COMMERCIAL LAW

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I. Introduction

The term commercial law has no fixed meaning in India. As a rule, there is no distinction between commercial and non-commercial contracts, government or non-government contracts. The concerned enactments are generally uniform in their application to these contracts.[1] There are no commercial courts in this country. Broadly speaking, a discussion on commercial law may include within its ambit the Indian Contract Act, 1872; the Negotiable Instruments Act, 1882; the Transfer of Property Act, 1882; the Presidency Towns Insolvency Act, 1909; the Provincial Insolvency Act, 1920; the Sale of Goods Act, 1930; the Indian Partnership Act, 1932; the Arbitration and Conciliation Act, 1996; the Companies Act, 1956 and the specific Relief Act, 1963.

This paper, however, deals with the Indian Contract Act (which includes general principles of law of contract, quasi-contracts, indemnity, guarantee, bailment, pledge, agency) and the enactments on sale of goods, partnerships and negotiable instruments.

II. Contracts

The first seventy-five sections of the Indian Contract Act, 1872, (hereinafter called the Act in this section) relate to formation of contract, its performance and damages for its breach. While an agreement may be valid or void, a contract is always valid and enforceable at law.[2] A voidable agreement or contract, however, is enforceable at the option of one party

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1. *Steel Authority of India Ltd.* v. *National Union Water Front Workers* AIR 2001 SC 3527. The contract laws are applicable not only with respect to the commercial contract but also to the employer-employee relationship as well.
2. S. 2(h) of Indian Contract Act, 1872.

only whose consent to enter into the contract was caused by a vitiating element such as fraud.[3]

Essentials of a contract

The essentials of a valid contract are:

1. Intention to create a contract;
2. Offer and acceptance;
3. Consideration;
4. Capacity to enter into contract;
5. Free consent of the parties; and
6. Lawful object of the agreement.

Writing is not essential for the validity of every contract. However, government contracts, arbitration agreements, and agreements made without consideration only in cases promises made on account of natural love and affection between parties standing in a near relation to each other and debtor's promise to pay time-barred debt must be in writing.

Intention to contract

Under English Law it is a settled principle that to create a contract, there must be a common intention of the parties to enter into legal obligations.[4] There is no specific provision in the Indian Contract Act requiring that an offer or its acceptance should be made with the intention of creating legal relation. Supreme Court too had expressed its reservation about the need of this separate requirement of intention to contract. However, the principle has been applied in its milder connotation in few cases.[5] It was observed that the concept of "intention to contract" as a necessary element of contract suits in the systems where the consideration is not a requisite of enforceability.[6] Promises made under joke, jest or mere excitement due to impulsive loss of mental equilibrium, promises made by a person when he is in great mental disturbance due to the death of his near and dear ones and mere social and domestic agreements[7] are presumed by law to be without the necessary legal intent and are, therefore, not enforced by courts.

The intention of the parties may be ascertained from the terms of the agreement and surrounding circumstances. Contracts with respect to family or social relations, are, almost always, presumed to be devoid of legal intent

3. S. 2(i).
4. *Rose & Frank Co.* v. *J. R. Crompton & Bros.* (1923) 2 KB 261.
5. *CWT* v. *Abdul Hussain Mulla Mohd Ali* (1988) 3 SCC 562 and *Banwari Lal* v. *Sukhdarshan Dayal* (1973) 1 SCC 294.
6. *CWT* v. *Abdul Hussain Mulla Mohd Ali* (1988) 3 SCC 562.
7. *Balfour* v. *Balfour* (1919) 2 KB 571.

whereas with respect to business matter, it is almost always presumed that the parties intended legal consequences to follow.[8] The onus is, however, on the party asserting absence of legal obligation.

The test to ascertain legal intention of the parties is objective and not subjective. Objective test signifies what a reasonable person would think the parties had intended and not what the parties actually intended. Therefore, it depends upon facts and circumstance of each case to ascertain the objective intention of the parties.[9]

Offer and acceptance

Offer (called proposal in the Act) and acceptance are necessary ingredients in the formation of contract. These signify willingness of the parties to enter into a bargain. An offer should be distinguished from an invitation to treat or from an invitation to receive orders. An offer is the final expression of willingness by the offeror to be bound by his offer. On the other hand, where a party, without expressing his final willingness, proposes certain terms on which he is willing to negotiate, he does not make an offer but only invites the other party to make an offer on those terms. Mere statements of price, catalogues, articles in shop windows or self-service stores with price tags, advertisements for tenders and auction sales and advertisements lacking requisite details are not offers but mere invitations to deal.

What is an offer essentially depends upon the facts involved in a case. Advertisements offering rewards and things placed in automatic vending machines are, however, offers. Voluntary retirement scheme (VRS) offered by the bank is not an offer but an invitation to offer whereas the application for VRS filed by an employee is an offer.[10] Therefore, an employee is within his powers to withdraw his application before his application is accepted. Similarly, fixation of reserve price for inviting tender is an invitation to tender and not an offer.[11]

An offer becomes complete only when it comes to the knowledge of the offeree. He may accept or reject the offer, expressly or impliedly. Any change by him in the terms of offer is tantamount to its rejection and is called a counter-offer, which the original offeror may or may not accept.

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8. L.J. Banks in *Rose* v. *Crompton* (1923) 2 KB 261.
9. For instance similar kinds of agreements to transfer the beneficial ownership of the matrimonial home at the time of separation to the wife resulted in different conclusions in *Merritt* v. *Merritt* (1970) 1 WLR 1211 and *Gould* v. *Gould* (1970) 1 Q.B. 275.
10. *Bank of India* v. *O P Swarnkar* (2003) 2 SCC 721. This is the reaffirmation of principle laid down in *Harvey* v. *Facey* (1893) AC 552 followed by Supreme Court in *McPherson* v. *Appana* AIR 1951 SC 184.
11. *Anil Kumar Srivastava* v. *State of UP & Ors.* AIR 2004 SC 4299.

An offeror may withdraw his offer before its acceptance is complete as against the proposer. Mere rumors reaching the offeree via a third person that the offeror has disposed of the subject-matter of the offer or is otherwise not interested in the bargain do not revoke the offer under section 6 of the Act. A proposal (offer) is revoked by communication of notice, by lapse of the time prescribed for its acceptance or in its absence by lapse of a reasonable time, by the non-fulfillment of a condition precedent by the offeree, or by death or insanity of the proposer if the other party had knowledge of this event at the time of making acceptance. With respect to bids, offer may be revoked before the hammer is down whereas in cases of tenders, it may be revoked before it is finally approved or confirmed by the appropriate authority.[12] However, right to withdraw an offer does not disentitle the offeree to forfeit the amount for not signing or non-performance of contract.[13]

An acceptance by post, that is by letter and telegram, becomes complete as soon as the letter is posted in the letterbox with proper address or the telegram is deposited with the telegraph authorities. The acceptor has a right to withdraw his acceptance before it comes to the knowledge of the offeror. This may be effected by an overreaching communication. Acceptance by telephone, face to face as in an auction sale or by any other instantaneous means of communication is complete as soon as the other party has heard and understood it.[14] Therefore an acceptance incompletely heard, because the voice was drowned in noise or for any other reason whatsoever, is not effective.

A person who is already under a duty to do a thing cannot make a valid acceptance of the offer which requires the doing of the same thing. An acceptance to be valid should be unqualified and not introduce a condition (unless it is implied by law in the offer). Nor should it be made in ignorance of the terms of offer. Thus, where an offer is conditional or acceptance is not duly and lawfully made, a contract cannot be concluded. Identical cross-offers do not create a contract. This is a case of two offers and not of offer and acceptance. An offeror may prescribe a positive mode of acceptance for the offeree to follow but he cannot require him to indicate acceptance by mere silence, which is the absence of an act. If the offeree does not follow the indicated method of acceptance, the offeror may insist on it. However, by failing to object within a reasonable time the offeror tacitly accepts the acceptance in the new mode adopted by the offeree. Where the proposal does not prescribe the method of acceptance, the offeree may express his

12. *Union of India* v. *Bhimsen Walaiti Ram* (1969) 3 SCC 146.
13. *National Highway Authority of India* v. M/s. *Ganga Enterprises* (2003) 7 SCC 410.
14. *Entores Ltd.* v. *Miles Far East Corporation* (1955) 2 ALL ER 493. The principle laid down in *Entores* case was endorsed by Supreme Court in *Bhagwandas Goverdhandas Kedia* v. *Girdharilal Parshottamdas & Co.* AIR 1966 SC 543.

acceptance in some usual and reasonable manner. Originally an offer even if received by hand may be accepted by post. If once it is rejected, it becomes dead and cannot be revived by acceptance although the time for acceptance has not elapsed.

Acceptance how made

An acceptance may be made by a counter-promise or by actual performance of the terms of the offer as required by the offeror. In reward cases, acceptance is made only by doing the requested act and not by making a promise to do an act, for the offeror is interested in performance and not in promise. It depends upon the terms and conditions of an offer whether its maker requires promise or performance.

Only concluded contracts are enforceable. A concluded contract is the result of an offer and its acceptance made by free consent of the parties competent to contract for a lawful consideration and with lawful object and is not expressly declared to be void. The contractual obligation thus arisen could not be thwarted by exercise of statutory powers by the state government.[15]

Consensus ad idem is an essential pre-requisite for a valid contract, which may be shown either in writing or by conduct of the parties. Thus a document signed by only one party to the contract cannot result into a binding contract. For instance, a document containing the proceedings of bid having the signature of only the chairman of the Board in the absence of any agreement on stamp paper does not result in concluded contract.[16]

Consideration and object of agreement

Section 2 (d) of the Act defines consideration as follows:

> When at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstains from doing, something, such act or abstinence or promise is called a consideration for the promise.

As a rule, an agreement without consideration is void and destitute of legal effect.[17] Law takes into account the human element that a person should be bound by his promise only when the other party at his request has either done or abstained from doing an act or does or promises to do an act. A promise without any of these acts or promises is said to be without consideration.

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15. *Central Dairy Farm* v. *GIindia Ltd. and Ors.* (2004) 1 SCC 55.
16. *Municipal Board Khumber* v. *Yadu Nath Singh* AIR 2004 Raj 790.
17. S. 25.

A mere promise to give donation, either orally or in writing, is without consideration because the promisee has neither done, nor does, nor promises to do something as may be desired by the donor. The promisor, therefore, is not legally bound to fulfil his promise. If, however, in pursuance of the promise, a charitable organization, for instance, has taken definite steps to carry out its objectives, the promisor is bound because the promisee has done something at the desire of the promisor.[18] This is called promissory estoppel. There is a problem concerning revocation of such unilateral promises. When can it be revoked? It is observed that it may be revoked before the promisee begins to alter his position. But this is a complex situation. What if the promisee stops the activity in between at his sweet will? For instance, mother, an owner of a house promised her son and daughter-in-law to transfer the house if they paid off the mortgage debt in installments.[19] She is bound by her promise the moment, son and daughter-in-law start paying the installment. But what if they stop the installments in between? It was observed that she would still be bound by the promise.

In recent years promissory estoppel has become a major ground for bulk of the litigation against the government. In India, the doctrine of promissory estoppel got its first recapitulation in *Collector of Bombay* v. *Municipal Corp. of the city of Bombay.*[20] It was further built upon in number of cases.[21] There are two pre-requisites of the doctrine. One, that there should be clear and unequivocal promise knowing and intending that it would be acted upon by promise; and two, that there is, in fact, acting upon the promise by the promisee so that it would be inequitable to allow promisor to go back on the promise.[22] The promise made by the government, even if without consideration would bind the government. The doctrine is operative not only in the field of contract but in legislative, administrative or statutory areas also.[23] The government may not be held bound by its promise if there is either over-riding public interest[24] or promise is unlawful.[25]

Settlement of *bona fide* but doubtful claims involves bargain between contracting parties and is, therefore, based on consideration. Money is not

18. *Abdul Aziz* v. *Masum Ali* AIR 1914 All 22. Also see *Kedar Nath* v. *Gorie Mohamed* 1886 ILR 14 Cal 64 and *Doraswamy Iyer* v. *Arunachala Ayyar* AIR 1936 Mad 135.
19. *Errington* v. *Errington* (1952) 1 KB 290.
20. AIR 1951 SC 469.
21. *Union of India* v. *Anglo Afgan Agencies* AIR 1968 SC 718; *Century Spg. & Mfg. Co. Ltd* v. *Ulhasnagar Municipal Council* (1970) 1 SCC 582; ITC *Bhadrachalam Paperboards* v. *Mandal Revenue Officer, AP* (1996) 6 SCC 634; *Pournami Oil Mills* v. *State of Kerala* (1986) Supp SCC 728 and *Delhi Cloth and General Mills Ltd.* v. *Union of India* (1988) 1 SCC 86.
22. *Motilal Padampat Sugar Mills Co. Ltd.* v. *State of UP* (1979) 2 SCC 409.
23. *Union of India* v. *Godfrey Philips India Ltd.* (1985) 4 SCC 364 and *Jit Ram Shiv Kumar* v. *State of Haryana* (1981) 1 SCC 11.
24. *State of Punjab* v. *Nestle India Ltd. and Ano.* (2004) 6 SCC 465.
25. *Amrit Banaspati Co. Ltd.* v. *State of Punjab* (1992) 2 SCC 411.

the only form of consideration. A consideration may consist sometimes in the doing of a requested act, sometimes in the making of a promise by the offeree. Forbearance to sue at the promisor's desire constitutes consideration. Similarly, restoration of family peace is a good consideration. Although it need not be adequate, it must amount to some thing which is of some value in the eyes of the law. The utterance of the words, 'thank you', at the request of the promisor is not something. The speaker, therefore, supplies no real consideration in such a case. There must be a return or *quid pro qua*, something of value received by the promisee as inducement of the promise. A consideration need not be for the benefit of the promisor or for the detriment to the promisee.[26] It may proceed from a third party. Except under exceptional circumstances, a stranger to contract cannot sue.

In the following cases,[27] consideration is not required:

(a) A written and registered agreement between parties standing in a near relation to each other and made on account of natural love and affection.

(b) A promise, either orally or in writing, to compensate, wholly or in part, a person who has already voluntarily done something for the promisor or something which the promisor was legally compellable to do.

(c) A written and signed promise by the debtor or his duly authorized agent to pay a time-barred debt to the creditor.

Since gift is a conveyance and not a mere promise, no consideration is required to validate it. Further, no consideration is necessary to create an agency.[28]

Capacity

Parties to a contract must be competent.[29] A person is competent to contract if at the time of making it, he is of sound mind, major and not disqualified from contracting under law. Where he has not attained the age of 18 years or if he is already under a court of wards then of 21 years, he is a minor.[30] Minors and persons of unsound mind do not possess the necessary capacity to enter into valid contracts. So agreements by them are void.[31] And no valid ratification can be made by them of their agreements entered into during infancy when they come of age. Because ratification

26. *CWT* v. *Her Highness Vijayaba* (1979) 2 SCC 213.
27. S. 25.
28. S.185.
29. S.10.
30. S. 3 of the Indian Majority Act, 1875.
31. *Mohoribibi* v. *Dharmodas Ghose* (1903) 30 IA 114.

relates back to the date of the making of the contract and no void contract may be validated by subsequent ratification.

The principle laid down in *Mohoribibi* case has limited application to contracts where minor is charged with obligations and other person seeks to enforce those obligations against the minor. The contracts beneficial to the minor may be enforced by or on behalf of the minor. It includes contract of apprenticeship, ordinary trade contracts, contract for sharing partnership profits, contract of marriage *etc.* The contract of marriage of a minor may be enforced at the instance of minor but cannot be enforced against the minor. Similarly, a non-onerous gift made in favour of minor donee may be accepted but onerous gift cannot bind the minor. In case, onerous gifts are accepted by him in his minority, if not repudiated on attaining majority, the obligations of gift would bind him.[32]

A minor cannot be estopped from pleading his minority. Where he makes a fraudulent misrepresentation of his age and obtains a loan, he can be asked, in discretion of the court under section 33 of the Specific Relief Act, 1963, to refund it or made compensation for it. An infant may be compelled to restore the property or goods obtained by misrepresentation only so long as the same is traceable in his possession. This is known as the equitable doctrine of restitution. This doctrine is not applicable if the infant has either sold the goods or converted them. He cannot be made to repay the value of the goods because that would amount to enforcing a void contract. The Indian Contract Act provides no remedy in such cases. A minor cannot be held liable for any contractual or tortuous liability arising out of contract, which would be an indirect way of enforcing his agreement. But where the tort is independent of the contract, the mere fact that a contract is also involved, will not absolve the infant from liability.

Ratification is an approval of a previous act or contract, which becomes the act or contract of the person approving it. If an action is taken by a person not competent to contract but ratified by a person having competence, that action shall not be treated as illegal.[33] It neither amounts to making of a new contract to be bound by the old one nor making new contract in terms of old contract. It is an act of adoption of the old contract itself with effect from the date on which it was made. A void agreement later ratified by virtue of endorsement is a valid contract.[34]

An unadjudged lunatic can enter into a valid contract during lucid intervals.[35] A juristic person can enter into a contract subject to limitations on its powers.

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32. *K. Balakrishnan* v. *K. Kamalam* & Ors. (2004) 1 SCC 581.
33. *Punjab University* v. *V. N. Tripathi* AIR 2001 SC 3672.
34. *Ashok J Pandya* v. *Suyog Coop Housing Society Ltd.* AIR 2003 NOC 118 (Guj).
35. S. 12.

Consent

Consent is the foundation of a contract. Law requires the meeting of minds (*aggregatio mentium*) between parties. They must agree upon the same thing in the same sense. When consent to a transaction is caused by coercion, undue influence, fraud or misrepresentation the agreement is voidable at the option of the party whose consent was so caused. For there is no free consent here. Similarly, mistake renders a contract voidable subject to sections 21 and 22.

Coercion, undue influence, fraud, misrepresentation and mistake are defined in sections 15 to 20 of the Contract Act. They do not overlap except that their effect may be common.[36]

Coercion: Consent is said to be caused by coercion when it is obtained either by committing or threatening to commit any act forbidden by the Indian Penal Code or by unlawfully detaining or threatening to detain any property. Coercion is equivalent to, what in English Law is called, duress. A new breed of duress called economic duress has developed in common law countries including India.

In business world, the commercial pressures[37] of varying degrees are inevitable. The aggravated form of commercial pressure may be considered as economic duress. Commercial pressure becomes economic duress if it is such that the victim is compelled to enter the contract against his will and is left with no alternative course open to him.[38] According to Lord Scarman,[39] commercial pressure to qualify as economic duress[40] must have two elements – pressure amounting to compulsion of the will of the victim and illegitimacy of the pressure. Illegitimacy of pressure is determined by taking into consideration the nature of pressure and nature of demand supported by the pressure. Not only the pressure but the demand must also be legitimate. For instance, threat to report criminal conduct to police cannot be classified as illegitimate pressure. If pressure is legitimate, there is no duress.[41]

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36. Sanjiva Row, *Contract Act and Law Relating to Tenders etc.*, 9th ed., Vol. 2, Delhi Law House, 2004, p.1141.
37. Commercial pressure concept was first recognized in *The Siboen* and *the Sibotre* (1976) 1 Lloyds Rep 293 and *North Ocean Shipping Co. Ltd.* v. *Hyundai Construction Co. Ltd.* (1978) 3 All ER 1170.
38. *Pao On and Others* v. *Lau Yin and Another* (1979) 3 All ER 65. Cited in *Atlas Express Ltd.* v. *Kafco Ltd.* (1989) 1 All ER 641.
39. *Universal Tankship Inc. of Monrovia* v. *International Transport Workers Federation and Others* (1982) 2 WLR 803.
40. It can be said that all economic duress are commercial pressure but all commercial pressure are not duress.
41. *Universal Tankship Inc. of Monrovia* v. *International Transport Workers Federation and Others* (1982) 2 WLR 803.

The economic duress does not signify the lack of will to submit but the intentional submission arising from the realization that there is no other practical choice open to him. This is the thread of principle which links the early law of duress (threat to life or limb) with later development when the law came to recognize as duress the threat to property and now the threat to man's business or trade.[42] Effectiveness of alternative remedy, absence of protests, availability of independent advice, benefits received and speed with which victim sought to avoid the contract are looked into, to differentiate between commercial pressure and economic duress.

The rationale behind making economic duress a ground to vitiate consent is that the apparent consent of the party aggrieved was induced by pressure exercised upon him by the other party which the law does not regard as legitimate with the consequence that his consent was treated revocable unless approbated expressly or by implication after the illegitimate pressure had ceased to operate on mind.[43] This principle is approved and applied by the Courts in India in number of cases.[44]

Undue Influence: Undue influence vitiates the consent. It is sometimes categorized as the subtle species of fraud whereby mastery is obtained over the mind of the victim by insidious approaches and seductive artifices.[45] Undue influence signifies the dominance of one over the will of another so as to influence his consent. It is presumed that a party is in a position to dominate the will of the other when they are either in a relationship of trust and confidence or one is having real or apparent authority over the other or a party is temporarily or permanently affected by reason of age, illness or mental or bodily distress. The principle, which is based on equity, is applicable where a transaction is found impeccable or unconscionable.

Under section 16, if the persons are in fiduciary relation with each other, there is presumption that a person is in a position to dominate the will of the other, which will vitiate the latter's consent on the ground of undue influence. In Roshanlal case[46] after analyzing the facts of the case, the Court observed that there is no fiduciary relationship between the doner and the donee. In cases of undue influence, where the transaction *ex facie* or on the evidence adduced appears to be unconscionable, the burden of

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42. Lord Scarman in *Universal Tankship Inc. of Monrovia* v. *International Transport Workers Federation and Others* (1982) 2 WLR 803.
43. *Pao On and Others* v. *Lau Yin and Another* (1979) 3 All ER 65.
44. *Dai-ichi Karkaria P Ltd.* v. *Oil and Natural Gas Commission* AIR 1992 Bom 309; *B & S Contracts and Designs Ltd.* v. *Victor Green Publications Ltd.* (1989) ICR 419; *Superintendent Engineer, Irrigation Deptt* v. *Progressive Engineering Co.* (1997) 4 Andh L D 489 DB, AP. *Central Inland Water Transport Corpn.* v *B. N. Ganguly* AIR 1986 SC 1571 and *Vinayakappa* v. *Dulichand* AIR 1986 Bom 193.
45. *Mahboob Khan* v. *Hakim Abdul Rahim* AIR 1964 Raj 250.
46. *Roshanlal* v. *Kartar Chand* AIR 2002 HP 134.

proving that the contract was not induced by undue influence lies on the party who was in a position to dominate the will of the other. Where parties are bound by a fiduciary relationship, as in cases of father and son, doctor and patient, master and servant, advocate and client, the law protects the weak party.

To prove that a transaction is a result of undue influence, it is to be proved that a) the defendant is in a position to dominate over the will of other; and b) he actually used the position. While applying the presumption of undue influence with respect to the unconscionable contracts, the bargaining power of the parties is also looked into. If the parties are on equal footing the mere unconscionableness of the bargain does not create the presumption of undue influence.

Presumption of undue influence arises depending upon the facts and circumstance of each case.[47] Grandfather making a gift of a portion of his properties to his only grandson on account of love and affection a few years before his death is found to be an unconscionable transaction on the face of it.[48] Urgent need of money[49] or statutory compulsion to make contract[50] cannot be regarded as one made under undue influence.

Undue influence is different from duress or coercion. Duress occurs when there is a physical compulsion[51] of the person or when there is a threat to the person's life or limb or threat of a physical beating or of imprisonment. Whereas undue influence may exist without violence or threats of violence against the victim. It depends upon the existence of a relationship between two parties which, while it continues, causes one to place a confidence in the other which produces a natural influence over the one which that other abuses to his advantage.

Fraud: Section 17 defines fraud. Fraud means a false statement made knowingly or without belief in its truth or recklessly without caring whether it be true or false. An absence of honest belief is essential to constitute fraud. The person making the statement must have been aware of the falsity of the statement. Fraud is thus committed where one person induces another to enter into some transaction on a false belief by a representation of a fact, which is not true, and which he does not believe to be true. Mere silence is no fraud. Silence may become deceptive when there is a duty to speak.[52]

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47. See generally, *Raghunath Prasad* v. *Sarju Prasad* AIR 1924 PC 60; *Ladli Prasad Jaiswal* v. *Karnal Distillery Co.* AOR 1963 SC 1367 and *Subhas Chandra Das* v. *Ganga Prasad Das* AIR 1967 SC 878.
48. *Subhas Chandra Das* v. *Ganga Prasad Das* AIR 1967 SC 878.
49. *Raghunath Prasad* v. *Sarju Prasad* AIR 1924 PC 60.
50. *Andhra Sugar Ltd.* v. *State of AP* AIR 1968 SC 599.
51. *Mahboob Khan* v. *Hakim Abdul Rahim* AIR 1964 Raj 250.
52. As in the case of contracts *of uberrime fides*.

Misrepresentation: Misrepresentation means misstatement of a fact material to the contract. It is defined in section 18. The section covers unwarranted statements and inducing mistake about subject matter. Misrepresentation may also arise from suppression of vital facts. It is not essential that there shall be any misrepresentation by express words. It is sufficient if the party defending knowingly induced the plaintiff to enter into a contract by leading him to believe something, which the party deceiving knows to be false.

Mistake: Mutual mistake of material facts in the formation of a contract renders the agreement void and not voidable. A unilateral mistake, however, does not render an agreement void. Nor does a mistake of law affect its validity.[53]

Lawful object

The consideration or object of an agreement is lawful, unless it is forbidden by law or is of such a nature that, if permitted, it would defeat the provisions of any law or is fraudulent or involves or implies injury to the person or property of another or the court regards it as immoral or opposed to public policy.[54] Every agreement of which the object or consideration is unlawful, is void. Agreement to stifle criminal prosecutions and marriage brokage agreements are hit by the above provisions. Maintenance and champertous agreements are not *per se* void on ground of public policy. Where an agreement, on its facts, is just and equitable and its object is not unfair, improper or speculative, it is not contrary to public policy and the court may enforce it. In champertous agreements the proportion in which the fruits of litigation are to be divided between the litigant and the claimant constitutes an important criterion to judge the validity of these agreements.

Where there is single consideration for several objects, some of which are lawful and some unlawful, the whole agreement is void. But if lawful part is severable from the unlawful part, the lawful part shall be given effect to.[55]

A contract, vesting jurisdiction in a court, which cannot exercise it under section 20 of the Code of Civil Procedure, is void and hit by section 23 of the Contract Act because of being against public policy.[56] Similarly, a

53. Where the contractor was to give an offer in response to invitation to tender, after verifying all the aspects of job like work site, its surrounding, availability and quantity of materials required etc. Later on contractor found out that his cost is increasing because the raw material has to be brought from far away quarry. His claim that the agreement is void due to mistake was rejected. *State of Karnataka* v *Steller Construction* AIR 2003 Kant 6.
54. S. 23.
55. *Canbank Financial Services Ltd.* v.*Custodian* (2004) 8 SCC 359.
56. *Ranjan Nagpal alias Ranjana Malik* v. *Devi Ram and Others* AIR 2002 HP 166.

contract providing for obtaining the deed of exchange of properties from registration office only after criminal cases were compromised, is held to be against public policy and thus void.[57] A contract for indefinite period or non-determinable by one party by giving notice of termination should be interpreted as perpetual. Perpetuity is attached to the legal personalities entering into contracts but not to the commercial or mercantile contracts unless based upon mutual trust and confidence.[58] Such contracts are against the public policy because in such cases, one party may completely ruin the other party's business by sheer inaction on their part. However, giving one party to the contract authority to terminate contract after the expiry of one year without assigning any reason is not unconscionable or opposed to public policy.[59]

Monopolistic agreements are opposed to public policy but trade combinations in several cases have been upheld. The Competition Act, 2002, now grapples with problems on the subject. An agreement among bidders at an auction sale not to bid against one another is not unlawful. Agreements in restraint of marriage, trade and legal proceedings are void. Similarly, unmeaning agreements, wagering agreements and agreements to do impossible acts are void. The seller of goodwill may, however, validly agree with the buyer to refrain from carrying on a similar business within specified local limits, which are reasonable. A written agreement to refer disputes to arbitration is valid.

A party to an illegal agreement who has advanced money under it to the other party would be entitled to reclaim it if the illegal purpose has not been, partly or wholly, carried out.

Performance of contracts

Parties may provide their terms of bargain as they like. Their promises bind their legal representatives in case of their death before performance, unless there is a contract to the contrary or the nature of the contract is such that it depends upon the personal qualifications of any party. A contract is validly discharged by faithful performance, or by release or remission by the promisee, or by frustration under law or by novation.

The parties to a contract are under obligation to perform the obligations undertaken. For this purpose, the subject of the contract must be certain and made available. Contract in which the identity and the price of the property were not disclosed, was held to be incapable of performance. Similarly, mere bid is not a concluded contract and thus cannot be performed.

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57. *Shrihari Jena alias Das* v. *Khetramohan Jena* AIR 2002 Ori 195.
58. *Rohit Dhawan* v. G. *K. Malhotra and Another* AIR 2002 Del 151.
59. *ONGC* v. *M/s Streamline Shipping* Co. AIR 2002 Bom 420.

An agreement to do an act, which is impossible in itself is void. Similarly, if subsequent to the making of the contract some event happens which the parties could not foresee and whose occurrence they could not control so that the agreement cannot be performed, the contract is said to be frustrated. For it becomes impossible of performance. The former impossibility is known as initial and the latter supervening. Frustration may occur by change in law, destruction of the subject-matter, death or incapacity of the contracting party to perform the contract or fundamental change in circumstances after the contract is made.[60] The occurrence of the frustrating event must have been beyond the contemplation of the parties and they must not have provided for it.[61] Nor should the event be attributable to a contracting party. Mere strike, lock-out in the factory, rise in price of contract goods or other commercial difficulties are not unforeseen circumstances and do not as such render the contract impossible of performance.

Outbreak of war makes a difference to the performance of most contracts. Where it involves dealing with an enemy state, the contract is at an end. In other cases, it depends upon the terms and nature of the contract itself whether it stand suspended, abrogated or not at all affected by war. Introduction of the permit system does not absolve the promisor from supplying the goods. He must make reasonable efforts to procure the permit to fulfil his agreement.

Frustration leads to automatic dissolution of the contract and exempts the parties from its performance of further performance without rendering any of them liable for damages. Where, however, any party has received any benefit under the agreement, he must restore it or made compensation for it to the other party. If the agreement is absolute in its terms, frustration does not occur except when there is change of law.

Quasi-contract

Quasi-contract means a relation between parties, which resembles the consequences of contract but is not a contract. In the former there is neither offer nor acceptance and the source of liability is the provision of the law. It

60. In *Nirmala Anand* v. *Advent Corp. Pvt. Ltd.* AIR 2002 SC 2290, it was held that the contract to sell the immovable property can not be said to be frustrated where the permission of the competent authorities to construct flats is terminated but the order is likely to be revoked.

61. In *Gujarat Housing Board* v. *Vipul Corporation* AIR 2004 Guj 319 it was held that mere denial by the allottees to allow work to be completed is not a case where the object or the purpose of the contract was effected by subsequent event to the extent that it became impossible and impracticable to perform the contract like destroying of the houses by natural calamities or damage to the house to the extent that water proofing would not serve any purpose.

operates because it would be unjust to allow a party to retain a benefit conferred by the other party, which he did not intend to bestow gratuitously. The latter is a true contract: there is offer and acceptance and the liability springs from the free will of the parties. A quasi-contractual liability is sometimes spoken of as based on contract implied in law. A contractual liability, on the other hand, is based on a contract implied in fact.

Quasi-contractual liability is difficult to classify. Partly it resembles liability under the law of tort as it arises independently of any contract and partly it resembles contract, as it is a liability *in personam* and not *in rem*. Therefore, the liability may be categorized as accrued either under an implied contract or under natural justice and equity. Lord Mansfield[62] relied upon the latter and held that the liability may be enforced on the principle of unjust enrichment, *i.e.*, enrichment of one person at the cost of another. But the beginning of 20th century marked the development of alternative approach,[63] which relies upon an *implied-in-fact* contract, which means enforcing a liability on the basis of notional/ implied/ fictional contract where an express contract is not there. But this position was changed in *Fibrosa case*[64] where advance money given for the supply of machinery, which was obstructed due to outbreak of war. Lord Wright took support from Lord Mansfield's theory of unjust enrichment and observed:

> "it is clear that any civilized system of law is bound to provide remedies for cases of what has been called unjust enrichment or unjust benefit, that is, to prevent a man from retaining the money of, or some benefit derived from, another which it is against conscience that he should keep. Such remedies in English law are generally different from remedies in contract or tort, and are now recognized to fall within a third category of the common law which has been called quasi-contract or restitution."

Sections 68 to 72 of the Indian Contract Act cover instances of quasi-contract. Indian Contract Act avoids the term quasi contract, instead uses the expression 'certain relationship those created by contract'.

1. *Supply of necessaries*: Under section 68, where necessaries of life are supplied to a person disqualified from contracting or to any of his legal dependents, the supplier is entitled to be reimbursed from the property of such disqualified person. A minor's agreement, though for necessaries of life, is not valid. Yet his property is liable in quasi-contract as if there was a real contract to supply the necessaries. The minor's liability is not personal. To make him liable, the goods must be

62. *Moses* v. *Macferlan* (1558-1774) ALL ER Rep 581: (1760) 2 Burr 1005.
63. *Sinclair* v. *Brougham* (1914) AC 394.
64. *Fibrosa Spolka Akeyjna* v. *Fairbain Lawson Combe Barbour Ltd.* (1943) AC 32.

suited to his condition in life and he should not have an adequate supply of the same at the time he received the goods. It is immaterial that the supplier was ignorant of the actual need of the minor and the position of the stock with him. The question of what are "necessaries" is not a pure question of law but a mixed question of law and fact.

2. *Payment by interested persons*: Under section 69, where in order to protect his interest, a person pays money for another who is legally bound to pay it, he is entitled to be reimbursed as if there was a real contract between the parties for the repayment. A mere moral, social or sentimental interest is not sufficient to invoke the provisions of the law in favour of the claimant. The interest must subsist at the time of payment. A payment made under one's own false apprehension that one's interest will be jeopardized if the other party's dues are not paid off cannot be recovered under this provision. Payment by a buyer of outstanding taxes on property contracted to be sold to him, which have accumulated owing to the default of the seller will be reimbursed because the buyer is interested in the payment of it. A mere voluntary payment is not protected.
3. *Liability to pay for non-gratuitous act*: Under section 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 benefit of it, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered. Plaintiff must do something lawfully with the intent to charge remuneration for his services but the defendant must have an option to accept or reject the benefit so conferred upon him. Thus the section does not encourage officious interference in affairs of others. Where goods have been supplied to government under a constitutionally void agreement and it has appropriated them, it must pay the fair value of the goods. The liability arises not under contract but under quasi-contract. The government must make reasonable compensation for the goods it received under the transaction.
4. *Finder of Goods*: Under section 71, where a person finds goods belonging to another and takes them into his custody, his liability is that of a bailee. This means that the finder must have *animus possidendi*. The finder is regarded as if he is a bailee under contract as far as his duties and liabilities are considered. The measure of bailee's liability is also the measure of the finder's liability. This has led to the judicial view that under law, bailment may arise independent of bailment. He may become liable for compensation if he uses them.
5. *Mistake*: Under section 72, where money has been paid or anything delivered by mistake or under coercion to a person, he must repay or return it. The courts have held that the word mistake includes both

mistake of fact and mistake of law. Thus tax paid under the (mistaken) notion that it is legally due, although it is not, can be recovered under this provision. To succeed, plaintiff must prove that the payment was the result of mistake, not connected with contract. Cases of payments made under forged document, fraud of a third party, wrong identity of person, and *bona fide* overpayment fall under this section, but not excess payment of rent fixed by the rent controller. Where in case of a single payment, parts of which have been paid under mistake and parts not, the courts would not embard upon the task of splitting the various claims. The section uses the word coercion in the dictionary sense and not in the technical sense of frustration of contract.

Damages for breach of contract

The principal remedies for breach of contract are (i) damages- general and/ or special, (ii) specific performance of contract, and (iii) injunction. Section 73 and 74 of the Act deal with the principles of assessment of damages, while the Specific Relief Act, 1963, deals with other remedies.

Section 73 reads:

> When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach or which the parties knew, when they made the contract, to be likely to result from the breach of it.

Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default, as if such person had contracted to discharge it and had broken his contract.

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

This section deals with unliquidated damages (*i.e.*, where the parties have fixed no damages to be paid in case of breach). It is not every breach but the actual loss which entitles the plaintiff to damages. Nominal damages thus will not be allowed unless the plaintiff has suffered some loss. Where there is a breach of contract to supply goods, the measure of damages is the same whether the breach occurs on the date set for performance of the contract or is anticipated to an earlier date. They are to be calculated as they

stood on the date of breach of contract (which is also the date of performance of contract). This section also provides that the same principle is applicable where there has been a breach of quasi- contractual obligation. Damages will not be granted for remote consequences of the breach. Again, special damages will not be allowed unless the defendant had at the relevant time notice of the special circumstances. Thus where plaintiff sent two books, which constituted part of an entire set and defendant failed to deliver them to the consignee, he was held liable, for want of notice, only for the price of the two lost books and not for the price of the whole set, although it may be rendered useless or less useful in consequence of the loss.

Section 74 reads:

> When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.
>
> Explanation— A stipulation for increased interest from the date of default may be a stipulation by way of penalty.
>
> Exception— When any person enters into any bail-bond, recognizance or other instrument of the same nature, or under the provisions of any law, or under the orders of the Central Government or of any State Government, gives any bond for the performance of any public duty or act in which the public are interested, he shall be liable, upon breach of the condition of any such instrument, to pay the whole sum mentioned therein.
>
> Explanation— A person who enters into a contract with Government does not necessarily thereby undertake any public duty, or promise to do an act in which the public are interested.

This section deals with liquidated damages. The question arises, whether in case of breach the injured party will be entitled as of right to the damages fixed by the parties. Under this provision, the court will allow reasonable compensation but not exceeding the amount so fixed. In other words, the fixed amount or the fixed measure of damages represents the maximum limit beyond which the courts will refuse to travel.

Damages are, in exceptional cases, allowed for breach of confidence. The amount of compensation depends upon circumstances among which mental pain and suffering is one factor.[65] There can be compensation for

65. *Prema* v. *Mustak Ahmed* AIR 1987 Guj. 106.

non-pecuniary loss.[66]

There are no separate provisions in the Act which deals with forfeiture of the earnest money or security money. The courts, however, have decided such cases of forfeiture under section 74. Where the amount is deposited by way of earnest money, the depositee, in case of breach of contract by the depositor, has a right to forfeit it even if he suffered no loss provided that the earnest amount is reasonable and not unreasonable. In the latter case, the deposit being in the nature of penalty, the depositee must prove his actual loss. And he will be entitled to recover the same from the guilty party. Where, however, the amount is deposited by way of security money, the depositee cannot forfeit it under any circumstances and must prove his loss in all cases. In other words, the distinction between reasonable and unreasonable amount, which applies in cases of earnest money, does not apply in cases of security money. This means, quite clearly, that where the depositee does not prove or fails to prove his loss consequent upon breach by the security depositor, he will be liable to return the full security amount to the depositor.

Indemnity and guarantee

Sections 124 to 147 of the Act deal with contracts of indemnity and contracts of guarantee. Section 124 defines a contract of indemnity as a contract by which one person promises to save the other from loss caused to him by the conduct of the promisor himself or by the conduct of any other person. This narrows the meaning of indemnity to loss occasioned by human conduct and excludes loss by natural event. Loss must be caused by some human agency. Thus fire and marine insurance contracts are, strictly speaking, not contracts of indemnity but enforced as contingent contract under section 31 of the Act. The definition restricts the scope of indemnity to cases where there is a promise to indemnify against a loss caused by the promisor himself or by any other person.

A contract by a vendor of immovable property that the vendee would be entitled to recover the amount which he is compelled to pay to a third person to satisfy such person's claim on the property sold, if any, is in the nature of a contract of indemnity. An indemnity holder (promisee) is entitled to recover from the promisor all damages and all costs which he was compelled in pay in any suit and all sums which he may have paid under a *bona fide* and prudent compromise of any such suit. The promise of indemnity may be express or implied.

66. For instance, in *Joseph* v. *Dr. George Moonjely* AIR 1994 Ker 289, a compensation of Rs: 1,60,000/- was awarded for negligent surgical operation causing death of the patient.

Section 126 defines a contract of guarantee as a contract to perform the promise or discharge the liability of a third person in case of his default. Such a contract may be oral or in writing. The guarantor is called the surety, the person for whose default the guarantee is given is called the principal debtor, and the person to whom it is given is called the creditor. There must be a conditional promise to be liable on the default of the principal debtor. Further if there is no principal debt, there can be no valid guarantee. It has been held that a contract of guarantee is not, like a contract of insurance *uberrimae fidei* but *strictissima juris*.

A guarantee without consideration is void. But there need not be any direct consideration between the surety and the creditor. The liability of a surety arises on the failure of the principal debtor to discharge his obligation. On such default, the creditor may proceed against the surety without exhausting his remedies against the principal debtor or concurrently make him a party to the suit. Again a guarantee which the creditor has obtained by misrepresentation or concealment of a material fact is invalid. Upon payment or performance of his liability, the surety steps into the shoes of the creditor and is invested with all those rights which the creditor had against the principal debtor, including the benefit or any security which the creditor had against the principal debtor at the time of entering into the contract of guarantee. A surety's ignorance of such a security does not affect his right to claim it.

In every contract of guarantee, the law implies a promise by the principal debtor to indemnify the surety for all sums which he has rightfully paid under it to the creditor. Co-sureties are liable to contribute equally, whether or not any of them knew of the other's contract of guarantee. Where they are bound in different sums still they are liable equally but subject to their respective pecuniary limits. If a creditor releases one of the sureties, it does not discharge others. Nor does the surety so released cease to be liable to other sureties. The liability of a surety is co-extensive (but not necessarily co-existive) with that of the principal debtor, unless it is otherwise provided by the contract.[67] Where the latter is a minor or the debt has become time-barred against him the surety nevertheless remains liable. The surety is liable for the payment of interest also under the contract.

A guarantee which extends to a series of transactions is called a continuing guarantee.[68] It may be revoked as to future transactions by notice to the creditor or by death of the surety, unless there is a contract to the contrary. Any change made by the principal debtor and creditor jointly in the terms of the contract without the surety's consent, whether or not it

67. S. 128.
68. S. 129.

is for the latter's benefit, discharges the surety as to transactions subsequent to the variance. Again the surety is discharged where the creditor releases the principal debtor or makes a composition with, or promises to give time to, or not to sue the principal debtor, or does any act which impairs the eventual remedy of the surety against the principal debtor. But mere forbearance on the part of the creditor to sue the principal debtor or to enforce any other remedy against him does not discharge the surety.

A contract of indemnity has two parties, while a contract of guarantee has three parties. In an indemnity, there is only one contract but in a guarantee there are three contracts. While undertaking in a guarantee is collateral, in an indemnity it is original. The liability under a contract of indemnity is contingent whereas the liability of the surety arises automatically since there is an existing debt of the principal debtor.

Bailment and pledge

Sections 148 to 181 of the Act deal with contracts of bailment and pledge. The liability of railways as a bailee is regulated by the Indian Railways Act, 1989.

Section 148 defines bailment as the delivery of goods by one person to another for some purpose upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them. The person who delivers the goods is called the bailor and the person to whom the goods are so delivered is called the bailee. Where a person already possesses the goods but contracts to hold them as a bailee, there is a contract of bailment although the physical possession of the goods has not moved from the bailor to the bailee. A bailment thus arises from contract. A guest is a bailee of the furniture he uses at a hotel. A deposit of money in a bank is not in the nature of bailment; it creates the relationship of borrower and lender between the parties. A person who lends his goods without any charge is called gratuitous bailor. His duty is naturally much less than that of a bailor for reward. A gratuitous bailment terminates when the bailor or bailee dies. By and large sections 151 to 167 lay down the duties of bailee as follows:

1. The bailee must in all cases of bailment take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed.[69] A clause in a contract of bailment exempting the bailee from the consequences of his negligence or of his servant is inoperative according to the modern (but not some old) decisions. A contract, however, fixing a higher standard of care is valid.

69. S. 151.

Unless there is a special contract to the contrary, the bailee is not liable for the loss, destruction or deterioration of the goods bailed to him if he has taken the reasonable amount of care. The burden of proof is on bailee to show that he was exercising reasonable care and if he can prove this he will not be liable.[70]

2. A bailee should not do any act inconsistent with the conditions of bailment; otherwise the contract would become voidable at the bailor's option.
3. Where the bailee makes an inconsistent use of the goods bailed to him, he becomes liable to compensate the bailor for any loss arising out of such use. Any unauthorised use of the goods would make the bailee absolutely liable for the damage to the goods. Besides this, the bailor can terminate the contract at once.
4. Where the bailee without the bailor's consent, mixes the bailor's goods with his own goods, he must bear the cost of their separation and consequential damages. If, however, the goods cannot be separated, the bailee must compensate the bailor for the loss of the goods.
5. The bailee must return the goods or deliver them according to the bailor's directions. He must also return any increase of profit, natural or otherwise, arising out of the goods bailed to him. If he makes default he will be responsible for any loss.

It should be noted that in case of several joint owners, the bailee may return the goods to one joint owner, unless there is a contract to the contrary. Where the bailee in good faith has returned the goods to the bailor who turns out to be not their owner, the bailee is not responsible to the owner in respect of the delivery.

Bailor's duty

It is the bailor's duty to disclose to the bailee all faults which may materially interfere with the use of the goods bailed, if he is aware of them. If, however, the goods were bailed on hire, the bailor's liability is absolute and it does not depend upon his knowledge of the defect.

If the bailor has no right to bail the goods and consequently the bailee sustains any loss, the bailor is responsible to the bailee for such loss. If the bailee's lawful charges are not paid, he can exercise lien and retain the goods until he receives the charges.

Finder of goods

A finder of goods has no right to sue the owner for compensation for trouble and expense he has voluntarily incurred to preserve the goods and to

70. *Chellapan Pillai* v. *Canara Bank* (1988) 2 Ker LT 54.

trace the owner. Under sections 168 and 169 he has, however, the following rights:

1. He may retain the goods until he receives compensation for such trouble and expense.
2. He may claim the reward for the return of the lost goods if it had been offered, presumably subject to the rules of offer and acceptance.
3. Where the goods are commonly the subject of sale and the owner cannot with reasonable diligence be found or refuses to pay the lawful charges, the finder has the right to sell the goods if they are of a perishable nature or likely to lose the greater part of their value or the lawful charges of the finder amount to two-thirds of their value.

A finder of goods is a bailee and therefore he is bound to exercise reasonable care.

Pledge

Section 172 defines pledge as the bailment of goods as security for payment of a debt or performance of a promise. The bailor in this is called the pawnor (pledgor), the bailee is called the pawnee (pledgee). The parties may stipulate the terms of their bargain. A valid pledge may be made by the owner, a person who has a limited interest provided the pledge does not extend beyond that interest, a mercantile agent and also by a person who has obtained possession of the goods pledged by him under a voidable contract under section 19 or 19A of the Act.

Where the pawnor defaults in payment of the debt or performance, the pawnee may bring a suit against him upon the debt or promise, and may retain the goods pledged as a collateral security; or he may sell the thing pledged on giving the pawnor reasonable notice of the sale. Where the pledge is by way of hypothecation, the creditor cannot directly seize the goods by entering into promises or otherwise. He has to do so either with the consent of the borrower or through the court order.[71] In case of shortfall, the pawnee is entitled to claim the balance from the pawnor; in case of excess proceeds, he must pay over the surplus to him. The pawnee is entitled to retain the goods only for the debt or promise. A sale without complying with the statutory requirement of reasonable notice is not effective, though authorized by the agreement. An adjourned sale needs no second notice. A defaulting pawnor may redeem the goods pledged at any time before the actual sale of the pledged goods. But, in addition, he has to pay the pawnor expenses which have arisen from his own default.

71. Avtar Singh, *Law of Contract and Specific Relief*, 9th ed., Eastern Book Co., Lucknow, 2005, p.600.

Agency

Sections 182 to 238 of the Act deal with principles of agency. An agent represents another person who is called the principal.[72] The latter must have attained the age of majority and of sound mind. In order to become liable to his principal, the agent should also be major and of sound mind. As between principal and third persons, any person, including a minor, can become an agent. Thus a minor can bind his principal to others but cannot bind himself to them.

No consideration is needed to create an agency. An agent differs from a servant and a bailee in certain respects. Agents are of several kinds and include factor, broker, del credere agent *etc.* An agency may be created expressly or by implication of circumstances, necessity, estoppel and ratification.

Ratification

Sometimes a person acts on behalf of another but without his authority. Such latter person if he is competent to contract—major and of sound mind—may retrospectively confer authority on the act and own it. It is known as ratification. Section 196 to 200 lay down essentials of a valid ratification:

1. The act to be ratified must have been done without the ratifier's authority or knowledge and on his behalf.
2. The person ratifying the act must have material knowledge of the facts of the case.
3. The ratification must be of the whole of the transaction.
4. The act to be ratified must not subject a third person to damages or terminate his any right or interest.
5. The ratifier must be competent to contract.

Ratification relates back to the date when the contract was originally made by the agent. Ratification may be express or implied. Upon valid ratification, the act is treated as if it was performed with the ratifier's authority.

Termination of authority

Sections 201 to 210 deal with revocation of authority. An agency is terminated when the principal revokes his agent's authority or the agent renounces the business of the agency or the business is completed or the principal or the agent dies or becomes of unsound mind or the principal is

72. Representative character and derivative authority are the distinguishing features of an agency. See *Krishna* v. *Ganapathi* AIR 1955 Mad 648.

adjudicated insolvent or time is expired. These grounds, however, are illustrative and not exhaustive. Revocation and renunciation may be expressed or implied. Revocation operates prospectively. An agency automatically ends when the principal's power over the agent ends. An agency for an unscheduled period may be terminated at the principal's pleasure for future transactions. Where, however, agency is for a fixed period, either the principal or the agent may terminate the agency earlier, but must compensate the other for the loss. Revocation to be effective must be brought to the notice of the concerned party. Where the agent has an interest in the continuance of the agency, the agency, unless there is a contract to the contrary, cannot be terminated. Section 202 of the Act illustrates this. A gives authority to B to sell A's land and to pay himself out of the proceeds, the debts due to him from A. A cannot revoke this authority nor can it be terminated by his insanity or death.

Duties of agent

Sections 211 to 221 of the Act lay down the following duties of an agent:

1. An agent cannot delegate his authority to another, unless there is a contract entitling him to do so, or the custom of the trade or the nature of the agency permits it.
2. An agent must conduct the business of the agency according to the principal's directions, or in their absence, according to the custom of the business. Where goods are destroyed by fire and the agent ignored to insure them, he is liable under this provision of his act of omission.
3. An agent must act with reasonable diligence and reasonable skill unless the principal has notice of his want of skill. He must make compensation to his principal for the consequences of his own neglect, want of skill or misconduct.
4. An agent must render proper accounts to his principal on demand.
5. An agent must, in case of difficulty, communicate with his principal with reasonable diligence to obtain his instructions.
6. An agent must not deal on his own account in the business of the agency. The principal may repudiate the transaction or claim benefit which may have resulted to the agent from the transaction.
7. An agent must not make secret profit but must pay to the principal all sums received on his account, but he may retain out of such sums all moneys concerning the advance or expenses incurred in the business of agency.
8. An agent must render proper accounts to his principal on demand.

Remuneration is due to an agent when the act has been completed. He has a lien on the principal's goods, papers and other property, movable

or immovable for its recovery, unless there is a contract to the contrary. An agent who is guilty of misconduct is not entitled to any remuneration pertaining to that part of the business which he has misconducted.

9. An agent cannot personally enforce contracts made on behalf of the principal nor is he bound by them, unless there is a contract to that effect. Such a contract is presumed to exist when the agent contracts on behalf of a principal who resides abroad, where the principal is undisclosed, or though disclosed cannot be sued. Where a government officer enters into an agreement on behalf of the government but the agreement does not comply with the constitutional requirements as to form, neither the officer nor the government is liable for its non-performance to the contractor. The officer is not an agent because the agreement is void.

Principal's duties

Sections 222 to 225 of the Act lay down the following duties of a principal to his agent:

1. The principal is bound to indemnify the agent against the consequences of all lawful acts done by the latter within the scope of authority given to him. But a principal is not liable to the agent for his criminal act, even though he employed him to do it.
2. The principal must compensate the agent for injury caused to him by the principal's neglect or want of skill.

Principal's liabilities to third parties

Agency has the effect of making the principal liable to third parties for the agent's acts. The liability arises in all cases where the act was *wrongful* and was done by the *agent* within the scope of *authority* given to him. It is immaterial that the agent committed the fraud, made misrepresentations or did some other wrong for his own benefit and not for his employer. The doctrine of *respondent superior* will be applicable in case the agent commits a tort while acting in the course of and within the scope of his agency. Where a principal gives money to an agent to purchase goods and he buys the same on credit but misappropriates the money given to him for the purpose, the principal remains liable to the third party for the price of the goods.

III. Partnership

Originally the law relating to partnership was embodied in the Indian Contract Act, 1872. Later, it was repealed by the Indian Partnership Act, 1932. Section 4 of the Partnership Act defines partnership as a relation

between persons who have agreed to share the profits of a business carried on by all or any of them acting for all. Thus the essentials of partnership are (i) a business, (ii) an agreement to share profit, (iii) its carrying on, (iv) either by all the partners or any of them on behalf of all and (v) mutual agency. An agreement which precludes one of the partners from sharing in profits does not make him a partner in the firm. Sharing in losses, however, is not a requirement of partnership.

Individually each member is a partner and collectively the members are called a firm. Since a firm is not a legal person, it cannot *qua* firm enter into a partnership with any person. A company, on the other hand, is a legal person. This is illustrated by hypothetically suggesting that even if all the members of a company meet with a fatal mishap, the company would still be in existence. A partnership would, however, cease to exist in such circumstances. The minimum and maximum members in a partnership, private company and public company respectively are two and twenty, two and fifty, seven (but ten in case of banking company) and unlimited. In other words, in partnership, the maximum number of members is restricted to twenty in all business except banking. In banking the maximum number is ten.

Co-owners are not co-partners because they do not carry on business. If two brothers divide the rent of their joint property, there is no partnership. If, however, they run a restaurant therein, there would be business. A partnership is different from a joint Hindu family business. The former springs from contract but in the latter a male becomes a member by mere birth. The relation of partnership arises from contract and not from status.

The real relation between the parties as based on all the relevant facts taken together must be looked at to determine the existence of partnership. Sharing in profits of partnership is an important but not the sole factor to judge whether or not a person is a partner in a firm. Similarly, the receipt of a share of profit by a lender of money, a servant or agent as remuneration, the widow or child of the deceased partner as annuity, a previous owner as consideration or part consideration for the sale of goodwill does not make him or her a partner. The test for determining partnership will be the real relation between the parties as shown from the relevant facts.

Mutual rights and duties

Sections 9 to 17 of the Indian Partnership Act lay down the rights and duties of partners which, except in case of section 10, apply in the absence of a contract to the contrary. Item four below, thus, is not subject to contract. Partners, therefore, may generally fix their rights and obligations as they deem fit. They may vary these from time to time with the consent of all the existing partners. The above Act states the following rights and duties:

1. Partners must carry on the business of the firm for their greatest common advantage. Every partner is bound to attend diligently his duties in the conduct of business.
2. They must be just and faithful to each other. They must act in good faith in terms of highest standards of honesty.
3. They must render true accounts and full information of relevant matters concerning the firm to any partner or his legal representative.
4. Every partner is legally bound to indemnify the firm for any loss caused to it by his fraud in the conduct of the business of the firm. A contract to the contrary here is unlawful and opposed to public policy.
5. A partner must indemnify the firm for any loss caused to it by his willful neglect in the conduct of the business of the firm
6. A partner is entitled to share profits equally and to contribute equally to the losses sustained by the firm.
7. A partner is not entitled to receive remuneration for taking part in the conduct of the business.[73]
8. The firm must indemnify a partner in respect of payments made and liabilities incurred by him in an emergency as well as in the ordinary and proper running of the business.[74]
9. The property of the firm includes the goodwill of the firm.
10. A partner must account for and pay to the firm all profits which he derives from any transaction of the firm or from the use of its name, property or business connection.
11. A partner must account for and pay to the firm all profits which he derives from any transaction of the firm or from the use of its name, property or business connection.
12. A transfer of a partner's interest whether absolutely or by way of mortgage or charge does not entitle the transferee, during the continuance of the firm, to interfere in the conduct of the business, to require accounts and to inspect the books of the firm.
13. The transferee of a partner's share is entitled to receive the share of profits of the transferring partner, and the share of his assets which may be found due to him on dissolution of the firm or his retirement.

The mutual rights of duties of partners continue to be the same in the reconstituted firm or in case of its continuance after the fixed term, unless there is a contract to the contrary.

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73. Compensation may be allowed to a working partner where there is any inequality between the respective labour put in by the partners. It is at the discretion of other partners.
74. No indemnity can be claimed if the loss in question is due to some improper conduct of the partner.

Partners and third parties

Sections 18 to 31 of the Partnership Act deal with the liabilities of partners to third parties. Every partner is an agent of the firm for purposes of the business of the firm. A notice, therefore, to a (working) partner is notice to the firm. A firm is liable to third parties for the wrongful acts of a partner. Thus where a partner having authority to buy goods for the business of the firm buys them on credit on its behalf and in its name, all the other partners also become liable for the payment of the price to the seller. Again where a partner or a firm receives money in the course of its business and it is misapplied, the firm is liable to make good the loss.

The firm's liability will arise only when the concerned act is wrongful, pertains to the business of the firm, and is done on behalf of the firm in the firm name or in any other manner expressing or implying an intention to bind the firm. Every partner is jointly and severally liable for the wrongful acts. A partner has authority in emergency and also implied authority in addition to the express authority which other partners may have conferred upon him. Under section 19, in the absence of any usage or custom or trade to the contrary, the implied authority of a partner does not empower him to:

(a) submit a dispute relating to the business of the firm to arbitration;

(b) open a banking account on behalf of the firm in his own name;

(c) compromise or relinquish any claim or portion of a claim by the firm;

(d) withdraw a suit or proceeding filed on behalf of the firm;

(e) admit any liability in a suit or proceeding against the firm;

(f) acquire immovable property on behalf of the firm;

(g) transfer immovable property belonging to the firm; or

(h) enter into partnership on behalf of the firm.

Rights of minor

1. He has the right to such share of the property and of the profits of the firm as may be agreed upon among the partners.
2. He is entitled to have access to, inspect and copy any of the accounts of the firm.
3. He may, within six months of his completing majority or knowing that he has been admitted to the benefits of partnership, whichever date is later, give a public notice that he has chosen to become or not to become a partner in the firm. If he fails to give such notice, he will be treated as a partner on the expiration of the six months. On his election to become a partner, his share in the property and profits of the firm is the same as during his minority. On his election not to become a

partner, his rights and liabilities existing during his minority continue up to the date on which he gives the public notice. His share is not liable after this date, and he can sue for his share of the property and profits.

Disabilities and liabilities of minor

1. A minor who is admitted to the benefits of partnership is disabled from suing the partners for an account or payment of his share of the property or profits of the firm, except when he is leaving the firm.
2. A minor's share is liable for the acts of the firm, but he is not personally liable for them.
3. Where a minor elects to become a partner, he becomes personally liable to third parties for all acts of the firm retrospectively since the date he was admitted to the benefits of partnership.
4. Where a minor represents that he is a partner in a firm, he may become liable for holding out.

Retirement of a partner

Sections 32 to 37 provide the manner in which a person ceases to be a partner and his rights and liabilities which flow from this. A partner ceases to be a partner:

(a) with the consent of all other partners;

(b) by exercise of the power to retire conferred upon him under an express agreement;

(c) by giving a written notice of retirement in case of partnership-at-will; and

(d) by a decision of expulsion by majority of the partners in the exercise in good faith of powers conferred upon them by contract.

An outgoing partner is liable for the past acts of the firm, unless there is a contract to the contrary between him, the remaining partners and the third party. Public notice must be given of the retirement, otherwise the outgoing partner and the firm continue to be liable as before.

An outgoing partner may carry on the same business as that of the old firm but unless the contract empowers him to do so, he cannot use the firm name, represent himself as carrying on the business of the old firm and solicit the customers of the firm. He may, under an agreement, be validly restricted to carry on a competing business with that of the firm within specified time or within specified local limits which must be reasonable. Such an agreement is not in restraint of trade. Where a partner dies or retires and the remaining partners nevertheless carry on the firm's business without any settlement of accounts between themselves, the outgoing partner of his estate is entitled, at his or its option, unless there is a contract to the

contrary, to such share of the profits from the date of ceasing to be partner as may be attributable to the use of his share of property in the firm or six percent per annum interest thereon. This provision, however, will not apply where the remaining partners have purchased the outgoing partner's share in accordance with the agreement.

Dissolution of a firm

Sections 39 to 44 of the Partnership Act deal with the ways in which a firm may be dissolved. The dissolution of a partnership between all the partners of a firm is called the dissolution of the firm.

Compulsory dissolution

Under section 41, a firm is compulsorily dissolved when all the partners or all but one are adjudicated insolvent or when the business of the firm becomes illegal. Where a firm carries on two or more businesses, separate and distinct from each other, the firm is dissolved only in respect of the unlawful business.

Contingent dissolution

Under section 42, the dissolution of the firm depends upon the happening of certain contingencies, unless there is a contract to the contrary. Thus a firm constituted for a fixed term is dissolved by the expiry of that term. So does a firm constituted to carry out specified adventures by their completion. A firm is also dissolved by the death of a partner or his adjudication as an insolvent.

Partnership at will

Under section 43, a partnership at will is dissolved when a partner gives notice in writing to other partners to this effect. The firm is dissolved as from the date mentioned in the notice or in its absence from the date of its communication.

Dissolution by court

Under section 44, the court may, at the suit of a partner dissolve the firm on the following grounds:

(a) that a partner has become of unsound mind, in which case the suit may be brought as well by the next friend of the partner who has become of unsound mind as by any other partner;

(b) that a partner, other than the partner suing, has become in any way permanently incapable of performing his duties as partner;

(c) that a partner, other then the partner suing, is guilty of conduct which is likely to affect prejudicially the carrying on of the business, regard being had to the nature of the business;

(d) that a partner, other than the partner suing, willfully or persistently commits breach of agreements relating to the management of the affairs of the firm or the conduct of its business, or otherwise so conducts himself in matters relating to the business that it is not reasonably practicable for the other partners to carry on the business in partnership with him;

(e) that a partner, other than the partner suing, has in any way transferred the whole of his interest in the firm to a third party, or has allowed his share to be charged under the provisions of rule 49 of order 21 of the first schedule to the Code of Civil Procedure, 1908 or has allowed it to be sold in the recovery of arrears of land revenue or of any dues recoverable as arrears of land revenue due by the partner;

(f) that the business of the firm cannot be carried on save at a loss, or

(g) on any other ground which renders it just and equitable that the firm should be dissolved.

Sections 45 to 55 deal with post-dissolution problems, that is, liability for acts of partners done after dissolution, right of partners to have business wound up after dissolution, continuing authority of partners for purposes of winding up, settlement of accounts, personal profits earned after dissolution, return of premium, use of firm name and sale of goodwill on premature dissolution.

Registration of firm

Sections 56 to 71 deal with registration of firm and consequences of non-registration. Under section 58, a firm may be registered by giving the registrar of the area a statement containing the name of the firm, its principal and other places of business, its duration, the names and permanent addresses of the partners and the date on which each partner joined the firm. This statement should be signed by all the partners or their duly authorized agents in the prescribed form and must be accompanied by prescribed fee to the Registrar. A firm name should not show royal patronage or sanction, approval or patronage of the government except with its written consent. When these provisions have been complied with, the Registrar shall record the information supplied to him in the register of firms. All alterations regarding firm name and its principal place of business, closing and opening of new branches, names and addresses of partners, constitution and dissolution of a firm and election of the minor (who has now attained majority) to become or not to become partner may be notified to the Registrar who shall amend the entry in the register of firms

accordingly. When a court decides a matter concerning the registered firm, it may also direct the Registrar to record in the register changes which may be consequent upon its decision. A certified copy of the contents of statements of a registered firm may be obtained by any person on application to the Registrar on payment of the prescribed fee. The recorded statements or intimation constitutes conclusive proof of the facts mentioned therein.

Under section 69, the registration of a firm is not compulsory, nor are penal consequences attributed to non-registration. A firm can act and carry on its lawful business unhindered. A non-registered firm, however, cannot file a suit to enforce a contract against a third party. By registration, the firm acquires the ability to sue but does not become a juristic personality. Also a partner of such a firm may not file a suit to enforce a right arising from a contract or under the Act against the firm or any of its partners. The non-registration, however, does not affect the right of a partner to sue for dissolution of the firm or for accounts of a dissolved firm or to realize its property. It also does not affect the powers of the official assignee under the law of insolvency to realize the property of the insolvent partner. Nor does it bar any suit or claim of set-off of a partner or of a firm not exceeding rupees one hundred, nor any proceeding in execution *etc.* The disability under the section can be removed by getting the firm registered before filing the suit. It, however, does not affect the right of a third party to enforce his claims against the non-registered firm.

IV. Sale of Goods

Originally the law relating to sale of goods was embodied in sections 76 to 123 in the Indian Contract Act, 1872. Later, it was repealed by the Sale of Goods Act, 1930. This Act is modeled, by and large, on the English Sale of Goods Act, 1893.

The Indian Act defines goods as every kind of movable property excluding actionable claim *e.g.* a claim to debt and money. Old coins are goods. So are stock and shares, growing crops, grass and things which are attached or are part of the land but have to be separated therefrom before or under the terms of a contract.[76] There can be a valid contract to sell goods which are yet to be manufactured, produced, or acquired by the seller under the terms of contract.

The Act nowhere defines a "sale", but its incidents can be gathered from by distinguishing a sale from an agreement to sell. The former is a transfer of ownership in *praesenti* in goods in consideration (exchange) of price. Neither payment of the price not delivery of goods at the moment is

76. S. 2 (7).

essential to constitute sale. A contract of sale may be absolute or conditional. Under the Act, an agreement becomes a sale when the time elapses or the conditions necessary to transfer the property (ownership) in the goods are fulfilled. The Act uses the phrase, contract of sale, which includes sale as well as agreement for sell. In other words, every sale includes or is preceded by an agreement for sale. By an agreement to sell a *jus in personam* is created, by a sale a *jus in rem* also is transferred. A contract of sale is formed by an offer to buy or sell goods for a price and its acceptance.[77] There is no condition that such an agreement should be in writing and/or registered. Irrespective of any amount involved, such a contract may be in writing or verbal or partly both. The parties may fix the price themselves or lay down any standard for its determination, through their course of dealings. If valuation of goods is agreed to be made by a third party, who refuses or becomes disabled so to fix the price, the buyer, if he has already accepted the goods, must pay a reasonable price for them. If the specific goods contracted to be sold have perished or substantially damaged before the making of agreement, the agreement is without any legal force. But where such goods become perished or so damaged before sale but after agreement to sell, the agreement is thereby avoided.

Conditions and warranties

Section 11 to 17 deal with conditions and warranties in a contract of sale. All stipulations in a contract of sale are not of equal importance. There are some stipulations which are so fundamental that their breach or non-performance is in fact a breach or non- performance of contract itself. There are other stipulations, performance of which is no doubt important, but do not go to the root of the transaction. Their breach does not destroy the contract. This distinction may be explained by the fact that the express or implied stipulation that the seller has title to the goods is a condition; but the express or implied stipulation that the buyer shall have and enjoy quiet possession of the goods, which therefore, must not have been hypothecated to a third person is a mere warranty. In the former case, the buyer is entitled to repudiate the contract and reject the goods. If he likes, he may treat the breach of condition and reject the goods. If he likes, he may treat the breach

77. The Supreme Court has held that according to the law, both of England and of India, in order to constitute a sale, it is necessary that there should be an agreement between the parties for the purpose of transferring title of goods, which of course presupposed capacity to contract, that it must be supported by money consideration, that as a result of transaction, the property must actually pass in the goods. Unless all these elements were present there would be no sale. *MP Laghu Udhog Nigam Maryadit, Bhopal and anor* v. *M/s Gwalior Steel Sales Branch, Gwalior and anor.* AIR 1992 MP 215.

of condition as a mere warranty, waive his right to disregard the contract and accept only damages. In the latter case of warranty, the buyer has the inferior remedy of damages only and cannot reject the contract. In each case it is a question to be determined on the facts and circumstances whether a stipulation is a condition or a warranty. But where the buyer has accepted the goods, the breach can only be breach of a warranty and not of a condition.

The Act lays down the following implied undertakings in case of a contract of sale, unless the parties show a different intention. Condition as to valid title of goods by the seller, warranty as to quiet possession of the goods in favour of the buyer, and lastly, a warranty that the goods sold to the buyer are free from any charge or encumbrance. Where, however, the defect in the goods is known to the buyer at the time a contract of sale is made, the implied undertakings do not apply.

In case of a contract of sale by description, the law implies a condition that the goods must correspond with the description, and where the sale is by sample as well as by description, the bulk of the goods must correspond with the sample and they must also correspond with the description and quality. Where there is a contract of sale by sample, the buyer impliedly must have a reasonable chance of comparing the bulk with the sample. Also, the goods must be free from defect and be merchantable.

As a rule, the act also provides that there is no implied warranty or condition as to the quality or fitness of goods (sold under a contract) for any particular purpose, except under section 16. this rule is known as the maxim of *caveat emptor* (buyer beware), which means that the buyer must make his purchases with his eyes wide open and in the absence of fraud, deliberate concealment or the like, the buyer cannot throw the burden of loss on the seller, where the defect was apparent on reasonable examination of the goods. Section 16 lists the following three exceptions:

1. Where the buyer buys goods (as coal from the coal dealer and milk from the milk dealer), informs the seller the purpose for which he needs the goods, thereby relying on the seller's skill or judgment, the law implies a condition that the goods must be reasonably fit for the required purpose. The implied condition as to fitness for a particular purpose does not avail where the goods are purchased under their patent or trade name.
2. Where the buyer buys goods from a seller, whether or not he is a manufacturer, whose business is to sell such goods, the law implies a condition that the goods must possess merchantable quality i.e. the quality which is generally found in such goods.[78] Thus if coal does not

78. The Act does not define the phrase merchantable quality.

burn, blade does not properly shave, the milk stinks, the ginger bottle bursts when unscrewed in the normal way or the beer contains arsenic, there is no merchantable quality.

The courts, however, have held that the first and the second exceptions overlap. Thus where a wrist watch which soon after purchase began to move irregularly or would stop or the radio which within the guarantee period gave loud buzzing noise, in spite of subsequent repairs by the dealer or the factory, there was held to be a breach of the above two conditions. The second implied condition does not apply to such defects as could be discovered when the buyer examined the goods.

3. There may exist an implied warranty or condition under the usage of trade.

Conditions can be treated as warranty in certain cases. The existence of an implied condition or warranty may be rebutted by proof of facts which shows contrary intention. Section 62 permits partners to exclude implied terms by their agreement.

Transfer of property in goods (incidence of loss)

Section 18 to 26 deal with the rules relating to passing of property in goods from the seller to the buyer, so as to determine as to who would be responsible for the loss of goods, should it occur. This matter can be discussed as under:

1. Passing of property in cases of specific goods,
2. Passing of property in cases of non-ascertained goods (*i.e.*, non-specific goods).
3. Sale or return transaction,
4. Reservation of right of disposal.

Several rights and obligations of the parties are linked with passing of property. The risk for the loss in goods remains in the seller, unless the property passes to the buyer. But this is only a general test and the parties might indicate a contrary intention in their contract. In other words, one may hold the property while the other may run the risk of loss.

Passing of property in specific goods

Property in the good is said to be passed to the buyer when he acquires proprietary rights over them. Goods are said to be specific when they are clearly identified and earmarked for sale at the time the contract of sale is made. Thus an agreement to sell a particular blue horse is a case of specific goods, but an agreement to sell (not a particular but) any or a blue horse is a case of non-ascertained goods.

Sections 19 to 22 deal with the rules on the subject. The fundamental rule is that the property in specific or ascertained goods passes to the buyer at the time when the parties intend it to pass.

But this intention has to be construed from their written document, if any, course of dealing or through any other overt act. *Bhagwat Narain Tendulkar* v. *Goa Cooperative Marketing and Supply Federal Ltd.* shows the importance of the intention of the parties. The intention has to be gathered from the substance of the agreement and merely from the words used by the parties.[79] The following rules, which apply in the absence of an intention to the contrary, may be noted:

(a) Where there is an unconditional contract for the sale of specific goods in a deliverable state (*i.e.*, goods are ready in the form in which they are required to be sold under contract), the property in the goods passes to the buyer as soon as the contract is made. The passing of the property is not contingent or simultaneous with the time of payment of the price or delivery of the goods. Thus where A offers to sell his sofa set to B for a stated price which is accepted by B, the property instantly passes to B on acceptance when the contract (for sale) is formed.[80]

(b) Where under the terms of contract the seller is bound to put the specific goods in a deliverable state (*e.g.*, the sofa set has to be painted), the property passes to the buyer when such things has been done (*e.g.*, sofa set is painted) and the buyer has notice of it.[81]

(c) Where there is a contract for the sale of specific goods which are in a deliverable state but the seller is bound to weigh, measure or test etc., the goods for ascertaining the price, the property passes to the buyer when such act or thing is done and the buyer has notice of it.[82]

Passing of property in unspecified (non-ascertained) goods

Sections 18 and 23 lay down the law on the subject. In the case of a contract for the sale of non-ascertained goods, the property does not pass to the buyer until the goods are ascertained.[83] It is further essential that the goods (which must be in a deliverable state) are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller. The property thereupon passes to the buyer. Thus, ascertainment and appropriation bring about change of ownership from seller to buyer. Where the seller delivers the goods to the buyer or to a carrier or a bailee for giving delivery to the buyer and has not reserved the

79. (1998) 2 MLJ 703 (Bom.).
80. S. 20.
81. S. 21.
82. S. 22.
83. S. 18.

right of disposal, the goods are unconditionally adjusted towards the contract. If goods are appropriated without assent, as aforesaid, or under a mistaken belief, there is no true appropriation. Further more, the goods cannot be said to be appropriated, if they do not answer the description for which the parties entered into a contract of sale. Where the seller selects the goods with the consent of the buyer or vice versa, they are irrevocably appropriated to the contract, and property in such goods passes on the buyer.

Sale or return

Under Section 24, the property in goods which are delivered to the buyer on "sale or return" (on other similar terms) pass to him when :

(a) he signifies his approval or acceptance to the seller or does any other act adopting the transaction;

(b) he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection to the seller even after the time fixed for their return is over or where no time was fixed, even after reasonable time has elapsed.[84]

Reservation of right of disposal

It is obvious that where under the terms of contract, the seller reserves the right of disposal of the goods until certain conditions are fulfilled, no property passes to the buyer, even though the goods are delivered to him. In such a case, the fulfillment of conditions and passing of property are contemporaneous. Where the goods are deliverable to the order of the seller or his agent, there is *prima facie* a reservation of right of disposal by him.

Transfer of title in goods

Sections 27to 30 deal with situations of protection of an innocent buyer when he purchased the goods from a person other than the true owner. The Act embodies the maxim *Nemo dat quod non habet* (No body can transfer a better title than he himself possesses) and then engrafts certain exception to it (in addition to exceptions given in other laws). Thus a thief and a mere finder of goods cannot transfer a valid title to a buyer, even though the latter purchased them in good faith without knowledge of the real state of affairs. Such a buyer is liable to the true owner to return the goods or give their value. The agent or any other person on behalf of the true owner may validly sell the goods under the authority or with the consent of the owner.

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84. As per this principle, the position of the purchaser, until he returns the goods within the prescribed period, is that of a bailer and on the expiry of the period, he becomes a purchaser. See *State of Maharastra* v. *Britannia Biscuits Co. Ltd.* 1995 Supp (2) SCC 72.

The consent may be express or implied, but it must be real. There may be cases where the owner may by his conduct be precluded from denying the seller's authority to sell. Where a clerk has restricted authority of the owner to sell the goods to defendants (third persons) they are not in any manner misled by the plaintiff (owner) and the latter, therefore, is not precluded from denying the clerk's authority to sell the goods to them. The following exceptions may be noted:

(a) "Where a mercantile agent is, with the consent of the owner, in possession of the goods or of a document of title to the goods, any sale made by him, when acting in the ordinary course of business of mercantile agent, shall be as valid as if he were expressly authorized by the owner of the goods to make the same; provided that the buyer acts in good faith and has not at the time of the contract of sale notice that the seller has no authority to sell."[85]

Under section 2 (9) of the Act, mercantile agent means a mercantile agent having in the customary course of business as such agent authority either to sell goods, or to consign goods for the purpose of sale or to buy goods, or to raise money on the security of goods. Under the exception, it is essential that (i) the sale must be by a mercantile agent, (ii) he must be in possession of the goods or of a document of title to goods (which includes bill of lading, dock-warrant, warehouse-keeper's certificate, wharfinger's certificate, railway receipt, warrant or order for the delivery of goods or any other document ordinary used in business as proof of possession or control of goods). The goods should be in the possession of the mercantile agent or with the consent of the true owner. It is further essential that the transferee is a buyer and bought the goods in good faith without notice of defect of title of the seller at the time of contract of sale.

(b) "If one of several joint owner of goods has the sole possession of them by permission of the co-owners, the property in the goods is transferred to any person who buys them of such joint owner in good faith and has not at the time of the contract of sale notice that the seller has no authority to sell."[86]

(c) When the seller of goods has obtained their possession under a contract which was voidable being caused on account of coercion, undue influence, fraud or misrepresentation as defined under the Indian Contract Act, and the contract was not rescinded at the time of sale, the transferee will get good title to the goods, if he buys in good faith without notice of the seller's defect of title.

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85. S. 27, 2nd paragraph.
86. S. 28.

(d) "Where a person, having sold goods, continues or is in possession of the goods or of the documents of title to the goods, the delivery or transfer by that person or by a mercantile agent acting for him. Of the goods or documents of title under any sale, pledge or other disposition thereof to any person receiving the same in good faith and without notice of the previous sale shall have the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make the same."[87]

(e) "Where a person, having bought or agreed to buy goods, obtains, with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge or other disposition thereof to any lien or other right of the original seller in respect of the goods shall have effect as if such lien or right did not exist."[88]

The word 'consent' in this sub-section means, as stated in section 13 of the Indian Contract Act, "agreeing on the same thing in the same sense", it does not mean "free consent" as under section 14 of the Contract Act. In other words, possession of goods obtained under a contract induced by fraud would still include consent of the owner, unless there was in fact no consent at all.

Under the Indian law, a purchaser does not take a valid title merely because he purchased the goods at a market overt. The English law of sale in market overt does not apply in India.

Performance of contract

The parties are governed by the terms of their contract. In absence thereof, the rules stated in sections 31 to 44 apply. These rules deal with delivery, buyer's right of examining the goods, *etc.* Briefly, these rules are as follows:

(a) Delivery of the goods and payment of the price are concurrent conditions.

(b) A delivery of part of goods, in progress of the delivery of the rest, has the same effect, for the purpose of passing the property in such goods, as a delivery of the whole.

(c) It is the duty of the buyer to apply for delivery.

(d) Goods sold are to be delivered at the place at which they are at the time of sale, and goods agreed to be the sold are to be delivered at the place at which they are at the time of the agreement to sell, or, if not then in existence, at the place at which they are at the time of the agreement to

87. S. 30(1).
88. S. 30(2).

sell, or, if not then in existence, at the place at which they are manufactured or produced.

(e) When it is the duty of the seller to send the goods and no time is prescribed therefore, the goods must be sent within reasonable time.

(f) Demand for delivery should be made at a reasonable hour.

(g) The expenses of an incidental to putting the goods into a deliverable state shall be borne by the seller.

(h) Where the seller delivers to the buyer less quantity, the latter may reject them. But in case he accepts them, he shall pay for them at the contract rate. But where the quantity is larger, the buyer may reject the whole quantity or that which is in excess of the contracted quantity. Apart from contract, the court may also take into consideration usage of trade and course of dealing between the parties as a guide.

(i) The buyer of goods is not bound to accept delivery of them by installments.

(j) The seller must make such contract with the carrier or wharfinger on behalf of the buyer as would be reasonable having regard to the nature of the goods and the other circumstances of the case.

(k) The risk of deterioration in the goods necessarily incident to the course of transit is to be borne by the buyer.

(l) The buyer has the right of examining the goods.

(m) The buyer is not bound to return the rejected goods, but he must intimate to the seller that he does not accept them (having right so to do).

(n) Where the buyer wrongfully refuses or neglects to take delivery of the goods, he is liable for the loss to the seller, including reasonable charges for the care and custody of the goods.

Rights of unpaid seller against the goods

Sections 45 to 54 deal with the rights of an unpaid seller against the goods. A seller is said to be unpaid when the whole of the price of goods is not paid to him or when a bill of exchange or other negotiable instrument has been received as conditional payment and the condition has not been fulfilled owing to dishonor of the instrument or otherwise.[89] Under the Act,

89. It has been held that there is no general principle of law, that whenever a method of payment was adopted involving a risk of non-payment by a third party, there was a presumption that the acceptance of payment through the third party was conditional on the third party making the payment, and that, if he failed to pay, the original obligation of the purchaser remained. Each method of payment, has to be considered in the light of the consequences and other circumstances attending that type of payment. When, as with credit card, a new form of payment is introduced

the unpaid seller of goods, by implication of law, has the following rights:

(a) a lien on the goods so long as the goods are in his possession and the full price has not been paid to him. The unpaid seller is entitled to retain goods until payment, where the goods were not sold on credit, where they were sold on credit and its period has expired, or where the buyer has become insolvent. The seller's right of lien is not affected in cases where he is in possession of the goods as agent or bailee for the buyer. Where the unpaid seller has parted with part of the goods, he may exercise his lien on the remainder, unless it amounts to waiver of the lien on the whole of the goods. The unpaid seller loses his lien when he ceases to be unpaid, when he delivers the goods to a carrier or bailee for transmission to the buyer unconditionally, when the buyer or his agent lawfully obtains possession of the goods, or when he waives or surrenders his right of lien. The right of lien, however, is not lost by obtaining a decree for the price of the goods sold.

(b) a right of stopping the goods in transit where the buyer has become insolvent. The right of stoppage in transit can be exercised only when (a) the buyer is insolvent, (b) the goods are in transit, (c) and the seller has parted with possession of the goods and the buyer has not taken them. By exercising his right of stoppage in transit, the seller resumes possession of the goods. The transit comes to an end if the buyer or his agent acquires the goods before their arrival at the destination. Under section 52, which deals with the duration of transit, if the goods are rejected by the buyer and the carrier or other bailee continues in possession of them, the transit is not deemed to be at an end even if the seller has refused to receive them back. Wrongful refusal of the carrier or of the bailee to deliver the goods to the buyer or his agent amounts to termination of transit. Unless the seller has expressly or impliedly waived his right, part delivery of goods to the buyer means termination of the right of stoppage in transit with regard to that part.

(c) The unpaid seller has a right of resale under section 54 (2), and can give to the new buyer a better title as against the original buyer:

> "Where the goods are of a perishable nature, or where the unpaid seller who has exercised his right of lien or stoppage in transit gives notice to the buyer of his intention to re-sell, the unpaid seller may, if the buyer does not, within a reasonable time, pay or tender the price, re-sell the goods within a reasonable time and recover from the original buyer damages for

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applicable to new sets of circumstances, it becomes necessary to consider whether such payment should be treated as absolute or conditional in the light of the consequences and circumstances of such new type of payment, not according to any general principle. See *Re Charge Card Services Ltd.* [1988] All ER 702 (CA).

any loss occasioned by his breach of contract, but the buyer shall not be entitled to any profit which may occur on the re-sale. If such notice is not given, the unpaid seller shall not be entitled to recover such damages and the buyer shall be entitled to the profit, if any, on the re-sale."

Remedies of seller and buyer

Sections 55 to 62 deal with this topic. Where the property in the goods has passed to the buyer, who defaults in payment of price, the seller may sue him therefore. Where, however, the buyer wrongfully neglects or refuses to accept and pay for them, the seller may sue him for damages. Similarly, the buyer may sue for damages where the seller breaches the contract. The court may compel the seller to specifically perform the contract under the Specific Relief Act, 1963 (as where the goods agreed to be sold are rare or their value cannot be ascertained adequately in money) instead of subjecting him to pay damages. The buyer may also reject the goods where there is a breach of an express or implied condition by the seller or he may waive his right of rejection of goods and claim only damages. Where the seller or the buyer wrongfully repudiates the contract before the date of performance, the other party at his option may claim damages without waiting for the due date as under anticipatory breach of contract. The damages (including special damages) will be assessed according to the Indian Contract Act. The court may, in addition, allow interest by way of damages, on the basis of an agreement between the parties, provisions of a statute or usage of trade.

In case of imposition or increase in duty or taxes after contract of sale, the seller may recover the amount due from the seller under section 64A. Similarly, in case of remission or decrease of duty or taxes after contract of sale, the buyer may deduct the amount due from the contract price.

Auction sale

Section 64 deals with auction sale of goods. It is not subject to contract to the contrary. Thereunder a bid is an offer and the acceptance is made or the sale is complete when the auctioneer announces its completion by the fall of the hammer or in other customary manner. Unless this is done, the bidder is at liberty to retract his bid. The seller or any person on his behalf may bid at the auction where he has expressly reserved this right. The auction sale may be announced to be subject to a reserved or upset price. This section is silent with regard to auctions which are announced to be "without reserve". Traditionally, under such a system even if a single bid is made, that is an acceptance and concludes the contract of sale. It appears that the section rules out such situations.

V. Negotiable Instruments

The law relating to negotiable instruments is contained in the Negotiable Instruments Act, 1881. While the Indian Contract Act, 1872, embodies general and specific principles governing contracts, this Act deals with particular forms of contract, *i.e.*, promissory notes, bills of exchange and cheques, and the rules relating to them. The preamble states that the act is intended "to define and amend" the law on these three instruments.

Under section 13, a negotiable instrument *means* these three instruments.[90] The use of word *means* considered together with the intent expressed in the preamble suggests that the list of negotiable instruments in this section is not exhaustive.[91] Whether or not a particular document is a negotiable instrument depends upon its usage or custom. A railway receipt, a mate's receipt, a deposit receipt, a receipt (including ordinarily a *pahunch*), letter of credit are not negotiable instruments. On the other hand, *shah jog hundi*,[92] government promissory notes, draft (but excluding a draft drawn by one branch upon another of the same bank) and debentures are negotiable instruments.

Promissory notes, bill of exchange, cheque

A promissory note (not being a bank note or a currency note) contains an unconditional undertaking in writing signed by its maker, to pay a certain sum of money only to, or to the order of, a certain person, or to the bearer of the instrument.[93] A bill of exchange, however, is a written unconditional order which directs a certain person or to its bearer. A person is certain although he is misnamed or designated by description only. Similarly, the sum payable is certain although it includes future interest. A cheque though a bill of exchange is always drawn on a specified banker and is payable on demand. It does not cease to be payable otherwise than on demand merely because it is postdated. It becomes payable on demand on the due date. A note or bill which does not specify the time for payment and a cheque are payable on demand.

A note and a bill differ from each other. In the note, the maker owns liability, in the bill he directs another person to pay. In other words, while in note the promisor is the principal debtor, in bill the drawer is a surety because his liability arises only when the drawer fails to pay the amount. In

90. As per S. 13 of the Negotiable Instruments Act, 1881, a negotiable instrument means "promissory note, bill of exchange, or cheque, payable either to order or to bearer".
91. Many other documents are also recognized as negotiable instruments on the basis of custom and usage, like hundis, treasury bills, share warrants, *etc.*, provided they possess the features of negotiability.
92. Hundis, is a popular indigenous document prevalent in India.
93. S. 4.

bill there are three parties while in note there are two. A bill (unless on demand) is required to be presented for acceptance and is dishonoured by non-acceptance; a cheque, on the other hand, is presented for immediate payment and may be dishonoured for non-payment; it does not require any acceptance. Certification of a post-dated cheque as "marked good for payment" by the drawee bank, does not, in the absence of an established custom or usage, amount to an acceptance of the cheque, nor as a guarantee for payment on the due date.

The holder of a note, bill or cheque is the person who is entitled to the possession thereof in his own name and to receive or recover the amount thereon. To be holder in due course, however, a person must have paid consideration in good faith without notice of want of title of the transferor before the amount mentioned in the instrument became payable.

A negotiable instrument possesses the attributes of negotiability. It is said to be negotiated when it has been transferred to any person so as to make him its holder. The negotiability of a cheque is destroyed only when it is marked as not negotiable and not by the use of the words "a/c payee only". Although the Negotiable Instruments Act makes no reference to "a/c payee" or "a/c payee only" such an indorsement or crossing does not invalidate the cheque. It has been held that such a crossing does not restrict the negotiability of the cheque. It is, however, a warning to the bank that the money is to be deposited in the account of the payee only, and not in any other account except at the banker's risk.

A negotiable instrument may be endorsed by signing on the back or face thereof or on an annexed slip or a stamped paper intended to be completed as a negotiable instrument. It must make the endorsee the holder of this instrument. It is said to be in blank when the indorser signs his name only; it is said to be in full when he makes a direction to a third person to pay to a certain person, who thereby becomes the indorsee.

Where a note or bill does not specify the time for payment and also in cases of cheque, they are payable on demand. Under section 21, the words at sight and on presentation in a note or bill means on demand. And "after sight" means after presentment for sight in a note and after acceptance, or noting for non-acceptance or protest for non-acceptance in a bill. Where a note or bill is not payable on demand, it is allowed three days of grace and its maturity falls on the third day after it is due. Since a cheque is payable on demand, no days of grace for payment are allowed to it.

Parties to negotiable instruments

A person, competent to contract according to the law, may bind himself or be bound by a duly authorized agent acting in his name by the making, drawing, acceptance, indorsement, delivery and negotiation of a note, bill or cheque. A minor may bind other persons but not himself. The powers of

a corporation to make, indorse or accept such instruments depend upon the memorandum. If it acts beyond it, the exercise of powers is *ultra vires*. An agent may be personally liable if he does not clearly indicate that he is signing merely as agent. The use of the words: "Managing Agent: Dehra Dun Electric Tramway Company Limited," below a person's signature was held not to have been made for and on behalf of the company.

The drawer of a bill or cheque must compensate the holder in case of its dishonour by the drawee or acceptor, provided that he has received the notice of dishonour. Where the bank, having sufficient funds of the drawer improperly refuses to pay, he must compensate the drawer for the loss resulting from such default. Similarly, where the maker of a note and the acceptor of a bill of exchange default in payment, they are bound to compensate a party to the note or bill for the loss or damage resulting to him, unless there is a contract to the contrary. An indorser becomes liable to a holder in case of dishonour for the loss, unless he has expressly excluded his liability provided that the indorser has received due notice of dishonour. The indorser, however, is discharged from his liability to the holder where the latter without the former's consent destroys or impairs the indorser's remedy against a prior party. An indorser being in the position of surety to the holder, the latter should not without the former's consent destroy or impair his remedy. Section 139 of the Indian Contract Act, which deals with the discharge of a surety, lays down a similar rule.

Negotiation

Under section 46, the making, acceptance or indorsement of a note, bill or cheque is completed by delivery, whether actual or constructive. These instruments, if payable to bearer, are negotiable by their delivery but if payable to order are negotiable by the holder by indorsement and delivery. The indorsement and delivery of negotiable instrument put the indorsee in the shoes of the indorser and transfer to him the property therein. He also gets the right of further negotiation unless the indorsement by express words restricts or excludes such right or merely constitutes the indorsee an agent to indorse the instrument or to receive its contents for the indorser or for some other specified person. The indorser may exclude his liability by using the words "without recourse".

Presentment

A bill of exchange may be payable at sight (*i.e.*, on demand) or after sight. In the former case, there is only one stage which is simultaneously presentment for acceptance as well as for payment. In the latter cases there are two stages, presentment for acceptance, presentment for payment. Acceptance has always to precede payment. For the Negotiable Instrument Act does not

make the drawee liable as such. His liability arises only upon acceptance. The law does not prescribe any particular mode of acceptance, although the requirements of section 7 of the Act have to be satisfied. This means that the drawee must sign his assent upon the bill itself. A mere acknowledgement of liability may not be acceptance.

A bill of exchange payable after sight must, where no time or place is specified for presentment, be presented to the drawee within a reasonable time after it is drawn, during business hours on a business day, otherwise no party is liable thereon. Under section 105, in determining what is reasonable time, the court must take into consideration the nature of the instrument and the usual course of dealing in similar instruments. In calculating the time, public holidays are excluded. If, however, the delay in presentment for acceptance or for payment is due to the circumstances beyond the control of the holder and not attributable to his default, misconduct or negligence, the delay is excused. Presentment thereafter should be made within a reasonable time of the ceasing of the cause for delay.

An instrument must be presented at the place specified therein. Where, however, the maker, drawee or acceptor of a negotiable instrument has no known place of business or fixed residence and the instrument specifies no place for acceptance or payment, the instrument may be presented to him in person wherever he can be found.

Under section 76, no presentment for payment is necessary and the instrument is dishonoured at the due date for presentment in the following cases:

(a) if the maker, drawee or acceptor intentionally prevents the presentment of the instrument; or if the instrument being payable at his place of business, he closes such place on a business day during the usual business hours, or if the instrument being payable at some other specified place, neither he nor any person authorized to pay it attends at such place during the usual business hours, or if the instrument not being payable at any specified place, he cannot after due search be found;

(b) as against any party sought to be charged therewith, if he has engaged to pay notwithstanding non-presentment;

(c) as against any party if, after maturity, with knowledge that the instrument has not been presented he makes a part-payment on account of the amount due on the instrument, or promises to pay the amount due thereon in whole or in part, or otherwise waives his right to take advantage of any default in presentment for payment;

(d) as against the drawer, if the drawer could not suffer damage from the want of such presentment.

Discharge from liability

The liability of a maker, acceptor or indorser of a negotiable instrument is discharged in three ways: by cancellation, by release, by payment. Again the maker, acceptor or indorser ceases to be liable to a holder (and to all parties deriving title under such holder after notice of discharge) who otherwise discharges such person.

The liability is extinguished where the holder cancels the name of the party liable on the instrument with a view to discharging him. A cancellation, therefore, made under mistake has no such effect. It has been held that were the acceptor of a bill seeks extension of time on the due date which the holder grants him, the bill is not cancelled and the acceptor is not released for his liability. It has been further suggested that if the result of this extension is discharge from liability of the acceptor, extraordinary consequences would follow in the dealing of merchants and banks.

As a rule, an agreement whereunder a new instrument is given in lieu of an existing one, does not discharge or release the liability of a party on the old instrument. When the amount on the first instrument is duly paid, it is discharged.

The maker, acceptor or indorser, as the case may be, is discharged from his liability, if he makes payment in due course of the amount due. The payee of a cheque is required to present it for payment within reasonable time of its issue. In default of this, the drawer, who had sufficient funds in his account in the bank for payment of the cheque, will be entitled to the actual damage caused to him through the delay. Section 84, illustration (a), makes this clear. In one case, an indorsee gave the endorsed cheque to his bank for collection and this bank, his agent, received in lieu a draft on the drawee's head office, which was current for three months. But neither the indorsee nor the agent bank presented the draft for payment. Meanwhile, both the agent bank and the drawee bank closed their businesses. It was proved that if the draft had been presented during the business period of the drawee bank, it would have been paid. Hence the fault of the indorsee in not presenting the draft within reasonable time discharged the indorser.

The following provisions may also be noted:

(a) If the holder of a bill of exchange allows the drawee more than forty-eight hours, exclusive of public holidays, to consider whether he will accept the same, the previous parties not consenting to such allowance are thereby discharged from liability to such holder.[94]

(b) If the holder of a bill of exchange acquiesces in a qualified acceptance, or one limited to part of the sum mentioned in the bill, or which

94. S. 83.

substitutes a different place or time for payment, or which, where the drawees are not partners, is signed by all the drawees, all previous parties whose consent is not obtained to such acceptance are discharged as against the holder and those claiming under him, unless on notice given by the holder they assent to such acceptance.[95]

(c) Any material alteration of a negotiable instrument renders the same void as against any one who is a party thereto at the time of making such alteration and does not consent thereto, unless it was made in order to carry out the common intention of the original parties; and any such alteration, if made by an indorsee, discharges his indorser from all liability to him in respect of the consideration thereof.

The provisions of this section are subject to those of sections 20, 49, 86, 125.[96]

A clerical correction intended to represent the parties' intention faithfully is not material alteration within the meaning of the section. Alterations regarding time for payment, date for execution of note and adding name of a party thereto fall within the ambit of the section. A writing or memorandum by a clerk in a corner of the bill has been held not to be a part of the document. Therefore, if the date on the corner is different from what it would be according to the bill, there is no material alteration at all. Material alteration makes the instrument void, if it was made by plaintiff or was made with his consent or was the result of his negligence. He is not responsible for the unauthorized action of a stranger.

(d) If a bill of exchange which has been negotiated is, at or after maturity, held by the acceptor in his own right, all rights of action thereon are extinguished.[97]

Notice of dishonour

There may be dishonour by non-acceptance and dishonour by non-payment. A bill of exchange requires both presentment for acceptance and presentment for payment. When a bill is duly presented to the drawee for acceptance, but he either refuses or makes a qualified or limited acceptance not acquiesced in by the holder or where presentment is excused but the drawee has not accepted the bill, the bill is said to be dishonoured by non-acceptance. When the maker of the note, acceptor of the bill or drawee of the cheque does not pay the amount of the instrument which is duly presented to him for payment, the note, bill or cheque is said to be dishonoured by non-payment. On dishonour by non-acceptance or by non-

95. S. 86, explanation omitted.
96. S. 87.
97. S. 90.

payment the holder of the instrument or some party who remains liable thereon, must give notice of such dishonour to all other parties whom the holder seeks to make severally liable and to some one of several parties whom he seeks to make jointly liable. It has been held that if notice of dishonour is not given by the assignee, the indorser is discharged from liability. The assignee, therefore, cannot maintain an action on the amount of the cheque.

Notice of dishonour may be oral or in writing and it may be given to the duly authorized agent of the concerned party or to his legal representative in case of his death, and to his assignee in case of his insolvency. The notice must clearly indicate in what way the instrument has been dishonored and that the sender seeks to hold liable the party for whom notice is intended. It must be given at the place of business or in its absence at the residence of the concerned party. When the party to whom notice is ignorant thereof, the notice is sufficient. The purpose of giving notice under section 93 of the Negotiable Instruments Act is not to demand payment but to bring home to the person intended to be notified the factum of dishonour of the instrument so as to make him liable since he was a surety for the payment of the amount by the drawee, the principal debtor. Under the Act, no notice of dishonour is necessary in the following cases:

(a) When it is dispensed with by the party entitled thereto;

(b) in order to charge the drawer, when he has countermanded payment;

(c) when the party charged could not suffer damage for want of notice;

(d) when the party entitled to notice cannot, after due search, be found; or the party bound to give notice is, for any other reason, unable, without any fault of his own, to give it;

(e) to charge the drawers when the acceptor is also a drawer;

(f) in the case of a promissory note which is not negotiable;

(g) when the party entitled to notice, knowing the facts, promises unconditionally to pay the amount due on the instrument.

In case of dishonour of a note or bill, the holder may cause such dishonour to be noted by a notary public.

Negotiable Instruments (Amendment) Act, 2002

Some changes have been brought into the Negotiable Instrument Act, 1881 by way of Negotiable Instruments (Amendment) Act, 2002. The core purpose of the amendment is to lay down provisions for the speedy disposal of cheque bouncing cases and to make the punishment stricter. The major changes are as follows:

(i) The definition of Cheques in Section 6 of the Negotiable Instrument Act and in Section 13 of the Information Technology Act, 2002 is amended to include truncated and electronic cheques. (ii) Consequently, the Information Technology Act, 2000 is made applicable to the Negotiable Instrument Act, 1881 in relation to electronic cheques and truncated cheques. (iii) Further, the punishment, under section 138 of the Negotiable Instrument Act, 1881 is enhanced from 1 year to 2 years. (iv)The period of notice under section 138(b) has been increased from 15 days to 30 days. (v) Section 142 provides immunity to the nominee director from being prosecuted under Chapter XVII of Negotiable Instrument Act, 1881. (vi) A proviso is added to Section 142, by which the Court is given discretionary powers to waive the period of one month, prescribed for taking cognizance of the case under the Act.

Five new sections, *viz*, sections 143 to 147 are inserted by the amendment. By section 143, courts are given power to try the offence of cheque bouncing summarily. The courts are directed to conduct the trial as expeditiously as possible. Courts must also make the effort to conclude the trial within six months from the date of filing of the complaint. Section 144 lays down the procedure for the service:

(a) by serving a copy of summons to be served at the place where such accused or witness ordinarily resides, or carries on business, or personally works for gain;

(b) by speed post;

(c) by such courier services as approved by a court of sessions.

Section 146 provides that the fact of dishonour will be presumed by the court on the basis of the bank's slip or memo, denoting that the cheque has been dishonoured, unless it is rebutted by other evidence. Section 147 makes the offence of cheque bouncing compoundable.

Suggested Readings

1. A. K. Sen and I. K. Mitra, *Commercial and Industrial Law*, 9th ed., 1970.
2. A. C. Dutt, *The Indian Contract Act*, 4th ed. by B.C. Mitra, 1969.
3. Avtar Singh, *Law of Sale of Goods & Hire Purchare*, 5th ed., Eastern Book Co., Lucknow, 2002.
4. Avtar Singh, *Negotiable Instruments*, 4th ed., Eastern Book Co., Lucknow, 2005.
5. F. Pollock and D. F. Mulla, *The Indian Contract and Specific Relief Acts*, 9th ed. by J. L. Kapur, 1972.
6. I. C. Saxena, *Contractual Remedies in Asian Countries*, ed. by J. Minattur, I.L.I. Publication, 1973.

7. Journal of the Indian Law Institute, *Special Issue* on *the Indian Contract Act and the Indian Evidence Act*, 1972.
8. K. Venkata Rao, *Commentaries on the Indian Contract Act,* 1961.
9. Law Commission of India, *Thirteenth Report*, Contract Act, 1872.
10. M.J. Sethna, *Mercantile Law*, 6th ed. by J.M.J. Sethna, 1970.
11. Nagendra Singh, *Commercial Law of India*, 1975.
12. Pollock & Mulla, *Sale of Goods Act,* 6th ed. by Justice K Ramamoorthy Butlerworths India, New Delhi, 2002.
13. R. H. Pandia, *Principles of Mercantile Law,* 6th ed., 1967.
14. Sanjiva Row, *The Indian Contract Act,* 6th ed. by R. B. Sethi and B. Malik, 3 vols., 1965.
15. T. R. Desai, *The Indian Contract Act, Sale of Goods Act and Partnership Act,* 18th ed. by K.H. Kaji, 1976.
16. V. G. Ramachandran, *The Law of Contract in India*, 3 vols., 1970-71.