ii)some forbearance, detriment, loss or responsibility suffered on undertaken by the other party.

(b) According to Sir Frederick Pollock, "consideration is the price for which the promise of the other is bought and the promise thus given for value is enforceable.

2**. Definition [Sec 2(d)]:-** when at the desire of the Promisor, the promise or any other person.

(a) has done or abstained from doing , or [Past consideration]

(b) does or abstains from doing, or [Present consideration]

(c) promises to do or abstain from doing something [Future consideration]such act or abstinence or promise is called a consideration for the promise.

Example (i) 'P' aggress to sell his car to 'Q' for Rs.50,000 Here 'Q's Promise to pay Rs50,000 is the consideration for P's promise and 'P's promise to sell the car is the consideration for 'Q's promise to pay Rs.50,000.
(ii) 'A' promises his debtor 'B' not to file a suit against him for one year on 'A's agreeing to pay himRs.10,000 more. Here the abstinence of 'A' is the consideration for 'B's Promise to pay.

Legal Rules for valid consideration

1. Consideration must move at the desire of the promisor.

D constructed a market at the instance of District collector. Occupants of shops promised to pay D a commission on articles sold through their shops. Held, there was no consideration because money was not spent by Plaintiff at the request of the Defendants, but at instance of a third person viz. the Collector and, thus the contract was void.

2. Consideration may move from the promisee or any other person who is not a party to the contract.

A owed Rs.20,000 to B. A persuaded C to sign a Pro Note in favour of B. C promised B that he would pay the amount. On faith of promise by C, B credited the amount to A's account. Held, the discharge of A's account was consideration for C's promise.

3. **Consideration may be past, present, Future**:

• Under English law, Past consideration is no consideration.
• Present consideration :- cash sale

Future or executory consideration:- A Promises to B to deliver him 100 bags of sugar at a future date . B promise to pay first on delivery.

4**. Consideration should be real and not illusory.** Illusory consideration renders the transaction void consideration is not valid if it is.

(i) Physically impossible (ii) Legally not permissible (iii) Uncertain (iv) illusory (fulfillment of a preexisting obligation)

5**. Must be legal**:- Consideration must not be unlawful, immoral or opposed to public policy.

6. **consideration need not be adequate**. A contract is not void merely became of the fact that the consideration is inadequate. The law simply requires that contract should be supported by consideration. So long as consideration exists and it is of some value, courts are not required to consider its adequacy.

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 .

7. The performance of an act what one is legally bound to perform is not consideration for the contract mean's something other than the promisor's existing obligation –

A contract not supported by consideration is void.

Exceptions to the Rule "No consideration. No contract".

Ex., an agreement without consideration is void.

1. Written and registered agreements arising out of love and affection:- [25 (1)]

• Expressed in writing and registered under law for the time being in force for registration of document
• Natural love and affection
• Between parties standing in a near relation to each other

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.

Example: A Hindu husband by a registered document, after referring to quarrels and disagreements between himself and his wife, promised to pay his wife a sum of money for her maintenance and separate residence. Held that the promise was unenforceable since natural love and affection was missing.

2. **Promise to compensate** [25(2)]

• Promise to compensate wholly or in part
• Who has already voluntarily done something for the promisor Something which the promisor was legally compellable to do.

Example:-A finds B's purse and give to him. B Promise to give A Rs.500. This is a valid contract.

3**. Promise to pay a time** – barred debt. [Sec 25(3)]

• A debt barred by limitation con not recovered. Hence, a promise to pay a such a debt is without any consideration.
• Can be enforced only when – in writing and sighed by Debtor or his authorized agent.

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.

4. **Completed gift**- gift do not require any consideration.
5. **Agency** (185) –According to the Indian contract Act. No consideration is necessary to create an agency.
6. **Bailment** (148)-consideration is not necessary to effect a valid bailment of goods. It is Called Gratuitous Bailment.
7. **Remission (63**).
8. **Charity**- If a person promises to contribute to charity and on this faith the promises undertakes a liability to the extent not exceeding the promised subscription, the contract shall be valid.

FREE CONSENT

In English law, this is called 'consensus – ad – idem'

Effect of absence of consent:

When there is no consent at all, the agreement is void – ab – initio'.

It is not enforceable at the option of either party

Example 1:-X have two car one Maruti car and one Honda city car. Y does not know that X has two cars Y offers to buy car at Rs.50,000. Here, there is no identity of mind in respect of the subject matter. Hence there is no consent at all and the agreement is void – ab – inito.

Example 2:-An Illiterate woman signed a gift deed thinking that it was a power of attorney –no consent at all and the agreement was void – ab –inito (Free consent)

Consent is said to be free when it is not caused by[Section 14]

(a) coercion [Section 15] (b) Undue influence [Section 16] (c) Fraud [Section 17]
(d) Misrepresentation [Section18] (e) Mistake [Section 20, 21,22]

Coercion [Section 15]

Essential elements of coercion

a) Committing any act which is forbidden by the IPC
(b) Threatening to commit any act which is forbidden by the IPC.
(c) Unlawful detaining of any property or
(d) Threatening to detain any property.
(e) coercion need not necessary proceed from party to contract.
(f) Coercion need not necessary be directed against the other contracting party.
(g) It is immaterial whether the IPC is or is not in force at the time or at the place where the coercion is employed

Effect of threat to file a suit:- A threat to file a suit (whether civil or court)does not amount to coercion unless the suit is on false charge. Threat to file a suit on false charge is an act forbidden by the IPC and thus will amount to an act of coercion.

Effect of Threat to commit suicide:- Threat to commit suicide amounted to coercion and the release deed was example discussed in class.

Detaining property under mortgage: Detention of property by a mortgage until the payment of loan does not amount to coercion.

Undue influence

Meaning of undue influence :-dominating the will of the other person to obtain an unfair advantages over the others.

(a) where the relation subsisting between the parties must be such that one party is in position to dominate the will of the other.
(b) The dominant party use his position. (c) Obtain an unfair advantage over the other .

Presumption of domination of will:- Circumstances & Examples

Where he holds a real or apparent authority over the other
Where he stands in a Trust fiduciary (benefit) relation to the other
Mental Capacity of a person is temporarily or permanently effected by reason of age, illness or mental or bodily distress
Master and servant, parent and child, Income Tax officer and assesses, principal and a Temporary Teacher.
Trustee and beneficiary spiritual Guru and his disciples, solicitors and clients. Guardian and wards
Relationship between medical attendant and ward.

Example :- A Poor Hindu widow agreed to pay interest at100% P. a because she need the money to Established her right of maintenance. It was held that the lender was in position to dominate the will of widow.

Undue influence [Section 16]

No. Presumption of Domination of will:- Landlord and Tenant , Creditor and Debtor , Husband and wife (other than Pardanashin) ,Principal and Agent

Effect of undue Influence:-[Section 19A] When consent to an agreement is caused by undue influence, the contract is voidable at the option of the party whose consent was so caused.

Burden of Proof:-A contract is presumed to be induced by undue influence if the following two condition:-

A party has the position to dominate the will of the others

The transaction is unconscionable (unreasonable)

In such a case dominant party is under the burden to prove the undue influence was not employed.

[Unconscionable transactions:-if transaction appears to unreasonable the dominant party to prove that there is no undue influence.]

Any other transaction:-weaker party to prove the influence was employed]

Where some transaction is entered into in the ordinary course of business, but due to certain contingencies, one party is able to make the other party agree to certain terms and conditions then it is not undue influence.

Example : A applies to a banker for a loan at a time when there is stringency in the money market.

The banker declines to make the loan except at an unusually high rate of interest.A accepts the loan on these terms. This is a transaction in the ordinary course of business, and the contract is not induced by undue influence.

Example : A spiritual guru induced his chela to donate all his property to the ashram and said that in return of it, he will certainly get salvation. The chela did the same. Held, that this is a case, of undue influence so it becomes void.

Contract with Pardanashin woman;- Induced by undue influence

Burden of Proof – Full disclosure is made to pardanashin women

Pardanashin Women - Understand the contract & Receipt of competent independent advice .

Undue influence Vs Coercion

Similarities: -Voidable at the option of aggrieved party:-

Coercion (15)	**Undue Influence (16)**
Meaning – using or threat to use physical force	Involves use of moral force(mental
obtain the consent of party (intention) -	Obtain an unfair advantag(intention)
Punishment under IPC -	Not criminally liable
Parties – Stranger	Between the parties to the contract
Relationship – Immaterial	One party dominate the other party
Voidable at the option of aggrieved Party.	Voidable or court set aside
Benefit - Back	Benefit – order of court – Back

Fraud

The term fraud means a take representation of facts made willfully with a view to deceive the other party. Under **Sec.17-** fraud means any act committed by a party toa contract or with his connivance or by his agent with intent to deceive another party there to orhis agent or to induce to enter into contract. **Essentials of fraud :-**

(a) By a party to the contract

(b) There must be representation – [an opinion a statement of expression – does not fraud].

(c) The representation must be false.

(d) Before conclusion of contract.

(e) The misrepresentation must be made willfully.

(f) The misrepresentation must be made with a view to deceive the other party.

(g) The other party must have actually been deceived.

(h) The other party have suffered a loss.

Fraud – definition include

The suggestion, as to fact, of that which is not true by one who does not believe it to be true.

The active concealment of a fact by one having knowledge or belief of the fact.

Ex. A furniture dealer conceals the crakes in furniture by polish work.

A promise made without any intention of performing it.

Any other act fitted to deceive.

Any such act or omission as the law specially declared to be fraudulent.

Ex:- T bought a cannon from H. It was defective, but H had plugged it. T did not examine the cannon, but it burst when he used it. Held as the plug had not deceived T, he was liable to pay for the cannon.

Ex.: Where the representation was true at the time when it was made but becomes untrue before the contract is entered into and this fact is known to the party who made the representation. If must be corrected. If it is not so corrected it will amount to be fraud.

When the silence amount tofraud:-(a) General rule:-Mere (only) Silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud.

EXCEPTION where the circumstances of the case are such that regarding being had to them. It is duty of the person keeping silence to speak. Such duty arises in the following two cases.

(1) Duty to speak exists where the parties stand in a fiduciary relationship, e.g. father and son, guardian and ward, trustee and beneficiary etc. or where contract is a contract of ubberimafidei (requiring utmost good faith), e.g. contracts of insurance.

Ex.:- A sells by auction to B a horse which A knows to be unsound. B' is A's daughter and has just come of age. Here the relation between the parties would make it A's duty to tell B is the horse is unsound.

(2) When silence itself equivalent to speech. B says to A " if you do not deny it I shall assume that the horse is sound". A say nothing – A's silence equivalent to speech. A can held liable to fraud.

[**Half Truth is worse than a blatant: -Example – company pay dividend – in class room**]

Sec. 19: A contract induced by **fraud is voidable** at the option of the party defrauded. Till the exercise of such option, the Contract is valid.

Effect of Fraud:- 1. Rescinds of contract

2. Right to insist upon performance
3. Right to claim damages – if he suffered loss.

Exception : The contract is not voidable in the following cases.

When the party who consent was caused by silence amount to fraud and be has the means of discovering the truth with ordinary diligence.

When the party give the consent in ignorance of fraud.

When the party after become aware of fraud takes a benefit.

When the parties can't be restored to their original position.

Where interests of third parties intervene before the contract is avoided.

Misrepresentation (section 18)

Misrepresentation is when a party (person) asserts something which is not true though he believes is to be true. In other words misrepresentation is a falls representation made innocently.

An agreement is said to be influenced by misrepresentation if all the following conditions are satisfied.

(a) The party makes a representation of a fact [The representation by a stranger (By anyone with his connivance or by agent)to the contract does not affect the validity of the contract.

(b) The misrepresentation was made innocently i.e. if was not made with a view to deceive the other party.

(c) The other party has actually acted believing the misrepresent to be true.

Misrepresentation include:-

Unjustified statement of facts – positive assertion – Believe to be true really not true.

Breach of duty.

Inducing other to make mistake as to qualify..

(1) Right to Rescind contract:-

Can't do

Discovering the truth with ordinary diligence.

Give consent in ignorance of misrepresentation

Become aware of misrepresentation takes a benefit

Where an innocent third party before the contract is rescinds acquires consideration some interest in the property passing under the contract.

Where the parties can't be restored to their original position.

(2) **Right to insist upon performance.**

Ex.:- Unlike Fraud he cannot sue for damage.

	Fraud (17)	Misrepresentation (18)
Meaning :-	wrongful representation is made willfully to deceive the party.	innocently without any intention to deceive the other party.

Knowledge of falsehood.

The person making the wrong statement does not believe it to be true.	The person making the statement believes it to be true.
Right to claim damage	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 ordinary diligence.	In case of misrepresentation the contract is not voidable if the aggrieved party had the means of discover truth with ordinary diligence

MISTAKE

Mistake Erroneously Belief about some facts

Mistake of Fact		Mistake of Law [21]	
Unilateral [22]	Bilateral [20]	Mistake of Indian Law	Mistake of foreign Law
One party Under Mistake of fact	Both parties under Mistake of facts		
The contract is valid [Not voidable and void]	The contract is void	The contract is valid	Same as mistakeof fact Void Both parties coming under mistake

Exception: -Where contract is not valid (void)

1**. Identity of persons contract with**

Ex. :- A woman, falsely misrepresenting herself to be wife of a well known Baron obtained two pearl necklaces from a firm of jewelers on the pretext of showing them to her husband before buying. She pledged them with a broker who took them in good faith. Held that there was no contract between jeweler and woman and even an innocent buyer or a broker did not get a good title. Broker must return necklaces to jeweler. Jeweler intended to deal not with her but with quite a different person, i.e., wife of a Baron.

2**. as the nature of the contract**

Ex.:-illiterate man sign Bill of exchanges by means of false, representation that it was a mere guarantee. It was held that he was not liable for bill of exchange because never intended to sign the bill of exchange

Bilateral Mistakes:-

Subject matter	Possibility
Existence, Quantity, Quality, Prices, Identity, Title.	Legal **Physical**

EVERY AGREEMENT OF WHICH THE OBJECT OR CONSIDERATION IS UNLAWFUL IS VOID [SEC 23]

(a) It is forbidden by law– law would also include the rules regulations, notifications etc. Under or issued under the authority given by a statute.

Ex.:- A sold liquor without license to B. The sale is unlawful as the sale of liquor without license is forbidden by the law, i.e., The Excise Act. Hence, A cannot recover the price.

Ex.:- a Hindu already married and his wife alive entered into a marriage agreement with Y an unmarried girl. The agreement is void because the second marriage is forbidden by **Hindu Law.**

b. If it defeats the Provisions of any Law. - not directly prohibited by any Law

Ex.:- A's estate is sold for arrears of revenue under the provision defaulter is prohibited from purchasing the state upon an understanding with A becomes the purchaser and agrees to convey the estate to A . Upon receiving from him the price which B has paid. The agreement is void.

(c) **If it is Fraudulent** Ex.: Object or consideration of an agreement is fraudulent. An agreement with such an object or consideration is unlawful and void.

(d) If it involves or Implies injury to a person or property of another.

Ex.:-Where it create injury to a person or to the property of another. An agreement with such an object or consideration is unlawful and void.

(e) If the court regards it as immoral.

⇒ X gave Rs.10,000 to Y a married woman to obtain a divorce from her husband. X agrees to marry when divorce taken. X would not recover the amt.

1. **Partially unlawful Object or consideration** [Sec. 24]: An Agreement is void if-(a) any part of a single consideration for one or more objects is unlawful; or

(b) any one or any part of one of several consideration for a single object, is unlawful.

2. **Example**: B is a licensed manufactured of permitted chemicals. A promise B to supervise B's business and combine it with the production of some contra band items together with the permitted items. B promises to pay A, Salary of Rs.10,000 p.m.

Agreement is void, object of A's promise and consideration for B's promise being partially unlawful.

3. **Lawful Consideration enforceable**: When there are several distinct promises made for one and the same consideration and one or more of the mare of such nature that law will not enforce it, only such of the promises as are unlawful cannot be enforced. Other which are lawful, can be enforced.

4. **Test of Severity:**

(a) If illegal part cannot be severed from legal part of a covenant, contract is altogether void.

(b) If it is possible to severe them, whether the illegality be due to Statute or Common Law, bad part alone may be rejected and good retained.

In case of pre– existing civil liability, the dropping of criminal proceedings need not necessarily be a consideration for the agreement to satisfy that liability.

Illegal agreement – Void – ab – intio

- Punishable by the criminal Law of the country or by any special legislation regulation effect of illegal agreement.
- Collateral transactions – illegal
- No action can be taken for the recovery of money paid or property transferred.
- If illegal part can't be separated from the legal part.

Whole agreement is altogether illegal. [Sec.57]

- If separated
- Legal part – enforces & illegal part – rejected.
- Reciprocal promises – In respect of reciprocal promises the agreement as to illegal promise is void.

Agreement opposed to public policy:-Alternative promises: where in alternative promises one part is illegal, only the legal pent can be enforced. [Sec. 58]

VOID AGREEMENT 2(g)- Void agreement is an agreement which is not enforceable by Law –void – ab – inito.

(1) Agreement by or with person's incompetent to contract [10, 11]
(2) Agreement entered into through a mutual mistake [20]
(3) Object or consideration – unlawful [23]
(4) Consideration or object partially, unlawful [24]
(5) Without consideration [25]
(6) Restraint of marriage [26]
(7) Restraint of trade [27]
(8) Legal proceeding [28]
(9) Consideration identified [29]
(10) Wagering agreement [30]
(11) Impossible agreement [56]
(12) An agreement to enter into an agreement in the future.

Agreement in Restraint of marriage [26]

Every agreement in restraint of marriage of any person other than a minor, is void, Any restraint of marriage whether total or partial is opposed to public policy.

Ex. A promised to marry else except Mr. B, and in default pay her a sum of Rs.1,00,000. A married someone else and B sued A for recovery of the sum. Held, the contract was in restraint of marriage, and as such void.

Ex. The consideration under a Sale Deed was for marriage expenses of a minor girl aged 12.

Held the sale was a void transaction being opposed to public policy.

Ex. Two co-widows – agreement – is one of them remarried – she shout forfeit her eight to her share in the deceased husband's property was not void because no restraint was imposed upon either of the two widows from remarrying.

Ex. Wife to divorce herself and to claim maintenance from the husband on his marrying a second wife was not void because no restraint was impose upon husband from marrying a second wife.

Agreement in Restrain of trade [27]

Every agreement by which anyone is restrained from exercised a Lawful profession, trade or business of any kind is void .

Burden for Proof :-Party supporting the contract:- must show that the restraint is reasonably necessary to protect public interest. Party challenging the contract:- restraints is injurious to the public.

Ex. : In Patna, 29 out of 30 manufacturers of combs agreed with R to supply combs only to him and not to anyone else. Under the agreements R was free to reject the goods if he found no market for them. Held, the agreement amounted to restraint of trade and void.

Exception to Sec. 27

(1) Sale of goodwill: -Seller of goodwill of a business may agree with the buyer to restrain from carrying on business.

(a) Must relate to same business (b) Restriction shall apply within specified Local limits.

(c) Restriction shall apply within a reasonable time period

(d) The specified local limits – depends on nature of business.

(a) Restriction on existing partner[11(2)].

- Not carry on business other than business of the firm till he is partner.

(b) **Restriction on outgoing partner** [36]

- Not carry on a similar business after retirement
- Local limits + specified period – local limit – nature of business

(c) Sec. 54:Upon or in anticipation of dissolution of Firm. Partners may agree that some or all of them will not carry on business similar to that of the Firm within specified periods or local limits.

(d) Sec. 55(2): Partner may agree with due buyers of Goodwill, not to use the Firm name or carry on Firm's business or solicit clients of the Firm.

(e) Sec. 55(3): Upon sale of Firm's Goodwill, a partner may agree that he will not carry on any business similar to Firm's within specified periods or local limits.

Exception under judicial interpretations :-(a)Trade combination.

- Traders may from associations among them to regulate the business or to fix prices.
- Such agreement like opening and closing of business venture, licensing of traders, supervision and control of dealers, etc. are valid even if they are in restraint of trade.
- But, a Combination that tends to create monopoly; or when two enter into an agreement to avoid competition, they are against public policy and hence void.

(b) Sale dealing agreement: -Agreements to deal in the products of a single manufacturer or to sell the whole produce to a single dealer are valid if their terms are reasonable.

Agreement –buyer of goods for Delhi market not to sell them in Chennai is valid.

- Not to sell any other firm – valid.

(c) **Service agreement.**

- Agreement: Employers may enter into agreements with employees– (i) not to engage in other work during the tenure of his employment; or (ii) not to engage in similar work after his termination.
- During Employment: The first restraint is always valid, e.g. doctors may be paid non practicing allowances to avoid practicing when they are employed in a hospital.
- After termination of service: The second restraint is valid only is it is to protect the trade interests or the employer. It may be imposed to prevent the outgoing employee from using trade secrets he had learnt during his tenure, to the detriment of his previous employer.
- Valid Agreements :Requiring employees to serve the organization for a few years after training leaving; or execution of a bond requiring employees leaving the organization to pay compensation to the employer are valid.
- Use of Personal Skills: The employer cannot prevent the employees from using his personal skills and knowledge to his benefit; e.g. an employer cannot restrain an employee to act in theatre plays or in perforating an art.

Agreement in Restraint of legal proceedings [28]

Agreement restricting enforcement of rights:

- An agreement by which any party is restricted absolutely from enforcing his legal rights Under any contract is void.
- Agreements Limiting period of limitation:- An agreement which limits the time within which an action way be brought is void.

- A partial restrain is not void, eg.

Ex. 1: A clause in a contract that any dispute arising between the parties shall be subject to jurisdiction of a court at a particular place only, is valid.

Ex. 2: An agreement is not void merelybecause if provides that any dispute arising between two or prove person shall be referred to arbitration.

- That has arises.
- Which may arise
- Which has already arisen?

Ex. 3: An agreement not to go in appeal to higher court against the judgment of a lower court not amount to restart of legal proceeding.

An agreement the meaning of which is not certain (Sec 29):

1. An agreement is called an uncertain agreement when the meaning of that agreement isnot certain or capable of being certain. Such agreements are declared void u/s 29.
2. Areas of uncertainty: Uncertainty may relate to – (a) Subject Matter of Contract; or(b)Terms of contract.

(a) Subject Matter: There may be uncertainty as regards – (i) existence; (ii) quantity (iii) quality;
(iv) price; or (v) title to the subject matter.

(b) Terms of Contract: There may be uncertaintyas regards – (i) existence (ii) quality; (iv) price;or (v) title and other terms in the contract.

Example: 1. A says to B "I shall sell my house; will you buy?" A says, "Yes, I shall buy". Due to uncertainty of price, the agreement is void and unenforceable. There is binding contract.

2. A agreed to pay a certain sum, when he was able to pay. Held, the agreement was void for uncertainty.
3. D agrees to sell his white horse, for Rs.5,000 or Rs.10,000.

WAGERING AGREEMENT [30] :-

An agreement between two persons under which money ormoney's worth is payable by one person to another on the happen or non happening of a future uncertain event is called a wagering agreement.

- X promise to pay Rs. 1000 to Y if it is rained on a particular day, and Y promise to pay Rs.1000 to X if it did not.
- Wagering agreement is promise to give money or money's worth upon the determination of uncertain event.-.

Essential elements of wagering agreements

(1) The must be a promise to pay money or money's worth
(2) Performance of a promise must depend upon determination of uncertain event. It might have already happened but the parties are not aware about it.
(3) Mutual chancels of Gains or Loss.
(4) Neither party to have control over the events
(5) Neither party should have any other interest in event.
(6) One party is to win and one party is to lose.

Ex. 1:- Agreement to settle the difference between the contract price and market price of certain goods or shares on a particular day.

Ex. 2: A lottery is wagering agreement. Therefore, an agreement to buy and sell lottery tickets is a wagering agreement. **Section 294** – A of the Indian Penal Code declares that drawing of lottery is an offence. However, the government may authorize lotteries. The persons authorized to conduct lotteries are exempt from the punishment. But, the lotteries still remain a wagering transaction.

Ex. 3: However, if the crossword puzzle prizes depend upon sameness of the competitor's solution with a previously prepared solution kept with the organizer or newspaper editor, is a lottery and, therefore, a wagering transaction.

Ex. 4: However, when any transaction in any commodity or in shares with an intention of paying or getting difference in price, the agreement is a wager.

Agreement not held as wagers:- Prize in terms of Prize competition Act, 1955 not exceeding Rs.1000 is not wagering agreement.

Horse race [500] – An agreement to contribute a plate or prize.

Contract of insurance utmost in good faith eg. Favor in public policy.

Share market transaction A commercial transaction should always be distinguished from a pure speculative transaction. A commercial transaction is done with an intention of delivery of goods (commodity or security) and payment of price. Therefore, it is not wagering agreement.

Crossword competition involving skill for its solution. If skill plays an important role in the result of a competition and prize depend upon the result, the competition is not Involve applications of skill and prizes are awarded to

the participants on the basis of merit of their solutions and not on chance. Therefore, such competitions are valid and are not wagers.

Athletic Competitions also fall in the category of games of skill. Therefore, these are also not wagers.

Example: A and B, two wrestlers, agreed to enter into a wrestling contest in Ahmedabad on a certain day. They further agreed that a party failing to appear on the fixed day was to forfeit Rs.500 and the winning party will receive a sum of Rs.1,000. Held, it was not a wagering agreement.

Contribution to chit fund is not wager – contributions made by the members are refunded by draw of lots.

Effects of wagering agreements:- Agreement is void.

⇒ No suit can be filled for any recovery of the amount won on any wager.

⇒ It is not illegal. Any agreement collateral to wagering agreement is valid.

⇒ However, it is illegal in state of Maharashtra and Gujarat.

⇒ Agreement which is prohibited by law is illegal agreement.

Example Agreement to commit crime.

Effects of illegal agreement:

• It is always void.

• Any collateral transaction to illegal agreement is also void.

attempted performance

Promisor is not responsible for non performance and they can sue the promisee for breach of contract –nor he (promisor) thereby lose his rights under the contract.

Essential of Valid tender

Unconditional- At a proper place- For whole obligation-Of exact amount and in legal tender money- At proper time- Reasonable opportunity to Promisee.

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 promise, 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 of money.

Effect of refusal of party to perform promise Wholly Sec 39.

Promisor – Refuse – Promise – wholly

Promisee can put an end of the contract or he can continue the contract if he has given his consent either by words or by conducts in its continuance.

Result –claim damages. [compensation]

1. Promisee – stranger can't demand performance of the contract.
2. Legal Representative – legal representative can demand Exception performance.
3. Third party – Exception to "stranger to a contract"

Who can demand performance?

Person by whom promise is to be performed Sec 40.

[who will perform the contract]

1. Promisor him self :-include personal skill, taste or art work.

Ex:- 'A' promises to paint a picture for 'B' as this promise involves personal skill of 'A'. It must be performed by 'A'.

2. Promisor or agent :-[does not involves personal skill]
3. Legal Representative [does not involve personal skill and taste]
4. Third person [Sec 41] :-Acceptance of promise from the third party:-

If the promisor accepts performance of a contract by a third party, he can't after wards enforce the performance against the promisor although the promisor had neither authorized not ratified the act of the third party.

[In other meaning once the promise accepts the performance from a third person, he cannot compel the promisor the perform the contract again]

Performance of Joint Promises:-Two or more person make a promise

Performed by all the joint promisor [42]

All the joint promisor – liable

Thus in India the liability of joint promisors is joint as well as several.

In England, however the liability of the joint promisors is only joint and not several andaccordingly all the joint promisors must be sued jointly.

Liability of joint promisor [43]

1. Liability –joint as well as several [unless express A + B + C 900 D. D may compel either A, B or C or any of two of them or all of them.
2. Where a joint promisor has been compelled to perform the whole promise, be may compel every other joint promisor to contribute equally with himself to the performance of the promise (unless a contrary intention appears from the contract).
3. If any one of the joint promisors make default in such contribution, the remaining joint promisors must bear the loss arising from such default in equal shares

[In English law if one joint promisor – discharge then all the joint promisors discharge]

Sec 45:-Rights to claim performance of joint [Devolution of joint rights]

1. During their joint lives–all the joint promisors .
2. After the death of any of them– The representative of such deceased promise jointly with the surging promise
3. With the representatives of all jointly.

Ex:-'A' in consideration of Rs 50,000 lent to him by 'B' and ' C' promises 'B' and 'C' jointly to replace them that sum with interest on a day specifies. 'B' dies. The right to claim performance rests with 'B' representatives jointly with 'c' during 'C' life.

- And after 'C's death with the representatives of 'B' and 'C' jointly .

Time place and manner of performance[46–50]

Time of performance is not specified + promisor agreed to perform without, a demand from the promise the performance must be made within a reasonable time. Reasonable time – in each particulars case – a question of fact.

2**. Time specified but hour not mentioned [47**].

Time of performance specified + promisor agreed to perform without application by the promisee

Performance must perform on the day fixed during the usual business hours and at the place at which the promise ought to be performed.

3. **Where Time is fixed and application to be made [48]**

Proper place and within the usual hour of business Promisee to apply for performance

4**. Performance of promise where no place is specified** and no application is to be made by the promise [49] It is the duty of the promisor to apply to the promise to appoint a reasonable place for the performance and perform it at such appointed place.

5.**Performance** in manner or at time prescribed or sanctioned by promise [50] In such prescribed manner and Prescribed time

Ex:- 'A' desires 'B' who owes him Rs 10,000 to send him a promissory note for Rs10,000 by Post. The debt is discharged as soon as 'B' puts into the post a letter containing the promissory note duly addressed to 'A'.

Performance of reciprocal promises

Reciprocal Promise :-Promises which form the consideration or part of consideration for each other as called reciprocal promises.

1. **Mutual and Independent**:-Such promises all to be performed by each party independently without waiting for the other party to perform his promise can't excuse himself on the ground of non-performance by the default party.

2. **Mutual and Dependent**:- Sue damage . The performance of promise by one party depended on the prior performance of the promise by other party.

[The party at fault becomes liable to pay compensation to the other party may sustain by the non performance of the contract – [54]

3. **Mutual and concurrent**: -when reciprocal promises are to be performed simultaneously a promisor need not perform his part unless the promise is ready and willing to perform [51]

Assignment of contract :-(a) by – operation of law (b) By an act of parties

- Death - Insolvency

Assignment is a made of transferring rights & interest to another party..

Rules regarding assignment

(a) The liabilities or obligations under a contract can't be assigned

(b) The rights and benefits under a contract which not of a personal nature can be assigned.

(c) An actionable claim can always be assigned

	Succession	Assignment
Meaning	Legal representative	Responsibility to another person.
Time	On the death	On the life time
Voluntary Act	By operation of law.	By act of party
Written document	Not required	Deed of assignment required.
Scope	Liability and rights	Rights

DISCHARGE OF A 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 (i.e. comes to an end).

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)

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 to come end. 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

Both parties know – put life into deed body – void .

Both don't know – void.

One know – compensate to other party

(b) **Effect of supervening Impossibility:-**

Where an act becomes impossible after the contract is made – void

Becomes unlawful, beyond the control of promisor – void

Promisor alone knows about the Impossibility – compensate loss.

When an agreement is discovered to be void or where a contract becomes void

Cases when a contract is discharged on the group of supervening Impossible

(a) Distraction of subject matter - Failure of the ultimate purpose of contract –

(b) Death of personal Incapacity

(c) Declaration of **war**

(d) change of Law

(e) Non existence or Non occurrence of a particular state of thing necessary for performance.

No Super Impossibility – does not become void

Difficulty of performance – coal – transport -Commercial Impossibility

Default of a third party -Strikes, knockout and civil disturbance.

Partial Impossibility – coronation of king and to sailing around the lake by boat.

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

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:

Contract is voidable.

Contract is unlawful.

SUIT FOR DAMAGES

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.

KINDS OF DAMAGES

The following are the different kinds of damages:

Ordinary damages These are the damages which are payable for the lossarising naturally and directly as result of breach of contract. It is also known as proximate damage or natural damage.

Special damages These are damages which are payable for loss arising due to somespecial circumstances. It can be recovered only if special circumstances which result in special loss incase of breach of contract and party have notice of such damage.

Example: A sends sample of his products for exhibition to an agent of a railway company for carriage to "New Delhi" for an exhibition. The consignment note stated:

"Must be at New Delhi, Monday Certain." Due to negligence of the company, the goods reached only after the exhibition was over. Held, the company was liable for the loss caused by late arrival of the products because the company's agent was aware of the special circumstances.

Exemplary or punitive or vindictive damages

These damages are allowed not to compensate party but as mean of punishment to defaulting party. The court may award these damages in the case of:

- Breach of contract to marry – loss based on mental injury.
- Wrongful dishonor of cheque – smaller amount, larger the damage.

Nominal damages

Where party suffers no loss, the court may allow nominal damages simply to establish that party has proved his case and won. Nominal damage is very small in amount.

Damages for inconvenience

If party has suffered physical inconvenience, discomfort for mental agony as result of breach ofcontract, party can recover the damage for such inconvenience.

Example: A photographer agreed to take photographs at a wedding ceremony but failed to do so. The bride brought an action for the breach of contract. Held, she was entitled to damages for her injured feelings.

Liquidated damages and penalty

Party may specify amount at the time of entering into contract. The amount so specified may be

(a) liquidated damage, (b) penalty.

If specified sum represent, fair and genuine pre – estimate damages likely to result due to breach, it is called liquidated damage.

But if specified sum is disproportionate to the damages, it is called as penalty.

As regard the payment of liquidated damages and penalty court can't' increase amount of damages beyond the amount specified in the contract.

Example: A gives B, a bond for the repayment of Rs.1,000 with interest at 12 per cent, at the end of six months, with a stipulation that, in case of default, the interest shall be payable at the rate of 75 per cent, from the date of default. This is a stipulation by way of penalty, and B is only entitled to recover from A such compensation as the Court considers reasonable.

Forfeiture of security deposit

Any clause in contract entitling the aggrieved party to forfeit security deposit in the nature of penalty and court may award reasonable compensation.

Payment of interest

- It is permissible.
- If interest is in nature of penalty, court may grant relief.
- If no rate of interest is specified in contract party shall be liable to pay as per the law in force or as per custom or usage of trade.

Cost of suit or decree

The court has also discretion to award costof suit for damages in addition to the damages for breach of contract.

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.

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.

QUASI CONTRACT

[Contracts implied in law or implied contract]

It means a contract which lacks one or more of the essentials of a contract.

Quasi contract are declared by law as valid contracts on the basis of principles of equity i.e. no person shall be allowed to enrich himself at the expense of another the legal obligations of parties remains same.

Nature of Quasi contracts:-

(a) A quasi contract does not arise from any formal agreement but is imposed by law.

(b) Every quasi contract based upon the principle of equity and good conscience.

(c) A quasi contract is always a right to money and generally though not always to a liquidated sum of money.

(d) A suit for its breach may be filed in the same way as in case of a complete contract.

(e) The right grouted to a party under a quasi contract is not available to him against the whole world but against particular person(s) only.

(f) A suit for breach of a quasi contract may be filed in the same way as in case of an ordinary contract

(g) Although there is no contract between the parties under a quasi contracts, yet they are put in the same position as if he were a contract between them.

Provisions relating to various quasi contracts are contained in section 68to sec 72 of the contract Act, 1872.

TYPES OF QUASI CONTRACTS Sec. 68

Supply of Necessaries Sec. 69

Reimbursement of money due Sec. 70

Obligation to pay for benefit out of non – gratuitous act Sec. 71

Responsibility of Finder of Goods Sec.72

Person receiving goods or money by mistake Sec. 68:

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

1. **Meaning of Necessaries:**

(a) Necessaries normally include articles required to maintain a particularperson in the state, degree and station in life in which he is.

(b) They are essentials to run a life.

(c) An item will not be considered necessary, if a person already has sufficient supply of things of such kind.

(d) Necessaries include Services rendered to a person.

(e) What constitutes necessaries depends on the circumstances of each case.

2. **Only property liable: person not liable:**

(a) It is only the property (movable and immovable) ofthe incapable person they shall be liable.

(b) He cannot be held liable personally.

(c) Where he doesn't own any property, nothing shall be payable.

3**. Example**: (i) A supplies B, a lunatic, with necessaries suitable to his condition in life. A is entitled to be reimbursed from B's property. (ii) A who supplies the wife and children of B, a lunatic, with necessaries suitable totheir condition in life, is entitled to be reimbursed from B's Property.

Payment By a person who is interested in a transaction [69]

Condition of section [69]

Sec. 69; A person, who is interested in the payment of money and pays such money, which another is bound by low to pay, is entitled to be reimbursed by the other.

(a) one party is legally bound to make a payment

(b) Some other persons make such payment

(c) The person making such payment is not legally bound to make such payment

(d) The person making such payment is interested in paying such amount

Legal effect of sec 69.:-If all the conditions of sec 69 are satisfy the person who is interested in paying such amount shall be entitled to recover the payment made by him.

Ex.:-The goods belonging to A were wrongfully attached in order to realize arrears of Government revenue due by G. A paid the amount tosave the goods from sale at was held that

A was entitled to recover the amount from G.

Obligation of person enjoying benefit of non-gratuitous act [70]

Conditions of section 70.

Sec.70 : 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 benefits thereof, then he is bound to make compensation to the other in respect of, or to restore the thing so done or delivered.

(a) A person has lawfully done something for another person or delivered something to another person.

(b) Such person must have acted voluntarily and non – gratuitously.

(c) The other person has enjoyed the benefit of the act done for him or the thing delivered to him.

Legal effect of sec 70.

If the conditions of sec70 are satisfied, there will be quasi contract between the parties.

Consequently, the party who has done something or delivered a thing shall be entitled to recover its value from the person who obtained the benefit of the same.

Ex.:-A a trades man leaves goods at B's house by mistake, B treat the goods as his own, He is bound to pay A for them.

A saves B's property from fire. A is not entitled to compensation from B if the circumstances show that be intended to act gratuitously.

Finder of Goods [71]

A person who finds goods belonging to another and takes them into custody, is subject to the same responsibility as a Bailee.

A finder of goods has same rights and duties at that of bailee.

Duty to take reasonable care of the goods

Duty not to use the goods for his own purpose.

Duty not to mix the goods with own goods

Right to recover expenses, reward, sell the goods

Ex.:-X a guest found a diamond ring at a birthday party of Y. X told Y and other guests about it. He has performed his duty to find the own. If he is not able to find the owner he can retain the ring as bales.

Money paid under a mistake or conversion [72]

Sec. 72: A person to whom money has been paid, or anything delivered by mistake or under coercion, must repay or return it.

Conditions of Sec. 72

(a) A person has (i) paid money to another person or

(ii) Delivered something to another person

(b) Such person must have acted

Under a mistake or under coercion.

Legal effect –quasi contract, recover its value from the person who obtained the benefit of same.

Example: (i) A and B jointly owe Rs.1,000 to C.A alone pays the full amount to C and B not knowing this fact, pays Rs.1,000 again to C.C is bound to repay the amount to B. (ii) A Railway Company refuses to deliver certain goods to the Consignee except upon payment of an illegal charge for carriage. The Consignee pays the sum charged in order to take delivery of goods. He is entitled to recover so much of the charge as was illegally excessive.

(Compensation for failure to discharge obligation created by quasi contract [73]

When an obligation created by quasi contract is not discharged the injured party is entitled to reline the same compensation from the party in default as if such person had, contracted to discharge is and broken his contract.

Quantum meruit: - [as much as is earned]

One party preventing the other:-If a party prevents the other party from completing his obligation under the contract the aggrieved party may claim payment on quantum merit for the part of contract already performed by him.

In case of void agreement or contract that becomes

Any person who has received any advantage under such agreement or contract is bound to restore if or to make compensation for it, to the person from who received it.

Ex):-A singer – two nights in every week during the next two month and B any ages to pay her Rs 100 for each night's performance on the sixth night, A willfully absent perfect. B must pay a for the five night on which she had sung.

(b) In case of Act preventing the completing of contract:-If a party does not complete the contract or prevents the other party to complete the contract the aggrieved party can sue or quantum meruit.

Ex.c:- owner – P write a book to be published as series in his magazine. After a few series were published the publication of the magazine was stopped. It was held that P could claim payment on quantum meruit for the part already published.

(c) In case of divisible contract :-(1) If the contract is divisible and

(2) If the party not at default has enjoyed benefit of the point performance.

(3) the contract is party performed

If the above condition an satisfied, the party at fault may claim on payment on quantum meruit for the part of contract performed by him be con recover such proportion of the contract price as the work done, by him bears to the work under the contracts.

(d) In case of indivisible contract performed completely but Badly.

Contract is indivisible, Lumpsum consideration.

Completely performed , Performed badly .

The party at fault may recover the contract price (Lump sum price) less the deduction made for doing badly.

Ex.:-X agreed to decorate Y's flat for a lump sum of Rs20,000. X did the complete work but Y complained of faulty work man stop. It costs Y another Rs3000 to remedy the defect. X could recover only Rs 17000 from Y.

(e) In case of Non – gratuitous Act – Three condition

(i) The thing must have been done or delivered lawfully.

(ii) The person who has done or delivered the thing must not have intended to do so gratuitously and (iii) The person from whom the act is done must have enjoyed the benefit of the act.

Ex.:-A, a tradesman leaves goods at B's shop be mistake B treats the good as his own. He is bound to pay A for them.

Difference between Quasi Contract and Contract

Matter	Quasi – contract	Contract.
Intentionally Form	It is not intentionally formed but law imposes upon the parties.	It is intentionally formed.
Essentials of contract	A quasi – contract does not possess all the essential of a valid contract.	It posses all the esentials.
Obligations	Obligations are implied upon by the law.	Obligation are created by parties
Foundation	It is founded upon the principle of equity.	It is founded on general Principle of law.

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SPECIAL CONTRACT (module-2)

BAILMENT

MEANING OF CONTRACT OF BAILMENT (Sec. 148) A 'bailment is the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them.

BAILMENT

Based on Benefit	**Based on Reward**
Exclusive benefit of Bailor	Gratuitous Bailment
Exclusive benefit of Bailee	Non gratuitous Bailment
Mutual Benefit of both	

J, neighbor of K, agrees to look after K's per while he is out of station. K is benefited.

Z lends a book to Y for reading. Y is benefited.

A hires furniture from B, by payment of hire charges, Both A and B are benefited.

Neither Bailor nor Bailee gets any remuneration,

e.g. A lends his book to his friend.

Bailor or Bailee gets remuneration e.g.

G gives his television set for repair to H, a technician. H gets paid for the job.

ESSENTIALS OF A VALID CONTRACTOF BAILEMENT (Sec.148)

Contract • There must be a contract. • The contract may be expressed or implied.

Goods Bailment can be made of goods only.

Delivery There must be delivery of goods by one person to another person.

Purpose of delivery The goods must be delivered for some purpose.

•The purpose may be expressed or implied.

Return or disposal of goods

• The delivery of goods must be conditional

• The condition shall be that the goods shall be – - returned (either in original form or in any altered from); or

- disposed of according to the directions of the bailor, when the purpose is accomplished.

MODES OF DELIVERY (Sec.149)

Actual delivery Transfer of physical possession of goods from one person to another .

Symbolic delivery Physical possession of goods is not actually transferred.

A person does some act resulting in transfer of possession to any other person.

Examples: (a) Delivery of keys of a car to a friend (b) Delivery of a railway receipt.

Constructive delivery

If – A person is already in possession of goods of owner.

Such person contracts to hold the goods as a bailee for a third person.

Then – Such person becomes the bailee, and the third person becomes the bailor.

CLASSIFICATION OF BAILMENT Gratuitous bailment

Bailment without any charges or reward, i.e. –

No hire charges are paid by bailee; and no custody charges are paid by bailor.

Non – gratuitous bailment

Bailment for some charges or reward, i.e.-

Hire charges are paid by Bailee; or , Custody charges are paid by bailer.

DUTIES OF A BAILOR (Sec. 150, 158, 159 and 164)

Disclose faults in goods [Sec. 150]: Bailer is bound to disclose to Bailee, faults in the goods bailed, of which he has knowledge. He should also disclose such information which – (a) materially interferes with the use of goods, or (b) expose the Bailee to extraordinary risk.

Liability for Defects in Goods In case of Gratuitous bailment In case of Non – Gratuitous Bailment

Bailor is liable only for those losses which arise due to non – disclosed risks.

Bailor is liable for damages whether or not he was aware of the existence of faults.

Example: A owning a motorcycle, allows B, his friend, to take it for a joy ride. A knows that its brakes were not proper but does not disclose it to B. B meets with an accident. A is liable to compensate B for damages. But when A had lent the motorcycle on hire, he is liable to B even if he did not know of the failure of his brakes.

Bear expenses [Sec.158] (Expenses of Bailment)

In case of Non – Gratuitous bailment **In case of Gratuitous bailment**

Bailor shall repay to Bailee, all necessary expenses incurred by him for the purpose of Bailment.

Bailor is liable to repay only extra ordinary expenses, and not the ordinary expenses.

Example: M lends his car to N and it runs out of petrol. N can recover the amount paid for refueling (ordinary expenses). If in case,the car suffers a breakdown, N can recover such charges as are paid

by him in bringing it back to condition (extra – ordinary expenses). He M hired the car to N, he shall be liable only for the repair charges, being extra ordinary expenses.

Indemnify the Bailee for defective title the bailor shall indemnify the bailee for any losscaused to Bailee due to defective title of bailor.

Indemnify the Bailee for premature termination

If , the bailment is gratuitous; and for a specific period.

Then – (a) the bailer may compel the Bailee to return the goods before expiry of the peiod of bailment; but (b) the bailer shall indemnify the Bailee for any loss incurred by the bailee.

Receive back the goods

• It is the duty of the bailer to receive back the goods, when returned by bailee.

• If the bailer wrongfully refuses to receive back the goods, he shall be liable to pay ordinary expenses of custody of goods incurred by the bailee.

DUTIES OF A BAILEE (Sec.151 to 157) (Take reasonable care)

• The bailee must take such case of goods as a man of ordinary prudence would take care of his own goods.

The bailee shall not be liable for any loss or destruction of goods, if –

(a) he is not negligent; or

(b) the loss was caused due to an act of God or other unavoidable reasons.

Not to make unauthorized use of goods

• The bailee must not make any unauthorized use of the goods.

• If the bailee makes any unauthorized use of goods, then –

(a) the bailment becomes voidable atthe option of the bailor; and

(b)The bailee shall be liable for any loss or damage even if such loss is caused due to an act of God or other unavoidable reasons.

Not to mix goods Goods are mixed with bailor's consent

The parties shall have a proportionate interest in such mixture.

Goods are mixed without bailor's consent, but the goods are separable

• The bailee shall pay the expenses of separation.

• The bailee shall pay damage incurred by the bailor.

Goods are mixed without bailor's consent, and goods are not separable

The bailee shall compensate the bailor for any loss caused to him.

Return the goods

• The Bailee must return the goods, without waiting for demand from bailer, if –

(a)The time specified in the contract has expired ; or

(b) The purpose specified in the contract is accomplished.

• If the goods are not so returned, then –

(a)The goods shall be at the risk of the Bailee;

(b) The Bailee shall be liable for any loss or damage, even if such loss is caused without any fault or negligence of the Bailee or due to an act of God or other unavoidable reasons.

Return accretion to goods

The Bailee must return to the bailer any accretion (i.e., addition) to the goods bailed.

Not to set up an adverse title

The Bailee has no right to allege that the bailer had no authority to bail the goods.

RIGHTS OF A BAILOR (Sec. 153, 159, 163, 180, 181)

Terminate the bailment

If – The Bailee does any act inconsistent with the terms and conditions of the contract of bailment.

Then – The bailment becomes voidable at the option of the bailor.

Demand back the goods

If – The bailment is gratuitous; and

For a specific period.

Then – (a) the bailer may compel the Bailee to return the goods before expiry of the period of bailment; and (b) the bailer shall indemnify the Bailee for any loss incurred by the Bailee.

File suit against wrongdoer

The bailer has the right to sue –

• A third party who does any damages to the goods; or

• A third party who deprives the Bailee from using the goods

Sue the Bailee The bailer may sue the Bailee to enforce his duties.

RIGHTS OF A BAILEE (Sec. 165, 166, 167, 170, 180)

Right to compensation

The Bailee has the right to be indemnified by the bailer, if –

• The bailer has no title to the goods; and

• As a consequence, the Bailee suffers some loss.

Return the goods

It is the duty as well as the right of the Bailee to return the goods to the bailer.

In case of joint bailer, the goods may be returned to any of joint bailers.

Recover charges incurred

Extra ordinary expenses

• The bailer is liable to pay the extraordinary expenses.

• The Bailee may recover the extraordinary expenses paid by him.

Ordinary expenses If the bailment is gratuitous, the bailer is liable to pay the ordinary necessary expenses,

i.e., the Bailee has the right to recover the ordinary necessary expenses incurred by him.

Suit for deciding the title The Bailee may apply to the Court for deciding the title to goods, if a person other than the bailer claims that the goods belong to him.

File suit against wrongdoer The Bailee has the right to sue –

• A third party who does any damages to the goods; or

• A third party who deprives the Bailee from using the goods.

Right of lien The Bailee has the right to retain the goods delivered to him until the charges due to him

are paid by the bailer.

TERMINATION OF BAILMENT.

Situation Explanation Example

Expiry of specified period. When bailment is for specific period.

Z lends a moped to Y for a period, it terminates on the expiry of the specified period. period of 3 months April – June. The Bailment terminates by the end of June.

Accomplishment of specified purpose

Where bailment is for a specified purpose, it terminates when such purpose is accomplished.

G hires tables and chairs, utensils, etc. from H for organizing his son's engagement. G shall return them once the engagement functions are over.

Bailee's act inconsistent with conditions

When bailee does some act which is inconsistent with the terms and conditions of bailment, the Bailor may terminate the bailment.

J gives his car to K keeping it in K's garage. K gives it to his son for racing. J can terminate the bailment.

Destruction of subject matter

When goods bailed are destroyed, Bailment comes to an end.

K hires a cycle from L. When the cycle is damaged beyond repair in an accident, bailment ends.

. **Gratuitous Bailment** Gratuitous Bailment can be terminated at any time.

Also, a Gratuitous Bailment ends by the death of either Bailor or Bailee. (Sec162)

Note :Where premature termination of bailment by the Bailor, causes loss to the Bailee exceeding the benefits derived by him, the Bailor shall indemnify the Bailee.

FINDER OF GOODS (Sec. 71, 168 and 169)

Finder of lost goods [Sec 71] A person, who finds goods belonging to another and takes them into his custody, is subject to the same responsibility as a Bailee.

Implied Agreement There is an agreement, implied by law between finder and owner of goods.

Duties of Finder A finder of lost goods is treated as Bailee of goods found. His duties are –

1. (a) To take initiative to find the real owner of the goods,
2. (b) To take reasonable care of the goods found,
3. (c) Not to put the goods found for his personal use, and
4. (d) Not to mix the goods found with his own goods.

Rights of Finder: Suit for specific reward [Sec.168] Right of Sale [Sec.169]

Finder of goods is not entitled to sue owner to compensate for trouble and expenses voluntarily incurred in –

(a) Preserving the goods, or (b) finding out the owner.

However, he is entitled to – If a thing which is commonly the subject of sale is lost, and

• Owner cannot be found with reasonable diligence, [or]

• Owner, if found, does not pay the lawful charges of the Finder.

Lien: Retain the goods against the owner till he receives such compensation

Suit: Sue the owner for payment of any specific reward offered by the owner for the return of goods lost, and retains the goods till payment of such reward.

Then, Finder of Goods is entitled to sell the same when – (a) the thing is in danger of perishing, or

(b) the thing is in danger of losing the greater part of its value, or (c) The lawful charges of finder, amount to of the value of the thing lost and found.

PLEDGE

MEANING OF 'PLEDGE', 'PAWNOR', 'PAWNEE' (Sec.172)

'Pledge' The bailment of goods as security for payment of a debt or performance of promise is called 'pledge'.

'Pawnor' The bailor in case of a pledge is called as 'pawnor'.

'**Pawnee'** The bailee in case of pledgeis called as 'pawnee'.

ESSENTIALS A VALID CONTRACT OF PLEDGE (Sec.172)

Contract • There must be a contract

• The contract may be expressed or implied.

Goods Pledge can be made of goods only.

Delivery There must be delivery of goods by one person to another person.

Purpose of delivery • The goods must be delivered for some purpose.

• The purpose must be to deliver the goods as security for

(a) Payment of a debt; or (b) performance of a promise.

Return of goods • The delivery of goods must be conditional

• The condition shall be that the goods shall be – returned (either in original form or in altered form); or,,- Disposed of according to the directions of the pawnor when the purpose is accomplished.

RIGHTS OF PAWNEE (Sec.173 and 176)

Right of Retainer [Sec.173] Pawnee may retain the goods pledged for –

(a) payment of the debt or the performance of promise,

(b) any interest due on the debt; and

(c) all necessary expenses incurred by him with respect to possession or for preservation of goods pledged.

Retainer for subsequent advances [Sec.174] (a) Where the Pawnee lends money to the Pawnor subsequently, after the date of pledge, it shall be presumed that the he has a right of retainer over the goods already pledged in respect of the subsequent lending also.

(b) This presumption can be made invalid only by an expenses provision to that effect.

Reimbursement of Expenses [Sec.175]

Where the Pawnee incurs extraordinary expenses to preserve the goods pledged with him, he is entitled to receive such amount from the Pawnor.

Rights in case of default by Pawnor [Sec.176]

(a) Suit : Pawnee may institute a suit against Pawnor when there is a default in payment of debt or performance of promise at the stipulated time.

(b) Retention / Sale of goods: Pawnee may – (a) retain the goods pledged as collateral security, or (b) sell the goods pledged by giving a reasonable notice to the Pawnor.

(c) Surplus / Deficit on Sale : When there is a surplus on sale, Pawnee shall pay the excess to the Pawnor. In case of deficit, Pawnor shall be liable for the balance amount.

(d) No Notice: Where the Pawnee does not give a reasonable notice to the Pawnor, the sale is valid, but Pawnee is liable to pay damages to Pawnor.

Right against true owner of goods [Sec.178A]

(a) Where the Pawnor has acquired possession of pledged goods, under a voidable contract u/s 19 or 19A but contract has not been rescinded at the time of pledge, the Pawnee acquires a good title to the goods, against the true owner.

(b) The title of Pawnee is good only where – (a) he had no notice of the Pawnor's defect in title and

(b) he acts in good faith.

Reasonable notice u/s 176 means that a notice of intended sale of the security by the Creditor within a certain date, so as to afford an opportunity to the Debtor to pay the amount within the time mentioned in the notice. Notice of sale is essential and a clause in the agreement excluding the requirement of Notice is inconsistent with the Act & is void and unenforceable.

DUTIES OF A PAWNOR (Sec.175)

Pay the debt The pawnor is liable to pay the debt or perform his promise as the case may be.

Pay deficit on sale If the Pawnee sells the goods due to default by the pawnor, the pawnor must pay the deficit.

Pay extra – ordinary expenses The pawnor is liable to pay to the pawnee any extraordinary expenses incurred by the Pawnee for preservation of goods.

Disclose faults in goods The pawnor is liable to disclose all the faults which –

(a) are material for use of the goods; or (b) may put the pawnee to extraordinary risks.

Indemnify the Pawnee If loss is caused to the pawnee due to defect in pawnor's title to the goods, the pawnor must indemnify the Pawnee.

DUTIES OF PAWNEE (Not to use the goods)

• The Pawnee has no right to use the goods

• However, he may use the goods, if he has been so authorized by the pawnor.

Return the goods The pawnee must return the goods if the pawnor pays the debt or performs his promise.

Take reasonable care The pawnee must take such care of goods pledged as a man of ordinary prudence would take care of his own goods.

Not to mix goods The pawnee must not mix his own goods with the goods pledged.

The Pawnee must return to the pawnor any accretion

RIGHTS OF A PAWNOR (Sec.177)

Redeem the goods pledged

Meaning of redemption Right to recover back the goods by making payment of the debt or performance of promise.

Time for redemption Where time of redemption is fixed, the pawnor may exercise redemption –

(a) Within the time so fixed; or

(b) Even after expiry of time so fixed, provided –

• The pawnee has not sold the good; and

• The pawnee pays the pawnee all expenses arising on account of his default.

Enforce pawnee's duties The pawnor has the right to enforce the duties of pawnee, if the pawnee fails to fulfill his duties.

Receive increase in goods The pawnor has the right to recover from pawnee any increase in goods pledged.

Right to receive notice of sale In case of default by the pawnor to pay the debt or perform his promise, the pawnee has the right to sell the goods, after giving a reasonable notice to the pawnor. If the pawnee fails to give notice, the pawnor has the right to recover the loss incurred by him.

Basis	Pledge	Bailment
1. Purpose	Pledge is bailment of goods to provide a security for a loan or fulfillment of an obligation.	Bailment may be for for a specific purpose, other than by way of providing security for a loan or fulfillment of an obligation
2. Sale of Goods	Pawnee, can do so by giving a notice to the pawnor.	Pledgee has a right of sale of goods pledged on default of Pawnor.
3. Use of Goods	Pledgee has no right of using goods pledged.	There is no right of sale to the Bailee. Bailee may either (a) retain goods, or (b) sue the Bailor for non – payment of his dues. Bailee can use the goods bailed as per terms of contract.

AGENCY

INTRODUCTION TO CONTRACT OF AGENCY (Sec.182)

Meaning of 'agent' An 'agent' is a person employed to –

- Do any act for another; or
- Represent another in dealings with third persons.

Meaning of 'principal' Principal' is the person –

- For whom an act is done by the agent; or
- Who is represented by the agent in respect of dealing with third persons.

Test of agency Where a person has the capacity to –

- Create contractual relations between the principal and a third party;
- Bind the principal by his own acts, there exists a relationship of agency.

CREATION OF AGENCY

By Operation of Law | By Express Agreement | By Implied Agreement | By Ratification of acts

(a) Estoppel, (b)Holding out (c) Necessity

SALIENT FEATURES OF AGENCY (Sec. 183, 184, 185 and 226)

Principal is liable for the acts of agent

• The principal is liable for all the acts of an agent which are lawful and within the scope of agent's authority.

• The contracts entered into by the agent on behalf of the principal have the same legal consequences as if these contracts were made by the principal himself.

Who may employ an agent? Any person may employ an agent if –

• He is of the age of majority; and

• He is of sound mind.

Who can be an agent?

• Any person may become an agent.

• Even a minor or a person of unsound mind can become an agent

Liability of agent

• Generally an agent is liable to the principal

• An agent is not liable to the principal if he is a minor or is of unsound mind.

Requirement of consideration

No consideration is necessary for creating an agency.

MODES OF CREATION OF AGANCY (Sec.187, 189, 196, 214 and 237)

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.

Implied agreement

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 isprevented 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.

Agency by necessity – Conditions

(i) There was an actual and definite necessity for acting on behalf of the principal.

(ii) The agent was not in a position to communicate with the principal.

(iii) The act was done for the purpose of protecting the interest ofhis principal.

(iv) The agent has exercised such reasonable care as a man of ordinary prudence would have exercised in his own case.

(v) The act was done bonafide.

Agency by operation of law Agency by operation of law arises where the law treats one person as an agent of another.

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.

KINDS OF AGENT.

A. Based on Authority

1. Special Agent	**2. General Agent**	**3. Universal Agent**
(a) Appointed to perform a particular transaction, sale of a house property.	Appointed to do all acts e.g. particular trade, business or employment.	Appointed to do all works for principal.
(b) Agent has limited authority	Authority is wide and continues till agency is terminated.	Authority is unlimited.
(c) Agent cannot bind Principal for acts of others.	All acts of Agent bind his principal provided that is legal.	Principal is bound by all Acts unless it is beyond the authority of agent.

B. Based on Nature of work .

1. Commercial or Mercantile Agents	2. Non – Mercantile Agents
(a) One who is authorized to sell goods or consign goods for the purpose of sale or to buy gods or to raise money on the security of goods.	Not engaged in business of selling & buying goods but act in their respective professional capacity.
(b) Includes Banker, Factor, Auctioneer, Broker, Commission Agent, & Del- Creder agent.	Includes Solicitors, Attorneys, C & F agent & Insurance agent.

DUTIES OF AN AGENT (Sec. 209 to 218)

1. To conduct the business in accordance with the directions given by the principal

2. To work with reasonable diligence, care and skill.

3. To render proper accounts to the principal on demand.

4. To communicate with his principal in case of difficulty and seek his instructions.

5. Not to deal on his own account unless all the material facts have been disclosed to the principal and consent of the principal has been obtained.

If the agent, without the knowledge of the principal, deals in the business of agency on his own account-**The principal has the following rights:**

(a) He may repudiate the transaction, if the agent dishonestly conceals any material facts or the dealings of the agent prove to be disadvantageous to him.

(b) He may claim from the agent the agency business other than the agreed remuneration.

6. Not to make any secret profit out of the agency business other than the agreed remuneration

7. To remit to the principal all the sums received in the principal's accounts in accordance with the terms and conditions of contract of agency.

8. Not to delegate authority or appoint sub – agent.

9. To protect and preserve the interest on behalf of the principal's representative in case of his death or insolvency of the principal.

10. Not to use information obtained in the course of the agency against the principal.

. RIGHTS OF AN AGENT (Sec. 217 to 225)

1. To retain money out of the sums received in agency business for advances made or expenses incurred and remuneration due to him.

2. To receive the agreed remuneration. If the remuneration is not fixed, then he has the right to recover such remuneration as is usual and customary in such business.

3. Right of lien on principal's goods, papers and other property until the amount due to him in respect of the same is paid.

4. An agent has the right to be indemnified by the principal against the consequences of all lawful acts done in exercise of the authority conferred on him.

5. An agent has the right to be indemnified by the principal against consequences of acts done in good faith that caused an injury to third person.

6. To claim compensation for injury caused because of principal's neglect or want of skill.

WHEN AN AGENT IS PERSONALLY LIABLE? (Sec. 230 and 231)

General Rule – No personal liability [Sec.230]

In the absence of contract to contrary, an Agent cannot –

(a) Personally enforce contracts entered into by him, on behalf of his Principal,

(b) Be held personally liable for them.

This is because the Agent merely acts on behalf of his Principal. Thus, he enjoys immunity from being personally sued.

Exceptions, i.e. Agent personally as well as joint & Severally Liable

The Agent is personally liable in the following cases –

1. Foreign Principal [Sec.230]: Where the contract is made by an Agent for the sale or purchase of goods for a merchant resident abroad.

2. Undisclosed Principal [Sec.230]: Where the Agent does not disclose the name of his Principal.

3. Principal cannot be sued [Sec.230]: Where the Principal, though disclosed, cannot be sued, e.g. Principal becoming of unsound mind, subsequent to appointment of agent.

4. Acting for a Principal not in existence: Where the Agent acts for a Principal who is not in existence at the time of making contracts, he shall be personally held liable e.g. Contracts entered into by Promoters before incorporation of a Company are made in their personal capacity and hence personally liable.

5. Agency coupled with interest [Sec.202] :Where the Agent has an interest in the subject matter of agency.

6. Agent guilty of Fraud [Sec.238] :Where an Agent is guilty of fraud or misrepresentation in matters that are outside the scope of his authority, he is personally liable, and do not affect his Principal.

7. Agent exceeds authority & act not ratified: Where an Agent acts either without any authority or exceeds his authority, he shall be held personally liable when the principal does not ratify his acts.

8. Agent receives or pays money: Where an Agent receives or pays money by mistake or fraud to a third party, he shall be personally liable to such third party. Also ha can personally sue the third party if the fraud or mistake is accountable to such third party.

9. Express Agreement for personal liability: Where an Agent expressly aggress to be personally bound.

10. Execution of Contract in his own name: Where an Agent executes a contract in his own name, without disclosing that he is acting as Agent for a Principal, he shall be personally liable, e.g. An Agent signs a Negotiable Instrument without making it clear that he is signing it as an Agent only, he shall be held personally liable on the same. He would be personally liable as Maker of P/N, even though he may be described as Agent.

11. Trade custom or usage: When trade usage or custom makes an Agent personally liable.

12. Agent with special interest: An Agent with special interest or with a beneficial interest, e.g. a Factor or Auctioneer, can sue and be sued personally.

13. Action against Agent or Principal [Sec 233] :Where the Agent is personally liable, a person dealing with him may hold - (a) either him or (b) his Principal or (c) both of them liable. The liability of Principal and Agent is “joint and several”.

14. Exclusive liability [Sec. 234] Where a person has made a contract with an Agent and –

• Induces such Agent to act upon it in the belief that only his principal would be held liable,

• Induces the principal to act upon it in the belief that only his Agent would be held liable.

Such Third person cannot later on, shift the liability on to –

• The Agent, or

• The principal, respectively.

AGENCY COUPLED WITH INTERST (Sec 202)

• When agency is created for securing some benefit to the agent over and above his remuneration as an agent, it is called as agency coupled with interest.

• The interest should exist at the time of creation of agency. If the interest arises after the creation of agency then it would not be called as agency coupled with interest.

• Agency coupled with interest cannot be terminated to the prejudice of such interest.

• Agency coupled with interest does not terminate even on the death or insanity of the principal.

• Thus, such agency is irrevocable to the extent of such interest.

IRREVOCABLE AGENCY (Sec.202 and 204) Agency coupled with interest Such agency cannot be terminated to the extent of such interest

Partly exercise of authority by the agent

Where the agent has partly exercised the authority, the principle cannot revoke the authority so far as regard such acts and obligation as arise from already done in the agency

Personal liability incurred by agent

Where the agent has incurred personal liability, the agency is irrevocable

DELEGATION OF AUTHORITY (Sec.190)

General rule The general rule is that an agent cannot lawfully employ another act, which he has expressly or impliedly undertaken to perform personally.

Exceptions

(a) There is a custom or usage of trade to that effect.

(b) Where power of the agent to delegate can be inferred from the conduct of the both the principle and the agent.

(c) When the principal is aware of the intention of the agent to appoint sub agent by the does not object to it.

(d) When principle permits appointment of a sub-agent.

(e) If the nature of the agency is such that the sub-agent is necessary

(f) Where the acts to be done is purely ministerial not involving confidence or use of discretion.

(g) Where unforeseen emergencies arise rendering appointment of a sub-agent necessary.

LEGAL RELATIONSHIP BETWEEN THE PRINCIPLE AND SUB-AGENT AND AGENT (Sec.190, 192 and 193)

If sub-agent is properly appointment

(a) Principal is bound to the third parties for the acts of sub-agent.

(b) The agent is responsible to the principal for the acts of sub-agent.

(c) The sub-agent is responsible to the agent for the acts done by him.

(d) The sub – agent is not responsible to the principle, except in case of fraud or willful wrong.

If sub – agent is not properly appointed.

(a) Principal is not bound to the third parties for the acts of sub – agent.

(b) The agent is responsible to the principle and third parties for the acts of sub – agent.

(c) The sub – agent is responsible to the agent for the acts done by him.

(d) The sub – agent is not responsible to the principle.

LIABILITY OF PRINCIPAL TO THIRD PARTIES FOR THE ACTS OF AGENT (Sec. 226 to 228)

Principal is liable for the acts of agent

•The principal is liable for all the acts of an agent which are lawful and within the scope of agent's authority.

• The contracts entered into by the agent on behalf of the principal have the same legal consequences as if these contracts were made by the principal himself.

When agent exceeds his authority

Whether the acts done within the authority are separable from the acts done beyond authority.

If yes – The principal is not bound for excess acts done by the agent.

If no – The principal is not bound by the transaction and the principal can repudiate the whole transaction.

TERMINATION OF AGENCY (Sec.201 to 210)

A. By the acts of parties

By agreement The principal and the agent may mutually agree to terminate the agency, at anytime.

By revocation • When the agency is coupled with interest, the principal cannot revoke the agency to the prejudice of such interest.

- The principal can revoke the authority at any time before, the authority has been exercised so as to bind the principal.

• The principal cannot revoke the authority given to his agent after the authority has been partly exercised.

• When agency if for fixed period, the principal must make compensation to the agent forpremature revocation of agency without sufficient cause.

• Revocation may be expressed or implied from the conduct of the principal

By the agent renouncing the business of agency

• Renunciation may be expressed or implied from the conduct of the agent.

• When agency is for fixed period, the agent must make compensation to the principal forpremature renunciation of agency without sufficient cause.

By operation of law

1. Completion of business of agency

2. Death or insanity of the principal or agent

3. Where the principal or the agent, being a company is dissolved

4. Destruction of subject matter of agency

5. Principal becoming insolvent

6. Expiration of period where agency was for a fixed period.

THE SALE OF GOODS ACT, 1930

COMMENCEMENT AND APPLICABLE

APPLICABILITY OF THE ACT

This act extends to whole of India, except the State of Jammu and Kashmir.

This act came into force w.e.f. 1 July 1930.

The 'contract of sale' includes both a sale as sell as an agreement to sell.

The word Indian was omitted the title of the Act in 1963 (22 sept.)

This Act does not deal with the sale of immovable property.

The transaction relating to immovable properties ,e.g., the sale, lease, gifts, etc., are governed by a separate Act known as 'Transfer of Property Act, 1882'. This Act is beyond the scope of this book.

DEFINITIONS (Sec. 2)

Buyer – Sec 2 (1) A person, who buys or agrees to buy the goods.

Delivery Sec (2) It means voluntary transfer of possession from one person to another.

Delivery State Sec 2(3) Goods are said to be in delivered state, when they are in such state that the Buyer would be bound to take the delivery of them in accordance with the contract.

Documents of title to Goods 2(4) A document of the title to goods may be described as any document used as proof of the possession or control of goods, authorizing or purporting to authorize, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented.

Section 2(4) of the Sale of Goods Act, 1930 recognizes the following as documents of title to goods:

(i) Bill of lading,

(ii) Dock warrant,

(iii) Warehouse keeper's certificate,

(iv) Railway receipt,

(v) Multi – modal transport document,

(vi) Warrant or order for the delivery of goods, and

(vii) Any other document used in the ordinary course of business as document of title (as described in the preceding paragraph).

Document of Title v. Document showing the title :

A document of title enables a person named therein to transfer the property by mere endorsement and delivery, whereas a document showing title does not confer any right to transfer by way of endorsement and delivery.

For example, a share certificate shows that the person named therein is entitled to the shares represented by it, but does not allow transfer of the shares by mere endorsement and delivery of the certificate.

Goods – Sec 2 (7) Goods mean every kind of movable property.

Other than **actionable claims and money**, and it includes. stock and shares, growing crops, grass and things attached to or forming part of land which are agreed to be severed before sale or under the contract of sale.

You may notice that 'money' and 'actionable claims' have been expressly excluded from the term 'goods'. 'Money' means the **legal tender**. 'Money' does not include old coins and foreign currency. They can, therefore, be sold or bought as goods. Sale and purchase of foreign currency is, however, also regulated by the **foreign Exchange Management Act,**

Actionable claims', like debts, are things which a person cannot make use of, but which can be claimed by him by means of a legal action. Actionable claims cannot be sold or purchased like goods, they can only be assigned, as per the provisions of Transfer of property Act.

Grass, growing crops, trees to be cut and their log wood to be delivered, malba of a building to be demolished, etc. are goods. Similarly, things like goodwill, copyright, trade mark, patents, water, gas electricity are all goods and may be the subject matter of a contract of sale.

Seller – Sec 2 (13) A person, who sells or agrees to sell the goods,.

Agreement to sell Where transfer of property in goods takes place at future date.

Sale Where transfer of property in goods takes place at the time of contract.

ESSENTIAL ELEMENTS OF VALID CONTRACT OF SALES

The following are the essentials of valid contract of sale:

There must be two parties, one seller and other buyer.

• Seller and buyer must be different.

• Part owner can sell goods to another part owner.

• Partners are not regarded as separate persons for the purpose of sale of the partnership property. They are the joint owners of the goods and as such they cannot be both sellers and buyers.

But, a partner may buy goods from the firm or sell goods to the firm.

There must be movable goods as subject matter of contract.

There must be a transfer of property in goods. It means general property.

There must be price involved. Price means money consideration for sale of goods.

•**Exchange of goods for goods is barter.**

If Exchange is for partly goods and partly for money it is sale.

All essential elements of valid contract must be observed.

The contract of sale can be entered into, expressly or impliedly.

Formation - The contract of sale may be formed by any of the following methods.

- Immediate delivery of goods.
- Immediate payment of price but delivery at some future date.
- Immediate payment of price and immediate delivery of goods.
- Delivery or payment or both made in installments.
- Delivery or payment or both will be made at future date.

TRANSFER OF "PROPERTY IN GOODS"

Property means general property in goods and not merely special property in goods. It means ownership of goods. Special property in goods means possession of goods.

Cases where property in goods is not transferred:

- Bailment
- Creating charge or pledge

Sale	**vs**	**Agreement to Sell**
Immediate transfer of ownership to buyer		Ownership remains with the seller
It is executed contract		It is an 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 receiver if buyer becomes insolvent before the payment of price	Delivery can be refused by seller if buyer becomes insolvent.

CLASSIFICATION OF GOODS

Existing goods Future goods Contingent goods

Existing goods

Existing goods are the goods, which are owned and possessed by the seller at the time of sale. Existing goods may be of three types;

(a) **Specific Goods**: The goods, which are identified and agreed upon by the parties at the time of contract of sale.

• It should be noted that the goods must be both identified and agreed upon.

(b) **Unascertained Goods:**

• These are the goods, are not identified and agreed upon at the time of the contract of sale.

• These goods are merely described by the parties at the time of contract of sale.

(c) Ascertained Goods:

• There are the goods, which are identified after the formation of contract of sale. When the un-ascertained goods are identified and agreed upon by the parties, the goods are known as ascertained goods.

Future Goods Future goods are those goods, which do not exist at the time of the contract of sale.

These goods are to be manufactured or acquired by the seller after the making of the contract of sale.

Future goods cannot be sold, but there can only be an agreement to sell.

Example: A, a manufacturer agrees to sell 5 tables and 50 chairs to B at Rs.10,000. B agrees to purchase it. However, tables and chairs are yet to manufactured by A.

Contingent goods It is a kind of future goods.

It is goods, the acquisition of which is contingent upon the happening or non –happening of an uncertain event.

Example: A agrees to sell the goods loaded on the ship "Titanic", which is coming from London to Bombay. The ship may or may not arrive. So, these goods will be called as contingent goods.

Basis	Futures Goods	Contingent Goods
1. Meaning.	Goods that are yet to be manufactured produced or acquired after making contract of sale.	Goods, the acquisition of which depends upon a contingency which may or may not happen.
2. Element of uncertainty	Acquisition of Future Goods does not depend upon and uncertainty.	The procurement of Contingent Goods is dependent upon an uncertain event.
3 Scope	Future Goods do not include Contingent Goods because of the element of certainty.	They are wider in scope, it includes future Goods.
4. Effect of Contract of	Where by a contract of Sale, the Seller purports to effect a present sale of future Goods.	There may be a contract of sale goods the acquisition of which by the seller depend on a contingency.

Price of Goods – Sec 9 – 10 Price means the money consideration for a sale of a Goods 2(10)

The following are the modes of determining price: [Sec. 9]

Price is specified under the contract. It is the most common method of determining the price. Here, parties decide the price in advance. Price may be determined as per the method specified in contract.

Example: Delivery of rice on 1st<u>December 2008 at the rate prevailing on that day.</u>

Price may be determined in accordance to custom and usage of trade. This method is applicable if parties regularly trade.

Where the price is not fixed as above, the buyer shall pay the seller a reasonable price.

'What is a reasonable price is a question of fact and circumstances.

Fixation of price by third party. (Sec. 10) If it is so, contract shall specify name of third party.

If third party fails to specify, contract is void but if goods are delivered to buyer and used by him, he is required to pay reasonable price.

If the third party is prevented from fixing price, defaulting party is liable for the damages.

Consequences of Destruction of Specific Goods – Sec 7 – 8

The consequences of destruction of specific goods can be discussed under the following three heads:

If goods perish before making the contract

• Contract is void – ab – initio, due to mistake as to existence of subject matter.

• It is to be noted that if the seller has knowledge about the destruction of goods, even then the enters into the contract of sale with buyer, then seller is bound to compensate to the buyer.

Where a part of the goods is perished before making contract

• If the goods was divisible, then the contract can be enforced party and if the goods was indivisible, then the contract becomes void – ab – inito.

Example: A contracted to sell one wagon containing 700 bags of groundnut toB. Unknown to A, 109 bags had been stolen at the time of sale, Therefore, A made a delivery of 591 bags.

Held, the sale was void.

If goods perish after the "Agreement to sell; but before' Sale [Sec. 8]

The contract is void if subsequently the goods have perished, and there is no fault on the part of the buyer or seller in perishing the goods.

Example: A horse was delivered upon trial for 8 days. However, the horse died within 8 days,without the fault of buyer or seller. Held, the seller must bear the loss, as the contract was void.

However, parties to the contract may provide otherwise also.

Section 7 and 8 are applicable only in case of specific goods.

Therefore, if unascertained goods are destroyed either before or after making the agreement, the contract shall not become void. Thus, in an agreement to sell unascertained goods, even if the entire stock of goods is destroyed, the contract that not become void and the seller will have to perform his promise.

Example 'A' agreed to sell to 'B' 100 bags of wheat from his stock of1,000 bags in his go down.

The entire stock was destroyed by fire. 'A' is bound to deliver 100 bags of wheat or else he will be liable for damages.

If the contract does not otherwise provide, then –

Stipulation as to time of payment is not deemed to be essence of contract.

Stipulation as to time of delivery is deemed to be essence of contract.

CONDITIONS AND WARRANTIES

Generally, at the time of sale, the seller makes some representation, statements of stipulations for the praise of his goods. Some of representations are in nature of opinion others are in nature of facts. Representation as to fact which becomes a part of contract of sale is called as ***stipulation.***

Stipulation may be condition or warranty depends upon its importance in relation to contract.

Stipulation which is essential to the main purpose of contract is known as condition.

Breach of condition gives the aggrieved party right to terminate the contract.

Stipulation which is collateral to the main purpose of the contract is warranty.

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

The conditions and warranties may be express or implied.

Express conditions and warranties are those, which the parties agree expressly, i.e. orally or in writing.

Implied conditions are those, which are implied by the law in the absence of any agreement to the contrary.

IMPLIED CONDITIONS

The following are the implied conditions which are contained in the Sales of Goods Act:

Conditions as to title – sec 14(a)

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

- In the case of sale, the seller has a right to sell the goods, and
- In the agreement to sell, the seller will have a right to sell the goods at the time of passing of ownership in goods.

If the title of seller out to be defective, the buyer must return the goods to the true owner and recover the price from the seller.

Conditions as to description – Sec 15
Where the goods are sold by description, there is an implied condition that the goods shall correspond to the description.

Example; A machine was sold. The buyer has not been the machine, but the seller described it as a new one. However, it was found to be a very old one. Held, the machine was not according to the description.

Sale by sample – Sec 17

Where the goods are sold by sample, the following are implied conditions.

- The bulk shall correspond to sample in quality.
- The buyer shall be given a reasonable opportunity to compare the goods with the sample.
- The goods shall be free from any defect, rendering them un – merchantable. It is to be noted that this implied condition applies only in the case of latent defects, i.e. those defects which cannot be discovered by ordinary inspection. In fact, such defects are discovered when the goods are put to

use or by examination in laboratories. The seller is not liable for apparent or visible defects which can be discovered by examination.

Sale by description as well as sample – Sec 15 If the sale is by sample as well as description, both conditions shall be satisfied. Goods must correspond with sample as well as description.

Example : A agreed to sell to C some oil described as "Foreign refined oil" and warranted only equal to sample. The goods supplied were equal to sample, but contained a mixture to hemp oil. Held, C could reject the goods.

Conditions as to quality and fitness for buyer's purpose –Sec 16 Where the buyer, expressly or impliedly, tells the seller the particular purpose for which he needs the goods and relies on the skill or judgment of the seller, there is an implied condition that the goods shall be reasonably fit for such purpose.

When the article can be used only for one particular purpose, the buyer need not informthe seller the purpose for which the goods are required.

Example: A purchased a hot water bottle from a chemist. While the bottle was being used by A's wife, it burst and injured A's wife. Held, the seller was liable for damages as the bottle was not fit for the purpose for which it was meant .

Exceptions to the implied condition as to quality or fitness

The condition as to quality or fitness' well not apply, if the buyer is suffering from an abnormality ,which renders the goods unsuitable for a particular purpose and the buyer does not inform the seller about that abnormally.

Example A purchased a coat. He had abnormally sensitive skin, By wearing the coat, he got skin complaint. Held, there was no breach of condition, as he had not disclosed the abnormally of his skin. Where the goods can be used for a number of purposes, the buyer should inform the particular purpose for which such goods were required. If the does not disclose, there is no such conditions of quality or fitness.

Conditions as to merchantability

Where goods are bought by description from a seller, who deals in goods of that description, there is an implied conditions that the goods shall be of merchantable quality.

Merchantability' means that there is no defect in the goods, which renders them unfit for sale. Thus, a watch that will not keep time and a pen that will not write cannot be regarded as merchantable.

Example: A radio set was sold to a layman. The set was defective. It did not work in spite of repairs, Held, the buyer could return the set and claim refund.

Condition as to wholesomeness In the case of eatable and food– stuff, there is an implied condition that the goods shall be wholesomeness, i.e., free from any defect which renders them unfit for human consumption.
Example: A Purchased milk from B, a milk dealer. The milk contained typhoid germs. A's wife on taking the milk got infected and died. Held, A was entitled to get damages .

IMPLIED WARRANTIES

The following are the implied warranties which are contained in the Sales of Goods Act:

In the absence to any contract showing contrary intention, there is an implied warranty that the buyer shall have and enjoy quiet possession of the goods. If the buyer is disturbed in the enjoyment of the goods, he can claim damages from the seller.

Warranty against encumbrances –Sec 14 Unless the circumstances of the case are such as to show a contrary intension, there is an implied warranty that the goods shall be free from any charge or encumbrance in favour of any party not declared to the buyer before or at the time contract is made.

However, there will not be any such warranty if charge is declared to buyer at the time of sale.

An implied warranty as to quality or fitness for a particular purpose may be annexed by the usage of trade. In case of sale of dangerous goods, the seller is under an obligations to warn the buyer about the probable danger. Failure to do so will make the seller liable to pay damages.

Example : A sold a tin of disinfectant to B, knowing that it was likely to be dangerous to the tin, whereupon disinfectant powder went into her eyes, causing her injury. Held, A was liable in damages to B, as he failed to warn B of the probable danger.

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.
Treatment	Breach of condition may be treated as breach of warranty	Breach of warranty treated as breach of condition.

DOCTRINE OF CAVEAT EMPTOR

The doctrine of 'Caveat Emptor' means "let the buyer beware".

It means that the buyer while purchasing goods must act with a "third eye and ear",

• He should be careful to see that the goods purchased will serve his purpose well.

• If the buyer is not careful and he finds later on that the goods do not serve his purpose, he cannot hold the seller liable for it.

• The seller is under no obligation to tell the defects of his articles.

However, in the following exceptions Doctrine of caveat emptor is not applicable:

• Implied conditions as to quality or fitness. It means when buyer has specified his purpose and relied on skill of seller, the doctrine of caveat emptor is not applicable.

When goods are sold by description, it should be of merchantable quality, In such case, doctrine of caveat emptor is not applicable.

In case of edible items, implied condition of wholesome ness is applicable and goods should are not fit for human consumption then buyer is not liable but seller will be liable.

MODULE-III

Consumer Protection Act- 1986.

Consumer Rights, Consumerism and Business

For consumer protection all stakeholders especially Business, Government and consumers are equally responsible. Business, comprising producers and all elements of distribution channels have to pay due regard to consumer rights.

Producer should not charge exorbitant prices in a seller's market.

Hoarding and black marketing is illegal.

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 Organisation 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:

1. Right to Safety
2. Right to be informed
3. Right to Choose **(Mentioned by President Kennedy)**
4. Right to be Heard
5. Right to Redress
6. Right to Healthy Environment **[Added by International Organization of Consumers Union=(IOCU)]**
7. Right to Consumer Education .

Some of the rights of consumers are

Right against exploitation by unfair trade practices.

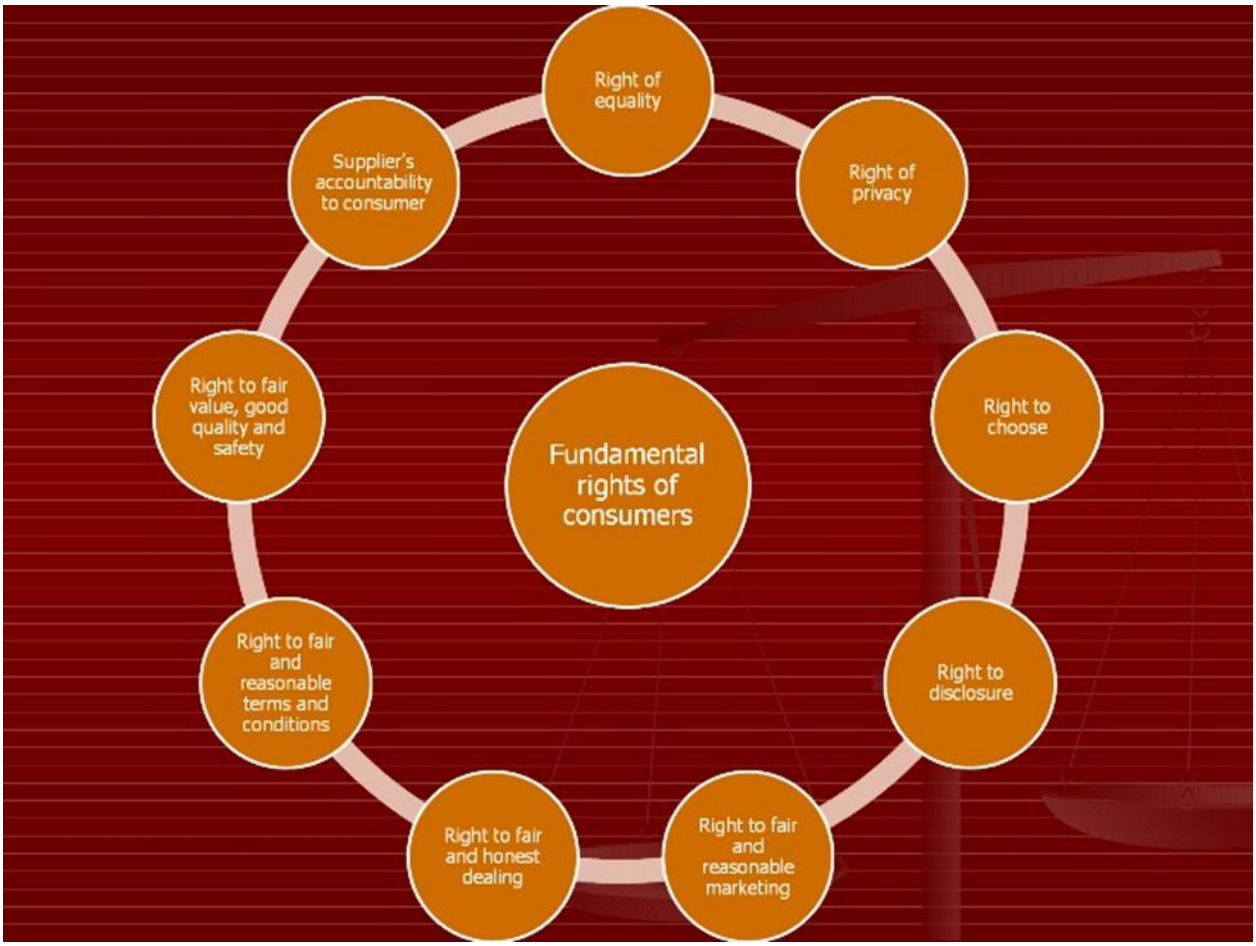
Right to protection of health and safety from goods and services that are available to the consumer.

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

Realising ecological responsibility , Consumer Solidarity.

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.

Objective: 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.

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.

Some of the problems faced by Indian consumers are:

Short supply of items of essential needs.

Lack of effective or workable competition.

Unfamiliarity of product features results in sale of substandard, inferior or even defective goods

Due to low literacy levels and unsatisfactory information flows, Indian consumers are not conscious of their rights.

Consumerism in India is not organised and developed.

Laws to safeguard interests of consumers are not effectively implemented

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. The main object of the legislature in the enactment of this act is to provide for the better protection of the interests of the consumer and to make provisions for establishment of consumer councils and other authorities for settlement of consumer disputes and matter therewith connected.

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.

The Consumer

The term 'consumer' is defined in Section 2(d) of the Consumer Protection Act, 1986 in two parts. One is a consumer who purchases goods, the other is a person who hires services.

"Consumer" means any person who:

Buys any goods for a consideration that has been paid or promised or partly paid and partly promised, or under system of deferred payment and includes any user of such goods (other than the person who buys such goods) for consideration paid or promised or partly paid or partly promised, or under any system of deferred payment when such use is made with the approval of

the buyer. But it does not include a person who obtains such goods for resale or for any commercial purpose.*

Hires or avails of any services for a consideration that has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any beneficiary or such services other than the person who hires or avails of the services for consideration paid.

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.

Aims and Objectives of the Act

The main objective of the Act (according to preamble to the Act) is to provide for better protection of the interest of consumers. Consumer councils and other authorities have been set up for settling the consumers' disputes and other matters. The objective of the Act of 1986 is as follows:

The foremost objective of the Consumer Protection Bill is to provide for better protection of the interest of the consumer and for that purpose, to make provisions for the establishment of Consumer Protection Councils and other authorities for the settlement of consumer disputes and for matters connected therewith.

The Act provided that for speedy and simple redressal at minimum expenses to consumer disputes, a quasi-judicial body is to be set up at the district, state and central levels.

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:

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;

The Central and state government.

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.

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.

Not to offer the hazardous goods for sale.

Consumer Protection Councils

These councils work towards the promotion and protection of consumers. Consumer councils are created to advise and assist the consumers in seeking and enforcing their rights. We have consumer protection councils both at the center level and state level.

Central Consumer Protection Council The Central government was authorised to establish the Central Council that has come to existence w.e.f. April 15, 1987 through the framing of the (Central) **Consumer Protection Rules (1987).**

Composition [Section 2 and Rule 3]

Member of the councils are selected from various areas of consumer interest, who are whenever possible, leading members of statewide organizations representing segments of the consumer public, so as to establish a broadly-based representative consumer council.

State Consumer Protection Council

Under Section 7 of the Act, state governments are required to establish their respective protection councils. The rules regarding its composition and other modalities are to be established by the respective state government. The objectives of the State Consumer Protection Council are described in Section 7 to be the same as those of the Central Council, namely, the points enumerated in Section 6.

Working Groups

The Central government may constitute from amongst the members of the Council a standing Working Group, under the Chairmanship of the Member Secretary of the Council. The Standing Working Group shall consist of not more than 30 members and shall meet when considered necessary by the Central government.

Consumer Disputes Redressal, Agencies Under the Consumer Protection Act, 1986 (CDRA)

Under this Act, Consumer Disputes Redressal Agencies 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 National Consumer Disputes Redressal Commission to be 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

The question of has to be jurisdiction considered with reference to the value, place, and nature of the subject matter:

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.

Jurisdiction of state council

1) Subject to the other provisions of this Act, the State Commission shall have jurisdiction:-

a) to entertain

i) complaints where the value of the goods or services and compensation, if any, claimed exceeds

rupees twenty lakhs but does not exceed rupees one crore; and

ii) appeals against the orders of any District Forum within the State; and

b) 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.

Jurisdiction of National Council Subject to the other provisions of this Act, the National Commission shall have jurisdiction— 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.

2) 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.

COMPANY LAW (1956)
Module - IV

About company law& company law board.

The Company Law Board is an independent quasi-judicial body in India which has powers to overlook the behaviour of companies within the Company Law. The concept of Company Law Board in its present form was introduced through an amendment to the Companies Act of 1956 in the year 1988.

It was constituted in its present form on May 31, 1991.Under Section 10E of the Companies Act, 1956 replacing the erstwhile Company Law Board which was primarily as a delegates of the Central government since 1.2.1964. The Company Law Board has framed Company Law Board Regulations 1991 wherein all the procedure for filing the applications/petitions before the Company Law Board has been prescribed.

The Central Government has also prescribed the fees for making applications/petitions before the Company Law Board under the Company Law Board (Fees on applications and Petitions) Rules 1991.

The Board has its Regional Benches at Mumbai, Calcutta, Chennai & New Delhi besides the Principal Bench at New Delhi and another Principal branch for Southern States at Chennai. The matters falling under section 247, 250, 269, and 388B are dealt with by the Principal Bench at New Delhi. The Regional Benches are mainly concerned with petitions/applications under sections 17, 18, 19, 58A(9), 58AA(1), 79/80A, 111,111A, 113/113(3), 117, 117C, 118(3), 141, 144(4), 163, 167, 186, 196, 219/219(4), 235, 237(b), 269, 284, 284(4), 304, 307,397/398, 408, 409, 614, 621A, 634A, of the Companies Act, 1956 and matters falling under Chapter VI of Part VI of the Companies Act, 1956 and Section 45QA of the Reserve Bank of India Act, 1934.

The matters falling under section 45QA of the Reserve Bank of India Act, which were earlier within the purview of the RBI, have now been entrusted to the Company Law Board. The Central Government have accordingly amended RBI Act giving powers to the Company Law Board to deal with the applications filed by the aggrieved depositors of Non-Banking Financial Companies (NBFCs) under section 45QA of the RBI Act, 1934. It is one of the branches of high court with the tribunal being the other one.

Company:

A company is an association or collection of individuals, people or *"warm-bodies"* or else contrived "legal persons" (or a mixture of both). Company members share a common purpose and unite in order to focus their various talents and organize their collectively available skills or resources to achieve specific, declared goals. Companies take various forms such as:

- Voluntary associations which may be registered as a Nonprofit organization
- A group of soldiers
- Business entity with an aim of gaining a profit
- Financial entities and Banks

A company or association of persons can be created at law as legal person so that the company is itself can accept Limited liability for civil responsibility and taxation incurred as members perform (or fail) to discharge their duty within the publicly declared *"birth certificate"* or published policy.

- Because companies are legal persons, they also may associate and register themselves as companies - often known as a Corporate group. When the company closes it may need a *"death certificate"* to avoid further legal obligations.

Meaning and definition

A company can be defined as an "artificial person", invisible, intangible, created by or under Law, with a discrete legal entity, perpetual succession and a common seal. It is not affected by the death, insanity or insolvency of an individual member.

United States of America

In the United States, a company may be a "corporation, partnership, association, joint-stock company, trust, fund, or organized group of persons, whether incorporated or not, and (in an official capacity) any receiver, trustee in bankruptcy, or similar official, or liquidating agent, for any of the foregoing."[2] In the US, a company is not necessarily a corporation.[3]

United Kingdom

In English law and in the Commonwealth realms a company is a body corporate or corporation company registered under the Companies Acts or similar legislation. Common forms include:

Private companies limited by guarantee Companies without share capital, often Non-profit entities

Private company limited by shares The commonest form of company

Public limited companies Companies, usually large, which are permitted to (but do not have to) offer their shares to the public, for example on the stock exchange

In Britain a partnership is not legally a company, but may sometimes be referred to informally as a company. It may be referred to as a firm.

Type A company limited by guarantee. Commonly used where companies are formed for non-commercial purposes, such as clubs or charities. The members guarantee the payment of certain (usually nominal) amounts if the company goes into insolvent/ liquidation, but otherwise they have no economic rights in relation to the company..

A company limited by guarantee may also be with or without having share capital**.**

A company limited by guarantee with a share capital. A hybrid entity, usually used where the company is formed for non-commercial purposes, but the activities of the company are partly funded by investors who expect a return. This type of company may no longer be formed, although provisions still exist in law for them to exist.

A company limited by shares. The most common form of company used for business ventures. Specifically, a limited company is a " company in which the liability of each shareholder is limited to the amount individually invested" with corporations being "the most common example of a limited company.". A company limited by shares may be a

Publicly traded company / Privately held company

A limited-liability company. "A company—statutorily authorized in certain states—that is characterized by limited liability, management by members or managers, and limitations on ownership transfer", i.e., L.L.C. structure has been called "hybrid" in that it "combines the characteristics of a corporation and of a partnership

or sole proprietorship". Like a corporation it has limited liability for members of the company, and like a partnership it has "flow-through taxation to the members" and must be "dissolved upon the death or bankruptcy of a member"for the debts (if any) .

An unlimited company with or without a share capital. A hybrid entity, a company where the liability of members or shareholders company are not limited. In this case doctrine of veil of incorporation does not apply.

Less common types of companies are:

Charter corporations. Before the passing of modern companies legislation, these were the only types of companies. Now they are relatively rare, except for very old companies that still survive (of which there are still many, particularly many British banks), or modern societies that fulfill a quasi regulatory function (for example, the Bank of England is a corporation formed by a modern charter).

Statutory Companies. Relatively rare today, certain companies have been formed by a private statute passed in the relevant jurisdiction.

Note that "Ltd after the company's name signifies limited company, and PLC (public limited company) indicates that its shares are widely held.

In legal parlance, the owners of a company are normally referred to as the "members". In a company limited or unlimited by shares (formed or incorporated with a share capital), this will be the shareholders. In a company limited by guarantee, this will be the guarantors. Some offshore jurisdictions have created special forms of offshore company in a bid to attract business for their jurisdictions. Examples include "segregated portfolio companies" and restricted purpose companies.

There are however, many, many sub-categories of types of company that can be formed in various jurisdictions in the world.

Companies are also sometimes distinguished for legal and regulatory purposes between **public companies** and **private companies**.

Public companies are companies whose shares can be publicly traded, often (although not always) on a regulated stock exchange.

Private companies do not have publicly traded shares, and often contain restrictions on transfers of shares. In some jurisdictions, private companies have maximum numbers of shareholders.

The following are the main characteristics and distinctive features of a company form of enterprise:

1. An Association of Persons: At least two persons or seven persons must come together to form a private or a public company respectively. A single individual cannot constitute a company. This is the reason why a company is called on Association of Persons.

2. Incorporated Association: A company comes into existence only after a certificate of incorporation has been obtained from the Registrar of Joint Stock Companies. Without incorporation, it has no legal existence.

3. Artificial Legal Person: A company is an artificial person created by law to achieve the objectives for which it is formed. A company exists only in the contemplation of law. It is artificial person in the sense that it is created by a process other than natural birth and does not possess the physical attributes of a natural person.

It is invisible, intangible, immortal and exists only in the eyes of law. It has no body, no soul and no conscience; it is regarded as an artificial person.

4. Distinct Legal Entity: A company is a legal person having a juristic personality entirely distinct and independent of the individual persons who are its members. It enjoys in many respects the right of a natural person in the eyes of law.

It can own property, conduct a lawful business, enter into contracts with others, buy, sell and hold property, all in its own name under its own seal. It can file a suit against others and can be sued against.

5. Perpetual Succession: A company has perpetual existence i.e. its existence is not affected by the death or lunacy or insolvency or retirement of its member.

Members may come and go, but the company continues its operations so long as it fulfils the requirements of the law under which it has been formed. Thus, a company has a perpetual succession irrespective of its membership.

6. Limited Liability: Liability of members of a limited company is limited to the face value of the shares subscribed by each of them. Members cannot be asked to pay anything more than what is due or unpaid on the shares of the company held by them.

In no case the personal property of the members of a company can be attached to satisfy the claims of creditors of a company.

7. Transferability of Shares: Members of a public limited company are free to transfer the shares held by them to any one members for either to purchase or sell the shares.

8. Diffused Ownership: Ownership of a company is in the hands of a large number of people. In case of Private Ltd. Company, the upper limit is up to 50. In case of a public Ltd. Company there is upper limit to the number of members.

Any individual is free to acquire the share of any company and become to the owner to that extent only. As such ownership is spread among a number of shareholders.

9. Separation of ownership and management: Shareholders are the owners of the company. Company's share holders are widely scattered. It is physically impossible for all of them to take patty in the management of the company.Being a share holder of a company does not give him the right to manage the affairs of a company.

The management is vested with the directors, who are the legal representatives of the shareholders. Thus owners of the company have no direct control over the management of the company.

10. Common Seal: A company being an artificial person cannot sign documents for itself whereas a natural person can do. The law has provided for the use of a common seal, with the name of the company engraved on it, as substitute for its signature.

The common seal of the company is approved in the first Board Meeting held immediately after the incorporation. Common seal has to be affixed on all important documents and contracts.

Any document bearing the common seal of the company duly signed by at least two directors will be legally binding on the company.

11. Corporate Finance: A company generally raises large amount of funds in form of issuing shares, debentures, bonds and incurring loans and advances from financial institutions. The total share capital of a company is divided into a number of shares which are held by individual members and institutions.

12. Object clause of Business: A company can conduct only such business as stated in its first Memorandum of Association. In order to bring any charges in its activity, the object clause must be changed.

13. Publication of Accounts: A joint stock company is required to file annual audited statements with the Registrar of Companies at the end of each financial year. The annual statements are available for inspection in the office of the Registrar.

Formation of company.

Formation process of private limited company.

The following article disucsses the process of forming a limited liability company in India. The laws relating to registration of a limited liability company in India is contained in Companies ACt, 1956. Registrars of Companies (ROC), appointed under Section 609 of the Companies Act, by the Ministry of Corporate Affairs (MCA), is vested with the primary duty of registering companies and of ensuring that such companies comply with statutory requirements under the Act. A company can be registered with the ROC of the state under whose jurisdiction the proposed company's registered office will be situated.

Pre- Registration Requirements

A Private Limited Company must have a Paid-up capital of INR 100,000 and a Public Limited Company must have a paid-up capital of INR 500,000. A Private Limited Company must have a minimum of two directors and two shareholders and Public Limited Company must have a minimum of three directors and seven shareholders.

The directors must have a valid Director Identification Number (DIN), allotted by the Ministry of Corporate Affairs. DIN is a unique identification number for an existing director or a person intending to become a director of a company. As per a recent amendment to the Companies Act 1956, DIN has become mandatory for all the directors. DIN is unique and specific to an individual therefore only one DIN is allotted per individual even if the individual serves as director at multiple companies. Application for the allotment of Director Identification Number (DIN) can be obtained online on MCA's website. Duly completed DIN Application Form must be mailed to MCA DIN Cell, along with a proof of identity and a proof of residence with colored photo. The photo affixed on the form and the proofs attached must be certified by a Public Notary or Gazetted Officer or any certified professionals. No fee is charged for issuing DIN. This process takes approximately 3 to 5 working days.

At least one of the directors should have a valid Digital Signature Certificate issued by the Certifying Authorities (CA) and approved by the Ministry of Corporate Affairs. The Information Technology Act, 2000 provides for use of Digital Signatures on the documents submitted in electronic forms, in order to ensure the security and authenticity of the documents filed electronically. Every document prescribed under the Companies Act, 1956, is required to be filed with the digital signature of the managing director or director or manager or secretary of the company. Therefore at least one of directors must have a digital signature. Any person may make an application to the Certifying Authority for the issue of a Digital Signature in such form as may be prescribed by the Central Government. Digital Signatures are typically issued with one year validity and two year validity. The issuance cost varies depending on the CA. Digital Signatures can be obtained within an hour.

Name Approval The first step in the process of formation is the application for MCA's approval of the desired name for the proposed company. Once, Company name is allotted, company registration documents are filed with respective ROC for registration. Application for name approval can be made online via MCA's portal MCA 21.Forms are available here**.**

The following particulars are required to complete the form

- Name of the proposed company
- Location of registered office of the proposed company
- Main Objectives of the business of the company

- Names of Subscribers to the Memorandum of Association
- Proposed Authorized Share Capital of the Company
- DIN & DSC

Select, at least four names (a maximum of Six names can be listed), and indicate the order of preference. Ensure that the company name is in accordance to the guidelines of the MCA, and also ensure the name is unique and does not resemble the name of any existing company in India. The company name must end with the words 'Private Limited' or 'PVT Ltd'. In order to have specific key words in the name such as corporation, International, Hindustan, Industries, India etc., the proposed company should satisfy a minimum authorized capital criteria. Duly completed Form 1A for name approval must be must be submitted to the concerned ROC along with a fee of INR 500/-.

The Registrar shall intimate, within two to three days, whether the proposed name is available or not. If the preferred name is not available apply for a fresh name on the same application. The name made available by the Registrar shall be valid for a period of six months. In case, if the company is not incorporated within this validity period, an application may be made for renewal of name by paying additional fees. Otherwise the name approval process has to be repeated by submitting new application after payment of requisite fees.

Preparation of Documents

After obtaining name approval from the ROC the following documents must be prepared to incorporate the company

- Memorandum of Association (MOA)
- Articles of Association (AOA)
- Form 1 – providing details of promoters of the company
- Form 18 – providing details of registered office of the company
- Form 32 – providing details Directors of the company

The Memorandum of Association is a document that sets out the constitution of the company. It contains, amongst others, the objectives and the scope of activity of the company and also describes the relationship of the company with the outside world.

The Articles of Association contain the rules and regulations of the company for the management of its internal affairs. While the Memorandum specifies the objectives and purposes for which the Company has been formed, the Articles lay down the rules and regulations for achieving those objectives and purposes. It also states the authorized share capital of the proposed company and the names of its first / permanent directors.

Professional help is to be sought in the drafting of the MOA and AOA, as it contains the governing policies, rules and by-laws of the proposed venture. The draft must be carefully vetted by the promoters before printing and stamping.

The MOA and AOA must be signed by at least two subscribers in his own hand, along with father's name, occupation, address and the number of shares subscribed for and witnessed by at least one person.

Then the MOA and AOA are required to be stamped & filed with the ROC. A stamp duty is required to be paid on the MOA and on the AOA. The stamp duty depends on the authorized share capital and varies between states. Details of applicable stamp duty can be obtained from here. eStamping facility is now available via MCA's portal. The document preparation process may take five to seven days.

Submission of Documents

Submit the following documents to the ROC with the filing fee and the registration fee:

- The stamped and signed Memorandum and Articles of Association (3 copies).
- Form-1, 18 & 32 in duplicate.
- Any agreement referred to in the Memorandum & Articles.
- Any agreement proposed to be entered into with any individual for appointment as Managing or whole time Director.
- Declaration of Compliance by an advocate or company secretary or chartered accountant or director, manager or secretary of the company
- Name availability letter issued by the ROC.
- Power of Attorney authorizing a person, on behalf of subscribers, any documents and papers filed for registration. The power of attorney should be given on Non-Judicial stamp paper of appropriate value and shall be submitted to the Registrar

Payment of Registration Fees

The fees payable to the Registrar at the time of registration of a new company varies according to the authorized capital of a company proposed to be registered. Payment for the Registration and Filing Fee must be made by Demand Draft/Banker's Cheque if it exceeds Rs.1000/.

Obtaining Certificate of Incorporation

The ROC will issue a Certificate of Incorporation after careful review of documents submitted. Section 34(1) cast an obligation on the Registrar to issue a Cert**ificate of** Incorporation, normally within 7 days of the receipt of documents.A Private Limited Company can start its business immediately on receiving the Certificate of Incorporation.

Doctrine of Indoor Management according to the Companies Act, 1956

The Doctrine of indoor management is a presumption on the part of the the people dealing with the company such as the shareholders that the internal requirements with regard to the articles of association and memorandum of association have been complied with.

The doctrine of indoor management helps in protection of external members from the company and states that the people are entitled to presume that the internal proceedings are as per the documents submitted with the registrar of companies.

They are not allowed to go into the procedural aspect, such as the fact that the internal proceedings might not happen regularly, or what are the proceedings before the directors, in an extraordinary general meeting.

Under the Indian law relating to companies, a public company is managed by a Board of Directors which is entrusted with the responsibility of managing the company in the most efficient and transparent manner.

However, in an era of recurring business scams, it would not be astonishing if the prospective shareholders feel insecure about investing in a particular company. Over the years, the shareholders have been given various tools to keep a check on the methods and practices adopted by the directors of a company for its internal management, but to what extent can one go in finding out about such methods and practices, is the

question to which the answer remains ambiguous. Nevertheless, some explanation in this regard can be sought in the Turquand's Rule or the doctrine of indoor management.

'Doctrine of Indoor Management', popularly known as the Turquand's Rule initially arose from 150 years ago in the context of the 'Doctrine of Constructive Notice'. The rule of the doctrine of indoor management is opposed to the rule of constructive notice. The latter seeks to protect the company against the outsider while the former seeks to protect the outsiders against the company.

The rule of constructive notice is confined to the external position of the company, and therefore, it follows that there is no notice as to how the company's internal machinery is handled by its officials. If the contract is consistent with the public documents, the person contracting will not be prejudiced by irregularities that may.be set the indoor working of company

The Doctrine of Indoor Management lays down that persons dealing with a company having satisfied themselves that the proposed transaction is not in its nature inconsistent with the memorandum and the articles, are not bound to inquire the regularity of any internal proceeding. In other words, while persons contracting with a company are presumed to know the provisions of the contents of the memorandum and articles, they are entitled to assume that the officers of the company have observed the provisions of the articles.

It is no part of duty of any outsider to see that the company carries out the requisite internal proceedings. It is important to note that the rule of constructive notice can be invoked by the company and it does not operate against the company. It operates against the person who has failed to inquire but does not operate in his favour.

DOCTRINE OF CONSTRUCTIVE NOTICE.

Every outsider dealing with a company is deemed to have notice of the contents of the Memorandum and the Articles of Association. These documents, on registration with the Registrar, assume the character of public documents. This is known as 'constructive notice' of Memorandum & articles of association.

The Memorandum and the Articles are open and accessible to all. It is the duty of every person dealing with a company to inspect these documents and see that it is within the powers of the company to enter into the proposed contract. Likewise special resolutions, when registered with the Registrar, become public documents, so that an outsider is on notice of their contents in the same way as he is of the Articles and the Memorandum. Thus, anyone dealing with a company is presumed not only to have read the Memorandum and the Articles but to have understood them properly.

The Articles of Association of a company contained a clause that all deeds and documents of the company shall be signed by the managing director, the secretary and a working director on behalf of the company only.

The doctrine of constructive notice of the Memorandum and Articles, however, is not a positive doctrine but a negative one. It is like doctrine of estoppels. It does not operate against the company. It operates only against an outsider dealing with the company. It prevents him from alleging that he did not know that the Memorandum and Articles rendered a particular act ultra vires the company.

The Rule of Doctrine of Indoor Management had its genesis in the English case *Royal British Bank v. Turquand[1]*. In this case, the directors of the company were authorized by the Articles to borrow on bonds such sums of money as should from time to time by a special resolution of the Company in a general meeting, be authorized to be borrowed. A bond under the seal of the Company, signed by two directors and the secretary was given by the Directors to the plaintiff to secure the drawings on the current account without the authority of any such resolution.

Then Turquand sought to bind the Company on the basis of that bond. Thus, the question arose whether the company was liable on that bond. The Court of Exchequer Chamber overruled all objections and held that the bond was binding on the Company as Turquand was entitled to assume that the resolution of the Company in general meeting had been passed.

The rule is based upon obvious reasons of convenience in business relations. Firstly, the memorandum and articles of association are public documents and are thus, open to public inspection. But the details of internal procedure are not open to public inspection. Hence an outsider "is presumed to know the constitution of a company; but what may or may not have taken place within the doors that are closed to him.

The rule is of great practical utility. It has been applied in a great variety of cases involving rights and liabilities. It has been used to cover acts done on behalf of a company by de facto directors who have, for instance, never been appointed, or whose appointment is defective, or who, having been regularly appointed, have exercised an authority which could have been delegated to them under the company's articles, but never has been so delegated, or who have exercised an authority without proper quorum etc.

Thus, where the directors of a company having the power to allot shares only with the consent of the general meeting, allotted them without any such consent; where the managing director of a company granted a lease of the company's properties, something which he could do only with the approval of the board; where the managing agents having the power to borrow without any such approval, the company was held bound.

Exception to the rules of doctrine of indoor management.

The rule is now more than a century old. In view of the fact that companies having come to occupy the central position in the social and economic life of modern communities, it was expected that its scope would be widened. But the course of decisions has made it subject to the following exceptions:

Knowledge of Irregularity

Where a person dealing with a company has actual or constructive notice of the irregularity as regards internal management, he cannot claim the benefit under the rule of indoor management. He may in some cases, be himself a part of the internal procedure. The rule is based on common sense and any other rule would "encourage ignorance and condone dereliction of duty".

Negligence

Where a person dealing with a company could discover the irregularity if he had made proper inquiries, he cannot claim the benefit of the rule of indoor management. The protection of the rule is also not available where the circumstances surrounding the contract are so suspicious as to invite inquiry, and the outsider dealing with the company does not make proper inquiry. If, for example, an officer of a company purports to act outside the scope of his apparent authority, suspicion should arise and the outsider should make proper inquiry before entering into a contract with the company.

Forgery

The rule in Turquand's case does not apply where a person relies upon a document that turns out to be forged since nothing can validate forgery. A company can never be held bound for forgeries committed by its officers. The leading case on this point is:

The plaintiff was the transferee of a share certificate issued under the seal of the defendant company. The certificate was issued by the company's secretary, who had affixed the seal of the company and forged the signatures of two directors. The plaintiff contended that whether the signatures were genuine or forged was a part of the internal management and, therefore, the company should be estopped from denying genuineness of the document.

But it was held that the rule has never been extended to cover such a complete forgery. Lord Loreburn said "It is quite true that persons dealing with limited liability companies are not bound to inquire into their indoor management and will not be affected by irregularities of which they have no notice. But this doctrine, which is well established, applies to irregularities which otherwise might affect a genuine transaction. It cannot apply to a forgery".

This statement has been regarded as a dictum, as the case was decided on the principle that the secretary did not have actual or implied authority to represent that a forged document was genuine and, therefore, there was no estoppel against the company. Hence, a general statement that the Turquand Rule does not apply to forgeries is not exactly warranted by the present authorities.

Representation through Articles

This exception deals with the most controversial and highly confusing aspect of the Turquand Rule. Articles of association generally contain what is called the "power of delegation".

Acts outside the scope of apparent authority

If an officer of a company enters into a contract with a third party and if the act of the officer is beyond the scope of his authority, the company is not bound. In such a case, the plaintiff cannot claim the protection of the rule of indoor management simply because under the Articles the power to do the act could have been delegated to him. The plaintiff can sue the company only if the power to act has in fact been delegated to the officer with whom he has entered into the contract.

Validity of acts of directors:

Acts done by a person as a director shall be valid, notwithstanding that it may afterwards be discovered that his appointment was invalid by reason of any defect or disqualification or had terminated by virtue of any provision contained in this Act or in the Articles:

Provided that nothing in this Section shall be deemed to give validity to acts done by a director after his appointment has been shown to the company to be invalid or to have terminated.

Lifting of Corporate veil:

Corporate veil: A legal concept that separates the personality of a corporation from the personalities of its shareholders,and protects them from being personally liable for the company’s debts and other obligations.

Lifting of Corporate veil:

At times it may happen that the corporate personality of the company is used to commit frauds and improper or illegal acts. Since an artificial person is not capable of doing anything illegal or fraudulent, the façade of corporate personality might have to be removed to identify the persons who are really guilty. This is known as ‘lifting of corporate veil’.

When the true legal position of a company and the circumstances under which its entity as a corporate body will be ignored and the corporate veil is lifted, the individual shareholder may be treated as liable for its acts.

The circumstances under which corporate veil may be lifted can be categorized broadly into two following heads:

1.Statutory Provisions 2.Judicial interpretation.

1) Statutory Provisions The Companies Act has been integrated with various provisions which tend to point out the person who's liable for any such improper/illegal activity. These persons are more often referred as "officer who is in default" under Section 2(60) of the Act, which includes people such as directors or key-managerial positions. Few instances of such frameworks are as following:-

A. Misstatement in Prospectus:- Under Section 26 (9), Section 34 and Section 35 of the Act, it is made punishable to furnish untrue or false statements in prospectus of the company. Through issuing prospectus, companies offer securities for sale. Prospectus issued under Section 26 contains key notes of the company such as details of shares and debentures, names of directors, main objects and present business of the company.If any person attempts to furnish false or untrue statements in prospectus, he is subject to penalty or imprisonment or both prescribed under the aforesaid sections, depending upon the case. Each of these sections create a distinct aspect, that which type of incorrect information furnishing would make such person liable for what amount or serving term.

B. Failure to return application money:- Under Section 39 (3) of the Act, against allotment of securities, if the stated minimum amount has not been subscribed and the sum payable on application is not received within a period of thirty days from the date of issue of the prospectus, then such officers in default are to be fined with an amount of one thousand rupees for each day during which such default continues or one lakh rupees, whichever is less.

C. Mis -description of Company's name:- The name of the company is most important. Usage of approved name entitles the company to enter into contracts and make them legally binding. This name should be prior approved under Section 4 and printed under Section 12 of the Act. Thus, if any representative of the company collect bills or sign on behalf of the company**,** and enter in incorrect particulars of the company, then such persons are to be held personally liable.

Similar things happened in the case Hendon vs. Adelman[6] where signatory directors were held personally liable for stating company's name on a signed cheque as "L R Agencies Ltd" while the original name was "L & R Agencies Ltd."

D. For investigation of ownership of company:- Under Section 216 of the Act, the Central Government is authorized to appoint inspectors to investigate and report on matters relating to the company, and its membership for the purpose of determining the true persons who are financially interested in the success or failure of the company; or who are able to control or to materially influence the policies of the company.

E. Fraudulent conduct:- Under Section 339 of the Act, wherever in case of winding up of the company, it is found that company's name was being used for carrying out a fraudulent activity, the Court is empowered to hold any such person be liable for such unlawful activities, be it director, manager, or any other officer of the company. In the case Delhi Development Authority vs. Skipper Construction Company (P) [7] it was stated that "where, therefore, the corporate character is employed for the purpose of committing illegality or for defrauding others, the court would ignore the corporate character and will look at the reality behind the corporate veil so as to enable it to pass appropriate orders to do justice between the parties concerned.

F. Inducing persons to invest money in company:- Under Section 36 of the Act, any person who makes false, deceptive, misleading or untrue statements or promises to any other person or conceals relevant data from other person with a view to induce him to enter into either of following:-

i. An agreement of acquiring, disposing, subscribing or underwriting securities.

ii. An agreement to secure profits to any of the parties from the yield of securities or by reference to fluctuations in the value of securities.

iii. An agreement to obtain credit facilities from any bank or financial institution.

In such circumstances, the corporate personality can be ignored with a view to identify the real culprit and make him personally liable under Section 447 of the Act accordingly.

G. Furnishing false statements:- Under Section 448 of the Act, if in any return, report, certificate, financial statement, prospectus, statement or other document required, any person makes false or untrue statements, or conceals any relevant or material fact, then he is liable under Section 447 of the Act.

If any document is sent from company to any place else, content of the documents are sent on the letter-head of the company, Now when this letter is received by any other person, he is supposed to be under assumption that he has received the letter from the company. This “any other person” here is persons appointed under the Act, such as Registrar of Companies (ROC). If he is furnished any false or untrue statement, that is also an offence. Thus, in order to determine the real guilty person, who allowed such documents being released in the name of the company is to be found by way of lifting the corporate veil.

H. Repeated defaults:- Under Section 449 of the Act, if a company or an officer of a company commits an offence punishable either with fine or with imprisonment and this offence is being committed again within period of 3 years, such company and officer are to pay twice the penalty of that offence in addition to any imprisonment provided for that offence.

Judicial interpretation:-

Though the Legislature has attempted to insert numerous provisions in the Act to make sure guilty person is pointed out as veil is pierced, there are instances where Judiciary has played it’s part better and kept a check that no guilty person, due to a mere technicality, walks free. Following are few such scenarios where Court may without any doubt lift the corporate veil:-

A. Tax Evasion:- It’s duty of every earning person to pay respective taxes. Company is no different than a person in eyes of law. If anyone attempts to unlawfully avoid this duty, he is said to be committing an offence. When strict rules are laid down for human being, why leave company?

One clear illustration was is Dinshaw Maneckjee Petit re[8] where the founding person of 4 new private companies, Sir Dinshaw, was enjoying huge dividend and interest income, and in order to evade his tax, he thus found 4 sham companies. His income was credited in accounts of these companies and these amounts were repaid to Sir Dinshaw but in form of a pretended loan. These loans entitled him to have certain tax benefits. It was rather held that purpose of founding these new companies was simple as means of avoiding super-tax.

B. Prevention of fraud/ improper conduct:- It is obvious that no company can commit fraud on it’s own. There has to be a human agency involved to commit such acts. Thus, one may make efforts to prevent upcoming frauds.

APPOINTMENT OF DIRECTORS. (PUBLIC COMPANY)

Section 252 provides that every public company (other than a public company which has become such by virtue of Section 43-A) must have at least 3 directors and every private company must have at least 2 directors. Subject to the minimum number of directors a company should have, the articles of a company may prescribe the maximum and the minimum number of directors for its board of directors. A company in a general meeting may by ordinary resolution increase or reduce the number of its directors within the limits fixed in that behalf by its article. A public company or a private company which is a subsidiary of a public company cannot increase the number of directors beyond the permissible maximum under its articles without the approval of the central government. However, no approval of the central government is required if such permissible maximum is twelve or less than twelve, and the increase in the number of its directors does not exceed twelve.

Appointment of Directors :

Director may be appointed in the following ways:

1. By the articles as regards first directors.

2. By the company in general meeting.

3. By the directors,

4. By third parties

5. By the principle of proportional representation

6. By the central government

1. First directors : The first directors are usually named in the articles. The articles may also provide that both the number and the names of the first directors shall be determined in writing by the subscribers to the memorandum or a majority of them. Where the articles are silent regarding the appointment of directors, the subscribers of the memorandum who are individuals shall be deemed to be the first directors of the company. They shall hold office until the directors are appointed at the first annual general meeting.

2. Appointment by company :

Appointment of subsequent directors is made at every annual general meeting of the company. Section 255 provides that not less than two-thirds of the total number of directors of a public company must be appointed by the company in general meeting. These directors must be subject to retirement by rotation. The remaining directors of such a company and the directors generally of a purely private company must also be appointed by the company in general meeting. In other words, not more than one-third of the total number of directors can act as non-retiring directors i.e not subject to retirement by rotation.

At every subsequent annual general meeting one-third of the directors of a public company are liable to retire by rotation. If the number is not three or a multiple of three, then the number nearest to one-third must retire from office. The directors to retire by rotation at every annual general meeting must be those who have been longest in office since their last appointment. As between person who become directors on the same day, those who are to retire will, subject to any agreement among themselves, be determined by lot.

At the annual general meeting at which a director retires, the company may fill up the vacancy by appointing the retiring director or some other person thereto. If the place of the retiring director is not so filled, and the meeting has not expressly resolved not to fill the vacancy, the meeting shall stand adjourned. If at the adjourned meeting also the vacancy is not filled, and the meeting has not expressly resolved not to fill the vacancy, the retiring director shall be deemed to have been re-appointed at the adjourned meeting unless:

1. At the meeting or at the previous meeting a resolution for the re-appointment of such director has been put to the meeting and lost;

2. He has by a notice in writing, addressed to the company or its board, expressed his unwillingness to be re-appointed;

3. He is not qualified or disqualified for appointment;

4. A special or ordinary resolution is necessary for his appointment or re-appointment.

A person other than a retiring director is also eligible for appointment to the office of director subject to his necessary qualification. A notice in writing signifying his candidature must be left at the office of the company at least fourteen days before the date of the meeting. The notice may be given either by the candidate himself or by his proposer. The company shall inform the members at least seven days before the meeting about the candidature. It is not necessary for the company to serve individual notices upon the members if the company advertises such candidature not less than seven days before the meeting, in at least two newspapers. One of the newspapers must be in English language and the other in the regional language of the place where the registered office of the company is located.

These provisions do not apply to a private company, unless it is a subsidiary of a public company.

A person who is being proposed as a candidate for the office of a director must sign and file with the company his consent in writing to act as a director if appointed. This requirement does not apply to a director retiring by rotating.

Appointment of directors of a public company must be voted individually by separate ordinary resolutions.

3. Appointment by Directors :

The directors are empowered to appoint

i) Additional directors.

ii) Alternate directors.

iii) Directors filling casual vacancy.

Additional Directors:

The board of directors may appoint additional directors from time to time. The number of directors and additional directors must not exceed the maximum strength fixed for the board by the articles. The additional directors shall hold office only up to the date of the next annual general meeting.

Alternate directors:

The board of directors may appoint an alternate director if authorized by the articles or by a resolution of the company in general meeting. An alternate director acts in the place of a director who is absent for more than three months from the state in which board meetings are held. He cannot hold office for a period longer than that permissible to the original director in whose place he has been appointed. He must vacate office on the return of the original director.

Casual vacancy:

Where the office of any director appointed by the company in general meeting is vacated before the expiry of his term, the directors may fill up the vacancy at a meeting of the board. The director so appoint will hold office

till the end of the term of the director in whose place he is appointed. These provisions are applicable only to a public company and a private company which is a subsidiary of the public company.

4. Appointment by third parties :

The articles may gives right to debenture-holders, financial corporations or banking companies who have advanced loans to the company to nominate director on the board of the company. The number of directors so nominated should not exceed one-third of the total strength of the board. They are not liable to retire by rotation.

5. Appointment by proportional representation : The articles of a company may provide that the appointment of not less than2/3 of the total number of director of a public company shall be according to the principle of proportional representation, either by the single transferable vote or by a system of cumulative voting or otherwise. Such appointments shall be made once in three years and interim casual vacancies may be filled up according to section 262.

6. Appointment by the central government :

According to section 408 of the companies act, the central government has the power to appoint directors for the purpose of prevention of oppression and mismanagement. It provides that the central government may appoint such number of directors on the board of the company as it may think fit to effectively safeguard the interest of the company, its shareholders, or public interest. Such an appointment shall be for a period not exceeding three years, and shall be made on the application of not less than 100 member or members holding not less than $1/10^{th}$ of the voting power of the company. Such directors will not be required to hold any qualification shares, not they shall be liable to retire by rotation.

Restriction on appointment of directors:

A person shall not be capable of being appointed a director by the articles or named as a director or proposed director of the company or intended company in a prospectus or statement in lieu of prospectus unless he or his agent in writing has signed and filed with the registrar consent in writing to act as such director and has:

(a) Signed the memorandum for his qualification shares; or

(b) Taken his qualification shares from the company and paid or agreed to pay for them; or

(c) Signed and filed with the registrar an undertaking in writing to take from the company his qualification shares and pay for them; or

(d) Field with the registrar an affidavit that his qualification share, if any, are registered in his name.

The provisions of section 266 do not apply to a private company.

Position of directors :

The exact position of directors with regard to the company is difficult to define. They are not servants of the company. Some describe the directors as trustees, agents or managing partner. Jessel, M.R. has observed, " it does not matter much what you call them so long as you understand what their true position is, which is that are merely commercial men managing a trading concern for the benefit of themselves and all other share-holders in it. They stand in a fiduciary position towards the company in respect of their posers and capital under their control."

Directors as agents :

Directors are in the eyes o law agents of the company for which they act. The general principals of the law of agency apply to the company and its directors. The position has long been established in Ferguson v. Wilson wherein cairns L. J. said.

Directors are merely agents of a company. The company itself cannot act in its own for it has no person; it can only act through directors and the case is as regard those directors merely the ordinary case of principal and agent. Whenever as agent is liable those directors would be liable; where the liability would attach to the principal and principal only, the liability is the liability of the company."

Where directors make contracts on behalf of the company they incur no personal liability provided they act within the scope of their authority. In such a case company alone would be liable.

Where directors contact in their own name, but really principal can sue the company as undisclosed the real principal can on the contract where director act in excess of their authority, in entering in to a contract, the company can be subsequent resolution ratify the act but if the director do something which is ultra vires the company, such s act cannot be ratified.

Director as Trustees :

Directors are not only agent but they are to some extent trustees also. They are trustees of the company's money or property which comes into their hands or which is actually under their control and also of the power entrusted to them.

As trustees of the company's money and property directors are accountable for their proper use and required to refund or restore the same if improperly used. Such property must be applied for the specified purpose of the company has not earned any profit; they are liable for the breach of trust.

Directors are the trustees of the powers conferred upon them and they must exercise those powers bonafide and for the benefit of the company as a whole.

Disqualification of directors :

The circumstances in which a person cannot be appointed as a director of a company are enumerated in section 247. According to this section, a person cannot be appointed as a director of a company, if

(i) He has been found to be of unsound mind by a competent court and the finding is in force;

(ii) He is an undischarged insolvent;

(iii) He has applied to be adjudicated as an insolvent and his application is pending;

(iv) He has been convicted of an office involving moral turpitude and sentence to imprisonment for not less than 6 months and a period of 5 year has not elapsed since the expiry's of his sentence;

(v) He has not paid any call in respect of share of the company held by him for period of six month from the last day fixed for the payment;

(vi) He has been disqualified by an order of the court under section 203, of an office in relation to promotion, formation and management of the company or fraud or misfeasance in relation to the company.

The central government may by notification in the official Gazette remove the disqualification enumerated in clauses(iv) and (v) above.

A private company which is not a subsidiary of a public company may be its articles provide for additional grounds for disqualification.

Restriction on number of Directorship :

No person can be a director in more than twenty companies. The following companies of which a person may be director:

(a) a private company which is neither a subsidiary nor a holding company of a public company;

(b) an unlimited company;

(c) an association not carrying on business for profit or which prohibited the payment of a dividend;

(d) a company in which such person is only an alternate director.

Where a person already holding the office of director in 20 companies is appointed as a director of any company, the appointment will not take effect unless such person has with in fifteen days thereof, effectively vacated his office as a director in any of the companies in which he was already a director. His new appointment will become void if he does not make a choice within fifteen days as aforesaid.

Any person who holds office or act as a director or more than 20 companies in contravention of the above provision shall be punishable with fine which may extend to Rs5, 000 in respect of each of those companies after the first 20

Vacation of office by Directors The office of a director shall become vacant if

(a) he fails to obtain or ceases to hold the share qualification required of him by the articles of the company;

(b) he is found to be of unsound mind by a component court;

(c) he applies to be adjudicated an insolvent;

(d) he is adjudged an insolvent;

(e) he is convicted by a court of an offence involving moral turpitude and sentence to imprisonment for not less than 6 months;

(f) he fails to pay any calls on the shares held by him within six months from the date fixed for payment; unless the central Government has by notification in the official Gazette removed this disqualification;

(g) he absent himself from three consecutive meetings of the board of directors or from all the meetings of board for a continuous period of 3 months whichever is longer without obtaining leave of absence from the board;

(h) he (whether by himself or by any person for his benefit or on his account) or any firm in which he is a partner or any private company of which is a director; accepts a loan or any guarantee or security for a loan from the company is contravention of section 295;

(i) he does not disclose to the board of directors of his interest in any contract or proposed contract with the company;

(j) he is restrained by court from being a director for committing fraud or misfeasance in relation to the company under section 203;

(k) he is removed by the company in general meeting in pursuance of section 284;

(l) Having been appointed a director by virtue of his holding any office or the other employment in the company, he ceases to hold such office or other employment in the company.

A person who acts as a director knowing fully well of his disqualification is subject to a penalty which may extend to Rs. 500 for each day on which he so acts as a director.

A private company which is not a subsidiary of a public company may by its articles provide for additional ground for vacating the office of a director.

Removal of directors :

A director of a company can be removed by

(a) shareholders (b) central government, (c) the court

Removal by shareholder : Section 284 empowers the company to remove a director by ordinary resolution before the expiry of his period of office except in the following cases:

(a) A director appointed by the central government under section 408.

(b) A director in case of a private company, holding office for life on the 1st day of April 1952. (A director for life subsequent to that day may be removed).

(c) Director appointed in accordance with the principal of proportional representation, under section 265. This is to ensure that the directors appointed by the minority are not removed by a bare majority.

Special notice is required of any resolution to remove a director or to appoint somebody in his place at the meeting at which he is removed. On receipt of such notice, the company will immediately send a copy thereof to the director concerned. He may make any representation in writing and the copy of such representation may be sent by the company to every member. Where the copy of the representation is not sent to the members, in that case the director concerned may require the representation to be read at the meeting.

A vacancy created by the removal of a director as aforesaid can be filled up at the meeting at which he is removed provided special notice of the proposed appointment was also given. The director so appointed shall hold office till the date the director removed would otherwise have hold office. If the vacancy is not filled, it shall be filled up as casual vacancy except that the director removed shall not be re-appointed.

The director so removed is entitled to claim compensation or damages for branch of contract.

Removal by the central government :

A director can also be removed at the initiative of the central government. The companies act enables the central government to remove managerial personnel (including a director) from office on the recommendation of the high court. The central government may refer to the high court cases against managerial person on any of the ground mentioned in section 388-B. Every such reference will be made in the form of an application which must contain a statement of material facts. The person against whom such reference is made must be joined as a respondent to the application.

The High court in the interests of creditors, members or the publish suo motu or on the application of the central government, may his duties until further orders direct the respondent not to discharge any of his duties until further orders. The court may also appoint a suitable person in place of the respondent. Every person so appointed is deemed to be a public servant.

At the conclusion of hearing of the case, the high court shall record its decision stating specifically whether or not the respondent is a fit and proper person to hold the office of director. If the finding of the high court is against the respondent the central government shall by order remove such a person from office.

The person who is so removed cannot hold office of a director for a term of five years unless the period is remitted. The person removed cannot claim any compensation for loss or termination of office.

Removal by the court:

On an application to the court for prevention of oppression and mismanagement the court may terminate or set aside or modify any agreement between the company and the managing director, or any other director or manager. On such termination, the director cannot serve the company in a managerial capacity for a period of five years from the date of the order of termination, without the permission of the court. The director on removal cannot sue the company for damages or compensation for loss of office.

PRIVILEGES OF A PRIVATE LIMITED COMPANY

Section	***Description of the matter***
3(1)(iii)	A Private Company need to have Minimum paid-up capital of Rs. 1 lakh as against Rs. 5 lakhs for Public Company.
12(1)	A Private Company can be formed by just two persons as against minimum seven persons required for incorporation of a Public Company.
58A	Deposits taken by Private Company from its members are exempt from the rigors of this Section. As per the provisions of this Section read with rule 2(b) of the Companies (Acceptance of Deposits) Rules, 1975 — amount received from its shareholders by a Private Company (provided the shareholder concerned furnishes at the time of giving the money to the Company, a declaration that the amount is not being given out of funds borrowed or accepted from others) is not included in the meaning of deposit. If the depositor ceases to be a shareholder, the deposits made by him cease to qualify for exemption from the date of such cessation
70(3)	A Private Company need not file Statement in lieu of Prospectus with ROC.
77(2 & 3)	There is no prohibition on a Private Company, which is not a subsidiary of a Public Company, to provide financial assistance to anyone for purchasing or subscribing for its own shares or of its holding Company.
81	A Private Company including subsidiary of a Public Company can issue its further shares to any person in any manner as it thinks best in its own interest
85 to 90	The Provisions of these Sections deals with kinds of share capital and that voting rights should be proportionate to the paid-up capital, prohibiting disproportionately excessive voting rights. These Sections are not applicable to a Private Company unless it is a subsidiary of a Public Company and such Company may issue share capital of any kind and with such proportionate or disproportionate or other voting rights as it may think fit.
108, 109, 110	The provisions of these Sections are about transfer of shares and debentures which shall not prejudice any power of a Private Company under its Articles to enforce the restrictions in rejecting a particular transfer of shares of the Company.

111(13)	The right of appeal to the Company Law Board against rejection of a transfer of shares is not available as long as the Private Company is only enforcing the provisions of its articles in rejecting a particular transfer. It appears from this section that a right of appeal will be available where the rejection is outside the provisions of the Private Company's Articles. The right of appeal is also available where there is transmission by court sale or sale by other public authority [s. 111(11)]
149	Procedure for obtaining Certificate of Commencement of Business do not apply to a Private Company. A Private Company can commence its business as soon as the Certificate of Incorporation is issued by the Registrar of Companies.
165	Private Company is not required to hold statutory meeting or prepare any statutory report.
170 to 186	The Provisions of these Sections relating to General Meetings applies to a Private Company unless in any particular Section it is specifically expressed that the applicability is not intended or unless the Articles of a Private Company which is not a Subsidiary of Public Company make any other provisions in respect of any of the matters covered by these Sections. Relaxation in the length of Notice for calling General Meeting, contents and manner of Service of Notices, Explanatory Statements, Quorum for meeting, Chairman of meeting, Restrictions of voting rights, etc. can be made to the extent to which the Company makes provisions in its Articles.
192A	Passing of resolution by Postal Ballot is not relevant for Private Company.
198	Ceiling on overall managerial remuneration not applicable to a Private Company. A Private Company, which is not subsidiary of a Public Company, may remunerate those in management, by such higher percentage of profits or in any manner as it may deem fit.
204	Restrictions on appointment of any firm or body corporate to office or place of profit is applicable to a Private Company which is not a subsidiary of Public Company.
220	Only the Member of Private Company which is not a subsidiary of Public Company is entitled to inspect or obtain copies of Profit and Loss Account of the Company .
224(1B)	The ceiling on the number of Companies an Auditor can audit, does not include audit of Private Limited Companies.
252	Minimum Directors for a Private Company is 2 (two) against 3 (three) in case of Public Co.
255 & 256	The Provisions of appointment of Directors and proportion of those who are liable to retire by rotation are not mandatory to a Private Company which is not a subsidiary of a Public Company
257	The provision requiring to give 14 days notice by new candidates seeking election as directors and depositing of certain amount (Rs. 500) are not mandatory for Private Company which is not a subsidiary of Public Company.

259	Central Government approval for increasing number of directors beyond the permissible maximum (presently 12) not required for Private Company which is not a subsidiary of Public Company.
262	The provision relating to manner of filling casual vacancy among directors and the duration of the period of office of those so appointed do not apply to Private Company which is not a subsidiary of Public Company.
263(1)	Appointment of two or more persons as directors by a single resolution can be done by Private Company which is not a subsidiary of Public Company.
264	Filing of consent of candidate for directorship with the Registrar of Companies is not applicable to Private Company which is not a subsidiary of Public Company.
266	Restrictions on appointment of director and subscription to qualification shares are not applicable to Private Company
268, 269	Central Government approval for amendments relating to appointment/re-appointment of a Managing Director/Whole-time Director/not liable to retire by rotation is not required by a Private Company which is not a Subsidiary of a Private Company.
270-273	Requirements of qualification shares holding by directors the time within which the qualification shares to be acquired and filing of a declaration by each director of the qualification shares held, is not applicable to Private Company
274(1)(g)	The disqualification under this Section does not include directorships of Private Company
274(3)	A Private Company which is not a subsidiary of a public Company may in its Articles provide special grounds for disqualification for appointment of person for the office of a Director.
275 to 279	The Directorships of Private Companies are not to be considered while calculating the limit on number of Companies in which a person can be director.
283 (3)	A Private Company may in its Articles provide special grounds for vacation of office of a Director .
292A	Provisions relating to formation of Audit Committee are not applicable.
293	Restrictions on certain powers of Board of Directors regarding selling, leasing, remitting or giving time for payments of debts, investing or borrowing moneys, or contributing to charities other than for political purpose are not applicable to a Private Company which is not a subsidiary of a Public Company
295	Restrictions on loans to directors/relatives, etc. does not apply to Private Company
300	No restrictions on interested directors from participating in the proceedings of the Board and exercising their votes are applicable to a Private Company which is not a subsidiary nor a holding Company of a Public Company

309, 310, 311	A Private Company which is not a subsidiary of a Public Company, is free from restrictions on payment of remuneration to the directors or increase in their remuneration. The procedures like filing Form 25C not required in case of Private Company
317	Restriction on period of appointment of managing director/manager for more than 5 years at a time do not apply to Private Company unless it is a subsidiary of a Public Company.
349, 350	Provision relating to the determination of net profits and ascertainment of depreciation shall not apply to a Private Company.
372A	Restrictions on giving loans or guarantees to other Companies or on making investment in the shares of other Companies do not apply to Private Company unless it is a subsidiary of a Public Company.
386, 387, 388	No. of Companies in which a person may be appointed as manager, the remuneration of a manager and the application of Sections 269, 310 to 312 and 317 in relation to managers do not apply to a Private Company unless it is a subsidiary of a Public Company.
409(3)	Powers given to the Central Government to prevent change in the Board of Directors are not applicable to a Private Company unless it is a subsidiary of a Public Company
416(1)	Restrictions on Contract by agents of the Company in which the Company is the undisclosed principal shall not apply to a Private Company which is a not a subsidiary of a Public Company.

Procedure for appointment of director (PRIVATE COMPANY)

1.	In case of a Private Company which is not subsidiary of a Public Company, the provisions of this section are not applicable and the appointment will be governed as per the Articles of Association of the Company. (Procedure for alteration of Articles of Association)
2.	Ensure that the persons to be appointed must have [Director Identification Number] (Section 266A) before being appointed as director.
3.	Notice must be given to the Company regarding proposal for appointment of a person as a director not less than 14 days before the General Meeting.
4.	Ensure that the aforesaid notice is not given by a person who is a retiring director. The notice must be given by a member of the company with a deposit of Rs. 500/- per candidate which will be refunded in case the candidate is elected. Alternatively, the person proposed to be appointed as director may himself give notice of his candidature as aforesaid.
5.	There is no prescribed form for this [notice].
6.	Obtain a [written consent] [Section 264(1)] from the person who is to be appointed as Director unless the individual himself notified his candidature.
7.	Inform all the members about the aforesaid candidature not later than 7 days before the meeting either by individual notices or by advertisement of this fact in at least two newspapers circulating in the place where the registered office of the company is situated, of which one must be in English and the other in regional language of that place, both the newspapers must have vide circulation. (Section 257 Provisos)
8.	In case of listed companies forward three copies of this notice to the stock exchange with which the shares of your company are listed. [Clause 31(c) of the Standard Listing Agreement]

9.	Hold and convene a General Meeting and pass an [Ordinary resolution], [Section 189(1)] if the Articles of Association of your company require passing of Special resolution for such appointment, then pass a special resolution with three-forth majority [Section 189(2)]. In case the of Special resolution see [Section 192]
10.	In case of listed companies send 3 copies of the notice and a copy of the proceeding of the General meeting to the Stock Exchange with which the shares of your company are listed. [Clause 31(c) & (d) of the Standard Listing Agreement]
11.	Such Director need to make a [intimation] with in twenty days to the other companies in which he is already a director, Managing Director, manager, Secretary. (Section 305).
12.	File [e-form no 32] with the concerned ROC within 30 days from the date of Appointment.
13.	Pay the requisite fee through Credit Card / by cash / by cheque in favour of "MCA Collection Account ICICI Bank" at the prescribed rates (Fee Calculator)
14.	Make necessary entries in the Register of Directors and in the Register of Director's Shareholding [section 303(1) & 307].
15.	If default is made in complying with the aforesaid requirements, the company and every officer of the Company who is in default will be punishable with fine upto Rs. 500/- for every day during which the default continues in case of contravention of [Section 303 (1)] and in case of contravention of [Section 307(1)] with fine upto Rs. 50,000/- and also with a further fine of upto Rs. 200/- for every day during which the default continues [Section 303(3) read with Section 307(8)]
16.	Refund the deposit of Rs. 500/- mentioned in point 4 to the person who has given the notice of candidature of a director only when he is appointed in the General Meeting and not otherwise.
17.	Notify the Stock Exchange with which shares of the Company are listed about the change in the company directors [Clause 30(a) of the Standard Listing Agreement]

NOTE

Section 257 provides for the right of persons other than the retiring directors to stand for directorship, and provides for the machinery for the election of such persons. It enables a person to stand for directorship at any general meeting and not necessarily only at an annual general meeting.

Any director retiring by rotation at an annual general meeting may be re-appointed at that meeting. This simply requires a recommendation by the Board of directors to the members of the company, which can be given by including in the notice of the annual general meeting under 'Ordinary Business' an item proposing the re-appointment of such director. However, the company at the annual general meeting can appoint some other person instead of the retiring director [section 256(3)]. In this case, the provisions of section 257 must be complied with.

Likewise, if a person, who is not a retiring director or who holds the office of director but was not appointed at an annual general meeting, is to be appointed as a director at an annual general meeting, the provisions of section 257 must be complied with.

Thus, the provisions of section 257 must be complied with when a person who is not a retiring director, is to be appointed as a director at any general meeting. The expression "retiring director" means a director retiring by rotation at an annual general meeting pursuant to the provisions of section 256.

Section 257 is not applicable to a private company which is not a subsidiary of a public company.

An essential pre-requisite for a retiring director to be re-appointed as director (whether to fill up the place of the retiring director or otherwise) as laid down in section 257(1), is that the company should have received a notice proposing a person as a candidate for directorship, to be appointed at the annual general meeting. This notice should be given to the company either by the person desiring to get appointed as a director or by any member of the company intending to propose some other person as director. In the former case, the person giving the

notice need not be a shareholder of the company. In either case, the notice must reach the company not less than fourteen days before the date of the concerned annual general meeting. The nomination need not be seconded.

The following requisites of section 257 must be complied with:

(1) The company must receive a notice proposing a person as a candidate for directorship, to be appointed as a director at a general meeting [section 257(1)].

(2) The notice of candidature can be given either by the candidate himself even if he is not a member of the company or by any member of the company.

(3) The notice must be in writing and signed by the candidate or the member giving it. If the notice is given by a member, it is advisable to mention the number of shares held and the folio.

(4) The notice must be given not less than 14 days before the meeting, *i.e.* 14 days or more. The notice must reach the company at least on the 14th day before the date of the meeting.

(5) The notice must be left at the office of the company. The notice must be given in the manner stipulated in section 51 of the Companies Act.

(6) The notice must accompany an amount of Rs. 500, which may be paid in cash or by cheque or demand draft.

There is no requirement as regards a specific time or hour at or before which the notice must be deposited. Therefore, the notice may be deposited at any time during the relevant day. Rejection of notice on the ground that it was deposited at 3.31 p.m. being "the last moment" on the 14th day before the day of the meeting was held to be wrong

If you are a listed company, note-

That the Board of Directors of the Company shall have an optimum combination of executive and nonexecutive directors, independent and non-independent directors.

The Concept of Liquidation/Winding Up in India
Bankruptcy and winding up

Bankruptcy of a company is not the same thing as winding up of a company. Whereas Indian law does not define bankruptcy, it defines winding up under the (Indian) Companies Act, 1956 (the 'Act'). The most important difference between bankruptcy and winding up is that in a bankruptcy proceeding the property of the bankrupt passes to a trustee who is appointed by a court to sell the property to pay the debts of the bankrupt party. However, in a winding up of a company, all the assets of the company still remain with the company until its dissolution, unless disposed of in the course of winding up by the liquidator. In the event of an Indian company registered under the Act becoming insolvent, it is 'winding up' that is applicable. These provisions apply equally to a listed company, a public limited company as well as a private limited company. The provisions of the Act guide the entire winding-up process The terms 'winding up' and

'dissolution' are sometimes erroneously used to mean the same thing. However, they are quite different in their meanings. Winding up is a process whereby all assets of the company are realised and used to pay off the liabilities and members. Dissolution of the company takes place after the entire process of winding up is over. Dissolution puts an end to the life of the company. A dissolution order passed by the court is like the death certificate of the company. As the concept of bankruptcy is not of much relevance in India, for the purposes of this article, the focus is on the concept of winding up.

The terms winding-up proceedings and liquidation proceedings are used interchangeably in this article.

Meaning and types of liquidation

Winding up of a company is the process whereby its life is ended and its property is administered for the benefit of its creditors and members. The court appoints an administrator,called a 'liquidator', who takes control of the company, takes possession of its assets and finally distributes any surplus among the shareholders in accordance with their respective rights. The objective behind the winding up of a company is to realise the assets, pay off the liabilities and distribute the surplus as expeditiously as possible.

Under section 425 of the Act, a company may be wound up in any one of the following three ways:

1) (a) By the court
(b) by passing of an appropriate resolution for voluntary winding up at a general meeting of members (voluntary winding up); and
(c) Voluntary winding up subject to supervision of the court.

Voluntary winding up In the case of voluntary winding up, the entire process is done without court supervision. When the winding up is complete, the relevant documents are filed before the court for obtaining the order of dissolution. A voluntary winding up may be done by the members or the creditors.

2) **Making a winding-up order (compulsory winding up);**

In law, **liquidation** is the process by which a company (or part of a company) is brought to an end, and the assets and property of the company redistributed. Liquidation is also sometimes referred to as **winding-up** or **dissolution**, although dissolution technically refers to the last stage of liquidation. The process of liquidation also arises when customs, an authority or agency in a country responsible for collecting and safeguarding customs duties, determines the final computation or ascertainment of the duties or drawback accruing on an entry.

Liquidation may either be compulsory (sometimes referred to as a *creditors' liquidation*) or voluntary (sometimes referred to as a *shareholders' liquidation*, although some voluntary liquidations are controlled by the creditors)

Compulsory liquidation The parties who are entitled by law to petition for the compulsory liquidation of a company vary from jurisdiction to jurisdiction, but generally, a petition may be lodged with the court for the compulsory liquidation of a company by:

- the company itself
- any creditor who establishes a *prima facie* case
- contributories
- the Secretary of State (or equivalent)
- the Official Receiver

Grounds

The grounds upon which one can apply for a compulsory liquidation also vary between jurisdictions, but the normal grounds to enable an application to the court for an order to compulsorily wind-up the company are:

- the company has so resolved
- the company was incorporated as a corporation, and has not been issued with a trading certificate (or equivalent) within 12 months of registration
- it is an "old public company" (i.e. one that has not re-registered as a public company or become a private company under more recent companies legislation requiring this)
- it has not commenced business within the statutorily prescribed time (normally one year) of its incorporation, or has not carried on business for a statutorily prescribed amount of time
- the number of members has fallen below the minimum prescribed by statute
- the company is unable to pay its debts as they fall due
- it is just and equitable to wind up the company

In practice, the vast majority of compulsory winding-up applications are made under one of the last two grounds.

An order will not generally be made if the purpose of the application is to enforce payment of a debt which is bona fide disputed.

A "just and equitable" winding-up enable the ground to subject the strict legal rights of the shareholders to equitable considerations. It can take account of personal relationships of mutual trust and confidence in small parties, particularly, for example, where there is a breach of an understanding that all of the members may participate in the business, or of an implied obligation to participate in management. An order might be made where the majority shareholders deprive the minority of their right to appoint and remove their own director.

The order Once liquidation commences (which depends upon applicable law, but will generally be when the petition was originally presented, and not when the **court** makes the order) dispositions of the company's property are generally void and litigation involving the company is generally restrained**.**

Upon hearing the application, the court may either dismiss the petition, or make the order for winding-up. The court may dismiss the application if the petitioner unreasonably refrains from an alternative course of action.

The court may appoint an official receiver, and one or more liquidators, and has general powers to enable rights and liabilities of claimants and contributories to be settled. Separate meetings of creditors and contributories may decide to nominate a person for the appointment of liquidator and possibly of supervisory liquidation committee.

Voluntary liquidation Voluntary liquidation occurs when the members of the company resolve to voluntarily wind-up the affairs of the company and dissolve. Voluntary liquidation begins when the company passes the resolution, and the company will generally cease to carry on business at that time (if it has not done so already). If the company is solvent, and the members have made a statutory declaration of solvency, the liquidation will proceed as a members' voluntary winding-up. In such case, the general meeting will appoint the liquidator(s). If not, the liquidation will proceed as a creditor's voluntary winding-up, and a meeting of creditors will be called, to which the directors must report on the company's affairs. Where a voluntary liquidation proceeds by way of creditor's voluntary liquidation, a liquidation committee may be appointed.

Where a voluntary winding-up of a company has begun, a compulsory liquidation order is still possible, but the petitioning contributory would need to satisfy the court that a voluntary liquidation would prejudice the contributories.

In addition, the term liquidation is sometimes used when a company wishes to divest itself of some of its assets. This is used, for instance, when a retail establishment wishes to close stores. They will sell to a company that specializes in store liquidation instead of attempting to run a store closure sale themselves.

Misconduct

The liquidator will normally have a duty to ascertain whether any misconduct has been conducted by those in control of the company which has caused prejudice to the general body of creditors. In some legal systems, in appropriate cases, the liquidator may be able to bring an action against errant directors or shadow directors for either wrongful trading or fraudulent trading.

The liquidator may also have to determine whether any payments made by the company or transactions entered into may be voidable as a transaction at an undervalue or an unfair preference.

Priority of claims The main purpose of a liquidation where the company is insolvent is to collect in the company's assets, determine the outstanding claims against the company, and satisfy those claims in the manner and order prescribed by law.

The liquidator must determine the company's title to property in its possession. Property which is in the possession of the company, but which was supplied under a valid retention of title clause will generally have to be returned to the supplier. Property which is held by the company on trust for third parties will not form part of the company's assets available to pay creditors.[12]

Before the claims are met, secured creditors are entitled to enforce their claims against the assets of the company to the extent that they are subject to a valid security interest. In most legal systems, only fixed security takes precedence over all claims; security by way of floating charge may be postponed to the preferential creditors.

Claimants with non-monetary claims against the company may be able to enforce their rights against the company. For example, a party who had a valid contract for the purchase of land against the company may be able to obtain an order for specific performance, and compel the liquidator to transfer title to the land to them, upon tender of the purchase price.[13]

After the removal of all assets which are subject to retention of title arrangements, fixed security, or are otherwise subject to proprietary claims of others, the liquidator will pay the claims against the company's assets. Generally, the priority of claims on the company's assets will be determined in the following order:

1. Liquidators costs
2. Creditors with fixed charge over assets
3. Costs incurred by an administrator
4. Amounts owing to employees for wages/superannuation
5. Payments owing in respect of workers's injuries
6. Amounts owing to employees for leave
7. Retrenchment payments owing to employees
8. Creditors with floating charge over assets
9. Creditors without security over assets
10. Shareholders (Liquidating distribution)

Unclaimed assets will usually vest in the state as *bona vacantia*.

Dissolution Having wound-up the company's affairs, the liquidator must call a final meeting of the members (if it is a members' voluntary winding-up), creditors (if it is a compulsory winding-up) or both (if it is a creditors' voluntary winding-up**).** The liquidator is then usually required to send final accounts to the Registrar and to

notify the court. The company is then dissolved. However, in common jurisdictions, the court has a discretion for a period of time after dissolution to declare the dissolution void to enable the completion of any unfinished business.

Striking off the Register.

In some jurisdictions, the company may elect to simply be struck off the Register as a cheaper alternative to a formal winding-up and dissolution. In such cases an application is made to the Registrar, who may strike off the company if there is reasonable cause to believe that the company is not carrying on business or has been wound-up and, after enquiry, no case is shown why the company should not be struck off.

However, in such cases the company may be restored to the Register if it is just and equitable so to do (for example, if the rights of any creditors or members have been prejudiced)

In the event the company does not file an annual return or annual accounts, and the company's file remains inactive, in due course, the Registrar at Companies House will strike the company off the register.

MODES OF WINDING OFF OF COMPANY.

Winding up of a company is a process of putting an end to the life of a company. It is a proceeding by means of which a company is dissolved and in the course of such a dissolution its assets are collected, its debts are paid off out of the assets of the company or from contributions by its members, if necessary. If any surplus is left, it is distributed among the members in accordance with their rights.

Modes of Winding Up

There are three modes of winding up of a company. These are:

(a) Compulsory winding up by the court.

(b) Voluntary winding up, which is itself of two kinds:

i. Members' voluntary winding up.

ii. Creditors' voluntary winding up.

(c) Winding up under the supervision of the court.

Winding up by court:

A company may be wound up by an order of the court. This is called compulsory winding up. Section 433 lays down the following grounds for the winding up of a company by the court.

1. Special resolution of the company: If the company has by a special resolution resolved that it may be wound up by the court. The power of the court in such a case is discretionary. The court may refuse to order winding up where it is opposed to public or company's interest.

2. Default in holding statutory meeting:

If a company makes a default in delivering the statutory report to the registrar or in holding the statutory meeting, the court may order winding up of the company either on the petition of the register or on the petition of the contributory. The petition for winding up must not be filed before the expiration of 14 days after the last

day on which the statutory meeting ought to have been held. However, the court may instead of making a winding up order, direct the statutory report shall be delivered or that meeting shall be held.

3. Failure to commence or suspension of business:

Where a company does not commence its business within a year from its incorporation, or suspends its business for a whole year, the court may order for its winding up. The power of the court is discretionary and will be exercised only where there is a fair indication that the company has no intension to carry on the business. Where the suspension of the business is temporary or can be satisfactorily accounted for, the court will refuse to make an order. A company will not be wound up if it abandons one of its several businesses, unless that business is the main object of the company.

4. Reduction of members below minimum: Where the number of members is reduced below 7 in the case of public company and below 2 in case of a private company, the court may order the winding up of the company. This provision is for the protection of existing members against unlimited liability.

5. Inability to pay debts: The court may order for the winding up of a company if it is unable to pay its debts. The basis of an order for winding up under this clause is that the company has ceased to be commercially solvent i.e. it is unable to met its current demands, although the assets when realized may exceed its liabilities. According to section 434 of the act a company shall be deemed to be unable to pay its debts in the following cases:

a. If a creditor to whom the company owes a sum of Rs.500 or more has served on the company a notice for payment and the company has for three weeks neglected to pay or otherwise satisfy him. But where the company bonafide disputes the debt and the court is satisfied with the defense of the company, the court will not order for its winding up.

b. If execution or other process issued on a decree or order of any court in favor of a creditor is returned unsatisfied in whole or in part.

c. If it is proved to the satisfaction of the court that the company is unable to pay its debts and in determining whether a company is unable to pay its debts, the court will take into account the contingent and the prospective liabilities of the company. What has to be proved under this clause is not whether the company's assets exceed it s liabilities, but whether it is unable to meet its current demands. If a company is unable to meet its current liabilities, it is commercially insolvent and liable to be bound up.

6. Just and equitable:

The last ground on which the court can order the winding up of a company is when the court is of the opinion that it is just and equitable that the company should be wound up. This clause gives the court a very wide power to order winding up wherever the court considers it just and equitable to do. The court will consider such grounds to wind up a company for just and equitable reasons as are not covered by the preceding fie clauses.

The following are the instances where the courts have exercised their discretion under this clause:

i) Where there is a deadlock in the management.

ii) Where it is impossible to carry on the business of the company except at a loss.

iii) Where the company has ceased to carry on its authorized business and is engaged in an illegal business.

iv) Where the object for which the company is formed is impossible of further pursuit.

v) Where the minority is being disregarded or oppressed.

vi) Where there is lack of confidence in directors.

vii) Where a company has been conceived and brought forth in fraud.

Prevention of oppression & Mis-Management

Oppression

Oppression is the exercise of authority or power in a burdensome, cruel, or unjust manner.[1] It can also be defined as an act or instance of oppressing, the state of being oppressed, and the feeling of being heavily burdened, mentally or physically, by troubles, adverse conditions, and anxiety.

The Supreme Court in Daleant Carrington Investment (P) Ltd. v. P.K. Prathapan[2], held that increase of share capital of a company for the sole purpose of gaining control of the company, where the majority shareholder is reduced to minority , would amount to oppression. The director holds a fiduciary position and could not on his own issue shares to himself. In such cases the oppressor would not be given an opportunity to buy put the oppressed.

Prevention of oppression

Section 397(1) of the Companies Act provides that any member of a company who complains that the affair of the company are being conducted in a manner prejudicial to public interest or in a manner oppressive to any member or members may apply to the Tribunal for an order thus to protect his /her statutory rights.

Sub-section (2) of Section 397 lays down the circumstances under which the tribunal may grant relief under Section 397, if it is of opinion that :-

(a)the company's affairs are being conducted in a manner prejudicial to public interest or in a manner oppressive to any member or members ; and

(b) to wind up the company would be unfairly and prejudicial to such member or members , but that otherwise the facts would justify the making of a winding up order on the ground that it was just and equitable that the company should be wound.

The tribunal with the view to end the matters complained of, may make such order as it thinks fit.

Who can apply

Section 397 of the Companies Act states the members of a company shall have the right to apply under Section 397 or 398 of the Companies Act. According to Section 399 where the company is with the share capital, the application must be signed by at least 100 members of the company or by one tenth of the total number of its members, whichever is less, or by any member, or members holding one-tenth of the issued share capital of the company. Where the company is without share capital, the application has to be signed by one-fifth of the total number of its members. A single member cannot present a petition under section 397 of the Companies Act. The legal representative of a deceased member whose name is again on the register of members is entitled to petition under Section 397 and 398 of the Companies Act.[3]

Under Section 399(4) of the Companies Act, the Central Government if the circumstances exist authorizes any member or members of the company to apply to the tribunal and the requirement cited above, may be waived. The consent of the requisite no. of members is required at the time of filing the application and if some of the

members withdraw their consent, it would in no way make any effect in the application. The other members can very well continue with the proceedings.

Conditions for Granting Reliefs

To obtain relief under section 397 the following conditions should be satisfied:-
1. There must be "oppression"- The Punjab and Haryana High Court in Mohan Lal Chandmall v. Punjab Co. Ltd[4] has held that an attempt to deprive a member of his ordinary membership rights amounts to "oppression". Imposing of more new and risky objects upon unwilling minority shareholders may in some circumstances amount to "oppression".[5]However, minor acts of mismanagement cannot be regarded as "oppression". The Court will not allow that the remedy under Section 397 becomes a vexatious source of litigation.[6] But an unreasonable refusal to accept a transfer of shares held as sufficient ground to pass an order under Section 397 of the Companies Act, 1956.[7]Thus to constitute oppression there must be unfair abuse of the powers and impairments of the confidence on the part of the majority of shareholders.

2. Facts must justify winding up- It is well settled that the remedy of winding up is an extreme remedy. No relief of winding up can be granted on the ground that the directors of the company have misappropriated the company's fund, as such act of the directors does not fall in the category of oppression or mismanagement.[8]To obtain remedy under Section 397 of the Companies Act, the petitioner must show the existence of facts which would justify the winding up order on just and equitable ground.

3. The oppression must be continued in nature – It is settled position that a single act of oppression or mismanagement is sufficient to invoke Section 397 or 398 of the Companies Act. No relief under either of the section can be granted if the act complained of is a solitary action of the majority. Hence, an isolated action of oppression is not sufficient to obtain relief under Section 397 or 398 of the Act. Thus to prove oppression continuation of the past acts relating to the present acts is the relevant factor , otherwise a single act of oppression is not capable to yield relief.

4. The petitioners must show fairness in their conduct-It is settled legal principle that the person who seeks remedy must come with clean hands. The members complaining must show fairness in their conduct. For ex- Mere declaration of low dividend which does not affect the value of the shares of the petitioner ,was neither oppression nor mismanagement in the eyes of law.[9]

5. Oppression and mismanagement should be specifically pleaded- It is settled law that , in case of oppression a member has to specifically plead on five facts:-

a) What is the alleged act of oppression ;

b) Who committed the act of oppression;

c) How it is oppressive;

d) Whether it is in the affairs of the company;

e) Whether the company is a party to the commission of the act of oppression.

Prevention of Mismanagement

The present Company Act does provide the definition of the expression 'mismanagement'. When the affairs of the company are being conducted in a manner prejudicial to the interest of the company or its members or against the public interest, it amounts to mismanagement.

Section 398(1) of the Companies act provides that any members of a company who complain:- that the affairs of the company are being conducted in a manner prejudicial to public interest or in a manner prejudicial to the interests of the company; or a material change has taken place in the management or control of the company, whether by an alteration in its Board of directors, or manager or in the ownership of the company's shares, or if it has no share capital, in its membership, or in any other manner whatsoever, and that by reason of such change, it is likely that the affairs of the company will be conducted in a manner prejudicial to public interest or in a manner prejudicial to the interests of the company; may apply to the Company Law Board for an order of relief provided such members have a right so to apply as given below.

If, on any such application, the Company Law Board is of opinion that the affairs of the company are being conducted as aforesaid or that by reason of any material change as aforesaid in the management or control of the company, it is likely that the affairs of the company will be conducted as aforesaid, the court may, with a view to bringing to an end or preventing the matters complained of or apprehended, make such order as it thinks fit.

Right to Complain mismanagement-

1. The following members of a company shall have the right to apply as above:-

   a) in the case of a company having a share capital, not less than one hundred members of the company or not less than one tenth of the total number of its members, whichever is less, or any member or members holding not less than one-tenth of the issued share capital of the company, provided that the applicant or applicants have paid all calls and other sums due on their shares;

   b) In the case of a company not having a share capital, not less than one-fifth of the total number of its members.

2. Where any share or shares are held by two or more persons jointly, they shall be counted only as one number.

3. Where any members of a company, are entitled to make an application, any one or more of them having obtained the consent in writing of the rest, may make the application on behalf and for the benefit of all of them.

4. The Central Government may, if in its opinion circumstances exist which make it just and equitable so to do, authorize any member or members of the company to apply to the Company Law Board, notwithstanding that the above requirements for application are not fulfilled.

5. The Central Government may, before authorizing any member or members as aforesaid, require such member or members to give security for such amount as the Central Government may deem reasonable, for the payment of any costs which the Court dealing with the application may order such member or members to pay to any other person or persons who are parties to the application.

6. If the managing director or any other director, or the manager, of a company or any other person, who has not been impleaded as a respondent to any application applies to be added as a respondent thereto, the Company Law Board may, if it is satisfied that there is sufficient cause for doing so, direct that he may be added as a respondent accordingly.

Notice to be given to Central Government of application

The Company Law Board must give notice of every application made to it as above to the Central government, and shall take into consideration the representations, if any, made to it by that Government before passing a final order.

Right of Central Government to apply

The Central Government may itself apply to the Company law Board for an order, or because an application to be made to the Company Law Board for such an order by any person authorized be it in this behalf.

Powers of Tribunal

Under Section 402 of the Companies Act ,1956 the powers of the Tribunal under Sections 397 and 398 are very wide .These are :-

1. The regulation of the conduct of the company's affairs in future;
2. The purchase of the shares or interests of any members of the company by other members thereof or by the company;
3. In the case of a purchase of its shares by the company as aforesaid, the consequent reduction of its share capital;
4. The termination, setting aside or modification of any agreement, howsoever arrived at, between the company on the one hand, and any of the following persons, on the other namely:-

   a) The managing director;

   b) Any other director;

   c) The manager;

   Upon such terms and conditions as may, in the opinion of the Company Law Board, be just and equitable in all the circumstances of the case ;the termination, setting aside or modification of any agreement between the company and any person not referred to in clause (d), provided that no such agreement shall be terminated, set aside or modified except after due notice to the party concerned and provided further that no such agreement shall be modified except after obtaining the consent of the party concerned; the setting aside of any transfer, delivery of goods, payment, execution or other act relating to property made or done by or against the company within three months before the date of the application, which would, if made or done by or against an individual, be deemed in his insolvency to be a fraudulent preference. Any other matter for which in the opinion of the Company Law Board it is just and equitable that provision should be made.

   Effect of alteration of memorandum or articles of company by order:

   Where an order makes any alteration in the memorandum or articles of a company, then, notwithstanding any other provision of this Act, the company shall not have power, except to the extent, if any permitted in the order, to make without the leave of the Company Law Board, any alteration whatsoever which is inconsistent with the order, either in the memorandum or in the articles. The alterations made by the order shall, in all respects, have the same effect as if they had been duly made by the company in accordance with the provisions of this Act.A certified copy of every order altering or giving leave to alter, a company's memorandum or articles, must within thirty days after the making thereof, be filed by the company with the Registrar who shall registrar the same. If default is made in complying with the above provisions, the company, and every officer of the company who is in default, shall be punishable with fine which may extend to five thousand rupees.

Consequences of termination or modification of certain agreements:

Where an order terminates, sets aside or modifies an agreement:-

the order shall not give rise to any claim whatever against the company by any person for damages or for compensation for loss of office or in any respect, either in pursuance of the agreement or otherwise; no managing or other director or manager whose agreement is so terminated or set aside, shall for a period of five years from the date of the order terminating the agreement, without the leave of the Company Law Board, be appointed, or act, as the managing or other director or manager of the company. Any person who knowingly acts as a managing or other director or manager of a company in contravention of the above provision, every director of the company, who is knowingly a party to such contravention shall be punishable with imprisonment for a term which may extend to one year, or with fine which may extend to five thousand rupees, or with both. The Company Law Board will not grant leave for appointment as managing director or director or manager of the company unless notice of the intention to apply for leave has been served on the Central Government and that Government has been given an opportunity of being heard in the matter.

Powers of Central Government to prevent oppression or mismanagement:

The Central Government may appoint such number of persons as the Company Law Board may, by order in writing, specify as being necessary to effectively safeguard the interests of the Company or its shareholders or public interests, to act as directors thereof for such period not exceeding 3 years on any one occasion[11] as it deems fit if the Company Law Board:-

On a reference being made to it by the Central Government ; or on an application of not less than one hundred members of the company or of members of the company holding not less than one-tenth of the total voting power therein, is satisfied, after such inquiry as it deems fit to make, that it is necessary to make the appointment or appointments in order to prevent the affairs of the company being conducted either in a manner which is oppressive to any members of the company or in a manner which is prejudicial to the interests of the company or to public interest.

However, in lieu of passing order as aforesaid, the Company Law Board may, if the company has not availed itself of the option given to it of proportional representation to minority shareholders on the Board of the company, direct the company to amend its articles in the manner provided section 265 and make fresh appointments of directors in pursuance of the articles as so amended within such time as may be specified in that behalf by the Company Law Board.

In case the Central Government passes such an order it may, if thinks fit, direct that until new directors are appointed in pursuance of the order aforesaid, not more than two members of the company specified by the Company law Board shall hold office as additional directors of the company. The Central Government shall appoint such additional directors on such directions.

The person appointed as a director by the Central Government in accordance with the above provisions, need not hold any qualification shares or need to retire by rotation. However, his office as director may be terminated at any time by the Central Government and another person appointed in his place. No change in the constitution of the Board of Directors can take place after an additional director is appointed by the Central Government in accordance with these provisions unless approved by the Company Law Board. The Central Government in such cases may also issue such directions to the company as it may consider necessary or appropriate in regard to its affairs.

Power of the Tribunals to prevent change in Board of Directors :

Where a complaint is made to the Company Law Board by the managing director or any other director or the manager of a company that, as a result of a change which has taken place or is likely to take place in ownership or any shares held in the company, a change in the Board of directors is likely to take place which (if allowed) would affect prejudicially the affairs of the company, the Company Law Board may, if satisfied, after such inquiry as it thinks fit to make that it is just and proper to do so, by order direct that no resolution passed or that may be passed or no action taken or may be taken to effect a change in the Board of directors after the date of the complaint shall have effect unless confirmed by the Company Law Board.

Any such order shall have effect notwithstanding anything to the contrary contained in any other provision of this Act or in the memorandum or articles of the company, or in any agreement with, or any resolution passed in general meeting by, or by the Board of directors or, the company. The Company Law Board shall have power when any such complaint is received by it, to make an interim order to the effect set out above, before making or completing the inquiry aforesaid. Nothing contained above shall apply to a private company, unless it is a subsidiary of a public company.[12]

Powers of Inspectors [S.240]:

Where an inspector investigating the affairs of the company thinks it necessary to investigate the affairs of another company in the same management or group , he is empowered to do so. However as mentioned in section 239(2), he has to obtain prior approval of the Central Government for that purpose.[13] Section 240 has been amended by the Amendment of 2000 .Sub-section (1) was substituted. The new sub-section provides that it shall be the duty of all officers and other employees and agents of the company and those of any other body corporate whose affairs are being investigated under Section 239:

a) to preserve and to produce to an inspector or any other person authorized by him in this behalf with the previous approval of the Central Government, all books and papers of or relating to the other body corporate, which are in their custody or power; and

b) otherwise to give to the inspector, all assistance in connection with the investigation which they are reasonable able to give.

For facilitating the task of the inspector it is the duty of all officers in charge of the management of the company to produce to the inspector all books and papers of the company which are in the custody and power and to give to the inspector all assistance in connection with the investigation which they are reasonably able to give.[14]The inspector may examine on oath any such person and for this purpose require his personal attendance.[15]If a person required to appear or to produce books, makes a default that is a punishable offence.[16]Where an inspector finds a person, whom he has no power to examine on oath, ought to be so examined the inspector may do so with the previous approval of the Central Government. Notes of any such examination are to be taken in writing and signed by the person examined and may be used in evidence against him [17].A refusal to answer any question is also punishable.

Conclusion

Oppression and mismanagement are part and parcel of business. During the course of business, oppression of small/minority shareholders takes place by the majority shareholders who are in control of the company. Similarly, mismanagement of business is not uncommon. When we talk of mismanagement we mean mismanagement of resources. Mismanagement could mean siphoning of funds, causing losses due to rash decision, not maintaining proper records, not calling requisite

meetings. Finer version of mismanagement could arise where the management does not act/react to a business situation leading to downfall of business.

The concept of oppression and mismanagement is more relevant or common to family owned concerns. The reasons are very obvious. Family owned concerns are owned by family members who over time develop vested interest in business vested interest in their own heirs being the most common - thereby leading to oppression of other family members. Here typically, the controlling member of the family appropriates the family holdings by means of either a fresh issue or fraudulent transfers in his favor or reconstitutes the board in such a manner as to alienate the other family members. The result is the other family members get oppressed.

Secondly, the family owned concerns are not professional managed and their system of functioning is usually personal. They lack probity and fair play. They generally do business in a manner where they begin to benefit personally to the exclusion of other members. This leads to oppression of other family members/mismanagement of companies.

In order to check all these discrepancies the need was felt to have any measure to prevent the Oppression and mismanagement and thus under Chapter 6th of Part 6th of Companies Act , 1956 provides for the judicial as well as administrative remedies to check Oppression and mismanagement. It is a powerful tool which provides such power that even a singer member can approach Company Law Board if any of his right has been infringed or in order to prevent the Oppression and mismanagement in the company.

Memorandum of association & articles of Association

In corporate governance, a company's **articles of association** (called articles of incorporation in some jurisdictions) is a document which, along with the memorandum of association (in cases where the memorandum exists) form the company's constitution, defines the responsibilities of the directors, the kind of business to be undertaken, and the means by which the shareholders exert control over the board of directors.

Overview

A company is an incorporated body so there should be some rules and regulations formed for the management of its internal affairs and conduct of its business as well as the relation between the members and the company. Moreover, the rights and duties of its members and the company are to be recorded. This is why Articles of Association are necessary. The Articles of Association is a document that contains the purpose of the company as well as the duties and responsibilities of its members defined and recorded clearly. It is an important document which needs to be filed with the Registrar of Companies.

United Kingdom

In the Table A of Schedule 1 of the Companies Act, 1956 is given a model regulations for the management of the company limited by shares. All or any of the regulations contained in

The Article of Association contains the following details:

1. The powers of directors, officers and the shareholders as to voting etc.,
2. The mode and form in which the business of the company is to be carried out.
3. The mode and form in which the changes in the internal regulations can be made.
4. The rights, duties and powers of the company as well as the members who are included in the Articles of Association.

The article is binding not only to the existing members, but also to the future members who may join in the future. The hires of members, successors and legal representatives are also bound by whatever is contained in the Article. The Articles bind the company and its members as soon as they sign the document. It is a contract between the company and its members. Members have certain rights and duties towards the company and the company have certain obligations towards its members. At the same time the company also expects some duties and obligations which the member has to fulfil for the smooth functioning of the company.

Other countries

The term **articles of association** of a company, or **articles of incorporation**, of an American or Canadian Company, are often simply referred to as **articles** (and are often capitalized as an abbreviation for the full term). The Articles are a requirement for the establishment of a company under the law of India, the United Kingdom, Pakistan and many other countries. Together with the memorandum of association, they are the constitution of a company. The equivalent term for LLC is Articles of Organization. Roughly equivalent terms operate in other countries, such as *Gesellschaftsvertrag* in Germany, *statuts* in France, *statut* in Poland, *cmamym* (Latin: *statut*) in Ukraine, *Jeong-gwan* in South Korea.

In **South Africa**, from the new Companies Act 2008 which commenced in 2011, articles and memoranda of association have been replaced by a "memorandum of incorporation" or "MOI". The MOI gives considerable more scope to vary how to the company is governed than the previous arrangement.

Content

The following is largely based on British Company Law, references which are made at the end of this Article.

The Articles can cover a medley of topics, not all of which is required in a country's law. Although all terms are not discussed, they may cover:

- the issuing of shares (also called stock), different voting rights attached to different classes of shares
- valuation of intellectual rights, say, the valuations of the IPR of one partner and, in a similar way as how we value real estate of another partner

- the appointments of directors - which shows whether a shareholder dominates or shares equality with all contributors
- directors meetings - the quorum and percentage of vote
- management decisions - whether the board manages or a founder
- transferability of shares - assignment rights of the founders or other members of the company do
- special voting rights of a Chairman, and his/her mode of election
- the dividend policy - a percentage of profits to be declared when there is profit or otherwise
- winding up - the conditions, notice to members
- confidentiality of know-how and the founders' agreement and penalties for disclosure
- first right of refusal - purchase rights and counter-bid by a founder

Directors

A Company is essentially run by the shareholders, but for convenience, and day-to-day working, by the elected Directors. Usually, the shareholders elect a Board of Directors (BOD) at the Annual General Meeting (AGM), which may be statutory (e.g. India).

The number of Directors depends on the size of the Company and statutory requirements. The Chairperson is generally a well-known outsider but he /she may be a working Executive of the company, typically of an American Company. The Directors may, or may not, be employees of the Company.

Shareholders

In the emerging countries there are usually some major shareholders who come together to form the company. Each usually has the right to nominate, without objection of the other, a certain number of Directors who become nominees for the election by the shareholder body at the AGM. The Treasurer and Chairperson is usually the privilege of one of the JV partners (which nomination can be shared). Shareholders may also elect Independent Directors (from the public). The Chair would be a person not associated with the promoters of the company, a person is generally a well-known outsider. Once elected, the BOD manages the Company. The shareholders play no part till the next AGM/EGM.

Memorandum of association

The Objectives and the purpose of the Company are determined in advance by the shareholders and the Memorandum of Association (MOA), if separate, which denotes the name of the Company, its Head- Office, street address, and (founding)Directors and the main purposes of the Company - for public access. It cannot be changed except at an AGM or Extraordinary General Meeting (EGM) and statutory allowance. The MOA is generally filed with a Registrar of Companies who is an appointee of the Government of the country. For their assurance, the shareholders are permitted to elect an Auditor at each AGM. There can be Internal Auditors (employees) as well as an External Auditor.

Board meetings

The Board meets several times each year. At each meeting there is an 'agenda' before it. A minimum number of Directors (a quorum) is required to meet. This is either determined by the 'by-laws' or is a statutory requirement. It is presided over by the Chairperson, or in his absence, by the Vice-Chair. The Directors survey their area of responsibility. They may determine to make a 'Resolution' at the next AGM or if it is an urgent matter, at an EGM. The Directors who are the electives of one major shareholder, may present his/her view but this is not necessarily so - they may have to view the Objectives of the Company and competitive position. The Chair may have to break the vote if there is a tie. At the AGM, the various Resolutions are put to vote.

Annual General Meeting

The AGM is called with a notice sent to all shareholders with a clear interval. A certain quorum of shareholders is required to meet. If the quorum requirement is not met, it is canceled and another Meeting called. If it at that too a quorum is not met, a Third Meeting may be called and the members present, unlimited by the quorum, take all decisions. There are variations to this among companies and countries.

Decisions are taken by a show of hands; the Chair is always present. Where decisions are made by a show of hands is challenged, it is met by a count of votes. Voting can be taken in person or by marking the paper sent by the Company. A person who is not a shareholder of the Company can vote if he/she has the 'proxy', an authorization from the shareholder. Each share carries the number of votes attached to it. Some votes maybe for the decision, others not.

Resolutions

There are two types of decision, known as an Ordinary Resolution and a Special Resolution.

A Special Resolution can be tabled at a Director's Meeting. The Ordinary Resolution requires the endorsement by a majority vote, sometimes easily met by partners' vote. The Special Resolution requires a 60,70 or 80% of

the vote as stipulated by the constitution of the Company. Shareholders other than partners may vote. The matters which require the Ordinary and Special Resolution to be passed are enumerated in Company or Corporate Law. Special Resolutions covering some topics may be a statutory requirement.

Model articles of association
In the United Kingdom, model articles of association, known as Table A have been published since 1865. The articles of association of most companies incorporated prior to 1 October 2009 – particularly small companies – are Table A, or closely derived from it. However, a company is free to incorporate under different articles of association, or to amend its articles of association at any time by a special resolution of its shareholders, provided that they meet the requirements and restrictions of the Companies Acts. Such requirements tend to be more onerous for public companies than for private ones.

Companies Act 2006
The Companies Act 2006 received Royal Assent on 8 November 2006 and was fully implemented on 1 October 2009. It provides a new form of Model Articles for companies incorporated in the United Kingdom. Under the new legislation, the articles of association will become the single constitutional document for a UK company, and will subsume the majority of the role previously filled by the separate memorandum of association.

Raising capital with prospectus

General In order to raise capital, companies issue securities which may includes shares, debentures, and options to acquire shares and debentures. The *Corporations Act 2001* (Cth) requires that disclosure to be made, subject to the certain exemptions, where an offer is made. If there is a failure to disclose in accordance with the provisions or where material misstatements or omissions have been made, issues surrounding civil and criminal liability may arise.

Disclosure requirements Essentially where disclosure is required, the following is necessary:

A prospectus must be prepared for the offer, unless an offer information statement can be used.

- The offer must include or accompany the prospectus unless it is permissible to use a profile statement. No offer can be made unless the prospectus is included or accompanies the offer
- Securities may only be issued or transferred in response to an application form. The person issuing the securities must have reasonable grounds to believe that the application form was accompanied by a disclosure document

Note: An offer information statement can only be used if the amount of money to be raised, including any amount already raised, does not exceed more than $10 million.

Contents of a disclosure document

Generally disclosure documents must contain:

- the terms and conditions of the offer
- the rights and liabilities attaching to the securities offered
- the identify of the company
- the nature of the securities
- the company's business
- the purpose of the offer
- the nature of the risks involved
- details of all amounts payable

In addition to these requirements a prospectus is required to contain all the information that an investor and their professional adviser would reasonably require to make an informed assessment of the following matters. There are several other specific content requirements listed in the *Corporation Act 2001* (Cth) and they vary depending on the nature of the disclosure document.

Advertising

It should also be noted that where a disclosure document is required, it is an offence to advertise the offer or publish a statement that either refers to the offer or may induce a person to apply for the securities

Company Act 2013.

INTRODUCTION

The 1956 Act has been in need of a substantial revamp for quite some time now, to make it more contemporary and relevant to corporates, regulators and other stakeholders in India.

While several unsuccessful attempts have been made in the past to revise the existing 1956 Act, there have been quite a few changes in the administrative portion of the 1956 Act. The most recent attempt to revise the 1956 Act was the Companies Bill, 2009 which was introduced in the Lok Sabha, one of the two Houses of Parliament of India, on 3 August 2009. This Companies Bill, 2009 was referred to the Parliamentary Standing Committee on Finance, which submitted its report on 31 August 2010 and was withdrawn after the introduction of the Companies Bill, 2011. The Companies Bill, 2011 was also considered by the Parliamentary Standing Committee on Finance which submitted its report on 26 June 2012. Subsequently, the Bill was considered and approved by the Lok Sabha on 18 December 2012 as the Companies Bill, 2012 (the Bill). The Bill was then considered and approved by the Rajya Sabha too on 8 August 2013. It received the President's assent on 29 August 2013 and has now become the Companies Act, 2013.

The changes in the 2013 Act have far-reaching implications that are set to significantly change the manner in which corporates operate in India. In this publication, we have encapsulated the major changes as compared to the 1956 Act and the potential implications of these changes. We have also included, where relevant, the provisions of the draft rules, which have been issued by the Ministry of Corporate Affairs (the MCA) till date for public comments. Such inclusions have been highlighted with an asterix at the end of the sentence (*).However, please note that these are only draft rules and will undergo changes before being notified.

Some key definition

Companies

1.1 One-person company: The 2013 Act introduces a new type of entity to the existing list i.e. apart from forming a public or private limited company, the 2013 Act enables the formation of a new entity a 'one-person company' (OPC). An OPC means a company with only one person as its member [section 3(1) of 2013 Act].

1.2. Private company: The 2013 Act introduces a change in the definition for a private company, inter-alia, the new requirement increases the limit of the number of members from 50 to 200. [section 2(68) of 2013 Act].

1.3. Small company: A small company has been defined as a company, other than a public company.

(i) Paid-up share capital of which does not exceed 50 lakh INR or such higher amount as may be prescribed which shall not be more than five crore INR

(ii) Turnover of which as per its last profit-and-loss account does not exceed two crore INR or such higher amount as may be prescribed which shall not be more than 20 crore INR:

As set out in the 2013 Act, this section will not be applicable to the following:

- A holding company or a subsidiary company
- A company registered under section 8
- A company or body corporate governed by any special Act [section 2(85) of 2013 Act]

1.4. Dormant company: The 2013 Act states that a company can be classified as dormant when it is formed and registered under this 2013 Act for a future project or to hold an asset or intellectual property and has no significant accounting transaction. Such a company or an inactive one may apply to the ROC in such manner as may be prescribed for obtaining the status of a dormant company.[Section 455 of 2013 Act]

2. Roles and responsibilities

2.1 Officer: The definition of officer has been extended to include promoters and key managerial personnel [section 2(59) of 2013 Act].

2.2 Key managerial personnel: The term 'key managerial personnel' has been defined in the 2013 Act and has been used in several sections, thus expanding the scope of persons covered by such sections [section 2(51) of 2013 Act].

2.3. Promoter: The term 'promoter' has been defined in the following ways:• A person who has been named as such in a prospectus or is identified by the company in the annual return referred to in Section 92 of 2013 Act that deals with annual return; or

- who has control over the affairs of the company, directly or indirectly whether as a shareholder, director or otherwise; or
- in accordance with whose advice, directions or instructions the Board of Directors of the company is accustomed to act.

The proviso to this section states that sub-section (c) would not apply to a person who is acting merely in a professional capacity. [section 2(69) of 2013 Act]

2.4: Independent Director: The term' Independent Director' has now been defined in the 2013 Act, along with several new requirements relating to their appointment, role and responsibilities. Further some of these requirements are not in line with the corresponding requirements under the equity listing agreement [section 2(47), 149(5) of 2013 Act].

3. Investments

3.1 Subsidiary: The definition of subsidiary as included in the 2013 Act states that certain class or classes of holding company (as may be prescribed) shall not have layers of subsidiaries beyond such numbers as may be prescribed. With such a restrictive section, it appears that a holding company will no longer be able to hold subsidiaries beyond a specified number[section 2(87) of 2013 Act].

4. Financial statements

4.1. Financial year: It has been defined as the period ending on the 31st day of March every year, and where it has been incorporated on or after the 1st day of January of a , the period ending on the 31st day of March of the following year, in respect whereof financial statement of the company or body corporate is made up. [section 2(41) of 2013 Act]. While there are certain exceptions included, this section mandates a uniform accounting year for all companies and may create significant implementation issues.

4.2. Consolidated financial statements: The 2013 Act now mandates consolidated financial statements (CFS) for any company having a subsidiary or an associate or a joint venture, to prepare and present consolidated financial statements in addition to standalone financial statements.

4.3. Conflicting definitions: There are several definitions in the 2013 Act divergent from those used in the notified accounting standards, such as a joint venture or an associate,, etc., which may lead to hardships in compliance.

5. Audit and auditors

5.1 Mandatory auditor rotation and joint auditors: The 2013 Act now mandates the rotation of auditors after the specified time period. The 2013 Act also includes an enabling provision for joint audits.

5.2 Non-audit services: The 2013 Act now states that any services to be rendered by the auditor should be approved by the board of directors or the audit committee. Additionally, the auditor is also restricted from providing certain specific services.

5.3. Auditing standards: The Standards on Auditing have been accorded legal sanctity in the 2013 Act and would be subject to notification by the NFRA. Auditors are now mandatorily bound by the 2013 Act to ensure compliance with Standards on Auditing.

5.4 Cognisance to Indian Accounting Standards (Ind AS): The 2013 Act, in several sections, has given cognisance to the Indian Accounting Standards, which are standards converged with International Financial Reporting Standards, in view of their becoming applicable in future. For example, the definition of a financial statement includes a 'statement of changes in equity' which would be required under Ind AS. [Section 2(40) of 2013 Act]

5.5. Secretarial audit for bigger companies: In respect of listed companies and other class of companies as may be prescribed, the 2013 Act provides for a mandatory requirement to have secretarial audit. The draft rules make it applicable to every public company with paid-up share capital > Rs. 100 crores*. As specified in the 2013 Act, such companies would be required to annex a secretarial audit report given by a Company Secretary in practice with its Board's report. [Section 204 of 2013 Act]

5.6. Secretarial Standards: The 2013 Act requires every company to observe secretarial standards specified by the Institute of Company Secretaries of India with respect to general and board meetings [Section 118 (10) of 2013 Act], which were hitherto not given cognizance under the 1956 Act.

5.7. Internal Audit: The importance of internal audit has been well acknowledged in Companies (Auditor Report) Order, 2003 (the 'Order'), pursuant to which auditor of a company is required to comment on the fact that the internal audit system of the company is commensurate with the nature and size of the company's operations. However, the Order did not mandate that an internal audit should be conducted by the internal auditor of the company. The Order acknowledged that an internal audit can be conducted by an individual who is not in appointment by the company.

The 2013 Act now moves a step forward and mandates the appointment of an internal auditor who shall either be a chartered accountant or a cost accountant, or such other professional as may be decided by the Board to conduct internal audit of the functions and activities of the company.

The class or classes of companies which shall be required to mandatorily appoint an internal auditor as per the draft rules are as follows: *

- Every listed company
- Every public company having paid-up share capital of more than 10 crore INR
- Every other public company which has any outstanding loans or borrowings from banks or public financial institutions more than 25 crore INR or which has accepted deposits of more than 25 crore INR at any point of time during the last financial year

5.8. Audit of items of cost: The central government may, by order, in respect of such class of companies engaged in the production of such goods or providing such services as may be prescribed, direct that particulars relating to the utilisation of material or labour or to other items of cost as may be prescribed shall also be included in the books of account kept by that class of companies. By virtue of this section of the 2013 Act, the cost audit would be mandated for certain companies. [section 148 of 2013 Act]. It is pertinent to note that similar requirements have recently been notified by the central government.

6. Regulators

6.1. National Company Law Tribunal (Tribunal or NCLT): In accordance with the Supreme Court's (SC) judgement, on 11 May 2010, on the composition and constitution of the Tribunal, modifications relating to qualification and experience, etc. of the members of the Tribunal has been made. Appeals from the Tribunal shall lie with the NCLT. Chapter XXVII of the 2013 Act consisting of section 407 to 434 deals with NCLT and appellate Tribunal.

6.2. National Financial Reporting Authority (NFRA): The 2013 Act requires the constitution of NFRA, which has been bestowed with significant powers not only in issuing the authoritative pronouncements, but also in regulating the audit profession.

6.3. Serious Fraud Investigation Office (SFIO): The 2013 Act has bestowed legal status to SFIO.

7. Mergers and acquisitions The 2013 Act has streamlined as well as introduced concepts such as reverse mergers (merger of foreign companies with Indian companies) and squeeze-out provisions, which are significant. The 2013 Act has also introduced the requirement for valuations in several cases, including mergers and acquisitions, by registered valuers.

8. Corporate social responsibility The 2013 Act makes an effort to introduce the culture of corporate social responsibility (CSR) in Indian corporates by requiring companies to formulate a corporate social responsibility policy and at least incur a given minimum expenditure on social activities.

9. Class action suits The 2013 Act introduces a new concept of class action suits which can be initiated by shareholders against the company and auditors.

10. Prohibition of association or partnership of persons exceeding certain number

The 2013 Act puts a restriction on the number of partners that can be admitted to a partnership at 100. To be specific, the 2013 Act states that no association or partnership consisting of more than the given number of persons as may be prescribed shall be formed for the purpose of carrying on any business that has for its object the acquisition of gain by the association or partnership or by the individual members thereof, unless it is registered as a company under this 1956 Act or is formed under any other law for the time being in force:

As an exception, the aforesaid restriction would not apply to the following:

A Hindu undivided family carrying on any business

An association or partnership, if it is formed by professionals who are governed by special acts like the Chartered Accountants Act, etc.[section 464 of 2013 Act]

11. Power to remove difficulties The central government will have the power to exempt or modify provisions of the 2013 Act for a class or classes of companies in public interest. Relevant notification shall be required to be laid in draft form in Parliament for a period of 30 days. The 2013 Act further states no such order shall be made after the expiry of a period of five years from the date of commencement of section 1 of the 2013 Act [section 470 of 2013 Act].

12. Insider trading and prohibition on forward dealings

The 2013 Act for the first time defines 'insider trading and price-sensitive information and prohibits any person including the director or key managerial person from entering into insider trading [section 195 of 2013 Act]. Further, the Act also prohibits directors and key managerial personnel

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