Rai Technology University

ENGINEERING MINDS

Elements of Mercantile Law

Subject: ELEMENTS OF MERCANTILE LAW **Credits: 4**

SYLLABUS

General Law of Contract
Offer and Acceptance, Capacity of Parties, Free Consent, Essentials of a Contract, Void Agreements and Contingent Agreements, Performance and Discharge, Remedies for Breach and Quasi Contracts, Consideration and Legality of Object

Specific Contracts and Arbitration
Bailment and Pledge, Carriage of Goods, Indemnity and Guarantee

Partnership
Rights, Duties and Liabilities of Partners, Dissolution of Partnership Firms, Definition and Registration of Partnership

Sale of Goods
Conditions and Warranties, Transfer of Ownership and Delivery, Rights of an Unpaid Seller, Nature of Contract of Sale

Suggested Readings:

1. S.S. Gulshan, Mercantile Law, Excel Books
2. Chawla, Garg & Sarin, Mercantile Law, Kalyani Publishers
3. B.S. Moshal, Mercantile Law, Ane Books Pvt Ltd

PART 1. GENERAL LAW OF CONTRACT –I

CHAPTER 1

ESSENTIALS OF A CONTRACT

STRUCTURE

- Learning objectives
- Introduction
- What is law?
- Meaning and sources of mercantile law
- The law of contract
- What is a contract?
- Classification of contracts
- Review Questions

LEARNING OBJECTIVES

After learning this chapter, you should be able to:

- Explain the purpose of law
- Describe the sources .of mercantile law
- Explain the meaning of-contract
- Distinguish flanked by a contract and an agreement
- Classify the contracts
- Distinguish flanked by void, voidable and illegal contracts
- Describe the essentials of a valid contract.

INTRODUCTION

The law of contract is the mainly significant branch of Mercantile Law. Without such a law it would be hard, if not impossible, to carry on any deal or business in a smooth manner. The law of contract is applicable not only to business but also to all day-to-day personal dealings. In information, each one of us enters into a number of contracts from sunrise to sunset. When a person

buys a newspaper or rides a bus or purchases goods or provides his radio for repairs or borrows a book from library, he is actually entering into a contract. All these transactions are subject to the provisions of the law of contract. In this introductory chapter you will learn, first of all, why we need law and what its several branches are. Then you will learn in relation to the meaning of mercantile law, its sources, and the vital characteristics of the law of contract viz., the meaning of contract, its classification, and the essentials of a valid contract.

WHAT IS LAW?

Before learning the meaning of the term 'Law' you necessity knows as to why we need law. No civilized society can exist without law. It is required for the preservation of peace and orderliness in every society. Without law, no person will care for others and their dealings may not materialize. With the growth of society and the concept of welfare state, it became necessary to regulate the conduct of people and protect their property and contractual rights. Hence, each country enacted laws suited to its several needs and the value system it cherished.

It is imperative that we should know the law to which we are subject, because ignorance of law is no excuse. For instance, if a person is caught traveling in a train without ticket, he cannot plead that he was not aware. of the rule concerning the purchase of ticket and so he may be excused. Hence, in our own interest, we should be conversant with the laws that are applicable to us.

Law means a 'set of rules'. Broadly speaking, it may be defined as the rules of conduct recognized and enforced through the state to manage and regulate people's behaviour with a view to securing justice, peaceful livelihood, and social security. Some of the significant definitions of the term „law' are as follows:

- "Law is a rule of civil conduct, prescribed through the supreme power of stale, commanding what is right and prohibiting what is wrong. " — Blackstone.
- 'Law is the body of principles recognized and applied through the state in the management of justice." — Salmond.

You will notice that law is a set of rules and principles relating to human actions with a view to regulate the actions of human beings in respect of one another and in relation to the society. You know the society is not static; its value system keeps on changing. Hence, law also keeps changing just as to the changing necessities of the society.

There are many branches of law, such as international law, constitutional law, criminal law, civil law, etc. Every law regulates and controls a scrupulous field of action. Mercantile law or commercial law is not a separate branch of law. It is a part of civil law which deals with the rights and obligations of mercantile persons arising out of mercantile transactions in respect of mercantile property.

MEANING AND SOURCES OF MERCANTILE LAW

You have learnt that mercantile law is a part of civil law and it governs and regulates the deal and commerce in a country. In other words, the mercantile law groups jointly laws that are measured significant for men in business and comprises laws relating to several contracts, partnerships, companies, negotiable instruments, insurance, carriage of goods, arbitration, etc.

Indian mercantile law is primarily a version of the English law. The dissimilar Indian Acts follow, to a considerable extent, the English mercantile law with some reservations and modifications necessitated through the peculiar circumstances prevailing in India. The main sources of mercantile law in India are as follows:

- ***English Mercantile Law:*** Our laws are based primarily on the English laws which urbanized through customs and usages of merchants or traders in England, These customs and usages governed these merchants in their dealings with each other. This law is also recognized as 'General Law'. As a matter of information, it is an unwritten law based on customs, usages, and precedents. The mainly significant part

of mercantile law, namely, the Law of Contracts, is still a part of General Law in England.

- ***Indian Statute** Law:* The Acts passed through the Indian Legislature are the main source of Indian mercantile law. The significant Acts passed through the Indian Legislature are the Indian Contract Act 1872, The Negotiable Instruments Act. The Sale of Goods Act 1930, The Indian Partnership Act 1932, The Companies Act 1956, and so on.
- ***Judicial Decisions:*** The past judicial decisions of courts are another significant source of law. They are usually followed through the courts while deciding alike cases before them. The past decisions have persuasive and guiding value. Wherever the law is silent on a point, the judge has to decide the case just as to the principle of equity, justice, and good conscience. The decisions of English courts are also regularly referred to as precedents in deciding several cases and for interpreting the Indian Statutes.
- ***Customs and Usages:*** The customs and usages of scrupulous deal are yet another significant source of Indian mercantile law. They play a significant role in regulating the dealings flanked by the merchants of that deal. But it is necessary that such customs or usages necessity be widely recognized, reasonable, and constant and necessity not be inconsistent with the law, The Indian Contract Act recognizes this information through providing that "nothing contained therein shall affect any usage or custom of deal." The Negotiable Instruments Act also creates a same provision. It says that "nothing contained therein shall affect any local usage relating to instruments in an oriental language."

THE LAW OF CONTRACT

The law of contract is the mainly significant part of mercantile law in India, It determines the circumstances in which the promise! made through the parties to a contract shall be binding on them and gives for the remedies

accessible against a person who fails to perform his promise. The law of contract is contained in the Indian Contract Act, 1872, which deals with the common principles of law governing all contracts 'and covers the special provisions relating to contracts like bailment, pledge, indemnity, guarantee and agency. Before 1930, this Act also contained the special provisions relating to contracts of sale of goods and partnership. In 1930, though, these provisions were repealed and separate Acts described the 'Sale of Goods Act' and the 'Indian Partnership Act' was passed governing the contracts of sale of goods and partnership respectively. Likewise, there are separate Acts for contracts relating to negotiable instruments, insurance, carriage of goods, etc. Let us now revise the exact nature of a contract and the other significant characteristics relating to it.

WHAT IS A CONTRACT?

Broadly speaking, a contract is an agreement made flanked by two or more persons to do or to abstain from doing a scrupulous act. A contract invariably makes a legal obligation flanked by the parties through which sure rights are given to one party and a corresponding duty is imposed on the other party. A contract has been defined through dissimilar authorities in several methods. Some of the significant definitions are as follows:

- A contract is an agreement, creating and defining the obligation flanked by parties. — Salmond
- A contract is an agreement enforceable at law made flanked by two or more persons through whom rights are acquired through one or more to acts or forbearances on the part of others. — Sir William Anson
- Every agreement and promise enforceable at law is a contract. Sir Fredrick Pollock

The definition as given in the Contract Act is based on Pollock's definition. Section 2(h) of the Act states that an agreement enforceable through law is a contract. On analyzing this definition of contract, you will notice that a contract essentially consists of two elements:

- An agreement, and
- Its enforceability through law.

Agreement

Section 2(e) of the Contract Act defines agreement as every promise and every set of promises forming the consideration for each other. In this context a promise refer to a proposal (offer) which has been accepted. For instance, Ramesh offers to sell his office for Rs. 8,000 to Shyam. Shyam accepts this offer. It becomes a promise and treated as an agreement flanked by Ramesh and Shyam in other words, an agreement consists of an offer through one party and its acceptance through the other. Therefore,

Agreement = Offer + Acceptance.

From the analysis it is clear that there necessity be at least two parties to an agreement, one creation an offer and the other accepting it. No person can enter into agreement with himself. There is another significant aspect relating to an agreement i.e., the parties to an agreement necessity have an identity of minds in respect of the subject matter. They necessity agree on the similar thing in the similar sense. This is also described consensus-ad-idern. Suppose A has two homes, one situated in South Delhi and the other in North Delhi. He offers to sell his North Delhi home to B while B is under the impression that he is buying the South Delhi home. Here, there is no identity of minds. Both the parties are thinking in relation to the dissimilar homes. Hence there is no agreement.

Legal Obligation

In order that an agreement may be regarded as a contract, it necessity provide rise to a legal obligation i.e., it necessity be enforceable through law. Any obligation (duty) which is not enforceable through law is not regarded as a contract. Social, moral, or religious agreements do not make any legal obligation. For instance, an agreement to take lunch jointly or to go to a picnic

is not a contract because it does not make a duty enforceable through law. Such agreements are purely of a social nature where there is no intention to make legal connection. Hence, they do not result in contracts.

In case of business agreements, though, the usual presumption is that the parties intend to make a legal connection. For instance, an agreement to sell a scooter for Rs. 8,000 is a contract because it provides rise to an obligation enforceable through law. In this agreement if there is default through either party, an action for breach of contract can be enforced through a court of law provided all the essentials of a valid contract are present in the agreement.

You necessity also note that every obligation which is enforceable through law is not automatically regarded as a contract. The obligations which do not arise out of agreements but from sources such as wrongful acts, judicial decisions, or decree of a court, husband, and wife connection are not regarded as contracts. Therefore, the law of contract is concerned with only those obligations which arise out of agreement. Salmond has rightly said in relation to the law of contract that

- It is the law of those agreements which make obligations, and those obligations which have their source in agreements.

Distinction flanked by an Agreement and a Contract

Difference between agreement and contract (see chart 1.1)

Chart 1.1 Difference between Agreement and Contract

Agreement.	Contract
1) Offer and its acceptance constitute an agreement.	1) Agreement and its enforceability constitute a contract.
2) An agreement may not create a legal obligation.	2) A contract necessarily creates a legal obligation.
3) Every agreement may not be a contract.	3) All contracts are agreements.
4) Agreement is not a concluded or a binding contract.	4) Contract is concluded and binding on the concerned parties.

CLASSIFICATION OF CONTRACTS

Contracts can be classified on a number of bases. They are:

- On the foundation of creation.
- On the foundation of execution.
- On the foundation of enforceability.

On the Foundation of Creation

A contract may be:

- Made in writing or through word of mouth or
- Inferred from the conducer of the parties or circumstances of the case.

The first category of contract is termed as 'express contract' and the second as 'implied contract'.

- ***Express Contract:*** An express contract is one where the conditions are clearly stated in words, spoken or written. For instance, A wrote a letter to B stating "I offer to sell my car for Rs. 30,000 to you"; B accepts the offer through letter sent to A. This is an express contract. Likewise, when A asks a scooter mechanic to repair his scooter and the mechanic agrees, it is an express contract made orally through spoken words.
- ***Implied Contract:*** A contract may be created through the conduct or acts of parties (and not through their words spoken or written). It may result from a continuing course of conduct of the parties. For instance, where a coolie in uniform carries the luggage of A to be accepted out of railway station without being asked through A to do so and A allows it, the law implies that A has agreed to pay for the services of the coolie. This is a case of an implied contract flanked by A and the coolie. Likewise, when A boards a D.T.C bus, an implied contract comes into being. A is bound to pay the prescribed fare.

'There is another category of implied contracts recognized through the Contract Act recognized as quasi-contracts (Sections 68 to 72). Strictly speaking, a quasi-contract cannot be described a contract. It is regarded as a connection resembling that of a contract. In such a contract the rights and obligations arise not through an agreement flanked by the parties but through operation of law. For instance, A, a trader, left sure goods at B's home through mistake. B treated the goods as his own and consumed it. In such a situation, B is bound to pay for the goods even though he has not asked for the goods.

On the Foundation of Execution

On the foundation of the extent to which the contracts have been performed, we may classify them as (i) executed contracts, and (ii) executory contracts.

- ***Executed Contracts:*** It is a contract where both the parties have fulfilled their respective obligations under the contract. For instance, A agrees to sell his book to B for Rs. 30. A delivers the book to B and B pays Rs. 30 to A. It is an executed contract.
- ***Executory Contracts:*** It is a contract where both the parties to the contract have still to perform their respective obligations. For instance, A agrees to sell a book to B for Rs. 30. If the book has not been delivered through A and B has not paid the price. the contract is executory.

A contract may sometimes be partly executed and partly executory. It happens where only one of the parties has performed his obligation. If A has delivered the book to B but B has not paid the price. the contract is executed as to A and executory as to B. On the foundation of execution, a contract can also be classified as unilateral or bilateral. A unilateral contract is one in which only one party has to perform his obligation, the other party had fulfilled his

part of the obligation at the time of the contract itself. For instance, A buys a ticket from the conductor and is waiting in the queue for the bus. A contract is created as soon as the ticket is purchased. The other party is now to give a bus wherein he could travel. A bilateral contract is one in which the obligations on the part of both the parties are outstanding at the time of the formation of the contract.

On the Foundation of Enforceability

From the point of view of enforceability a contract may be:

- Valid,
- Void,
- Voidable,
- Illegal or
- Unenforceable.

These conditions shall be used quite regularly in this course. Hence, you necessity form a clear thought in relation to the their respective meanings.

- ***Valid Contract:*** A contract which satisfies all the circumstances prescribed through law is a valid contract. If one or more of these elements is/are missing, the contract is either void, voidable, illegal or unenforceable.
- ***Void Contract:*** Just as to Section 2 (i) A contract which ceases to be enforceable through law becomes void when it ceases to be enforceable. It is a contract without any legal effects and is a nullity. You should note that a contract is not void from its inception. It is valid and binding upon the parties when made, but subsequent to its formation, due to sure reasons, it becomes unenforceable and so treated as void. A contract may become void due to impossibility of performance, change of law or some other reasons. For instance, A promised to marry B. Later on, B dies. This contract becomes void on

the death of B. A void contract should be distinguished from void agreement. Section 2(g) says that an agreement nor enforceable through law is said to be void. In the case of void agreement no contract comes into subsistence. Such an agreement confers no rights on any person and makes no obligations. It is void ab-initio i.e., from the very beginning. For instance an agreement with a minor is void because a minor is incompetent to contract. Now it should be clear to you that a void agreement is not the similar thing as a void contract. A void agreement never matures into a contract; it is void from the very beginning. A void contract, on the other hand, was valid when it was entered into, but subsequently, because of one cause or the other, became void. A contract cannot be void ab-initio; it is only an agreement which can be void ab-initio.

- ***Voidable Contract:*** Just as to Section 2(i) of the Contract Act, An agreement which is enforceable through law at the option of one or more of the parties thereon, but not at the option of the other or others, is a voidable contract. Therefore, a voidable contract is one which can be set aside or repudiated at the option of the aggrieved party. Until it is set aside or avoided through the party entitled to do so, it remnants a valid contract. A contract is usually treated as voidable when the consent of a party has not been free i.e., it has been obtained either through coercion, undue power, misrepresentation or fraud. The contract is voidable at the option of the party whose consent has been so caused. For instance, A threatens to shoot B if he does not sell his new scooter to A for Rs. 5,000, B agrees. Here the consent of B has been obtained through coercion. Hence, the contract is voidable at the option of B, the aggrieved party. If, though, B docs not exercise his option to set aside the contract within a reasonable time and if in the meanwhile a third party acquires a right in relation to the subject matter for some consideration, the contract cannot be avoided. For instance, A obtains a ring through fraud. Here, B's consent is not free and so he can cancel this contract. But if, before this option is exercised through B, A sells the ring to C ’who acquires ii after paying

the price and in good faith, contract cannot be avoided. You should note that the option to set aside the contract on this ground is not accessible to the other party. Hence, if the aggrieved party chooses to regain the contract, it remnants enforceable through law, If though, the aggrieved party avoids the contract, the other party is also freed from his obligation to perform the contract and if the party avoiding the contract has received any benefit under the contract, he necessity restore such benefit to the person from whom it was received (Section 64).

Chart 1.2 Distinction flanked by Void Agreement and Voidable Contracts

	Void Agreement		Voidable Contract
i)	It is void from the very beginning.	1)	It remains valid till it is repudiated by the aggrieved party.
2)	A contract is void if any essential element of a valid contract (other than free consent) is missing.	2)	A contract is voidable if the consen of a party is not free.
3)	It cannot be enforced by any party.	3)	If the aggrieved party so decides, the contract may continue to be valid and enforceable.
4)	Third party does not acquire any rights.	4)	An innocent party in good faith and for consideration acquires good title before the contract is avoided.
5)	Lapse of time will not make it a valid contract, it always remains void.	5)	If it is not avoided within reasonable time, it may become valid.
6)	Question of damages does not arise.	6)	The aggrieved party can also claim damages.

- ***Illegal or unlawful contract:*** The word illegal' means contrary to law. You know that contract is an agreement enforceable through law and so, it cannot be illegal. It is only the agreement which can be termed as illegal or unlawful. Hence, it is more appropriate to use the term 'illegal agreement' in lay of 'illegal contract'. An 'illegal agreement' is one which has been specifically declared to be unlawful under the provisions of the Contract Act or which goes against the provisions of any other law of the land. Such agreement cannot be enforced through

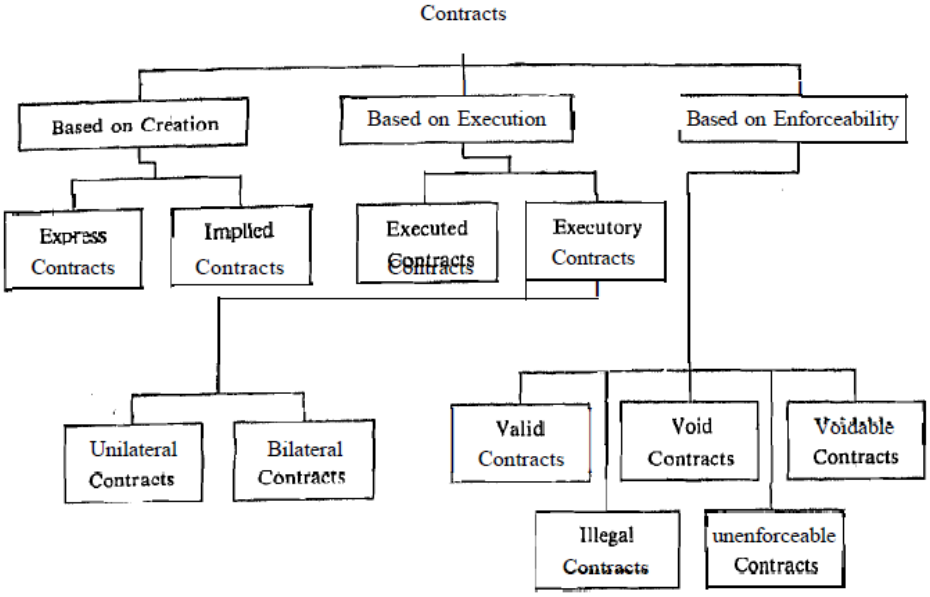
law. For instance, A agrees to pay Rs. 50,000 to B if B kills C. This is an illegal agreement because its substance is unlawful. Even if B kills C, he cannot claim the agreed amount from A. The term 'illegal agreement' is wider than the term 'void agreement'. All illegal agreements are void but all void agreements are not necessarily illegal. For instance, an agreement to sell a scooter to the minor is void but it is not illegal because the substance of this agreement is not unlawful. The other significant variation flanked by the illegal and the void agreement relates to their effect on the transactions -which are collateral to the main agreement. In case of illegal agreements even the collateral agreements become void. For instance, A engages B to shoot C. To pay B, A borrows Rs. 10,000 from D who is aware of the purpose of the loan. In this case, there are two agreements - one flanked by A and B and the other flanked by A and D. Since the main agreement flanked by A and B is illegal the agreement flanked by A and D which' is collateral to the main agreement is also void. D cannot recover the money from A. Take another instance. A borrows money from D to pay off his wagering (betting) debts to B. Here the main agreement is void (not illegal). Hence the agreement flanked by A and D being a collateral agreement shall not be affected even though D was aware of the purpose of the loan. From these examples, it should be clear to you that the agreements collateral to the illegal agreements are also void but the transactions collateral to void agreements are not affected in any method, they remain valid.

Chart 1.3 Difference between Void and Illegal Agreements

Void	Illegal
1) All void agreements are not necessarily illegal.	1) All illegal agreements are void.
2) Collateral transactions to a void agreements are not affected i.e., they do not become void.	2) Collateral transactions to an illegal agreements are also affected i.e., they also become void.
3) If a contract becomes void subsequently, the benefit received has to be restored to the other party.	3) The money advanced or thing given cannot be claimed back.

- ***Unenforceable contract:*** It is a contract which is actually valid but cannot be enforced because of some technological defect. This may be due to non-registration of the agreement, non-payment of the requisite stamp fee, etc. Sometimes, the law requires a scrupulous agreement to be in writing. If such agreement has not been put in writing, it becomes unenforceable. For instance, an oral agreement, for arbitration is unenforceable because the law requires that an arbitration agreement necessity be in writing. It is significant to note that in mainly cases, such contracts can be enforced if the technological defect involved is removed. For instance, if the document which embodies a contract is under stamped, it will become enforceable if the requisite stamp is affixed. Look at Figure 1.1. It provides a bird's eye view of the dissimilar kind of contracts.

Figure 1.1 Classification of Contracts



Essentials of a Valid Contract

You have learnt that an agreement enforceable through law is a contract. An agreement in order to be enforceable necessity has sure essential elements. Just as to Section 10 - All agreements are contracts if they are made through the free consent of the parties competent to contract, for a lawful consideration and with a lawful substance, and are not hereby expressly declared to be void. Therefore, an agreement becomes a valid contract if it has the following elements.

- Proper offer and its proper acceptance
- Intention to make legal connection
- Free consent
- Capability of parties to contract
- Lawful consideration
- Lawful substance
- Agreement not expressly declared void
- Certainty of meaning

- Possibility of performance
- Legal formalities

Let us now talk about these essential elements one through one.

- ***Proper offer and proper acceptance:*** In order to make a valid contract it is necessary that there necessity be at least two parties, one creation the offer and the other accepting it. The law has prescribed sure rules for creation the offer and its acceptance that necessity be satisfied while entering into an agreement. For instance, the offer necessity is definite and duly communicated to the other party. Likewise, the acceptance necessity be unconditional and communicated to the offered in the prescribe mode, and so on. Unless such circumstances with regard to the offer and the acceptance are satisfied the agreement does not become enforceable.
- ***Intention to make legal connection:*** There necessity is an intention in the middle of the parties to make a legal connection, If an agreement is not capable of creating a legal obligation it is not a contract. In case of social or domestic agreements, usually there is no intention to make legal connection. For instance, in an invitation to dinner there is no intention to make legal connection and so, is not a contract. Likewise, sure agreements flanked by husband and wife do not become contracts because there is no intention to make legal connection. This point can well be illustrated through the well-known case of Balfour v. Balfour. Mr. Balfour had promised to pay £ 30 per month to his wife livelihood in England when she could not accompany him to Caulon where he was employed. Mr. Balfour failed to pay the promised amount. Mrs. Balfour filed a suit against her husband for breach of this agreement, It was held that she could not recover the amount as it was a social agreement and the parties never planned to make any legal dealings. In commercial. or business transactions the usual presumption is that the parties intend to make legal dealings. Though, this presumption may' be negative through express conditions to the contrary. The case of

Rose & Frank Co. v. Crompton Brothers is relevant here. In this case there was an agreement flanked by Rose & Frank Company and Crompton Brothers Ltd. whereby the former was appointed as selling mediators in North America. One of the clauses in the agreement read, "This agreement is not entered into as a formal or legal agreement and shall not be subject to legal jurisdiction in the law courts." It was held, that this agreement was not a legally binding contract as there was no intention to make legal dealings. You necessity note that whether intention to make legal connection exists in an agreement or not is a matter for the court to decide which may look at the conditions and circumstances of the agreement and the circumstances under which the agreement was made

- ***Free consent:*** For a contract to be valid, it is essential that there necessity is free and genuine consent of the parties to the contract. They necessity have made the contract of their own free will and not under any fear or pressure. Just as to Section 14, consent is said to be free when it is not caused through (i) coercion,' undue power, (iii) fraud, (iv) misrepresentation, or (v) mistake. In case the consent is obtained through any of the first four factors, the contract would be voidable at the option of the aggrieved party. But if the agreement is induced through mutual mistake which is material to the agreement, it would be void.
- ***Capability of parties:*** The parties to an agreement necessity be competent to contract i.e., they necessity be capable of entering into a contract. If any party to the contract is not competent to contract, the contract is not valid. Now the question arises as to who are competent to contract? Answer to this question is provided through Section II of the Act which says that every person is competent to contract who is of the age of majority just as to the law to which he is subject and who is of sound mind, and is not disqualified from contracting through any law to which he is subject. From this section you will notice that in order to be competent to enter into a contract, the person should be a major (adult), should be of sound mind and he necessity not be

declared disqualified from contracting through any law to which he is subject. Therefore, the flaw in capability may be due to minority, lunacy, idiocy, etc. If a party to a contract suffers from any of these flaws, the agreement, with a few exceptions, is not enforceable at law.

- ***Lawful consideration:*** An agreement necessity is supported through consideration. Consideration means something in return. It is also defined as the price paid through one party to buy the promise of the other. Though, this price need not always be in conditions of money. For instance, A agrees to sell his book to B for Rs. 20. Here the consideration for A is Rs. 20, and for B it is the book. The consideration may be an act (doing something) or forbearance (not doing something) or a promise to do or not to do something, The consideration may be past, present or future, consideration necessity be real i.e., it necessity have some value in the eyes of law. Though, the consideration need not be adequate. For instance, A sells his car worth Rs. 50,000 to B for Rs. 10,000 only. This is a valid promise provided the consent of A is free. For a contract to be valid, the consideration should also be lawful. The consideration is measured lawful unless it is forbidden through law, or is fraudulent, or involves or implies injury to the person or property of another; or is immoral, or is opposed to public policy.
- ***Lawful substance:*** The substance of an agreement necessity is lawful. An agreement made for any act which is prohibited through law will not be valid. For instance, if A rents out a home for use as a gambling den, the agreement is void because the substance of the agreement is unlawful. The agreement shall be void; Therefore, the consideration as well as the substance, of the agreement should be lawful.
- ***Agreement not expressly declared void:*** The agreement necessity not have been expressly declared void under Contract Act. Sections 24 to 30 specify sure kinds of agreements which have been expressly declared void. They are agreement in restraint of marriage, agreement in restraint of legal proceedings, agreement in restraint of deal, and agreement through method of wager. For instance, A agreed to pay Rs.

1,000 to B if he (B) does not marry throughout his life. B promised not to marry at all. This agreement shall not be valid because it is in restraint of marriage which has been expressly declared void under Section 26. You should note that if an agreement possesses all other essential elements of a valid contract but is belongs to the category of such agreements that have been expressly declared void through the Contract Act, no power on earth can create it a valid contract.

- ***Certainty of meaning:*** Section 29 of the Contract Act gives that Agreements, the meaning of which is not sure or capable of being made sure, are void. Therefore to create a valid contract it is absolutely essential that its conditions necessity be clear and not vague or uncertain. For instance, A agreed to sell 100 tones of oil to B. Here it is not clear what type of oil is planned to be sold. So, this agreement is not valid on the ground of uncertainty. If, though, the meaning of the agreement could be made sure from the circumstances of the case, it will be treated as a valid contract. In the instance, if we know that A and B are dealers in mustard oil only, and then the agreement shall be enforceable because the meaning of the agreement could be easily ascertained from the circumstances of the case.
- ***Possibility of performance:*** The conditions of the agreement necessity also are such as are capable of performance. An agreement to do an act impossible in itself is void. (Section 56.) If the act is impossible of performance, physically or legally, the agreement cannot be enforced through law. The reasoning is very easy. We create an agreement with a view to perform it and if the performance is not possible, what is the fun of creation such agreements? For instance, A promises to B that he will enclose some region flanked by two parallel rows or that he will run at a speed of 200 kms. per hour or that he will bring gold from the sun. All these acts are such which are impossible of performance and so the agreement is not treated as valid.
- ***Legal formalities:*** You have learnt that an oral agreement is as good as is a written agreement. The Contract Act does not require that a contract necessity be in writing to be valid. But, in some cases the Act

has specified that the agreement necessity be made in writing. For instance, a promise to pay a time barred debt necessity be in writing and an agreement for a sale of immovable property necessity be in writing and registered under the Transfer of Property Act, In such a situation, the agreement necessity comply with the necessary formalities as to writing, registration, etc. If these legal formalities are not accepted out, then the contract is not enforceable through law.

After discussing the essential elements of a valid contract, it should now be clear to you that all these elements necessity be present in an agreement so that it becomes a valid contract. If any one of them is missing or absent, the agreement will not be enforceable through law.

REVIEW QUESTIONS

- What is Law?
- Describe an agreement.
- What do you mean through legal obligation?
- What is a void contract?
- When is a contract voidable?
- What is an illegal agreement?

CHAPTER 2

OFFER AND ACCEPTANCE

STRUCTURE

- Learning objectives
- Introduction
- Offer
- Acceptance
- Communication of offer and acceptance
- Revocation of offer and acceptance
- Lapse of an offer
- Review questions

LEARNING OBJECTIVES

After learning this chapter, you should be able to:

- Explain the meaning of offer and acceptance
- Describe the legal rules for a valid offer
- Distinguish offer from tender and cross offer explain the rules for a valid acceptance
- Describe the rules concerning communication of offer and acceptance
- Describe the rules concerning revocation of offer and acceptance
- Explain when an offer lapses,

INTRODUCTION

You learnt that an agreement enforceable through law is a contract and that an agreement to become enforceable through law necessity has sure essential elements. You also learnt that there necessity be at least two parties to an agreement, one creation an offer and the other accepting that offer. Therefore, an offer and its acceptance are the starting points in the creation of an agreement. In this chapter you will learn in relation to the several rules concerning a valid offer and a valid acceptance. You will also learn how an

offer and its acceptance are to be communicated and when they can be revoked.

OFFER

What is an Offer?

You have learnt in chapter that for creation a valid contract there necessity be a lawful offer and a lawful acceptance of that offer. An offer is also described ‚proposal'. The words 'proposal' and 'offer' are synonymous and are used interchangeably. Section 2(a) defines the term 'proposal' as follows:

- "When one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to create a proposal."

From the definition of offer you will notice that an offer involves the following elements.

- It necessity be an expression of readiness or willingness to do or to abstain from doing something. Therefore, it may involve a 'positive' or a 'negative' act. For instance, A offers to sell his book to B for Rs. 30. A is creation a proposal to do something i.e., to sell his book. It is a positive act on the part of the propose A. On the other hand, when A offers not to file a suit against B if the latter pays A the outstanding amount of Rs. 1,000, the act of A is a negative one i.e., he is offering to abstain from filing a suit.
- It necessity be made to another person. There can be no 'proposal' through a person to himself,
- It necessity be made with a view to obtain the assent of that other person to such act or abstinence. Therefore a mere statement of intention-"I may sell my furniture if I get a good price" is not a proposal.

The person creation the offer is described the 'offerer' or the 'promisor' and the person to whom it is made is described the 'offeree'. When the offeree accepts the offer, he is described the 'acceptor' or the 'promise'. For instance, Ram offers to sell his scooter to Prem for Rs. 10,000 This is an offer through Ram. He is the offerer or the promisor. Prem to whom the offer has been made is the offeree and if he agrees to buy the scooter for Rs. 10,000 he becomes the acceptor or the promise.

How is an Offer Made?

An offer can be made through any act which has the effect of communicating it to the other. An offer may either be an 'express offer' or an 'implied offer'

Express Offer

When an offer is made through words, spoken or written, it is termed as an express offer. When A says to B that he wants to sell his book to B for Rs. 20, it is an express offer. Likewise, when A writes a letter to B offering to sell his car to him for Rs. 40,000, it is also an express offer through A. The oral offer may be made either in person or in excess of telephone. Section 9 of the Contract Act reads: “In as distant as the proposal or acceptance of any promise is made in words, the promise is said to be express."

Implied Offer

It is an offer which is not made through words spoken or written. An implied offer is one which is inferred from the conduct of a person or the circumstances of the scrupulous case. For instance, public transport like DTC in Delhi or BEST in Bombay runs buses on dissimilar routes to carry passengers who are prepared to pay the specified fare. This is an implied offer. Likewise, when a coolie picks up your luggage to carry it from railway platform to the taxi, it means that the coolie is offering his service for some payment. This is an implied offer through the coolie. A bid at an auction is an

implied offer to buy. Section 9 says that "In so distant as such proposal or acceptance is made otherwise than in words, the promise is said to be implied.

To Whom an Offer is Made?

Just as to law, an offer can be accepted only through the person to whom it is made. Hence, we necessity know how to identify the person to whom the offer has been made. From this point of view, an offer may be 'specific' or 'common'. When an offer is made to a definite person or scrupulous group of persons, it is recognized as specific offer and it can be accepted only through that definite person or that scrupulous group of persons to whom it has been made. For instance, A offered to buy sure goods from B at a sure price. This offer is made to a definite person B. So, if goods are supplied through P, it will not provide rise to a valid contract.

On the other hand, if an offer which is not made to a definite person, but to the world at big or public in common, it is described a common offer. A common offer can be accepted through any person through fulfilling the conditions of the offer. Offers of reward made through method of advertisement for finding lost articles are the mainly appropriate instance of a common offer. For instance, B issues a public advertisement to the effect that he would pay Rs. 100 to anyone who brings hack his missing dog. This is a common offer and any member of the public can accept the said offer through finding the lost dog. Likewise, a company advertised that it would pay £ 100 to anyone who contacts influenza after by the smoke balls of the company for a sure era just as to the printed directions. Mrs. Carlill used the smoke balls just as to the directions of the company but subsequently she contacted influenza. She filed a suit for the reward. It was held that she would recover the reward as she had accepted the offer through complying with the conditions of the offer.

Legal Rules for a Valid Offer

An offer or proposal made through a person cannot legally be regarded as an offer unless it satisfies the following circumstances.

- ***Offer necessity intend to make legal dealings:*** An offer will not become a promise even after it has been accepted unless it is made with a view to make legal obligations. It is so because the very purpose of entering into an agreement is to create it enforceable in a court of law. A mere social invitation cannot be regarded as an offer because if such an invitation is accepted it will not provide rise to any legal connection. For instance, A invites his friend B to a dinner and B accepts the invitation. If B fails to turn up for dinner, A cannot go to the court to claim his loss. In social agreements the presumption is that the parties do not intend to make legal connection. In business agreement, though, it is presumed that it will be followed through legal consequences. But if the parties to a business agreement also agree that none of them shall go to court in case of its breach, then even such an agreement will not be treated as a contract.
- ***Conditions of offer necessity are sure, definite, and not vague:*** No contract can be shaped if the conditions of the offer are vague, loose, and indefinite. The cause is quite easy. When the offer itself is vague or loose or uncertain, it will not be clear as to what exactly the parties planned to do. A vague offer does not convey what it exactly means. For instance, A promises to buy one more horse from B if the horse purchased earlier proves lucky. This promise cannot be enforced because it is loose and vague. Same is the case when A agrees to sell his car to B for Rs. 30,000 after creation necessary repairs. What are necessary repairs is a debatable question and as such the offer is not valid. If, though, the conditions of the offer are capable of being made sure, the offer is not regarded as vague. For instance, A offers to sell to B "a hundred quintals of oil". The offer is uncertain as there is nothing to illustrate what type of oil is planned to be sold. But, if A is a dealer

in coconut oil only, it is quite clear that he wants to sell coconut oil. Hence, his offer is not vague. It is a valid offer. Sometimes, the parties agree to enter into a contract on some future date, Such agreement is not valid because the conditions of the offer are uncertain and they are yet to be settled. The law does not allow creation of an agreement to agree in future. In the case of Loftus v. Roberts, an actress was occupied for a provincial tour. The agreement provided that if the party went to London, the actress will be occupied at a salary to be mutually agreed upon. It was held that there was a contract as the conditions were not definite.

- ***The offer necessity is distinguished from a mere declaration of intention:*** Sometimes a person may create a statement without any intention of creating a binding obligation. Such statement or declaration only indicates that he is to negotiate and an offer will be made or invited in future. For instance an auctioneer advertised in a newspaper that a sale of office furniture will be held on a sure date. A person with the intention to buy furniture came, from a distant lay for the auction, but the auction was cancelled. He cannot file a suit against the auctioneer for his loss of time and expenses because the advertisement was merely a declaration of intention to hold auction, Likewise, a notice that goods will be sold through tender does not amount to an offer. When a person calls for tenders, it is only an effort to ascertain whether an offer can be obtained within such a margin as the seller is willing to adopt (Spencer v. Harding). The tenderers through submitting their tenders create offers and it is for the person inviting tenders to accept them or not. In case of Farina v. Fickus, a father wrote to his would be son-in-law that his daughter would have a share of what he left. It was held that the letter was a mere statement of intention and not an offer.
- ***Offer necessity is distinguished from an invitation to offer:*** An offer necessity is distinguished from an invitation to receive an offer or to create on offer or to negotiate. In the case of invitation to offer there is no intention on the part of the person sending out the invitation to

obtain the assent of the other party to such invitation. On the other hand, offer is a final expression of willingness through the offerer to be bound through his promise, should the other party choose to accept it. In case of an invitation to offer, his aim is to merely circulate information of his readiness to negotiate business with anybody who on such information comes to him, An invitation to offer is not an offer in the eyes of law and does not become a promise on acceptance. You necessity have noticed that shopkeepers usually display their goods in showcases with price tags attached. The shopkeeper in such cases is not creation an offer so that you can accept it. We are in information inviting you to create an offer which he may or may not accept. You cannot compel the shopkeeper to sell the goods displayed in the showcase at the market price. Likewise, quotations, catalogues, price list, advertisements in a newspaper for sale or a circular sent to prospective buyers do not constitute an offer. In the case of Pharmaceutical Society of Great Britain v. Boots Case Chemists Ltd., goods were displayed in the shop for sale with price tags attached on each article. The customers used to select goods and take them to the cashier for the payment of the price. It was held, that in this case there was only an invitation to offer and not an offer itself. The shopkeeper cannot be compelled to sell the goods at the price indicated. The contract was made, not when the customer selected the goods, but when the cashier accepted the offer to buy and receive the price. Likewise, a prospectus issued through a company for subscription to its shares through the members of the public is only an invitation to offer. When a person fills up the form and deposits it with the bank along with the application money, he is basically creation an offer to buy shares. Now it is for the company to accept his offer in full or partially, or reject it outright.

- ***The offer necessity is communicated:*** An offer necessity is communicated to the person to whom it is made. The first part of the definition of proposal emphasizes this information through saying that „When one person signifies to another his willingness to or to abstain".

It means that an offer is complete only when it is communicated to the offeree. You should note that a person can accept the offer only when he knows in relation to the it. An offer accepted without his knowledge does not confer any legal rights on the acceptor. There can be no valid acceptance unless there is knowledge of the offer. In the case of Fitch v. Snedakar, S offered a reward to any one who returns his lost dog. F brought the dog without any knowledge of the offer of reward. It was held that F was not entitled to the reward because F cannot be said to have accepted the offer which he was not aware of. In another significant case of Lalman Shukla v. Gauri Dutt, G sent his servant L to trace his lost nephew. When the servant had left, G announced a reward of Rs. 501 to anyone who traces the boy. L establishes the boy and brought him house. When L came to know of the reward, he decided to claim it. It was held that L was not entitled to the reward because he did not know in relation to the offer when he establishes the missing boy. It is also necessary that the offer is communicated through the offerer himself or through his authorized agent. If a person comes to know in relation to the offer from some offer source, he cannot create it a binding contract through accepting it. For instance, A writes a letter to B at Bombay offering to sell his home. This letter is misplaced and it never reaches B. But, a general friend P had informed B in relation to the said letter of A containing the offer. B sends his letter of acceptance to A. In such a situation, no contract will be shaped.

- ***Offer should not contain a term the non-compliance of which would amount to acceptance:*** The offer should not impose on the offeree an obligation to reply. While creation the offer the offerer cannot say that if the offer is not accepted before a sure date it will be presumed to have been accepted. Unless the offeree sends his reply, no contract will arise. For instance, A writes to B "I offer to sell my scooter to you for Rs. 7,000. If I do not receive a reply through Wednesday after that, I shall assume that you have accepted the offer." If B does not reply, it shall not imply that he has accepted the offer. Hence, there will be no

contract. Though, the offered can lay down the mode through which the acceptance is to be communicated.

- ***Special conditions or circumstances in an offer necessity also are communicated:*** The offerer is free to lay down any conditions and circumstances in his offer, and, if the other party accepts the offer then he will be bound through those conditions and circumstances. The significant point is that if there are some special conditions and circumstances they should also be duly communicated, The question of special conditions arises usually in case of average form of contracts. For instance, the Life Insurance Corporation of India has printed form of contracts containing big number of conditions and circumstances. Likewise, average contracts are made with railways, shipping companies, banks, hotels, arid cleaners etc. Such big companies are in a location to use the weakness of the individual through including sure conditions and circumstances in the contract which limit their liability. In order to protect the interest of the common public it is provided that the special conditions of the offer necessity are duly brought to the notice of the offeree. If this is not done the offeree will not be bound through those conditions. This can be done either through expressly communicating the special conditions of through giving a reasonable notice in relation to the subsistence of the special conditions i.e., through drawing his attention to them through printing in red ink or bold letters 'for' circumstances see back' or 'P.T.O.' on the face of the printed form or ticket. If this is not done, the offeree will not be bound through them. The leading case on this point is that of Handerson v. Stenvcns. In the case A purchased a steamer ticket for traveling from Dublin to Whitehaven and this information was printed on the face of the ticket. On the back, of the ticket sure circumstances were printed, one of which excluded the liability of the company for loss, injury, or delay to the passenger or his luggage. A never looked at the back of the ticket and there was nothing to draw his attention to the circumstances printed on the back face. His luggage was lost due to the negligence of the servants of the shipping company. It was held that A was entitled to

claim compensation for this loss of his luggage in spite of the exemption clause because there was no indication on the face of the ticket to draw his attention to the special conditions printed on the back of the ticket. You necessity note that if the special conditions and circumstances have been brought to the notice of the offeree, he will be bound through them even if he has not read them or is an illiterate. In the case of Parket v. South Eastern Railway Company, P deposited his bag in the cloakroom at a railway station. On the face of the receipt the words "see back" were printed. One of the circumstances printed on the back limited the liability of the railway company for any package to £ 1, The bag was lost and P claimed £ 24. Sh, 10, the actual value of the bag. P admitted knowledge of the circumstances printed on the back, but denied having read it. It was held-that P was bound through the print on the back face even though he had not read them because the railways had given reasonably enough notice on the face of the ticket as to the subsistence of circumstances. So, P could recover £ 10 only. The similar rule is applicable even where the special circumstances are printed in a language which the acceptor does not understand provided his attention has been drawn to them in a reasonable manner. In such a situation, it is the acceptor's duty to inquire for the translation of the circumstances before accepting the offer and if he did not inquire, he is presumed to know them and he will be bound through them. You necessity also note that the special conditions and circumstances should be brought to the knowledge of the offeree before the contract is concluded and not afterwards. A subsequent communication will not bind the acceptor unless he himself agrees thereto, For instance, a couple hired a room in a hotel for a week. When they entered the room they establish a notice on the wall disclaiming the owner’s liability for damage, loss, or theft of articles. Some of their items- were stolen. The owner of the hotel was held liable since the notice was not a part of the contract as it came to the knowledge of the client after the contract has been entered into. Finally, the conditions and circumstances necessity be reasonable. A

term is measured to be unreasonable if it defeats the very purpose of the contract or if it is against the public policy. Therefore, if the conditions and circumstances in a standardized contract are unreasonable, then the other party will not be bound through them. For instance, if a arid cleaner limits his liability to 20 per cent of the market price of the article in case of loss, the customer will not be bound through this circumstances because it means that the arid cleaner can purchase garments at 20 per cent of their price.

Cross Offers

Two offers which are alike in all compliments, made through two parties to each other, in ignorance of each other's offer are recognized as 'cross offers". Cross offers do not amount to acceptance of one's offer through the other and as such no contract is concluded. For instance, A of Delhi, through a letter offers to sell his home to B of Bombay for Rs. 10 lakh. At the similar time, B of Bombay also creates an offer to A to buy A's home for Rs. 101 lakh. The two letters cross each other. There is no concluded contract flanked by A and B because both the parties are creation offers. If they want to conclude a contract, at least one of them necessity send his acceptance to the offer made through the other.

Standing Offers

Sometimes an offer may be of a continuous nature. In that case it is recognized as standing offers, A standing offer is in the nature of a tender. Sometimes a person or a department or some other body requires sure goods in big quantities from time to time. In such a situation, it usually provides an advertisement inviting tenders. An advertisement inviting tenders is not an offer but a mere invitation to offer. It is the person submitting the tender to supply goods or services who is deemed to have made the offer, when a scrupulous tender is accepted or approved, it becomes a standing offer. The acceptance or approval of a tender does not though, amount to acceptance of

the offer. It basically means that the offer will remain open throughout a specified era and that it will be accepted from time to time through placing specific orders for the supply of goods. Therefore each order placed makes a separate contract. The offerer can though withdraw his offer at any time before an order is placed with him. Likewise, the party who has accepted the tender is also not bound to lay any order unless there is an agreement to purchase a specified quantity. For instance, A agrees to supply coal of any quantity to B at a sure price as will be ordered through B throughout the era of 12 months. It is a standing offer. Each order given through B will be an acceptance of the offer and A will be bound to supply the ordered quantity of coal. A can though, revoke the offer for future supplies at any time through giving a notice to the offeree.

ACCEPTANCE

What is an Acceptance?

You have learnt that when an offer is accepted, it results in an agreement. Let us now revise what exactly an acceptance is. Acceptance is an expression through the offeree of his willingness to be bound through the conditions of the offer. This results in the establishment of legal dealings flanked by the offerer and offeree. Section 2(b) of the Indian Contract Act defines the term 'acceptance' as "when the person to whom the proposal is made signifies his assent thereto, the proposal is said to he accepted. A proposal when accepted becomes a promise. For instance, A offers to sell his book to B for Rs. 20. B agrees to buy the book for Rs. 20. This is an acceptance of A's offer through B.

Who Can Accept?

An offer can be accepted only through the person or persons to whom it is made. An offer made to a scrupulous person (specific offer) can be accepted only through him and none else. The rule of law is that if A wants to enter into a contract with B, then C cannot substitute himself for B without A's

consent. In the case of Boulton v. Jones, A sold his business to B but this information was not recognized to an old customer C. C sent an order for goods to A through name. B supplied the goods to C. It was held that there was no contract flanked by B and C because C never made any offer to B. If an offer is made to the world at big (common offer) any person can accept the offer provided he has the knowledge of the offer. You have seen in Carlill v. Carbolic Smoke Ball Co's case that the lady accepted the offer through by the smoke balls. Likewise, in case a reward has been offered for giving information in relation to the missing person or a lost article, any person who provides the necessary information first, shall be entitled to the reward.

How is an Acceptance Made?

You know that an offer may be either express or implied. Likewise, the acceptance may also be either express or implied. When the acceptance is given through words spoken or written, it is described an 'express acceptance'. For instance, A offers to sell his book to B for Rs. 20. B may accept this offer through stating so orally or through writing a letter to A. The acceptance may also be implied through conduct. For instance, A offers a reward of Rs. 100 to anyone who traces his lost dog. B, who was aware of this offer, discovers the dog; he is entitled to the reward as he accepted the offer through doing the required act. Take another instance. A enters into DTC bus for going to Rajghat. This is an implied acceptance through A and he is bound to pay the fare.

Legal Rules for a Valid Acceptance

The acceptance of an offer to be effective necessity fulfills sure circumstances. These are:

- ***Acceptance necessity is absolute and unqualified:*** Section 7 (1) of the Indian Contract Act gives that 'In order to convert a proposal into a promise, the acceptance necessity he absolute and unqualified' This is so because a qualified. and conditional acceptance amounts to a counter offer leading to the rejection of the original offer. No

difference should be made through the offeree in the conditions of offer. If while giving acceptance, any difference is made in the conditions of the offer the acceptance will not be valid and there will be no contract. For instance, A offers to sell his scooter to B for Rs. 8,000 and B agrees to buy it for Rs. 7,500. It is a counter offer and not an acceptance. If, later on, B is ready to pay Rs. 8,000 A is not bound to sell his scooter, because B's counter offer has put an end to the original offer. If only a part of the offer is accepted the acceptance will not be valid. For instance, A offers to sell 100 quintals of wheat to B at a sure price. B accepts to buy 70 quintals only. It is not a valid acceptance since it is not for the whole of the offer. Therefore, an offer should be accepted as it is, without any reservations, variations, or circumstances. Any difference, howsoever unimportant it may be, creates the acceptance invalid. Sometimes, a person may accept the offer "subject to a contract" or "subject to formal contract" or "subject to contract to be approved through the solicitors". In such cases no contract arises because a condition remnants to be performed in the future. For instance, A's bid was provisionally accepted at an auction sale. The acceptance was 'subject to confirmation'. Before confirmation, though, A withdrew his bid. It was held that because acceptance was not absolute, it was subject to confirmation; A can withdraw his bid before it is confirmed.

- ***Acceptance necessity is in the prescribed manner:*** Where the offerer has prescribed a mode of acceptance, it necessity is accepted in that very manner. If the offer is not accepted in the prescribed manner it is up to the offerer to accept or reject such acceptance. But when the acceptance is not in the prescribed manner and the offerer wants to reject it, he necessity inform the acceptor within a reasonable time that he is not bound through acceptance since it is not in the prescribed manner. If he does not do so within a reasonable time, he will be bound through the acceptance. For instance, A creates an offer to B and says "send your acceptance through telegram". B sends his acceptance through a letter. A can refuse this acceptance on the ground that it was

not accepted in the prescribed manner. But, if A fails to inform B within a reasonable time he will be deemed to have accepted the acceptance through ordinary letter and it will result in the formation of a valid contract: If, though, no mode has been prescribed, it should be accepted in some usual and reasonable manner.

- ***Acceptance necessity is communicated:*** You have learnt in the definition of acceptance that it should be signified. In other words, the acceptance is complete only when it has been communicated to the offerer. A mere mental acceptance, not evidenced through words or conduct, is no acceptance. In Brogen v. Metropolitan Railway Co.'s case an offer to supply coal to the railway Co, was made. The manager wrote on the letter 'accepted', put it in his drawer, and forgot all in relation to the it. It was held that no contract was made because acceptance was not communicated. Communication of acceptance does not mean that the offerer necessity approach to know in relation to the acceptance. Even if the letter of acceptance is lost in transit or delayed, the offerer is bound through the acceptance because the acceptor has done all that is required of him. You should note that the offerer, while creation an offer, cannot impose a burden on the other party to communicate his refusal or rejection. He can certainly prescribe the manner in which the offer is to be accepted. But, he cannot lay down the manner in which it is to be refused. For instance, the offerer cannot say that if he does not hear anything from the other party within seven days, the offer will be deemed to have been accepted. This point can be illustrated through the well-recognized case of Felthouse v. Bindley. In this case, F offered through a letter to buy his nephew's horse for £ 30 saying, "If I hear no more in relation to the him, I shall consider the horse is mine". The nephew sent no reply at all but told Rindley, his auctioneer, not to sell that scrupulous horse as he intends to sell it to his uncle. Bindley, though, sold the horse through mistake. F sued the auctioneer for conversion. It was held that F will not succeed as his nephew had not communicated acceptance and hence there was no contract.

- ***Acceptance necessity is communicated through a person who has the power to accept:*** For an acceptance to be valid it should be communicated through the offeree himself or through a person who has the power to accept. Therefore, if acceptance is communicated through an unauthorized person, it will not provide rise to legal dealings. The case of Powell v. Lee can be mentioned in support of this point. In this case P applied for the post of a headmaster in a school. The managing committee passed a resolution appointing P to the post but this decision was not communicated to P. Though, a member of the managing committee, in his individual capability and without any power, informed P in relation to the decision. Subsequently, the managing committee cancelled its resolution and appointed someone else. P filed a suit for breach of contract. It was held that he was not informed in relation to the his appointment by some authorized person, hence there was no communication of acceptance.
- ***Acceptance necessity is made within the time prescribed or within a reasonable time:*** Sometimes the offerer while creation the offer fixes the era within which the offer should be accepted. In such a situation, the acceptance necessity be given within the prescribed time and if no time is prescribed, it should be accepted within a reasonable time. What is the reasonable time depends upon the facts of the case. Where an offer to buy shares of a company was made in June but the acceptance was communicated in November, it was held that because acceptance was not given within a reasonable time the offer had elapsed...
- ***Acceptance necessity be given before the offer lapses or is withdrawn:*** The acceptance necessity be given while the offer is in, force. Once an offer has been withdrawn or stands lapsed, it cannot be accepted. For instance, A offered, through a letter, to sell his car to B for Rs. 40,000. Subsequently, A withdraws his offer through a telegram, which was duly received through B, After the receipt of the telegram; B sends his acceptance to A. This acceptance is not valid.

You will learn in relation to the rules relating to lapse of an offer later in this unit.

COMMUNICATION OF OFFER AND ACCEPTANCE

You have learnt that offer and acceptance have to be communicated. Unless an offer is communicated it cannot be accepted. Likewise, an acceptance which is not communicated does not make any legal dealings. Now the question arises as to when the communication of offer and acceptance is regarded as complete so as to bind the concerned parties. When the contracting parties are face to face, there is no problem concerning communication, because there is instantaneous communication of the offer and its acceptance. The problem arises when parties are at a aloofness from each other and they have to do it through post. In such a situation, it is very significant for us to know the exact time when communication of the offer and acceptance is complete because as soon as the communication is complete the parties loose the right of withdrawal or revocation. Let us now take up the rules concerning the communication of the offer and acceptance.

Communication of Offer

Just as to Section 4 of the Contract Act, the communication of an offer is complete when it comes to the knowledge of the person to whom it is made i.e., when the letter containing the offer reaches the offeree. For instance, A of Delhi sends a letter through post to B of Bombay offering to sell his home for Rs. 10 lakh. The letter is posted on April 5, and this letter reaches B on April 7. The communication of the offer is complete on April 7. In the instance, if the letter containing the offer never reaches B, but B comes to know in relation to the proposal from some other source and sends his acceptance, it will not amount to proper communication of the offer and so no contract will arise.

Communication of Acceptance

The rules concerning communication of acceptance have to be studied from the point of view of offerer and as. well as the offeree because the communication of acceptance is complete at dissimilar times for the offerer and the offeree.

Just as to Section 4 of the Contract Act, "the communication of acceptance is complete:

- As against the proposer, when it is put in a course of transmission to him, so as to be out of the power of the acceptor, and
- As against the acceptor, when it comes to the knowledge of the proposer.

Therefore, the offerer becomes bound through the acceptance as soon as the letter of acceptance is duly posled through the acceptor, but the acceptor is bound through his acceptance only when the letter of acceptance reaches the offerer. It is quite motivating to note that a valid contract arises even if the letter of acceptance is lost in transit or is delayed. You should keep in mind that the offerer will be bound through the acceptance only when the letter of acceptance was correctly addressed, properly stamped, and actually posted. Therefore, if the acceptance letter is not correctly addressed, it will not be binding upon the offerer.

From the rules, it necessity be amply clear that as distant as the acceptor is concerned, he is not bound through acceptance till it reaches the offerer. You necessity have noted that there is a time gap flanked by the two dates, the date on which the letter of acceptance is posted and the date on which the offerer actually receives it. This time gap can be utilized through the acceptor to withdraw his acceptance through a speedier means of communication.

In the instance if B of Bombay sends his acceptance through post on April 10 the communication of acceptance is complete against A on April 10

i.e., when the letter of acceptance is posted, but the communication of acceptance shall be complete as against B only when this letter reaches A. Suppose A receives the letter of acceptance on April 12, at 11 a.m. then B will be bound through his acceptance on April 12 only. In other words, the law has given a chance to the acceptor to withdraw his acceptance.

Contracts in Excess of, Telephone

A contract through telephone is treated on the similar principle as an oral agreement made flanked by two parties when they are face to face with each other. Therefore, when offers of acceptance are made on phone, the parties are in direct get in touch with, and no contract is concluded until the offerer actually receives or hears the acceptance i.e., the contract is made only when the acceptance, is clearly heard and understood through the offerer. The acceptor necessity ensures that his acceptance is properly received through the offerer. Normally when the parties disconnect they usually utter such words as 'Bye', „O.K,' etc. This designates that the parties have heard what they wanted to communicate. But, if the conversation is interrupted before acceptance has been given, the contract is not concluded. For instance, A made an offer to B in excess of telephone. While B was conveying his acceptance, the row suddenly went dead and A could not hear anything. Therefore, no contract was concluded. Then, B creates another effort and this time he could convey his acceptance. The contract is said to be concluded on the second effort.

REVOCATION OF OFFER AND ACCEPTANCE

The term 'revocation' basically means 'taking back or 'withdrawing'. Both offer and acceptance can be revoked or withdrawn. But, it is possible only upto a sure stage. Let us now revise the rules concerning the revocation of offer and acceptance.

Revocation of Offer

Just as to Section 5 of the Contract Act “a proposal may be revolted at any time before the communication of its acceptance is complete as against the proposer, but not afterwards.” You know that communication of acceptance is complete as against the offerer when it is put in a course of transmission so as to be out of his power. Hence, an offer can be revoked at any time before the letter of acceptance has been posted. For instance, A offers through letter to sell his car to B at a sure price. A may revoke his offer at any time before B posts his letter of acceptance, but not afterwards. Once the letter of acceptance has been posted, the offer cannot be revoked. So, when the offerer wishes to revoke his offer, his necessity does so through a speedier mode of communication so that the revocation notice reaches the offeree before he posts his letter of acceptance. Revocation necessity always be expressed and move from the offerer himself or a duly authorized agent. Notice of revocation of a 'common offer' necessity is given through the similar channel through which the original offer was made.

Revocation of Acceptance

Section 5 of the Contract Act further gives that 'an acceptance may be revoked at any time before the communication of the acceptance is complete as against the acceptor, but not afterwards.' You have already learnt that the communication of acceptance is complete as against the acceptor when it comes to the knowledge of the offerer. Hence, the acceptor can revoke his acceptance at any time before his letter accepting the offer reaches the offerer. Once the letter acceptance reaches the offerer, the acceptance cannot be revoked. Therefore, for effective revocation of acceptance it is necessary that the acceptor should adopt some speedier mode of communication so that his revocation reaches the offerer before the letter of acceptance. For instance, A offers through a letter dated February 2, sent through post, to sell his home to B at a sure price. B accepts the offer on February 6 through a letter sent

through post. The letter reaches A on February 8 at 2 p.m. Here B may revoke his acceptance at any time before 2 p.m. on February 8, but not afterwards.

Sometimes, an motivating situation may arise. The letter of acceptance and the telegram containing revocation of acceptance may be delivered to the offerer at the similar time. In such a situation the formation of a contract is a matter of chance. Which one is opened first through the offerer will decide the issue. Usually it is presumed that a man of ordinary prudence will first read the telegram. Hence, the revocation will be quite effective.

When the parties at distant spaces communicate in excess of telephone or telex, the question of revocation does not arise because there is instantaneous communication of the offer and its acceptance. The offer is made and accepted at the similar time.

In brief you should keep in mind that an offer can be revoked at any time before the letter of acceptance' is posted and an acceptance can be revoked before it reaches the offerer.

Communication of Revocation

The communication of revocation is complete at dissimilar times for the person who creates it and the person to whom it is made. Just as to Section 4 the communication of revocation is complete.

- As against the person who creates it, when it is put into a course of transmission to the person to whom it is made, so as to be out of the power of the person who create it.
- As against the person to whom it is made, when it comes to his knowledge.

Instance

A proposes through letter to sell his home to B at a sure price. B accepts the proposal through a letter sent through post. If A revokes his offer

through telegram, then revocation of offer is complete as against A, when the telegram is sent and for B it is complete when B receives the telegram. If B revokes his acceptance through telegram the revocation of acceptance is complete for B when the telegram is sent and as against A, when it reaches him.

LAPSE OF AN OFFER

You have learnt that the acceptance necessity be given before the offer lapses or is revoked. Now the question arises as to how extensive an offer remnants open or upto what time it can be accepted. You necessity know this because the offer necessity be accepted before it lapses. Once an offer lapses it cannot be accepted. Let us now talk about the circumstances leading to lapse. They are as follows:

- ***Through lapse of stipulated or reasonable time:*** The offeree necessity accept the offer within the time prescribed in the offer and if no time is prescribed, it necessity be accepted within a reasonable time. Therefore, the offer lapses if it is not accepted within the time prescribed in the offer or within a reasonable time. What is a reasonable time depends upon the circumstances in each case. In the case of Ramsgate Victoria Hotel Co. v. Montefiore, M offered to buy shares of a company on June 8. The Company informed him in relation to the allotment on November 23. M refused to accept the shares. It was held that M's offer to buy shares had lapsed because it was not accepted within a reasonable time.
- ***Through death or insanity of the offerer or the offeree before acceptance:*** An offer lapses through the death or insanity of an offerer if the information of his death or insanity comes to the knowledge of the acceptor before he creates his acceptance... But if the offer is accepted in ignorance of the death or insanity of the offerer, there will be a valid contract. This means that the death or insanity of the offerer does not terminate the offer automatically. The offer lapses only when this information comes to the knowledge of the offeree before acceptance. Our law is dissimilar in this respect from English law

where the death of the offerer terminates the offer even if acceptance is made in ignorance of the death. There is no provision in the Act in relation to the effect of the death of an offeree before acceptance. But it is an recognized rule that the offer comes to an end on the death of the offeree, because an offer can be accepted only through the offeree and not through any other person. It cannot be accepted through the legal heirs of the offeree.

- ***Through failure to fulfill condition precedent to acceptance:*** When there is a condition in the offer which necessity is fulfilled before the acceptance of the offer, the offer lapses if the acceptance is given without fulfilling that condition? For instance, A offered to sell his scooter to B for Rs. 10,000 subject to the condition that B should pay Rs. 2,000 before a sure date. B accepted the offer but did not pay the money. In this case the acceptance has no validity and the offer stands terminated.

- ***Through rejection of offer through the offeree:*** An offer lapses as soon as it is rejected through the offeree. Once an offer is rejected, it cannot be revived subsequently. An offer is said to be rejected, if the offeree expressly rejects it or accepts it subject to sure circumstances.
- ***If it is not accepted in the prescribed or usual mode:*** Sometimes, the offerer prescribes the mode of acceptance. In such a situation the offer necessity, be accepted in that very manner and if it is not accepted in the prescribed mode the offer stands lapsed. For instance, A offers to sell his home to B and writes to B 'send your acceptance through telegram'. Now if the acceptance is sent through some other mode, then A may not be bound through the acceptance.
- ***Through counter offer through the offeree:*** Counter offer means creation a fresh offer instead of accepting the original offer. A counter offer amounts to the rejection of the original offer. Hence, as soon as the counter offer is made, the original offer stand lapsed. If the person who creates a counter offer changes his mind and wishes to accept the original offer, he cannot do so. For instance, A offered to sell his bicycle to B for Rs. 200. B said that he would buy it for Rs. 170. Here B's offer to buy for Rs. 170 is counter offer and terminates the original offer of A. If later on B wants to buy the cycle for Rs. 200, it will be a case of a fresh offer and not an acceptance of the original offer.
- ***Through revocation:*** If the offerer revokes the offer before its acceptance through the offeree, the offer stands lapsed. Just as to rules, an offer can be revoked, at any time before it is accepted through communicating a notice of revocation to the offeree. For instance, at an auction sale, the highest bidder can revoke his offer to buy before the fall of the hammer.
- ***Through subsequent illegality or destruction of subject-matter:*** An offer lapses if it becomes illegal before it is accepted. For instance, A of Delhi offered to supply 100 bags of rice to B at Lucknow on a sure

date. But, before this offer is accepted through B, the Government has issued an order prohibiting the inter-state movement of food grains. Automatically the offer made through A comes to an end. Likewise, if the subject-matter of the offer is destroyed before acceptance, the offer lapses.

REVIEW QUESTIONS

- What is an offer?
- What do your mean through a common offer?
- What happens if an offer is not accepted in the prescribed' mode?
- Describe Acceptance.
- What happens if the acceptance is not just as to the mode prescribed?

CHAPTER 3

CAPACITY OF PARTIES

STRUCTURE

- Learning objectives
- Who is competent to contract?
- Location of a minor
- Agreements through persons of unsound mind
- Persons disqualified through law
- Review questions

LEARNING OBJECTIVES

After learning this chapter, you should be able to:

- Explain who is competent to contract
- Explain who is a minor and describe the location of agreements with the minors
- Identify persons of unsound mind and explain the location of agreements with such persons
- Identify persons disqualified under other laws and describe their location in relation to contract.

WHO IS COMPETENT TO CONTRACT?

Section 11 of the Indian Contract Act clearly states as to who shall be competent to contract. It gives that every person is competent to contract:

- Who is of the age of majority just as to the law to which he is subject,
- Who is of sound mind, and
- Who is not disqualified from contracting through any law to which he is subject?

Therefore, a person to be competent to contract should not be:

- A minor, or
- Of an unsound mind, or
- Disqualified from contracting

LOCATION OF A MINOR

Who is a Minor?

Just as to Section 3 of the Indian Majority Act, a person is deemed to have attained majority:

- When he completes 18 years or
- Where a guardian of person or property or both, has been appointed through a Court of Law (or where his property has passed under the superintendence of the Court of Wards), he attains majority on completion of 21 years.

In other words, normally a person shall be treated as minor if he has not attained the age of 18 years. In the' following two cases, though, he is treated as minor until he attains the age of 21 years.

- Where a guardian of a minor's person or property is appointed under the guardians and Wards Act, 1890, or
- Where the superintendence of minor's property is assumed through a Court of Wards.

Location of Agreements through a Minor

Just as to Section 11, as stated earlier, no person is competent to contract who is not of the age of majority. In other words, a minor is not competent to contract. In information, the law acts as the guardian of minors and protects their rights because they are not mature and may not possess the

capacity to judge what is good and what is bad for them. Hence the minor is not bound through any promises made through him under an agreement. The location with regard to minor's contracts may be summed-up as follows:

- ***A contract with or through a minor is absolutely void and the minor so cannot bind himself through a contract:*** The Privy Council in the case of Mohiri Bibee v. Dharmodas Ghosh held that a minor's agreement is altogether void. The facts of the case were: Dharmodas a minor, entered into a contract for borrowing a sum of Rs. 20,000. The lender advanced Rs. 8,000 to him and Dharmodas executed a mortgage of his property in favor of the lender. Subsequently, the minor sued for setting aside the mortgage. The Privy Council held that sections 10 and 11 of the Indian Contract Act create the minor's contract void and so the mortgage was not valid. Then, the mortgagee, prayed for refund of Rs. 8,000 through the minor. The privy council further held that as a minor's contract was void, any money advanced to him could not be recovered.
- ***Fraudulent representation through a minor:*** Will it create any change in case minor is guilty of deliberate misrepresentation in relation to the his age thereby inducing the other party to contract with him? No! it will create no change in the status of the agreement. The contract shall continue to remain void because if such a thing is permitted, unscrupulous people while dealing with a minor shall, as a first thing, inquire him to sign a declaration that he is of the age of majority. It will therefore defeat the whole objective of protecting his interests. In the case Leslie v. Sheill. S, a minor through fraudulently on behalf of himself to be a major, induced L to lend him £ 400. He refused to repay it and L sued him for the money. Held, that the contract was void and S was not liable to repay the amount due. The similar decision was endorsed in the case of Kanhya Lai v. Girdhari Lal and the minor was

not held liable on the promissory note executed through him, But, should it mean that those younger in age have liberty to cheat the seniors and retain the benefits. The Lahore High Court (prior to partition) in Khan Gul v. Lakha Singh held that where the contract is set aside the status quo ante should be restored and the court may direct the minor, on equitable grounds, to restore the money or property to the other party. Therefore, in such cases, if money could be traced, the court would, on equitable grounds, inquire the minor for restitution. Sections 30 and 33 of the Specific Relief Act. 1963 give that in case of a fraudulent misrepresentation of his age through the minor, inducing the other party to enter into a contract, the court may award compensation to the other party.

- ***Ratification of a contract through a minor on attaining the age of majority:*** A minor's agreement is void abinitio. Hence, there can be no question of its being ratified even after he attains majority. In Indran Ramaswamy v. Anthaopa a person gave a promissory note in satisfaction of one executed through him for money borrowed when he was a minor. The Court held that the claim there under could not be enforced because there was no fresh consideration. Consideration given throughout minority is not a good consideration. Though, where a person on attaining majority actually pays the debt incurred through him throughout minority, it is treated as valid. In law it is to be regarded on the similar footing as a gift. You should note that an agreement with a minor is merely void and not unlawful and so the sum paid cannot be sued for subsequently.
- ***Minor's contract jointly with a major person:*** Documents jointly executed through a minor and an adult major person would be void vis-à-vis the minor. But they can be enforced against the major person who has jointly executed the similar provided there is a joint promise to pay through such a major person.

- ***Minor as a partner:*** A minor cannot be a partner in a partnership firm. Though, a minor may, with the consent of all the partners for the time being, be admitted to the benefits of partnership (Section 30 of the Partnership Act, 1932). This means he can share the profits without incurring any personal liability for losses.
- ***Minor as an agent:*** A minor can act as an agent and bind his principal through his acts without incurring any personal liability.
- ***Minor as a shareholder:*** There has been a strong controversy as to whether a minor can become a shareholder/member of a company. In view of the provisions of the Indian Contract Act and the Privy Council's decision, a minor cannot become a member of the company. Therefore, if a minor acquires partly paid shares the company will not be able to recover the uncalled amount from the minor. Though, there are contrary decisions wherein it has been held that a minor can become a subscriber to the memorandum of association and can acquire shares through allotment. In Laxon Co.'s case, it was held that a minor can be a shareholder unless the articles of association of the company prohibit it. In Dewan Singh v. Minerve Films Ltd., the Punjab High Court held that there was no legal bar to a minor becoming a member of a company through acquiring shares (i.e., through method of transfer) provided the shares were fully paid up and no further obligation or liability was attached to them. It may therefore be concluded that a minor can become a shareholder/ member of a company provided that the shares held through him are fully paid shares and the articles of association do not prohibit it.
- A minor cannot be declared insolvent because he is incapable of contracting debts.

Exceptions

Contract for the Benefit of a Minor

A person incompetent to contract may accept a benefit and be a transferee, Although a sale or mortgage of property through a minor is void, a duly executed transfer through method of sale or mortgage in favor of a minor who has paid to valid consideration is not void. Such a transaction shall be enforceable through him or any other person on his behalf, A minor, so, in whose favor a deed of sale is executed is competent to sue for possession of the property conveyed thereby. It was held through a Full Bench of the Madras High Court that a mortgage executed in favor of a minor who has advanced the mortgage money is enforceable through him or through any other person on his behalf. Likewise, a minor can be the payee of a cheque or any other negotiable instrument and claim payment thereon. Also, where a minor sells goods to another major person, he shall be entitled to recover its price from him.

Contract through Guardian

A contract may be entered into on behalf of a minor through his guardian or manager of his estate. In such a case the contract can be enforced through or against the minor provided that the contract (a) is within the scope of the power of the guardian or manager, and (b) is for the benefit of the minor.

Therefore, a contract entered into through a parent or certified guardian of a minor for the sale of property belonging to the minor can be enforced through either party since it may be for the minor's benefit. Though, all contracts made through a guardian on behalf of a minor are not valid. For instance, the guardian of a minor has no power to bind the minor through a contract for the purchase of immovable property. Likewise, a guardian of a minor cannot enter into a valid contract of service on his/her behalf.

Contract for Supply of Necessaries

A Contract for supply of necessaries to a minor or to those who are dependent on him can be enforced against him, not personally, but as distant as his property may extend. Section 68 in this regard reads as follows:

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

It may not be possible to draw an exhaustive list as to what shall constitute ‚necessaries'. In information, what may be 'necessaries' for one may be a luxury for another? Buttons, for instance, are a normal part of clothing and may so be treated as 'necessaries', but not the gold or diamond buttons (a prince may be an exception). 'Necessaries' necessity, so, be understood in relation to the social status of the person concerned. 'Necessaries' normally contain articles required to uphold a scrupulous person in the state, degree, and station in life in which he is. The English Sale of Goods Act defines necessaries as goods appropriate to the condition in life of the minor, and to his actual necessities at the time of sale and delivery. Therefore, an thing will not be treated as necessaries if a person is already sufficiently supplied with things of that type. It is immaterial whether the other party knows this or not. In the case of Nash v. Inman a minor who was a B. Com. student, bought eleven fancy coats from N. He was, at that time, adequately provided with clothes. Weld, not even a single coat, was a necessity. His properties could not, so, be attached for its payment. In India, besides food, clothing and shelter the education and marriage of a female have also been held to be necessaries. Any supply of such items or loans for the similar shall, so, qualify for claim under Section 68.

Though, you should note that the payment for necessaries supplied to a minor can only be claimed out of the properties belonging to the minor. He cannot be held personally liable for the similar, i.e., he cannot be asked to expend labour in exchange, nor can his income, if any, be attached. This rule is equally applicable to the necessary services rendered to him. Therefore, the lending of money to a minor for the purpose of defending a suit on behalf of a minor in which his property is in jeopardy or for defending him in prosecution, or for saving his property from sale in execution of a decree is deemed to be a service rendered to the minor. Other examples of necessary services rendered to a minor are: provision of education, medical and legal advice, provision of a home on rent to a minor for the purpose of livelihood and continuing his studies.

It should also be noted that the parent or guardian of a minor cannot be held liable unless those goods are supplied (or services rendered) to a minor as the agent of the parent or guardian, that is, the minor has composed them on behalf of his parent or guardian.

AGREEMENTS THROUGH PERSONS OF UNSOUND MIND

Who is a Person of Sound Mind?

You know that a person while creation a contract should be of a sound mind otherwise the contract will have no validity in the eyes of law. Who is a person of sound mind has been amply clarified through Section 12 of the Indian Contract Act which reads a person is said to be of sound mind for the purpose of creation a contract, if at the time when he creates it, he is capable of understanding it and of forming a rational judgment as to its effect upon his interests. Therefore soundness of mind of a person depends on two facts:

- His capacity to understand the conditions of the contract, and

- His skill to form a rational judgment as to its effect upon his interests. If a person is incapable of both, he suffers from unsoundness of mind. Idiots, lunatics and drunken persons are examples of those having an unsound mind

Section 12 further states that a person who is usually of unsound mind, but occasionally of sound mind, may create a contract when he is of sound mind. A person who is usually of sound mind, hut occasionally of unsound mind, may not create a contract when he is of unsound mind. Examples:

- A patient in a lunatic asylum, who is at intervals of sound mind, may contract throughout those intervals.
- A sane man, who is delirious from fever or who is so drunk that he cannot understand the conditions of a contract or form a rational judgment as to its effect on his interest, cannot contract whilst such delirium or drunkenness lasts.

Whether a party to a contract, at the time of entering into the contract, is of sound mind or not is a question of information to be decided through the court.

Burden of Proof

The following rules may be noted in this regard:

- Where a person is usually of sound mind, the burden of proving that he was of unsound mind at the time of execution of a document lies on the person who challenges the validity of the contract.
- Where a person is usually of unsound mind, the burden of proving that at the time he was of sound mind lies on the person who affirms it.

- In cases of drunkenness or delirium from fever or other causes, the onus lies on the party who sets up that disability to prove that it lived at the time of the contract.

Location of Agreements through Persons of Unsound Mind

- ***Lunatics:*** A lunatic is a person who is mentally deranged due to some mental strain or other personal experience. Though, he has some intervals of sound mind. He is not liable for contracts entered into while he is of unsound mind. Though, as regards contracts entered into throughout lucid intervals, he is bound. His location in this regard is identical with that of a minor.
- ***Idiots:*** An idiot is a person who is permanently of unsound mind. Idiocy is a congenital defect. Such a person has no lucid intervals. He cannot create a valid contract. In Inder Singh v. Parmeshwardhari Singh a property worth in relation to the Rs. 25,000 was agreed to be sold through a person for Rs. 7,000 only. His mother proved that he was a congenital idiot, incapable of understanding the transaction. Holding the sale to be void, Justice Sinha of Patna High Court stated that "it is not necessary that a man necessity be suffering from lunacy to disable him from entering into a contract. A person may, to all appearances, behave in a normal fashion but at the similar time, he may be incapable of forming a judgment of his own as to whether the act he is in relation to the to do is in his interest or not. In the present case he was incapable of exercising his own judgment"
- ***Drunken Persons:*** Drunkenness is on the similar footing as lunacy. A contract through drunken person is altogether void. It should be noted that partial or ordinary drunkenness is not enough to avoid a contract. It necessity be clearly shown that, at the time of contracting, the person pleading drunkenness was so intoxicated as to be temporarily deprived

of cause and was not in a location to provide valid consent to the contract. Illustration (b) to Section 12 of the Indian Contract Act reads: A similar man is delirious from fever or who is so drunk that he cannot understand the conditions of a contract or form a rational judgment as to its effects on his interest cannot contract while such delirium or drunkenness lasts.

Exceptions

A contract with a person of unsound mind is subject to the similar exceptions as the contract with a minor is. Therefore a person of unsound mind:

- May enforce a contract for his benefit, and
- His properties, if any, shall be attachable for realization of money due against him for supply of necessaries to him or to any of his dependents.

PERSONS DISQUALIFIED THROUGH LAW

Besides minors and persons of unsound mind, there are some other persons who have been declared incompetent of contracting, partially or wholly, so that the contracts of such persons are void. In competency to contract may arise from political status, corporate status, legal status, etc.

Alien Enemy

An alien is a person who is the citizen of a foreign country. Therefore, in the Indian context an alien may be:

- An alien friend, or

- An alien enemy. An alien friend, (i.e., a foreigner) whose country is at peace with the Republic of India, has usually the full contractual capacity of a natural born Indian subject.

But, he cannot acquire property in Indian ship or be employed as Master or any of other Chief Officer of such a ship. In the case of contracts with an alien enemy (i.e., an alien whose country is at war with India) the location may be studied under two heads:

- Contracts throughout the war and
- Contracts made before the war.

Throughout the survival of the war, an alien can neither contract with an Indian subject nor can be sued in an Indian Court except through license from the Central Government. As regards contracts entered' into before the war breaks out, they are either dissolved of merely suspended. All contracts, which are against the public policy or are such that may benefit the enemy, stand dissolved. The contracts which are not against public policy are merely suspended for the duration of the war and revived after the war is in excess of, provided they have not already become time-barred under the law of limitations. It may be observed that an Indian, who resides voluntarily or who is carrying on business in a hostile territory will be treated as an alien enemy.

Foreign Sovereigns and Ambassadors

Foreign sovereigns and accredited representatives of a foreign state (Ambassadors) enjoy some special privileges. They cannot be sued in our courts unless they choose to submit themselves to the jurisdictions of our courts. They can enter into contracts and enforce those contracts in our courts, but they cannot be proceeded against in Indian Courts without the sanction of the Central Government. The aforesaid immunity of a sovereign continues

even if he engages in deal. But, an ex-king is not entitled to this privilege and can therefore be sued against in our courts. If, though, a foreign sovereign, etc. enter into a contract through an agent residing in India, the agent shall be held liable on the contract.

Convicts

A convict is not competent to contract throughout the continuance of sentence of imprisonment. This inability comes to an end with the expiration of the era of sentence. A convict can, though, enter into, or sue on, a contract when on parole or when he has been pardoned through the court.

Company under the Companies Act or Statutory Corporation under special Act of Parliament

A company or a corporation is an artificial person. It exists only in contemplation of law, its contractual capacity, is determined through its constitution. The contractual capacity of a statutory corporation is expressly defined through the statute creating it. The contractual capacity of a company registered under the Companies Act is determined through the objects clause of its memorandum of association. Any act done in excess of the powers given in the memorandum is ultra-vires and void.

Insolvents

When a debtor is adjudged insolvent, his property stands vested in the Official Receiver or Official Assignee appointed through the Court. He cannot enter into contracts relating to his property and sue, and be sued, on his behalf. This disqualification of an insolvent is removed after he is discharged.

REVIEW QUESTIONS

- Who is competent to contract? State the location of contracts with a minor.
- What are necessaries? When is a minor liable on a contract for necessaries?
- Who is a Person of Sound Mind?
- What is idiocy?

CHAPTER 4

FREE CONSENT

STRUCTURE

- Learning objectives
- Introduction
- Meaning of consent
- Concept of free consent
- Coercion
- Undue power
- Distinction flanked by coercion and undue power
- Fraud
- Misrepresentation
- Distinction flanked by fraud and misrepresentation
- Mistake
- Review questions

LEARNING OBJECTIVES

After learning this chapter, you should be able to:

- Explain the meaning of consent
- Describe the circumstances when consent is not free
- Explain the meaning of coercion and undue power, and their effect on the
- Validity of a contract
- Distinguish flanked by 'coercion and undue power'
- Explain the meaning of misrepresentation and fraud, and describe their
- Effect on the validity of a contract
- Distinguish flanked by misrepresentation and fraud

- Describe several kinds of mistakes and their effect on the validity of a contract.

INTRODUCTION

You have learnt that there are some essentials of a valid contract and one of them is that the consent of the contracting party's necessity be free. If the consent is not free, the contract shall be treated as void or voidable depending upon the factor which affected the consent. In this chapter you will learn in relation to the meaning of consent and the several factors that affect the consent viz., coercion, undue power, fraud, misrepresentation, and mistake. You will also learn how distant the validity of an agreement is affected through each of these factors.

MEANING OF CONSENT

You have learnt that when two parties enter into a contract they should provide their consent. The consent of the parties means that they understand the similar thing in the similar sense. There necessity be no misunderstanding flanked by the parties in relation to the subject matter of the contract. Section 13 of the Indian Contract Act defines the term 'Consent' as Two or more persons are said to consent when they agree upon the similar thing in the similar sense.

Therefore, consent involves identity of minds in respect of the subject matter of the contract. In English Law, this is described 'consensus-ad-idem'. If the parties are not ad-idem on the subject matter of the contract, then there is no real agreement flanked by them. When two persons enter into a contract concerning a scrupulous person or a thing and it turns out that each of them had a dissimilar person or thing in mind, no contract would exist flanked by them. For instance, A has two Maruti cars; one is blue and the other red. He wants to sell his red Maruti car. B who knows of only A's blue car, offers to

buy A's car for Rs. 60,000. B accepts the offer thinking it to be an offer for his red Maruti car. Here the two parties are not thinking in conditions of the similar subject matter. Hence, there is no consent and the contract will not be valid. In Foster v. Mackinnon, the defendant has purported to endorse a bill of exchange which he was told was a guarantee. The court held that he was not liable as his mind did not go with that writing and he never planned to sign a bill of exchange. There was no consent and consequently no agreement arose.

CONCEPT OF FREE CONSENT

For a contract to be valid it is not enough that the parties have given their consent. The consent should also be free i.e., it has been given through the free will of the parties involving no pressure or use of force. Section 10 of the Contract Act specifically gives that All agreements are contracts if they are made through the free consent of the parties Now let us understand when the consent is said to be free.

Section 14 of the Act states that Consent is said to be free when it is not caused through:

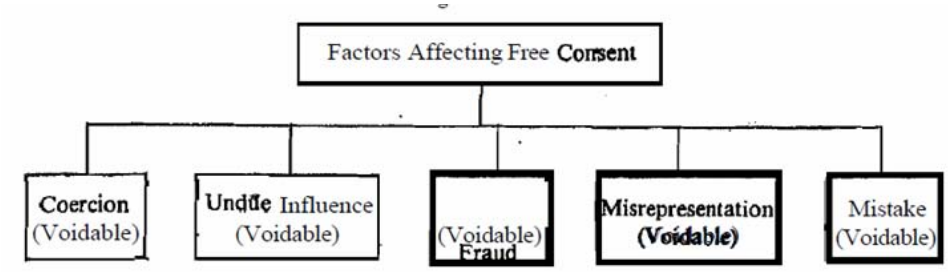
- Coercion,
- Undue power,
- Fraud,
- Misrepresentation,
- Mistake.

Therefore, the consent of the parties to a contract is regarded as free if it has not been induced through any of the five factors stated under Section 14. In other words, the consent is not free if it can be proved that it has been caused through coercion, undue power, fraud, misrepresentation, or mistake, For instance, X, at a gun point, creates Y agree to sell his home to X for Rs.

50,000. Here, Y's consent has been obtained through coercion and so, it shall not regard as free.

When the consent of any party is not free, the contract is usually treated as voidable at the option of the party whose consent was not free. If, though, the consent has been caused through mistake on the part of both the parties, the contract is measured void. Look at Figure 4.1. It depicts the factors affecting free consent and their effect on the validity of the contract.

Figure 4.1. Factors Affecting Free Consent and their Effect on the Validity of the Contract



You should note that there is a variation flanked by, the two situations viz., when there is no free consent, and when there is no consent at all. In case the consent is not free the contract is voidable, at the option of the party whose consent was not free. But, in case there is complete absence of consent, the agreement is void ab-initio i.e., it is not enforceable at the option of the party whose consent was not free. But in case there is complete absence of consent, the agreement is void ab-initio i.e., it is not enforceable at the option of either party.

COERCION

What is Coercion?

Coercion means forcibly compelling a person to enter into a contract i.e., the consent of the party is obtained through use of force or under a threat. Section 15 of the Contract Act defines 'coercion' as Coercion is:

- The committing or threatening to commit, any act forbidden through the Indian Penal Code; or
- The unlawful detaining or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement.

In other words, the consent is said to be caused through coercion when it is obtained through exercising some pressure through either committing or threatening to commit any act forbidden through the Indian Penal Code or unlawfully detaining or threatening to detain any property. Coercion, therefore, implies committing or threatening to commit some act which is contrary to law. Let us now analyze the implications of this definition.

- ***Committing any act forbidden through the Indian Penal Code:*** When the consent of a person is obtained through committing any act which is forbidden through the Indian Penal Code, the consent is said to be obtained through coercion. Committing a murder, kidnapping, causing hurt, rape, defamation, theft etc. are some of the examples of the acts forbidden through the Indian Penal Code. For instance, A beats B and compels him to sell his scooter for Rs. 2,000. In this case the consent of B is induced through coercion. In the case of Ranganayakamma v. Alwar Setti, A Hindu Widow of 13 was forced to adopt a boy under threat that her husbands dead body would not be allowed to be removed unless she adopts the boy. The widow adopted the boy and subsequently applied for cancellation of the adoption. It was held that the adoption was voidable at her option as her consent was obtained

through coercion because preventing the dead body from being removed for cremation is an offence under Section 297 of the Indian Penal Code.

- ***Threatening to commit any act forbidden through the Indian Penal Code :*** From the definition you will observe that not only the committing of an act forbidden through the Indian Penal Code amounts to coercion but even a threat to commit such act amounts to coercion. Therefore, a threat to shoot, to murder, to kidnap or to cause bodily injury will amount to coercion. For instance, A threatens to shoot B, if he does not sell his ship to A for Rs. 1, 00,000. B agrees to sell his ship to A. Here the consent of B has been obtained through coercion. As per the explanation of Section 15, it does not matter whether the Indian Penal Code is or is not in force in lay where the coercion is employed. If the suit is filed in India, this provision will apply. For instance, A, on board an English ship on the high seas, causes B to enter into an agreement through an act amounting to criminal intimidation under the Indian Penal Code. A, afterwards sues B for breach of contract at Calcutta. A has employed coercion, although his act is not an offence through the law of England and although Section 506 of the Indian Penal Code was not in force at the time when, or the lay where, the act was committed.
- ***Unlawful detaining of any property:*** If a person unlawfully detains the property of another person and compels him to enter into a contract with him, the consent is said to be induced through coercion. For instance, an agent refused to hand in excess of the explanation books of the principal to the new agent appointed in his lay unless the principal released him from all liabilities. The principal had to provide a release deed as demanded. It was held that the release was not binding because the consent of the principal was obtained through exercising coercion.

- ***Threatening to detain any property unlawfully:*** If a threat is held out to detain any property of another person, this also amounts to coercion. In Bansraj v. The secretary of State, the Government gave a threat of attachment against the property of A for the recovery of a fine due from B, the son of A. A paid the fine. It was held that the consent of A was induced through coercion and he could recover the amount paid under coercion.
- ***Intention of causing any person to enter into an agreement:*** The act of coercion necessity has been done with the substance of inducing or compelling any person to enter into a contract.

From the discussion it becomes clear that the definition does not say anywhere as to through whom or against whom coercion can be exercised. Hence, whether the act of coercion is directed against the promisor or any other person in whose welfare the promisor is Interested, the consent will not be free. For instance, A threatens to kill B's son C if B refuses to sell his car to him. Here, the threat is directed against C (B's son). So, the consent is treated as induced through coercion. Likewise, it is not necessary that the threat should approach from a party to the contract; it may approach from a stranger, For instance. A threatens to kill B if he, does not sell his home to D. B agrees to sell his home to D. Though A is a Stranger to the contract the consent is caused through coercion. What is significant, so, is that a forbidden act was involved to obtain the consent of the other party. Whether it moves from the party or a stranger to the contract, is immaterial.

Threat to File a Suit

Sometimes a doubt may arise whether a threat to file a suit amounts to coercion or not. You should know that a threat to file a civil or criminal suit does not amount to coercion because it is not forbidden through the Indian

Penal Code. Though, a threat to file a suit on false charge amounts to coercion since such an act is forbidden through the Indian Penal Code.

Threat to Commit Suicide

Under the Indian Penal Code a suicide and a 'threat to commit suicide' are not punishable. But, an effort to commit suicide is punishable. Now, the questions arise whether a 'threat to commit suicide' shall amount to coercion or not. This point was measured through Madras High Court in the case of Ammiraju v. Seshamma. In this case a person, through a threat to commit suicide, induced his wife and son to execute a release deed in favor of his brother in respect of sure property. The transaction was set aside on the ground of coercion. The court held that though a threat to commit suicide is not punishable under the Indian Penal Code, it is deemed to be forbidden through that code.

Effect of Coercion

The effect of coercion is explained in Sections 19 and 72 of the Act. Section 19 gives that when the consent of a party to an agreement is obtained through coercion, the manage is voidable at the option of the party whose consent was not free (also described aggrieved party). In other words, it is upto the aggrieved party to decide whether to set aside the contract or perform it. If, though, the aggrieved party decides to avoid the contract, he cannot be compelled to perform his promise. But in that case, he has to restore any benefit received through him under the contract, to the other party from whom it had been received. For instance, A threatens to kill B if he refuses to sell his scooter for Rs. 1,000 to A. B sells his scooter to A and receives the payments. Here B’s consent was 'not free and if B decides to avoid the contract then he will have to return Rs. 1,000 which he had received from A.

Section 72 clearly gives a person to whom money has been paid anything delivered under coercion, necessity repay or returns it. For instance, a railway company refused to deliver sure goods to the consignee, except upon the payment of some illegal charges for carriage. The consignee paid the illegal charges in order to obtain the goods. Here he is entitled to recover so much amount of the charges as were illegal and excessive.

Burden of Proof

The burden of proving that consent was induced through coercion lies on the party who wants to avoid the contract. In other words, it is for the aggrieved party to prove that his consent was not free. This could be done through proving that he would not have entered into this contract had coercion not been employed.

UNDUE POWER

What is Undue Power?

The second factor which affects consent and creates it unfree, is undue power. The term 'undue power' means the improper or unfair use of one's superior power in order to obtain the consent of a person who is in a weaker location. Section 16 (i) of the Contract Act defines undue power as 'A contract is said to be induced through undue power' where the dealings subsisting flanked by the parties are such that one of the parties is in a location to control the will of the other and uses that location to obtain an unfair advantage in excess of the other.

If we analyze this definition, two essentials of undue power become clear:

- The dealings subsisting flanked by the parties should be such that one of them is in a location to control the will of the other, and
- The dominant party should have used that location to obtain an unfair advantage in excess of the other.

Both the features necessity is present simultaneously. The attendance of one without the other will not invalidate the contract on the ground of undue power, Examples:

- A, a lady gifted all her property to B, her spiritual guru so that she may secure benefits to her soul in after that world. Later on, she disputed the validity of the gift deed. Here, the spiritual guru was in a location to control the will of his disciple A and through by his strong location obtained an unfair advantage. Hence, it was held that the consent of A was obtained through undue power.
- A was suffering from a number of ailments and B was treating him. B through exercising his power in excess of A as his medical attendant induced A to agree to pay B an unreasonable sum for his professional services. In this case B has used his superior location to obtain an unfair advantage in excess of A. Therefore, you observe that undue power compels a person in a weaker location to do something which he otherwise would not have done had he been left free to do the things. Undue power destroys the free mind of a person and compels him to do something which is against his will. Therefore, undue power is a type of mental pressure and not a physical coercion.

Presumption of Power of Will

You have learnt that undue power is involved only when one party is in a location to control the will of the other. Now the question arises as to when can a person be said to be in a location to control the will of the other.

Answer to this question is provided through Section 16 (2) of the Act. It states that a person is deemed to be in a location to control the will of another where:

- ***He holds a real or apparent power in excess of the other:*** Examples of such cases are dealings flanked by master and the servant, parent and child, income tax officer and assessed.
- ***He stands in a fiduciary relation to the other:*** It means a connection based on trust and confidence. The category of fiduciary relation is very wide. It comprises the connection of guardian and ward, spiritual adviser (guru) and his disciples, doctor, and patient, solicitor and client, trustee and beneficiary, a woman and her confidential managing agent. You should note that through judicial decisions it has been held that undue power cannot be presumed flanked by husband and wife, landlord and tenant, and creditor, and debtor.
- ***He creates a contract with a person whose mental capability is temporarily or permanently affected through cause of age, illness, or mental or bodily distress:*** Persons of weak intelligence, old age, indifferent health or those who are illiterate can be easily influenced. Hence, the law provides them protection. For instance, A, an illiterate old man of in relation to the 90 years, physically in firm and mentally in distress, executed a gift deed of his properties in favor of B, his adjacent relative who was looking after his daily needs and managing his farming. The court held that B was in a location to control the will of A.

Effect of Undue Power

If the consent of a party is induced through undue power, the contract is voidable at the option of the party whose consent has been so caused. Section 19 A of the Act states the effect of undue power as when consent to an

agreement is caused through undue power, the agreement is a contract voidable at the option of the party whose consent was so caused. Any such contract may he set aside either absolutely, or, if the party who was entitled to avoid has received any benefit there under, upon such conditions and circumstances as the court may appear presently. For instance, A, a money-lender, advanced Rs. 100 to B, an agriculturist, and through undue power, induced B to execute a bond for Rs. 200 with an interest at 6 percent per month. The court may set the bond aside; ordering B to repay Rs. 100 with such interest as may appear presently.

In case of coercion, you learnt that if the aggrieved party decides to avoid the contract, he has to return or restore the benefit received through him. But, when a contract is avoided on the ground of undue power, the court has the discretion to inquire the aggrieved party for refunding the benefit either in full or in part of set aside the contract without any direction to the aggrieved party to refund the benefit.

Burden of Proof

When a party to a contract decides to avoid the contract on the ground of undue power, he will have to prove that:

- The other party was in a location to control bis will. It may be remembered that mere proof of nearness of dealings is not enough for the court to assume that one person was in a location to control the will of the other, the dominating location of the stronger party has to be proved.
- The other party actually used his power to obtain an unfair advantage. The aggrieved party has not only to prove the dominating location of the stronger party but he has also to illustrate that the stronger party

had actually used his location and influenced his will to obtain an unfair advantage in excess of him.

When the weaker party has proved the mentioned two points, it is then for the stronger party to prove that he has not used any undue power and illustrate that the consent of the other party was freely obtained. The provision is contained in Section 16 (3) of the Contract Act which states that, Where a person who is in a location to control the will of another enters into a contract with him, and the transaction appears, on the face of it or in the proof adduced, to be unconscionable, the burden of proving that such contract was not induced through undue power shall be upon the person in a location to control the will of the other.

Unconscionable Transactions

You will notice that in Section 16 (3) the term 'unconscionable transactions' has been used. The transaction is said to be unconscionable when a person who was in a location to control the will of the other creates use of his location and enters into a contract which is of great benefit to him and is unfair to the other party. In other words, if the stronger party creates an exorbitant profit of the other's distress, the transaction will be unconscionable i.e., it is something which shocks the conscience.

In case of unconscionable transactions, the stronger party has to prove that the contract is not induced through any undue power. For instance, A, being in debt to B, the money-lender of his village, contracts a fresh loan on conditions which appear to be unconscionable. It lies on B' to prove that the contract was not induced through undue power.

You should note that basically because the rate of interest is very high, it does not become an unconscionable transaction. For instance, A applied to a banker for a loan at a time when there was stringency in the money market. The banker declined to create the loan except at an unusually high rate of interest. A accepted the loan on these conditions. This was a transaction in the ordinary course of business and the contract was not induced through undue power. Therefore, a transaction will not be set aside merely because the rate of interest is too high. Though, if the rate of interest is so high that the court considers it unconscionable, say when the interest rate is 75 per cent or 100 per cent per annum, the court may vary the rate of interest. Instance A, a poor Hindu widow was in great need of money to set up her right to maintenance. She took a loan of Rs. 1,500 bearing a rate of interest of 100% p.a. the court held it to be an unconscionable transaction and customized the interest rate to 24% p.a.

You should also note that a party to a contract cannot avoid it on the ground of undue power through merely showing that the transaction is unconscionable. He will also have to prove that the other party was in a location to control his will and he has used that location to obtain an unfair advantage.

The presumption of undue power can be rebutted through showing that

- The stronger party had made a full disclosure of all the facts to the aggrieved party before creation the contract,
- The price was adequate, and
- The weaker party was in receipt of competent self-governing advice before entering into the contract.

Contracts with Pardanashin Woman

A pardariashin woman is one who observes complete seclusion i.e., who does not approach in get in touch with people other than her family members. Law gives a special protection to pardanashin woman on the ground of their being ignorant as distant as the worldly knowledge goes. A contract with a pardanashin woman is presumed to have been induced through undue power. The burden of proving that no undue power was used lies on the other party. The other party will have to prove that:

- The conditions of the contract were fully explained to her,
- She understood the implications,
- Free self-governing advice was accessible to her, and
- She freely consented to the contract.

Here you should note that this protection is accessible only to a woman who observes complete parda. Some degree of parda or seclusion is not enough to entitle her to get special protection.

DISTINCTION FLANKED BY COERCION AND UNDUE POWER

In case of both coercion and undue power the consent is not free and the contract is voidable at the option of the aggrieved party. But there are some vital points of variation flanked by the two. These are summarized as follows:

- Coercion:
    - Connection flanked by the parties is not necessary.
    - Consent is given under the threat of an offence.
    - It involves physical force or threat.
    - It may move from even a stranger and may be against the promisor himself or a person in whose welfare the promisor is interested.

- When the contract is avoided, any benefit received has to be restored or refunded.

- Undue Power:
  - Some sort of connection necessity exists flanked by parties.
  - Consent is obtained through dominating the will, no offence is committed.
  - It involves moral pressure.
  - It is employed through the a party to the contract.
  - When the contract is avoided, it is at
  - The discretion of the court to direct the aggrieved party to restore or refund the benefit received.

FRAUD

What is Fraud?

Fraud basically means a willful wrong representation of information, made through a party to a contract with the intention to deceive the other party or to induce him to enter into a contract. The term 'fraud' is defined through Section 17 of the Indian Contract Act as follows:

- "Fraud means and comprises any of the following acts committed through a party to a contract or through any one with his connivance or through his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract:
  - The suggestion, as to a information, of that which is not true, through one who does not consider it to be true;
  - The active concealment of a information through one having knowledge or belief <± the information;
  - A promise made without any intention of performing it;
  - Any other act fitted to deceive;

- Any such act or omission as the law specially declares to be fraudulent. "

From the analysis of the definition it follows that the following elements necessity be present in the act to constitute fraud.

- ***The fraud necessity is committed through a party to the contract through or may one with his connivance, or through his agent:*** The fraud through a stranger to the contract does not affect the validity of the contract. For instance, A was induced to buy shares of a company on the foundation of a false statement made through B, B was neither the director nor the representative of the company, and he was a mere stranger. Hence, A cannot avoid the contract on the ground of fraud because the false statement was made through a stranger to the contract and not through the company or its agent. But, if the false statement had been made through a director. Of the company, A could avoid the contract.
- ***The fraud necessity is committed with an intention to deceive the other party:*** For instance, A intending to deceive B creates a false statement to him that 100 units are manufactured every month in his factory, though A is aware that only 75 to 80 units are produced every month. B is induced to buy the factory. Here B's consent is obtained through fraud.
- ***There necessity is a representation or assertion and it necessity is false:*** To constitute fraud there necessity is some representation or assertion which is false and the party creation it knows that it is false. Instance, A while selling his scooter to B says that it is brand new knowing fully well that it is a used one. A's statement amounts to fraud. Sometimes it may so happen that when a representation was made it was true, but before the contract is entered into, it becomes

untrue, and this information is recognized to the party. In such a situation, it necessity be corrected. If it is not corrected, it will amount to fraud. In this connection you should also note that if the person creation representation honestly believes his statement to be true, he cannot be held liable for fraud, no matter how ill-advised, negligent or stupid he might have been. In order to constitute fraud, the false representation necessity has been made intentionally.

- ***The representation necessity relate to a information:*** A mere opinion, a statement of expression or intention or puffing expression is not treated as fraud. For instance, A says to B while selling his horse, "my horse is as good as that of Y". This is a statement of opinion. But, if A says that this horse cost him Rs.5000, it becomes a statement of information and if it is incorrect it amounts to fraud.
- ***Active concealment of a information also amounts to fraud:*** When the party takes positive steps to prevent an information from reaching the other party it is described active concealment and this amounts to fraud. For instance, A, a horse dealer showed a horse to B. A knew that the horse had a cracked hoof which he had filled up in such a method as to defy discovery. The defect was subsequently exposed through B. So, he refused to buy the horse. It was held that the contract could be avoided through B as his consent was obtained through fraud.
- ***The fraud necessity has actually deceived the other party:*** The act committed with intent to deceive necessity actually deceives. The party necessity has relied on it to accord his consent. In other words, an effort to deceive the other party through which the other party is not actually deceived is not fraud. In Horsefall v. Thomos, A had a defective cannon. In order to canceal it; he put a metal plug on it. B did not look at the gun and bought it. The cannon burst before the payment was made through B. B refused to pay. It was held that B was bound to pay because he was not actually deceived. He would have bought the

cannon even if the plug had not been inserted, he never examined it. Therefore, it can be said that a deceit which does not deceive is not fraud.

- ***The party acting on the representation necessity has suffered some loss:*** It is a general rule that "there can be no fraud without damage and there can be no damage without an injury". The damage or injury may be in the form of loss of money or money's worth or in some other form.

Does Silence Amount to Fraud?

Mere silence on the part of a party to the contract in relation to the sure material facts relating to the subject matter of the contract does not usually amount to fraud. The common rule is that a party to the contract is under no legal obligation to disclose the whole truth to the other party or to provide him the whole information in his possession. This rule is given in Explanation to Section 17 which says "Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud". For instance, A sells through auction to B, a horse which A knows to be unsound. A says nothing to B in relation to the horse's unsoundness. This is not a fraud.

Though, there arc two exceptions to this rule in which silence also amounts to fraud. These are as follows.

- Where the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak. Such duty to speak arises in the following cases.
    - ***Fiduciary connection:*** Where one party reposes trust and {confidence in the other, the party necessity reveal the truth. For instance, A sells through auction a horse to B, his daughter

who has presently approach of age. Here, the relation flanked by the parties are such that it becomes A's duty to tell B in relation to the unsoundness of the horse.

- ***Contracts of absolute good faith:*** Where one party has to depend upon the good faith of the other, the other party is bound to speak. For instance, in all contracts of insurance, it is the duty of the proposer to create full disclosure of all material facts to the insurance company. If an assured conceals the material facts like extensive illness, the insurance company can avoid the contract on the ground of fraud. Likewise, contracts of family settlements, marriage, and allotment of shares, sale of immovable property, guarantee, etc. are such where full disclosure necessity is made.

- Where the silence is, in itself, equivalent to speech. Sometimes, the silence is equivalent to speech. In such cases, the silence of a person amounts to fraud. For instance, A is selling his horse to B. The horse appears to be sound. Even then B says to A, "If you don't deny it, I shall assume that the horse is sound" A says nothing. Here A's silence is equivalent to speech.

Consequences of Fraud

When consent to a contract is induced through fraud, the contract is voidable at the option of the party whose consent was so caused. In case of fraud, the aggrieved party usually has the following remedies:

- He can rescind (cancel) the contract, but it necessity be done within a reasonable time. The right to avoid the contract is, though, lost in the following cases.

- When the party whose consent was caused through fraudulent silence had the means of discovering the truth with ordinary diligence;
- Where the party was not defrauded i.e., the party gave the consent in ignorance of fraud;
- Where a party, after becoming aware of the fraud, takes a benefit under the contract or affirms it in some other method;
- Where, an innocent third party, before the contract is rescind, acquires, for, consideration; some interest in the property passing under the contract; or
- Where the parties cannot be restored to their original location.

- If the party whose consent was not free thinks it proper to accept the contract, he may do so and insist upon its performance. The second para of Section 19 gives that a party whose consent was caused through fraud may, if he thinks fit, insist that the contract shall be performed, and that he shall be put in the location in which he would have been if the representation made had been true. For instance, A fraudulently informs B that A's estate is free from encumbrances. B, believing the statement to the true, bought the estate. It was later exposed that the estate was subject to a mortgage. In this case, B may either avoid the contract or insist on its being accepted out subject to the mortgage debt being redeemed.
- The aggrieved party can also sue for damages. Fraud is a civil wrong. Hence, compensation can be claimed. For instance, a party suffers some injury because of the unsound horse. If the information of the unsoundness of horse was not disclosed despite enquiry, due compensation can be demanded.

MISREPRESENTATION

What is Misrepresentation?

The word representation means a statement of information made through one party to the other, either before or at the time of creation the contract, with regard to some matter essential for the contract, with an intention to induce the other party to enter into contract. A representation, when wrongly made, either innocently or intentionally, is described 'misrepresentation'. You know when a wrong representation is made willfully with the intention to deceive the other party, it is described fraud.

But, when it is made innocently i.e., without any intention to deceive the other party, it is termed as 'misrepresentation'. In such a situation, the party creation the wrong representation honestly believes it to be true. For instance, A while selling his car to B, informs him that the car runs 18 kilometers per liter of petrol. A he believes this. Later on, B discovers that the car runs only 10 kilometers per liter. This is a misrepresentation through A.

Section 18 of the Contract Act classifies acts of misrepresentation into the following three groups:

- ***Positive assertion:*** When a person creates a positive statement of material facts honestly believing it to be true though it is false, such act amounts to misrepresentation. For instance, A while selling his farm to B, tells him that 100 quintals of rice are produced in his farm. A honestly believes the statement to be true. Later on, it is establish that the farm produces only 80 quintals of rice. Here, A has made a misrepresentation.
- ***Breach of Duty:*** Section 18(2) says that any breach of duty which, without an intent to deceive, provides an advantage to the person committing it, or anyone under him, through misleading another to his prejudice or to the prejudice of anyone claiming under him, amounts to misrepresentation. In such a case, there is no intention to deceive, but

party on behalf of commits a breach of duty which he owes to the other party. A breach of duty would also exist where a party bound to disclose sure information does not do so. Such non-disclosure would also amount to misrepresentation. For instance, in a life policy, the assured does not disclose the information that he had previously suffered from some serious ailments. The non-disclosure, though, innocent it may be, would entitle the insurer to avoid the contract on the ground of misrepresentation of facts. Such a duty exists flanked by banker and customer, landlord and tenant and all contracts of utmost good faith. Such cases can also be termed as 'constructive fraud'.

- ***Inducing mistake in relation to the subject-matter:*** The subject matter of every agreement necessity clearly is understood through the concerned parties. If one of the parties leads the other, even innocently, to commit a mistake concerning the nature or excellence of the subject-matter, it is measured misrepresentation. Section 18(3) of the Act says when a party causes, though innocently, the other party to the agreement to create a mistake as to the substance of the thing which is the subject-matter of the contract, this is misrepresentation. For instance, A chartered a ship to B, which was described in the 'charter party' and was represented to him as being not more than 2,800 tonnage register. It turned out that She registered tonnage was 3,045 tons. A refused to accept the ship in fulfillment of the charter party, and it was held that he was entitled to avoid the charter party through cause of the erroneous statements as to tonnage.

Essentials of Misrepresentation

- The representation should be made innocently, honestly believing it to be true and without the intention of deceiving the other party.

- Misrepresentation should be of facts material to the contract. A mere expression of one's opinion is not a statement of facts.
- The representation necessity is untrue, but the person creation it should honestly consider it to be true.
- The representation necessity be made with a view to inducing the other party to enter into contract and the other party necessity have acted on the faith of the! representation. A party cannot complain of misrepresentation if he had the means of discovering the truth with ordinary diligence.
- The false representation necessity has been made through one party to the contract to the other who is misled. If it is not addressed to the party who is misled, then it is not misrepresentation. In Peek v. Gurney, some false statements were made in the prospectus of a company. A purchased some shares from B, the allotted, on the foundation of prospectus. A wanted to avoid the contract on the ground of misrepresentation. It was held that he cannot avoid the contract because the prospectus was addressed to the first allotted and not to A.

Effect of Misrepresentation

Section 19 of Contract Act gives that when consent to an agreement is caused through misrepresentation, the agreement is voidable at the option of the party whose consent was so caused. Therefore, the aggrieved party has the following two rights:

- ***He can rescind the contract:*** This right is accessible only in such cases where he was not in a location to discover the truth with ordinary diligence. For Instance, A through misrepresentation, leads B erroneously to consider that 500 quintals of indigo are made annually at A's factory. B examines the records of the factory, which illustrate that only 400 quintals of indigo have been produced. After this B

decides to buy the factory. Here, the contract cannot be avoided through B on the ground of misrepresentation.

- If the aggrieved party thinks it proper, he may accept the contract and insist upon its performance. He may compel the other party to put him in the location in which he would have been if the representation made had been true.

Loss of Right to rescind the contract; You have seen that the party whose consent was caused through misrepresentation can avoid or rescind the contract. Though, this right is lost in the following cases:

- If he could discover the truth with ordinary diligence.
- If his consent is not induced through misrepresentation.
- If he, after coming to know in relation to the misrepresentation, expressly affirms the contract or acts in such a manner which shows that he has accepted it.
- If, before the contract is rescinded, the third party acquires some right in the subject-matter in good faith and for some consideration.
- If the parties cannot be restored to their original location.

DISTINCTION FLANKED BY FRAUD AND MISREPRESENTATION

Fraud and misrepresentation have several points in general. For instance, in both cases a false representation is made through a party. Likewise, in both cases the contract is voidable. But there are several points of variation. These are summarized as follows:

- Fraud :
    - Wrong statement is made intentionally.
    - The person creation the wrong statement does not consider it to be true.
    - There is an intention to deceive.

- Besides rescinding the contract, the aggrieved party can also claim damages.
- Except where the silence amounts to fraud, the contract is voidable even if the party defrauded had the means of discovering the truth with ordinary diligence.

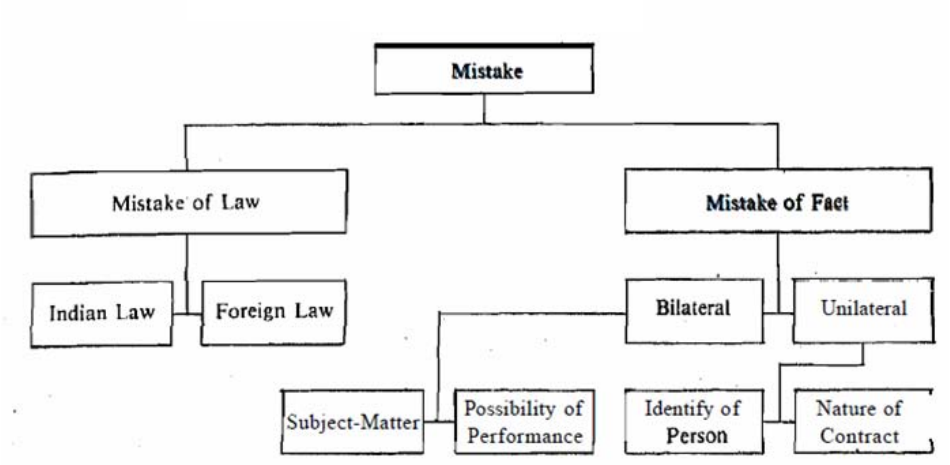
- Misrepresentation:
  - Wrong statement is made innocently.
  - The person creation the wrong statement believes it to be true.
  - There is no intention to deceive.
  - The aggrieved party can rescind the contract but cannot claim damages.
  - The aggrieved party cannot avoid the contract if he had the means of discovering the truth with ordinary diligence.

MISTAKE

You know that if the consent is obtained through coercion, undue power, fraud, misrepresentation, or mistake, it is not measured as free consent. You have learnt in relation to the coercion, undue power, fraud, and misrepresentation. We shall, now talk about in relation to the 'mistake'.

Mistake may be defined as the erroneous belief concerning something. Whenever an agreement is made under a mistake, there is no consent, and the agreement is nor valid. Broadly speaking, Mistake may be of two kinds: (1) Mistake of Law and Mistake of information. Mistake of law can be further classified into (a) mistake of Indian law, and (b) mistake of foreign law. Likewise, mistake of information can be (a) bilateral mistake or (b) unilateral mistake. Look at figure 4.2, for detailed classification of mistakes.

Figure 4.2 Types of Mistakes



Mistake of Law

As stated earlier, mistake of law may be:

- Mistake of Indian Law, or
- Mistake of foreign law.

Mistake of Indian Law

The common rule is that mistake of law of the land is no excuse. Section 21 lays down that a contract is not voidable because it was caused through a mistake as to any law in force in India. It is because every one is supposed to know the law of the country and if a person does not know the law of his country, then he necessity suffer the consequences, Therefore, a mistake of Indian law will not affect the validity of the contract. For instance, A and B create a contract grounded on the erroneous belief that a scrupulous debt is time barred through the Indian Law of limitations. This contract is valid.

Mistake of Foreign Law

A person is supposed to know the laws of his country but he cannot be expected to know the laws of other countries. So, the rule that 'ignorance of law is no excuse' cannot be applied to foreign law. A mistake of foreign law is treated as a mistake of information. Section 21 lays down that a mistake as to a law not in force in India has the similar effect as a mistake of information. Hence, the contract will be void, if both the parties are under a mistake as to a foreign law.

Mistake of Information

You have learnt that mistake of information may be classified into two groups viz., Bilateral mistake, and Unilateral mistake. Let us now understand the nature and effect of such mistakes.

- ***Bilateral Mistake:*** When both the parties to an agreement are under a mistake of information essential to the agreement, the mistake is recognized as bilateral mistake of information. In such a situation, there is no agreement at all because there is complete absence of consent. Section 20 of the Act gives where both the parties to an agreement are under a mistake as to a matter of information essential to the agreement, the agreement is void. Therefore, for declaring an agreement void under this section, the following three circumstances necessity be satisfied.
- ***Both the parties necessity be under a mistake:*** The mistake necessity be mutual, For instance, A, having two cars, a Fiat and another Maruti, offers to sell his Fiat car to B and B not knowing that A has two cars, thinks of the Maruti car and agrees to buy it. In this case, there is no consent whatsoever. So, the agreement shall be void.

- ***Mistake necessity is of information and not of law:*** Explanation to Section 20 gives that an erroneous opinion as to the value of the thing which shapes the subject- matter of the agreement is not treated as mistake relating to a matter of information. For instance, A buys a painting believing it to be worth Rs. 10,000 while in information it is worth only Rs. 2,000. The contract remnants valid. A will have to blame himself for ignorance of the true value of the painting.
- ***Mistake necessity relate to as essential information:*** The mistake necessity relate to a matter of information which is essential to the agreement. In other words, only such mistake of information that goes to the root of the agreement renders the agreement void. For instance, A agrees to buy from B a sure horse. It turns out that the horse was dead at the time of the bargain, though neither party was aware of the information. The agreement is void, because the mistake relates to something i.e., the horse, which is essential to the contract.

A bilateral mistake may be (a) mistake as to the subject-matter, or (b) mistake as to the possibility of performance.

- ***Mistake as to the subject-matter of the contract:*** Where both the parties to an agreement are under a mistake relating to the subject-matter of the contract, the agreement is void. A mistake as to the subject-matter may take following shapes.
    - ***Mistake as to the subsistence of the subject-matter:*** When both the parties are under a mistake concerning the subsistence of the subject-matter, the agreement is void. For instance; A agrees to sell to B a specific cargo of goods supposed to be on its method from England to Bombay. It turns out that, before the day of the bargain, the ship carrying the cargo had been cast

absent and the goods lost. Neither the party was aware of these facts. The agreement is void.

- ***Mistake as to the identity of subject-matter:*** Where the parties to a contract have dissimilar subject-matter in their minds i.e., one party had one thing in mind and the other party had another, the agreement is void because there is no consensus-ad-idem. For instance, A offers to sell his old Delhi home to B. A had another home in South Delhi. B thinks he is buying the South Delhi's home. There is no agreement flanked by A and B.
- ***Mistake as to the title of the subject-matter:*** Sometimes the buyer already owns the property which a person wants to sell to him, but the concerned parties are not aware of this information. In such a case, the agreement is void as there is a mistake in relation to the title of the subject-matter.
- ***Mistake as to the quantity of the subject-matter:*** Where both the seller and the buyer create a mistake concerning the quantity of the subject-matter, the agreement is void. In the case of Henked v. Pape, P inquired in relation to the price of rifles from H suggesting that he might buy fifty rifles. On getting the quotation, P telegraphed "send three rifles". But. because of the mistake of the telegraph authorities, the message transmitted was "send the rifles" H dispatched fifty rifles. P accepted three rifles and returned the remaining forty seven rifles. It was held that there was no contract. Though, P was liable to pay for three rifles on the foundation of an implied contract.
- ***Mistake as to the excellence of the subject-matter:*** If the subject-matter is something essentially dissimilar from what the parties thought it to be, the agreement is void. For instance, A

contracts to sell a scrupulous horse to B. A and B consider it to be a race horse. But, it turns to be a cart horse. The agreement is void.

- ***Mistake as to the price of the subject-matter:*** Where there is a mutual mistake as to the price of the subject-matter, the agreement is void. For instance, where a seller of sure goods mentioned in his letter the price as Rs. 1,250 when he really planned to write Rs. 2,250, the agreement is void. In this connection, you should keep in mind that an erroneous opinion as to the value of the thing which shapes the subject-matter of the agreement is not treated as a mistake of information.

- ***Mistake as to the possibility of performance:*** If the parties to the agreement consider that the contract is capable of performance, while in information it is not so, the agreement is treated as void or. the ground of impossibility. It may be (i) a physical impossibility or (ii) a legal impossibility.
  - ***Physical impossibility:*** A contract for the hiring of a room for witnessing the coronation procession of Edward VII was held to be void because strange to the parties the procession had already keen cancelled and there is no question of witnessing if...
  - ***Legal impossibility:*** An agreement is void if it gives that something shall be done which cannot legally be done.

Unilateral Mistake

The term 'unilateral mistake' means where only one party to the agreement is under a mistake. Usually, a unilateral mistake does not create the agreement void. Just as to Section 22, a contract is not voidable merely because it was caused through one of the parties to it being under a mistake as

to a matter of information. If a man due to his own negligence or lack of reasonable care does not ascertain what he is contracting in relation to the, he necessity bear the consequences. For instance, A sold oats to B through example and B, thinking that they were old oats, purchased them. In information, the oats were new. It was held that B was bound through the contract.

In some cases, though, a unilateral 'mistake may be fundamental and may affect the character of the contract. In such a situation, the agreement is void. Therefore, in the following cases, even though the mistake is unilateral, the agreement is void.

- ***Mistake as to the identity of the person contracted with:*** Mistake as to the identity of the person violates a contract. For instance, where A intends to contract only with B, but enters into a contract with C believing him to be B, the contract is void. It should be noted that a mistake in relation to the identity of the contracting party will render the contract void only if (a) the identity of the party is of material importance to the agreement, and (b) the other party knows that he is not planned to be a party to the agreement. The following cases illustrate this point. In the case of Cundy v. Lihdsav, one Blenkarn, knowing that Blenkiron & Co. was the reputed customers of Lindsay & Co. placed an order with Lindsay & Co. through imitating the signature of Blenkiron. The goods were then sold to Cundy, an innocent buyer. In a suit through Lindsay & Co. against Cundy for recovery of goods, it was held that as Lindsay never planned to contract with Blenkarn, there was no contract flanked by them and as such even an innocent buyer (Cundy) did not get a good title. Hence, Cundy necessity returns the goods or creates payments of price. In the case of Lake v. Simmons, a woman, through falsely misrepresenting she to be the wife of a well recognized Baron (a millionaire) obtained

two pearl necklaces from a firm of jewelers on the pretext of showing them to her husband before buying. She pledged them with a broker, who in good faith paid her Ks. It was held that there was no contract flanked by the jeweler and the woman and even an innocent buyer or a broker did not get a good title. The broker necessity returns the necklaces to the jeweler. Here the jeweler planned to deal not with her but with quite a dissimilar person, i.e., the wife of a Baron. In the case of Said v. Butt, S knew that on explanation of his criticism of the plays in the past, he would not be allowed entry at the performance of a play at the theatre. The managing director of the theatre gave instructions that a ticket should not be sold to S. S, though, obtained a ticket through one of his friends. On being refused admission to the theatre, he sued for damages for breach of contract. It was held that there was no contract with S, as the theatre company never planned to contract with S. In the case of Foster v. Mackinnon, an old illiterate man was induced to sign a bill of exchange, through means of a false representation that it was a mere guarantee. Held, he is not liable for the bill as he never planned to sign a bill of exchange.

Effect of Mistake

While discussing several kinds of mistakes, the effect of each kind of mistake has been clearly stated. It can now be summarized as follows:

- Where both the parties to an agreement are under a mistake as to a matter of information essential to the agreement, the agreement is void.
- In mainly cases of unilateral mistake, the contract is not void. But, where unilateral mistake defeats the true consent of the parties, the agreement is treated as void.

- Any person who has received any advantage under such agreement, he is bound to restore it, or to create compensation for it, to the person from whom he had received it.
- People to whom money has been paid or anything delivered through mistake necessity repay or return it.

REVIEW QUESTIONS

- What is Coercion?
- What is Undue Power?
- What is an unconscionable transaction?
- Describe 'Fraud'.
- What is 'Misrepresentation'?
- What are the consequences of fraud?
- What is mistake?
- What do you understand through mistake of information?
- What is a unilateral mistake?

PART 2. GENERAL LAW OF CONTRACT-II

CHAPTER 5

CONSIDERATION AND LEGALITY OF OBJECT

STRUCTURE

- Learning objectives
- Introduction
- What is consideration?
- Legal rules for valid consideration
- Stranger to a contract and stranger to consideration
- Adequacy of consideration
- Legality of agreements without consideration
- Legality of object and consideration
- Agreements opposed to public policy
- Review questions

LEARNING OBJECTIVES

After learning this unit, you should be able to:

- Describe what is consideration
- Explain what is lawful consideration and its significance in relation to the validity of a contract
- Explain how inadequacy of consideration does not affect the validity of a transaction,
- State the exceptions to the rule 'no consideration, no contract'
- Explain when the object or the consideration shall be unlawful
- Describe the agreements which are measured opposed to public policy.

INTRODUCTION

You learnt in relation to the essentials of a valid contract. One such essential, as per Section 10 of the Indian Contract Act, is 'lawful consideration'. In this chapter, you will learn in relation to the meaning of consideration, rules of a valid consideration, effect of inadequate consideration on the validity of an agreement, enforceability of agreements without consideration and the circumstances under which consideration is regarded as unlawful. You will also revise in relation to the agreement which is declared opposed to public policy.

WHAT IS CONSIDERATION?

In Mercantile law, the term 'consideration' is used in the sense of quid pro quo which in turn means 'something in return'. This 'something' may be some benefit, right, interest or profit that may accrue to one party or it may be some forbearance, detriment, loss, or responsibility upon the other party. This explanation of consideration was given in a very popular English case of Currie v. Misa. Another easy and good account of 'consideration' is accessible in Sir Pollock’s definition.

In his book 'Pollock on Contracts', he says, "consideration is the price for which the promise of the other is bought, and the promise therefore given for value is enforceable". Section 2(d) of the Indian Contract Act defines consideration as when at the desire of the promisor, the promise or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing something, such act or abstinence or promise is described a consideration for the promise. Examples:

- A agrees to sell his home to B for Rs. 10, 00,000. Here B's promise to pay Rs. 10, 00,000 is the consideration for A's promise to sell the home and A's to sell the home is the consideration for B’s promise to pay Rs. 10, 00,000.

- X promises his debtor Y not to file a suit against him for one year on Y's agreeing to pay him Rs. 100 more. Here the abstinence of X is the consideration for Ys promise to pay.

Therefore, all contracts consist of two clearly separable parts:

- The promise, and
- The consideration for the promise.

A person who creates a promise to do or to abstain from doing something usually does so as a return for some Joss, damage, or inconvenience that may have or may have been occasioned to the other party in respect of the promise. The benefit so received or the loss, damage or inconvenience so caused is regarded in law as the consideration for the promise. It should be noted that a promise without consideration is purely gratuitous and, though, sacred and morally binding it may be, it cannot make a legal obligation. "No consideration, no Contract" is the rule of law. The following two cases prove this point.

- ***Abdul Aziz v. Mazum All:*** In this case a person verbally promised the Secretary of the Mosque Committee to subscribe Rs. 500 for rebuilding of a mosque. Cater; he declined to pay the said amount. Held, there was no consideration and hence the agreement was void.
- ***Kedanath v. Gorie Mohammad:*** In this Case the defendant had agreed to subscribe Rs. 100 towards the construction of a Townhall at Howrah. On the faith of the promise, the Secretary described for plans and entrusted the work to contractors and undertook liability to pay them. Held, the agreement was enforceable being one supported through consideration in the form of a detriment to the Secretary who had undertaken a liability to the contractors on the faith of the promise made through the defendant.

LEGAL RULES FOR VALID CONSIDERATION

If you analyze the definition of consideration as per Section 2(d), you may notice sure essential characteristics which are necessary for consideration to be valid and acceptable legally. These characteristics are also recognized as the legal rules for consideration. Let us now revise such rules in detail.

- ***Consideration necessity move at the desire of the promisor:*** To create a contract binding and enforceable, it is not enough that there is consideration but also that consideration has been supplied at desire of the promisor. Therefore, where an act is done at the desire of a third party and not the promisor, that act cannot constitute valid consideration. For instance, D constructed a market at the instance of the Collector of a district. The occupants of the shops in the said market promised to pay D a commission on articles sold through their shops. Held, there was no consideration because the money was not spent through the plaintiff at the request of the defendants, but voluntarily for a third person and, therefore, the contract was void (Durga Prasad v. Baldeo). It does not mean, though, that a promisor necessity gets the benefit personally. The consideration may accrue to the third party at the request or desire of the promisor. For instance, A, who owes Rs. 20,000 to B, persuaded C to pass a promissory note for the amount in favor of B. C promised B that he would pay the amount (through passing on a promissory note), and B credited. the amount to A's Explanation in his books. The discharge of A's explanation was consideration for C's promise (through C the promisor had not the received benefit) National Bank of Upper India v. Bansidhar.
- ***Consideration may move from the promise or any other person:*** The second rule as to consideration is that the act which is to constitute consideration may be done through the promise himself or through any other person. "Any other person" (that is, a person other than the promise) is technically referred to as stranger to consideration. This is

sometimes described as doctrine of constructive consideration. It means that, as extensive as there is a consideration for a promise, it is immaterial who has furnished it. The case of Chinnayya v. Ramayya is a good illustration on the point. In this case, A through a deed of gift transferred sure property to her daughter, with a direction that the daughter should pay an annuity to A's brother, as had been done through A. On the similar day the daughter executed a writing in favor of the brother, agreeing to pay the annuity. Afterwards, she declined to fulfill her promise saying that no consideration had moved from her uncle ('A's brother') The Court, though, held that the words 'the promise or any other person' in Section 2(d) clearly illustrate that the consideration need not necessarily move from the promise, it may move from any other person. Hence. A's brother was entitled to uphold the suit.

- ***Consideration may be past, present, or future:*** The words used in Section 2(d) are "has done or abstained from doing" refer to past. Likewise, the words "does or abstains from doing" refer to present and the words "promises to do or to abstain from doing" refer to future. Accordingly in India, consideration may be past, present, or future.
- ***Past Consideration:*** Past consideration is something wholly done, forborne or suffered before the creation of the agreement. Examples:
    - ***A, a minor, was given the benefit of sure services through the plaintiff:*** The plaintiff rendered those services, not voluntarily but at the desire of A. These services were sustained even after majority at the request of A who subsequently promised to pay an annuity to the plaintiff. It was held that the past consideration was a good consideration. (Sindhc v. Abraham)
    - ***A renders some services to B at B's request in the month of November:*** In December B promises to pay A, a sum of Rs. 100 for his services. The services of A will be past

consideration. A can recover the past amount. But under English Law past consideration is no consideration'. Therefore, if the promise was made in England, it could not have been enforceable. Present Consideration: Consideration which moves simultaneously with the promise is described present consideration, 'cash sales' is an excellent instance of the present consideration.

- ***Future Consideration:*** When the consideration is to move at a future date, it is described future or executory consideration. It takes the form of a promise to be performed in the future. For instance, A promises B to deliver him 100 bags of wheat at a future date. B promises to pay for it on delivery.
- ***Consideration necessity is of some value:*** Consideration as defined under Section 2(d) of the Indian Contract Act means some act, abstinence, or promise on the part of the promise or any other person which has been done at the desire of the promisor. Should it mean that even a worthless act will be enough to create a good consideration if it is only done at the promisor's desire? If. for instance, A promises to provide his new Maruti car to B, provided B will fetch it from the garage of etching the car cannot through any stretch of imagination be described a consideration for the promise. Yet it is the only act the promisor desired the promise to do. Such an act no doubt, satisfies the words of the definition, but it does not catch its spirit. In Chidambara v. P.S. Ranga, Justice Subba Rao of Supreme Court observed that consideration shall be "something" which not only the parties regard but the law can also regard as having some value. Likewise, in Kulasekaraperumal V. Pathakutty, Justice Srinivasan of Madras High Court observed that though the Indian Contract Act does

not in conditions so require, consideration necessity be good or valuable. It necessity be real and not illusory. For instance, A promises to pay an existing debt punctually if B, the creditor, - provides him, some discount. The agreement is without consideration as the discount cannot be enforced as consideration being unreal and illusory.

- ***Consideration necessity is Legal:*** Consideration which is not legal, naturally, has no value in the eyes of the law and, so, cannot be a real consideration.

Therefore, the main points of Legal Rules for Consideration are as follows:

- Consideration necessity move at the desire of the promisor
- Consideration may be supplied through the promise or any other person
- Consideration may be past, present or future
- Consideration necessity be of some value, i.e., it necessity be real and not illusory
- Consideration necessity is legal.

STRANGER TO A CONTRACT AND STRANGER TO CONSIDERATION

You have learnt that in India, consideration is permitted to be supplied through any person and it need not necessarily be supplied through the promise himself. Therefore, the concept of 'stranger to consideration' is a valid and acceptable concept. Though, a stranger to the consideration necessity is distinguished from a stranger to a contract. A stranger to a contract means a person who is not a party to the contract. Such a person cannot even in India, bring a valid suit. For instance, A who is indebted to B, sells his property to C

and C promises to pay off the debt to B. In case C fails to pay, B has no right to sue C being stranger to the contract.

Exceptions

The aforesaid rule that a stranger to a contract cannot sue is, though, subject to sure exceptions. In other words, even a stranger to a contract may enforce a claim in the following cases:

- ***In the case of trusts, the beneficiary may enforce the contract:*** In Khwaja Muhammad v. Mussaini Begum, H sued her father-in-law K to recover Rs. 15,000 being the arrears of allowance described Kharchi-i-Pandan — betel box expenses (Pinmoney) payable to her through K under an agreement made flanked by K and his father, in consideration of his marriage to K's son D. Both H and D were minors at the time of marriage. The Privy Council held the promise to be enforceable through H.
- ***On the similar principle, the provision of marriage expenses of female members of a Joint:*** Hindu Family entitles the female member to sue for such expenses on a partition flanked by male members.
- ***In the case of an acknowledgement of liability or through past performance thereof:*** Where X receives money from Y for paying it to Z and X admits to Z the receipt of that amount, then X becomes the agent of Z and will be liable to pay the amount to him.
- In the case of a family resolution, if the conditions of the resolution are reduced into writing, the members of the family who originally had not been parties to the resolution, may enforce the agreement. Shuppu v. Subramanium.
- In the case of assignment of a contract, when the benefit under a contract has been assigned, the assignee can enforce the contract. Kishan Lal Sadhu v. Pramila Bala Dasi.

ADEQUACY OF CONSIDERATION

In information, adequacy of consideration is always the lookout of the promisor. Courts do not see whether every person creation the promise has recovered full return for the promise. Therefore , if 'A' promises to sell a home worth Rs. 8,00,000 for Rs. 80,000 only, the inadequacy of the price in itself shall riot render the transaction void. But where a party pleads coercion or undue power or fraud, inadequacy of consideration will also be a piece of proof to be looked into. Distant instance, B agrees to sell a horse worth Rs. 1,000 for Rs. 10, B denies that his consent to the agreement was freely given. The inadequacy of consideration is a information which the Court should take into explanation in considering whether or not B's consent was freely given. Section 25 of Indian Contract Act also states that an agreement to which the consent of the party is freely given is not void merely because the consideration is inadequate; but the inadequacy of the consideration may be taken into explanation through the Court in determining the question whether the consent of the promisor was freely) given.

LEGALITY OF AGREEMENTS WITHOUT CONSIDERATION

As discussed earlier, as per Section 10 of the Indian Contract Act consideration is an significant element for a contract to be valid. Section 25 echoes this view and declares a contract without consideration as void. Though, it also recognizes sure exceptions; Besides, section 185 also gives for a case where a contract without consideration shall be valid. Therefore , the circumstances under which a contract, in spite of no consideration, may be enforceable are stated below:

- ***Agreements in writing and registered:*** An agreement made without consideration is valid if it is:
    - Expressed in writing,

- Registered (under the law for the time being in force for registration of documents), made on explanation of natural love and affection, and
- Is flanked by parties standing in a close to relation to each other. For instance, an elder brother, on explanation of natural love and affection, promised to pay the debts of his younger brother. The agreement was put to writing and was registered. Held, the agreement was valid. (Venkataswamy v. Rangaswamy). You should note that for an agreement to be valid under this clause, the agreement necessity be the result of natural love and affection. Nearness of relation through itself does not necessarily import natural love and affection. Therefore , where a Hindu husband through a registered document, after referring to quarrels and disagreements flanked by himself and his wife, promised to pay his wife a sum of money for her maintenance and separate residence, it was held that the promise was unenforceable Rajlakhi Devi v. Bhootnath.

- ***Promise to compensate—Section 25(2):*** A promise made without consideration is valid if
  - It is a promise to compensate (wholly or in part).
  - The person to be compensated has already done something voluntarily, or has done something which the promisor was legally compellable to do. Examples:
    - A discovers B's purse and provides it to him. B promises to provide Rs. 100 to A, This is a valid contract even though A was not occupied for the purpose through B and. so, consideration did not move at the desire of B, the promisor.

- A supports B's infant son without asking. B promises to pay A's expenses for so doing. Once again, this is a contract.

- ***Promise to pay a debt barred through limitation act— Section 25(3):*** A promise to pay a debt barred through Limitation Act shall be valid without consideration because legally it remnants no longer claimable. You should know that a debt becomes barred under the Limitation Act, if the similar is not claimed within a era of 3 years. Though, a promise to pay a time barred debt (wholly or in part) shall be valid if
  - The promise is put into writing
  - Signed through the debtor or his agent, and
  - Relates to a debt which the creditor might have enforced payment of but for the law of limitation. For Instance, X owes Y Rs. 800, but the debt is time barred. X signs a written promise to pay Rs. 600 on explanation of the debt. This is a valid contract.
- ***Completed gifts:*** The rule no consideration, no contract does not apply to completed gifts. These need not be the result of natural love and affection or close to relation, but the gifts necessity is complete. Completed gifts mean gifts made and accepted. Though a promise to gift is not valid.
- ***Agency:*** For creation of an agency, no consideration is required. You should note that, though, if no consideration has passed to the agent, he is only a gratuitous agent and is not bound to do the work entrusted to him, although if he begins the work he necessity do it to, the satisfaction of his principal.
- ***Charity:*** If a person promises to contribute to charity and on this faith the promise undertakes a liability to the extent not exceeding the promised subscription, the contract shall be valid.

To sum up, an agreement without consideration shall be valid in the following cases:

- If the agreement is in writing and registered resulting from natural love and affection flanked by persons in close to connection.
- If it is a promise to compensate for something voluntarily done for the promisor.
- If it is a written promise to pay a debt barred through the law of limitation.
- If it is a promise with regard to completed gifts, i.e., gifts made and accepted through the other.
- If it relates to creation of an agency.
- If it is a promise to contribute to charity and with this faith, the promise undertakes a liability.

LEGALITY OF OBJECT AND CONSIDERATION

In mainly of the cases, the words 'Object' and 'Consideration' mean the similar thing. But in stone cases they may be dissimilar. For instance, where money is borrowed for the purpose of the marriage of a minor, the consideration for the contract is the loan and the object is the marriage. We have already noted that an agreement will not be enforceable if its object or the consideration is unlawful. Just as to section 23 of the Act, the consideration and the object of an agreement are unlawful in following cases:

- ***If it is forbidden through law:*** If the object or the consideration of an agreement is the doing of an act forbidden through law, the agreement is void. An act or an undertaking is forbidden through law when it is punishable through the criminal law of the country or when it is prohibited through special legislation derived from the legislature. Examples:

- A loan granted to the guardian of a minor to enable him to celebrate the minor's marriage in contravention of the Child Marriage Restraint Act is illegal and cannot be recovered back.
- A promises to drop prosecution which he has instituted against B for robbery, and B promises to restore the value of the things taken. The agreement is void, as its object is unlawful.

- ***If it defeats the provisions of any law:*** If it is of such a nature that if permitted, it would defeat the provisions of any law. In other words if the object or the consideration of an agreement is of such a nature that, though not directly forbidden through law, it would defeat the provisions of the law, the agreement is void. For instance, As estate is sold for arrears of revenue under the provisions of an Act of the Legislature, through which the defaulter is prohibited from purchasing the estate. B, upon the understanding with A, becomes the purchaser and agrees to convey the estate to A for the price which B has paid. The agreement is void as it renders the transaction, in effect, a purchase through the defaulter, and would so defeat the object of the law.
- ***If it is fraudulent:*** An agreement with a view to defraud others is void. For instance, A, B, and C enter into an agreement for the division in the middle of them of gains acquired or to be acquired, through them through fraud. The agreement is void as its object is unlawful.
- ***If it involves or implies injury to the person or property of another***: If the object of an agreement is to injure the person or property of another, it is void. For instance, A borrowed Rs. 100 from B. A executed a bond promising to work for B without pay for 2 years and in case of default agreed to pay interest at a very exorbitant rate and the principal amount at once. Held, the contract was void.
- If the Court regards it as immoral or opposed to public policy: An agreement whose object or consideration is immoral or is opposed to

the public policy, is void. For instance, A let a cab on hire to B, a prostitute, knowing that it would be used for immoral purposes. The agreement is void.

Partial Illegality

Section 24 of the Indian Contract Act gives that if any part of a single consideration for one or more objects, or any one or any part of any one of many consideration for a single object, is unlawful, the agreement is void. For instance, A promises to supervise the business on behalf of B, a licensed manufacturer of some permissible chemicals and some contraband items. B promises to pay A, a salary of Rs. 10,000 per month. The agreement is void, the object of A's promise and the consideration for B's promise being in part unlawful.

It is well settled that if many separate promises are made for one and the similar lawful consideration, and one or more of them be such as the law will not enforce, that will not of itself prevent the rest from being enforceable. The test is whether a separate consideration which is wholly lawful can be establish for the promise described in question. Just as to Justice Wiles, the common rule is that, where you cannot sever the illegal from the legal part of a covenant, the contract is altogether void; but where you can sever them, whether the illegality be created through statute or through the general law, you may reject the bad part and retain the good.

AGREEMENTS OPPOSED TO PUBLIC POLICY

It is very hard to describe the term 'public policy' with any degree of precision because public policy', through its very nature, is highly uncertain and fluctuating. It keeps on varying with the habits and fashions of the day, with the growth of commerce and usage of deal. In England, Lord Halsbury in

case of Janson v. Drieftein Consolidated Mines Etd, observed" that categories of public policy are closed, and that no court can invent a new head of public policy." Section 23 of the Indian Contract Act, though, leaves it open to court to hold any contract as unlawful on the ground of being opposed to public policy.

In easy words, it may be said that an agreement which conflicts with morals of the time and contravenes any recognized interest society, it is void as being against public policy. Therefore , an agreement which tends to be injurious to the public or against the "public good is void as being opposed to public policy. Just as to Mulla, "Agreements may offend against the public policy, or tend to the prejudice of the State in time of war (trading with the enemies, etc.), through tending to the perversion or abuse of municipal justice, (stifling prosecution, champerty, maintenance) or in private life through attempting to impose inconvenient and unreasonable restrictions on the free choice of individuals in marriage or their liberty to exercise any lawful trading.

Heads of Public Policy

The commonly accepted grounds of public policy contain:

- ***Trading with Enemy :*** All contracts made with an alien (foreigner) enemy, unless made with the permission of the Government, are illegal on the ground of public policy.
- ***Agreements for stifling prosecution:*** Contracts for compounding or suppressing of criminal charges for offences of a public nature are illegal and void. The Law states "you cannot create a deal of your felony (crime), you cannot convert a crime into a source of profit". It is observed in Sudhindra Kumar v. Ganesh Chandra, that no court of law can countenance or provide effect to an agreement which attempts to

take the management of law out of the hands of the judges and put it in the hands of private individuals. For instance, A knowing that B has committed a murder, obtains a promise from B to pay him (A) Rs. 1,00,000 in consideration of not exposing B. This is a case of stifling prosecution and the agreement is illegal and void.

- ***Contracts in the nature of champerty and maintenance:*** In England agreement of 'maintenance' and 'champerty' are void on the ground of their being opposed to public policy. 'Maintenance' means the promotion of litigation in which a person has no interest of his own. In other words, where a person agrees to uphold a suit, in which he has no interest, the proceeding is recognized as Maintenance. Therefore , maintenance tends to encourage speculative litigation. „Champerty' is a bargain whereby one party is to assist another in recovering property and, in turn, is to share in the procedure of the action. Under English Law, both of these agreements are declared illegal and void. Indian Law is dissimilar. In Raja Venkata Subhadrayamma Guru v. Sree Pusapathi Venkatapathi Raju, the Privy Council held that champerty and maintenance are not illegal in India, and that Courts will refuse to enforce such agreements only when they are establish to be extortionate and unconscionable and not made with the bonafide object of assisting the claims of the person unable to carry on litigation himself. In other words, only those agreements which appear to be made for purposes of gambling in litigation and for injuring or oppressing others, through encouraging unholy litigation, will not be enforced, but not all agreements of champerty or maintenance. Therefore , an agreement to render services for the conduct of litigation in consideration of payment of 50 per cent of the amount recovered through Court would be legally enforceable. But, where it was establish that the value of the part of the estate promised to be conveyed amounted to Rs. 64,000 in return for Rs. 12,000 which was

to be spent through the financier on the prosecution of an appeal in the Privy Council, it was held that although the agreement was bonafide, it could not be enforced, the reward being extortionate and unconscionable.

- ***Agreements for the sale of public offices and titles:*** Traffic through method of sale in public offices and appointments obviously tends to the prejudice of the public service through interfering with the selection of the best qualified persons. Such sales are; so; unlawful and void. Examples:
    - A promises to pay B Rs. 5,000 if B secures him an employment in the public service. The agreement is void.
    - Likewise, where A promises to pay a sum to B in order to induce him to retire so as to give room for As appointment to the public office held through B, the agreement is void (Saminatha v. Muthusarni).
- ***Agreements in restraint of parental rights:*** Just as to law, the father is the guardian of his minor child. After the father, the right of guardianship vests in the mother. This right cannot be bartered absent through any agreement. Therefore the power of a father cannot be alienated irrevocably and any agreement purporting to do so is void. For instance, a father having two minor sons agreed to transfer their guardianship in favor of Mrs. Annie Besant and also agreed not to revoke the transfer. Subsequently. he filed a suit for recovery of the boys and a declaration that he was the rightful guardian, the court held that he had the right to revoke his power and get back the children (Giddu Narayanish v. Mrs. Annie Besant).
- ***Agreements in restraint of marriage:*** Under Section 26, every agreement in restraint of the marriage of any person other than a minor is void.

- ***Marriage brokerage or brokage contracts***: A marriage brokerage contract is one in which, in consideration of marriage, one or the other of the parties to it, or their parents or third parties receive a sure sum of money. Accordingly, dowry is a marriage brokerage and hence unlawful and void. In the case of Venkatakrishna v, Venkatachalam, a sum of money was agreed to be paid to the father in consideration of his giving his daughter in marriage. Held, such a promise amounted to a marriage brokerage contract and was void. Likewise, where a purohit was promised a sure sum of money in consideration of procuring a second wife for the defendant, it was held that the promise was opposed to public policy and, therefore , voids (Vaithvanathan v. Gangaraju). In the case, if marriage had been performed and the money remnants unpaid, it cannot be recovered in a Court of Law. But, if the money had been paid and marriage also performed, the money cannot be got back.
- ***Agreements in restraint of legal proceedings:*** Section 28 identifies two types of agreements as void: (i) an agreement through which a party is restricted absolutely from enforcing his legal rights arising under a contract through the usual legal proceedings in the ordinary tribunals, and (ii) an agreement which limits the time within which the contractual rights may be enforced.
- ***Agreements interfering with course of justice:*** Any agreement for the purpose or to the effect of by improper power of any type with judges or officers of justice is void.
- ***Agreements in restraint of deal:*** In India, agreements in restraint of deal, whether the restraint is total or partial, are declared void under Section 27.
- ***Agreements tending to make monopolies:*** Being opposed to public interest, the contracts tending to make monopolies are void. For instance, in District Board of Jhelum v. Harichand a local body granted

a monopoly to A to sell vegetables in a scrupulous locality. Held, the agreement was void.

- ***Agreement in restraint of personal liberty:*** Agreements which unduly restrict the personal freedom of persons are void and illegal being against-public policy. For instance, X, the debtor, borrowed money from Y, the money lender, on the promise that he would not, without his written consent, leave his job, borrow money, dispose of his property, or change his residence. Held, the agreement was void and illegal as it restricted the personal freedom of X (Harwood v. Miller's Timber and Trading Co.)

REVIEW QUESTIONS

- What is consideration?
- What is quid-pro-quo?
- Is past consideration valid?
- Can consideration move from a stranger?

CHAPTER 6

VOID AGREEMENTS AND CONTINGENT CONTRACTS

STRUCTURE

- Learning objectives
- Void agreements
- Contingent contracts
- Review question

LEARNING OBJECTIVES

After learning this unit, you should be able to:

- Describe and, identify agreements which are void-ab-initio or become void subsequently
- Explain the status of agreements in restraint of marriage, deal and legal proceedings
- Describe uncertain agreements and state whether such agreements shall be valid or not
- Describe wagering agreements, state their legal status and distinguish flanked by such agreements and other alike contracts
- State the effect of 'impossibility' on contracts and their legal status.

VOID AGREEMENTS

Section 2(g) of the Indian Contract Act defined a void agreement as, "an agreement not enforceable through law". Some agreements are void-ab-initio which means that they are unenforceable right from the time they are made. For instance, you learnt that an agreement with a minor or a person of unsound mind is void-ab-initio. Such an agreement does not become a contract at all. There may, though, be some agreement which, when made, are enforceable (i.e., they are contracts) but later, due to development of sure circumstances or change in circumstances, the contracts becomes

unenforceable. When they become unenforceable they are described 'void contracts'. For instance, A agrees to sell B a ship load of sugar on its method from Cuba to India. Due to heavy storm, the sea water enters the ship and the whole sugar gets wet. This creates the contract void as A cannot compel B to accept wet sugar in lay of sugar saying it is the similar sugar, only its form having changed. So also B cannot insist A to deliver him the agreed sugar or else pay damages. Then, there are sure agreements which have been expressly declared void under sure provisions of the contract Act or any other law.

The following kinds of agreements have expressly been declared void under several sections of the Indian Contract Act.

- Agreements through or with persons incompetent to contract (sections 10 & 11).
- Agreements entered into through a mutual mistake of information flanked by the parties (section 20).
- Agreement, the substance or consideration of which is unlawful (section 23).
- Agreement, the consideration or substance of which is partly unlawful (section 24).
- Agreement made without consideration (section 25).
- Agreements in restraint of marriage (section 26).
- Agreements in restraint of deal (section 27).
- Agreements in restraint of legal proceedings (section 29).
- Wagering agreement (section 30).
- Impossible agreement (section 56).
- An agreement to enter into an agreement in the future.

Agreements in Restraint of Marriage

Just as to section 26 of the Indian Contract Act, every agreement in restraint of the marriage of any person, other than a minor, is void. The restraint may be common or partial. Therefore the party may be restrained from marrying at all, or from marrying for a fixed era, or from marrying a scrupulous person or a class of persons. For instance, A promised to marry none else except B, and in default pay her a sum of Rs. 2,000. A married some one else and B sued A for recovery of Rs. 2,000. Held, the agreement was in restraint of marriage and as such void (Lowe v. Peers).

Though, a penalty upon remarriage may not be construed as a restraint of marriage. Therefore , an agreement flanked by two co-widows that if 'one of them remarried she should forfeit her right to her share in the deceased husband's property, has been upheld (Rao Rani v. Gulab Rani). Likewise, a provision in Nikah Nama (marriage ,agreement) through which a Muslim husband authorises his wife to divorce herself from him in the event of his remarrying a second wife is not void. Therefore , if the wife divorces herself from the husband on his marrying a second wife, the divorce shall be valid, and she will be entitled to maintenance from him (Badu v. Badarannessa).

Agreements in Restraint of Deal

Freedom of deal and commerce is a fundamental right protected through Article 19(g) of the Constitution of India, Presently as the Legislature cannot take absent individual freedom of deal, so also the individual cannot barter it absent through an agreement. As per Justice James, V.C., "public policy requires that every man shall be at liberty to work for himself, and shall not be at liberty to deprive himself or the state of his labour, ability or talent, through any contract that he enters into". Courts, so, do not allow any

tendency to impose restrictions upon the liberty of an individual to carry on any business, profession, or deal.

In India, the law on the subject is contained in section 27 which reads: Every agreement through which any one is restrained from exercising a lawful profession, deal or business of any type, is to that extent void. Therefore , all agreements in restraint of deal, whether common or partial, qualified or-unqualified, are void. Examples:

- In Patna municipality 29 out of 30 manufacturers of combs agreed with R to supply him combs and not to any one else. Under the agreement R was free to reject the goods if he establishes there was no market for them. Held, the agreement amounted to restraint of deal arid was therefore void (Sheikh Kalu v. Ramasaran Bhagat).
- An employee of a company, agreed not to employ himself in a same business within a aloofness of 800 miles from Madras after leaving the company's service. Held, the agreement was void (Oakes & Co. v. Jackson).
- A and B accepted on business of braziers in a sure locality in Calcutta. A promised to stop business in that locality if B paid him Rs. 900 which he had paid to his workmen as advance. A stopped his business but B did not pay him the promised money. Held, the agreement was void and, so, nothing could he recovered on it. (Madhab v. Raj Coomar).

Exceptions

There are two exceptions to this rule: 1) those created through statutes, and 2) those arising from judicial interpretations of section 27.

- ***Statutory Exceptions:*** Following are the exceptions created through the statutes: Sale of Goodwill: The seller of goodwill of a business may

agree with the buyer thereof not to carry on a same business within specified local limits. Such a restraint shall be valid, if limits are reasonable (section 27). Please note that the reasonableness of restrictions will depend upon several factors, such as the region in which the goodwill is effectively enjoyed, the price paid for it and all, the nature of the business. For instance, a seller of imitation jewellery in England, sold his business to B and promised that for a era of two years he would not deal (a) in imitation jewellery in England (b) in real jewellery in sure foreign countries. The first promise alone was held lawful. The second promise is void and the restraint was unreasonable in point of legroom and nature of business (Goldsoll V. Goldman).

- ***Sure restraints in partnership:*** There are four provisions under the Partnership Act which recognize agreements in restraint of deal as valid. Accordingly, partners may agree that:
    - A partner shall not carry on any business other than that of the firm while he is a partner [section 11(2) of the Indian Partnership Act, 1932].
    - A partner on ceasing to be a partner will not carry on any business alike to that of the firm within a specified era or within specified local limits. The agreement shall be valid only if the restrictions are reasonable [section 36(2) of the Indian Partnership Act, 1932].
    - Partners may, upon or in anticipation of the dissolution of the firm, create an agreement that some or all of them will not carry on a business alike to that of the firm within a specified era or within specified local limits. Such an agreement shall be valid provided the restrictions imposed are reasonable (section 54 of the Indian Partnership Act, 1932).
    - A partner may, upon the sale of the goodwill of a firm, create an agreement that such partner will not carry on any business

alike to that of the firm within a specified era or within specified local limits. Any such agreement shall be valid if the restrictions imposed are reasonable [section 55(3) of the Indian Partnership Act, 1932].

Exceptions

- ***Under Judicial Interpretations:*** Following are the exceptions arising under judicial interpretation of section 27 of Indian Contract Act.
    - ***Deal Combinations:*** Business combinations with the thought of regulating business and not restraining it have been held to be desirable in public interest. Restraints imposed through such associations are, so, not to be declared void on grounds of restraint of deal. In the case of Haribhai v, Sharef Ali, four ginning factories entered into an agreement fixing uniform rate for ginning cotton and pooling their earnings to be divided flanked by them in sure proportions. The Bombay High Court held the agreement to be valid and enforceable. Bur the Courts would not allow a restraint to be imposed disguised as deal regulations. Therefore , an agreement flanked by sure persons to carry on business with the members of their caste only (Vaithelinga v. Saminada), and an agreement to restrict the business of sugar mill within a zone allotted to it, have been held void (Carew & Co. Ltd. v. North Bengal Sugar Mills).
    - ***Exclusive Dealing Agreements:*** Reasonable agreements to deal in the products of a single manufacturer or to sell the whole produce to a single dealer have been upheld to be valid and not in restraint of deal. Therefore , the following agreements were upheld as enforceable:
    - An agreement through a manufacturer of dhotis to supply 1,36,000 pairs of sure account to the defendant and not to sell

goods of that type to any other person for a fixed era (Carliles Nephew & Co. v. Ricknauth Buckte mull).

- An agreement through a person to sell all the salt manufactured through him to a firm for five years (Mackenzie v. Sriramiah).
- An agreement through a person to sell all the mica produced through him to the plaintiffs, and neither to any other firm nor to stay any in stock (Subha Naidu v. Haji Badshah Sahb).
- An agreement through a buyer of goods for Calcutta Market, not to sell them in Madras. Though, where a manufacturer or supplier, after meeting all the necessities of a buyer, has surplus to sell to others, he cannot be restrained from doing so (Shaikh Kalu v. Ram Saran Bhagat). Likewise, exclusive dealing agreements shall not be valid if their conditions are unreasonable or they unreasonably check competition (Esso Petroleum Co. v. Harper's Garage Ltd.).

- ***Service Agreements:*** An agreement of service through which a person binds himself throughout the term of the agreement not to take service with anyone else or, directly or indirectly, take part in or promote or aid any business in direct competition with that of his employer is valid (Charles Worth v. MacDonald). For instance, A agreed to become assistant for three years to B who was a doctor practicing at Zanzibar. It was agreed that throughout the term of the agreement A was not to practice on his own explanation in Zanzibar. After one year, A started his own practice. Held, the agreement was valid and A could be restrained through an injunction from doing so,

These days it is a general practice to appoint trainees. A service bond is normally got signed whereby the trainee agrees to serve the organisation for a stipulated era. Such agreements, if reasonable, do not amount to restraint of deal and hence are enforceable. But an agreement to restrain an employee

from competing with his employer after the termination of his employment may not be allowed through the courts. Therefore , in the case of Brahamputra Tea Co. v. E. Scarth, where an effort was made to restrain a servant from competing for 5 years after the era of service, the court disallowed it,

Agreements in Restraint of Legal Proceedings

Section 28 of the Indian Contract Act regards the following two restraints of legal proceedings as void.

Restriction on Legal Proceedings

An agreement through which a party is restricted absolutely from enforcing his legal rights under, or in respect of, any contract through the usual legal proceedings in the ordinary tribunals. For instance, a contract contains a stipulation that no action should be brought upon it in case of breach, Such a stipulation would be void because it would restrict both parties from enforcing their rights under the contract in the ordinary tribunals. But, a contract whereby it is provided that all disputes arising flanked by the parties should be referred to the arbitration, whose decision shall be accepted as final and binding on both parties of the contract, is not invalid. The courts have power, in spite of such a stipulation, to set aside the decision of the arbitrator on grounds of misconduct on the part of the arbitrator. A contract may contain a double stipulation that any dispute flanked by the parties should be settled through arbitration, and neither party should enforce his rights under it in a court of law. Such stipulation would be valid as regards its first branch, (i.e., all disputes flanked by the parties should be referred to arbitration, because that stipulation itself would not have the effect of ousting the jurisdiction of the courts. But the latter branch of the stipulation (i.e., neither party should enforce his rights under it in a court of law) would be void because through

that the jurisdiction of the court would be necessarily excluded. Further, it should be noted that the restriction imposed upon the right to sue should be absolute in the sense that the parties are precluded from pursuing their legal remedies in the ordinary tribunals. Therefore , where there are two courts, both of which have jurisdiction to attempt a suit, an agreement flanked by the parties that the suit should be filed in one of those courts alone and not in the other, does not contravene the provisions of section 28 (Milton & Co. v. Ojha Automobile Co.).

Limitation of Time

Another kind of agreement rendered void through section 28 is where an effort is made through the parties to restrict the time within which an action may be brought so as to create it shorter than that prescribed through the law of limitation. For instance, just as to the Indian Limitation Act, an action for breach of contract may be brought within three years from the date of breach. If a clause in an agreement gives that no action should be brought after two years, the clause is void. A clause in a policy of life insurance declaring that "no suit to recover under this policy shall be brought after one year from the death of the assured" was held void. Though, cases of the sort are distinguished from those which give for surrender or forfeiture of rights if no action is brought within the stipulated time. A clause in a policy of life insurance provided "if a claim be made and rejected and an action or suit be not commenced within three months after such rejection..., all benefits under the policy shall be forfeited." This clause was held valid.

Uncertain Agreements

An agreement is described an uncertain agreement when the meaning of that agreement is not sure or capable of being made sure. Such agreements are declared void under section 29. Examples:

- A agrees to sell to B "one hundred tons of oil". The agreement is void for uncertainty since there is no clarity in the agreement what type of oil was planned.
- A agrees to sell B "my white horse for Rs. 5,000 or Rs. 10,000". There being nothing to illustrate which of the two prices was to be given, the agreement is void.

In the case of Guthying v. Lynn, a horse was bought for a sure price coupled with a promise to provide £ 5 more if the horse proved lucky. The agreement was held void for uncertainty. The Court had no machinery to determine what luck the horse had brought to the buyer. Cases relating to uncertain agreements have usually arisen in connection with the sale of goods where uncertainty is related to the price. For instance, where goods are sold, the price being payable subject to 'hire-purchase' conditions (Scammell v. Custen) or at such price as should be agreed upon flanked by the parties (May & Butcher v. The Type), the agreement in each case was held void for uncertainty as to price. Though, you should note that where the price is left to be fixed through a third party, there is no uncertainty and the agreement will be enforceable. For instance, where A agrees to sell to B one thousand kilograms of rice at a price to be fixed through C, there is no uncertainty as the price is capable of being made sure. The agreement, so, is not rendered void. Likewise, if the agreement is totally silent as to price, it will be valid, as in that case, section 2 of the Sale of Goods Act will apply and the reasonable price shall be payable.

Sure other illustrations where agreements have been declared void for uncertainty:

- An agreement to grant a lease when no date of commencement is expressly or impliedly fixed (Giribala Dasi v. Kalidas Bhanga). But when the commencement of a lease, is dependent upon a contingency, which has occurred, the agreement is not void (Sitlani v. Viroosing).
- An agreement to pay a sure amount, after deductions as would be agreed upon flanked by parties (Kalpana Devara v. Krishna Mitter).
- A contract to negotiate (Courtney and Fairbaion Ltd. v. Tolani Bors. (Hotels) Ltd.)
- A defendant passed a document to the Apra Savings Bank whereby he promised to pay to the manager of the bank the sum of Rs. 10 on or before a sure date and a same sum monthly every succeeding month. It was held that the instrument could not be regarded as a promissory note as it was impossible from its language to say for what era it was to continue and what amount was to be paid under it (Carter v. The Agra Savings Bank).

Sure illustrations where agreements have been held not to be uncertain:

- A, who is a dealer in coconut oil only, agrees to sell to B "one hundred tons of oil". The nature of A's deal designates the meaning of the words, and A has entered into a contract for the sale of one hundred tons of coconut oil.
- A agrees to sell B "all the grain in my granary at Ramnagar". There is no uncertainty here to create the agreement void.
- A agrees to sell B one hundred tons of coconut oil at a price to be fixed through C, As the price is capable of being made sure, there is no uncertainty here to create the agreement void.

Wagering Agreements

The Indian Contract Act does not describe a wager. A wagering agreement, just as to Sir William Anson, is a promise to provide money or money's worth upon the determination or ascertainment of an uncertain event. Cock burn C J. defined it as "a contract through A to pay money to B on the happening of a given event in consideration of B's promise to pay money to A on the event of no happening." Therefore , a wagering agreement is an agreement under which money or money's worth is payable, through one person to another on the happening or non-happening of a future uncertain event. For instance, A and B bet as to whether it would rain on a scrupulous day or not—A promising to pay Rs. 100 to B if it rained, and B promising an equal amount to A, if it did not. This agreement is a wager.

Essentials of a Wagering Agreement

From the account of a wagering agreement, following essentials may be noted.

- ***Uncertain event:*** The first thing essential to wager is that the performance of the bargain necessity depends upon the determination of an uncertain event. An event may be uncertain either because it is yet to take lay or it might have already happened but the parties are not aware of its result.
- ***Mutual chances of gain or loss:*** The second essential characteristic is that upon the determination of the contemplated event each party should stand to win or lose. If either of the parties may win but cannot lose, it is not a wagering agreement.
- ***Neither party to have manage in excess of the event:*** Neither party should have manage in excess of the happening of the event one method or the other. If one of the parties has the event in his own hands, the transaction lacks an essential ingredient of a wager.

- ***No other interest in the event:*** Further, neither party should have interest in the happening of the event other than the sum or stake he will win or lose.
- ***Promise to pay money or money's worth:*** Lastly, to constitute wager, the promise should be to pay money or money's worth only.

Effects of Wagering Agreement

An agreement through method of wager is void. Section 30 gives: agreements through method of wagon are void; and no suit shall be brought for recovering anything alleged to. be won on any wager or entrusted to any person Jo 'abide through the result of any game or other uncertain event on which any wager is made. Therefore , in India, unless the wager amounts to a lottery (it is a crime just as to section 294-A of the Indian Penal Code), it is not illegal but basically void. For instance, A borrows Rs. 500 from B to pay to C, to whom A has lost a bet. Agreement flanked by A and B is valid. It should be noted that in Maharashtra and Gujarat they have been declared illegal.

Lotteries

Lottery is an arrangement for the sharing through chance in the middle of persons purchasing tickets. The dominant motive of the participants need not be gambling. Where, though, a wagering transaction amounts to a lottery, it is illegal and comes under section 294-A of the Indian Penal Code.

In the case of Universal Mutual Aid and Poor Homes Association v. Thoppa Naidu, monthly subscriptions were composed to raise a donation finance to carry out charitable objects. A substantial portion of the interest accruing on the finance so raised was utilized in granting loans free of interest and cash bonuses to sure subscribers, the names, and amounts to be determined through means of drawings. The court held that the business

accepted on through the company was a lottery and, so, illegal though there was a charitable or philanthropic purpose annexed to the lottery. The company was, so, ordered to be wound up.

A cycle and gramophone dealer started a chit with 100 subscribers, each subscribing Rs.3 per month, for a era of 20 months. There was to be a monthly draw in which the subscriber whose number or name drawn was given a cycle or a gramophone at his option and relieved from further liability to pay subscriptions. In the 21st month each of the subscribers who did not draw at any of the previous drawings were given a cycle or gramophone, it was held that the transaction amounted to a lottery and was, so, illegal (Public Prosecutor v. M. Naidu).

Does the permission from the Government to hold lottery create it legal? In the case of Sir Dorabji Tata v. Edward F. Lance, where the Government of India had sanctioned a lottery described the War Loan Lottery, the plaintiff sued on a contract to purchase a ticket bearing a scrupulous number, and for an injunction restraining the Secretary of the Turf Club from proceeding with the drawing. The defense was that, it being a wagering contract, the suit was not maintainable. The court held that the permission granted through the Government will not have the effect of overriding section 30 of the Indian Contract Act and creation such a lottery legal. Its only effect was that the person responsible for running the lottery would not be punishable under the Indian Penal Code.

Is purchasing a lottery ticket an offence? It is not an offence to buy a lottery ticket. Section 294-A of the Indian Penal Code is aimed at promoters of lotteries (Barclay v. Pearson). In one of the recent judgments, Supreme Court held that sale of a lottery ticket confers on the purchaser thereof two rights; (a) a right to participate in the draw, and (b) a right to claim a prize contingent

upon his being successful in the draw (H. Anraj v. Government of Tamil Nadu). Therefore this decision of the Supreme Court, through recognizing the right of the purchaser of a lottery ticket has reversed' the earlier outlook on the subject. It may well be said that where a lottery is authorized through the Government, it shall not be illegal as was decided in the case of Sir Dorabji Tata v. Edward F. Lance. Consequently, collateral transactions shall also be enforceable. Therefore , where A lends Rs. 2,000 to B for purchase of lottery tickets, A shall be able to recover the similar.

Exceptions to Wagering Agreements (Transactions Held 'Not Wagers? The following transactions have been held not to be wagers:

- Transactions for the sale and purchase of stocks and shares or for the sale and delivery of goods, with a clear intention to provide and take delivery of shares or goods, as the case may be. You should note that, where the intention is only to settle in price differences, the transaction is a wager and hence void.
- Prize competitions which are games of ability, e.g., picture puzzles, athletic competitions, etc. Therefore , an agreement to enter 'into a wrestling contest in which the winner was to be rewarded through the whole sale proceeds of tickets, was held not to be a wagering contract (Babasaheb v. Rajaram). A crossword puzzle in which prizes depend upon correspondence of the competitor's solution with a previously prepared solution kept with the editor of newspapers is a lottery and so, a wagering transaction. Just as to Prize Competition Act, 1955 prize competitions in games of ability are not wagers provided the prize money does not exceed Rs. 1,000.
- An agreement to contribute to a plate or prize of the value of above Rs. 500 to be awarded to the winner of a horse race. (section 30).
- Contracts of insurance are not wagering agreements even though the payment of money through the insurer may depend upon a future

uncertain event. contracts of insurance differ from the wagering agreements in the following compliments:

- It is only the person possessing an insurable interest that is permitted to insure life or property, and not any person, as in the case of a wager.
- In the case of fire and marine insurance, only the actual loss suffered through the party is paid through the company and not the full amount for which the property is insured. Even in the case of life insurance, the amount payable is fixed only because of the difficulty in estimating the loss caused through the death of the assured in conditions of money, but the underlying thought is only indemnification.
- Contracts of insurance are regarded as beneficial to the public and are, so, encouraged. Wagering agreements on the other hand are measured to be against public policy.

Agreements to do Impossible Acts

Section 56 of the Indian Contract Act declares that an agreement to do an act impossible in itself is void. Therefore , where A agrees with B to discover treasure through magic, the agreement is void. We may say that parties who purport to agree to the doing of something obviously impossible necessity be deemed not to be serious or not to understand what they are doing. Moreover, law cannot regard a promise to do something obviously impossible as of any value and such a promise is, so, no consideration.

An agreement to do an act impossible in itself should be contrasted from a contract which becomes impossible of performance. Subsequent impossibility renders a contract void when the act becomes impossible.

Restitution

Restitution means "return" or "restoration". When an agreement or a contract becomes void, the person who has received any benefit or advantage under such agreement or contract necessity restore it or compensate for it to the person from whom he has received it (section 65).

Examples:

- A pays B Rs. 1,000 in consideration of B's promising to marry C, who is A's daughter, C is dead at the time of the promise. The agreement is void. B necessity repays Rs. 1,000 to A.
- A contracts with B to deliver to him 250 quintals of rice before the first of May. A delivers 130 quintals only before that day and none after. B retains 130 quintals after the first of May. B is bound to pay A for 130 quintals.
- A, a singer, contracts with B the manager of a theatre, to sing at his theatre for two nights in every week throughout the after that two months and B agrees to pay her a hundred rupees for each night's performance. On the sixth night, A willfully absents herself from the theatre, and B, in consequence rescinds the contract. B necessity pays A for the five nights on which she had sung.
- In the instance, if A receives an advance of Rs. 1,000 and is unable to sing due to illness, A necessity returns the advance. B cannot sue A for the loss he has suffered due to A's illness.

It necessity be noted that me law of restitution is applicable only to those contracts which become void later on through some event which the promise could not prevent or because of supervening impossibility. The principle of restitution does not apply to the contracts which are void-ab-initio

with the exception where the minor has entered into agreement through misrepresenting his age.

CONTINGENT CONTRACTS

What is a Contingent Contract?

A contingent contract is a contract to do or not to do something if some event, collateral to such contract, does or does not happen (section 31). For instance, A contracts to pay B Rs. 10,000 if B's home is burnt. This is a contingent contract. The following are the essential characteristics of a contingent contract.

- The performance of a contingent contract is made dependent upon the happening or non-happening of dome event.
- The event on which the performance is made to depend, is an event collateral to the contract i.e., it does not form part of the reciprocal promises which constitute the contract. For instance, where A agrees to deliver 100 bags of wheat and B agrees to pay the price only afterwards, the contract is a conditional contract arid not contingent, because the event on which B's obligation is made to depend is a part of the promise itself and not a collateral event. Likewise, where A promises to pay B Rs. 10,000 if he marries C, it is not a contingent contract.
- The contingent event should not be the mere will of the promisor. For instance, if A promises to pay B Rs. 1,000 if he so chooses, it is not a contingent contract. Though, where the event is within the promisor's will but not merely his will, it may be a contingent contract. For instance, if A promises to pay B Rs. 1,000 if A left Delhi for Bombay, it is a contingent contract, because going to Bombay is an event no doubt within A's will, but is not merely his will.

Rules Concerning Enforcement of Contingent Contracts

The rules concerning contingent contracts are summarized hereunder (sections 32 to 36):

- Contracts contingent upon the happening of a future uncertain event cannot be enforced through law unless and until that event has happened, And if, the event becomes impossible, such contract becomes void (section 32). Examples:
    - A creates a contract with B to buy B's horse if A survives C. This contract cannot be enforced through law unless and until C dies in A's life-time.
    - A contracts to pay B a sum of money when B marries C. C dies without being married to B. The contract becomes void.
- Contracts contingent upon the non-happening of a sure future event can be enforced when the happening of that event becomes impossible, and not before (section 33). For instance, A agrees to pay B a sum of money if a sure ship does not return. The ship is sunk. The contract can be enforced when the ship sinks.
- If a contract is contingent upon as to how a person will act at an unspecified time, the event shall be measured to become impossible when such person does anything, which renders it impossible that he should so act within any definite time, or otherwise than under further contingencies, (section 34). For instance, A agrees to pay B a sum of money if B marries C. But C marries D. The marriage of B to C necessity now be measured impossible, although it is possible that D may die and that C may afterwards marry B.
- Contracts contingent upon the happening of an uncertain specified event within a fixed time become void if, at the expiration of the rime fixed, such event has not happened or if, before the time fixed, such event becomes impossible (section 35) For instance, A promises to pay

B a sum of money if a sure ship returns within a year. The contract may be enforced if :he ship returns within the year, and becomes void if the ship is burnt within the year.

- Contracts contingent upon the non-happening of a specified event within a fixed time may be enforced through law when the time fixed has expired and such event has not happened, or before the time fixed expired, if it becomes sure that such event will not happen' (section 35). For instance, A promises to pay B a sum of money if a sure ship does not return within a year. The contract may be enforced if the ship does not return within the year, or is burnt within the year.
- Contingent agreement to do or not to do anything, if an impossible event happens, are void, whether the impossibility of the event is recognized or not to the parties to the agreement at the time when it is made, Examples:
    - A agrees to pay B Rs. l,000 if two parallel straight rows should enclose a legroom. The agreement is void.
    - A agrees to pay B Rs. 1,000 if B will marry A's daughter C and C was dead at the "time of the agreement. The agreement is void.

Variation Flanked by a Contingent Contract and a Wagering Agreement

- A wagering agreement consists of reciprocal promises while a contingent contract may not consist of reciprocal promises.
- A wagering agreement is of a contingent nature while a contingent contract may not be of a wagering nature.
- A wagering agreement is void while a contingent contract is valid.

- In a wagering agreement parties haveno other interest in the subject matter except for winning or losing of wagering amount while it is not so in contingent contracts.
- In a wagering agreement the future event is the sole determining factor while in a contingent contract future event is only collateral.

REVIEW QUESTION

- Talk about the law concerning wagering agreements under the Indian Contract Act.
- A promises to marry B only and none else and in the event of breach agrees to pay Rs. 50,000. A marries C, can B claim Rs. *50.000?*
- What are contingent contracts? State the rules concerning enforcement of such contracts. Provide illustrations.

CHAPTER 7

PERFORMANCE AND DISCHARGE

STRUCTURE

- Learning objectives
- Introduction
- Meaning of performance
- Who can demand performance?
- Who necessities perform?
- Time and lay for performance?
- Time as the essence of the contract
- Performance of reciprocal promises
- Assignment of contracts
- Appropriation of payment
- Manners of discharge of a contract
- Review questions

LEARNING OBJECTIVES

After learning this chapter you should be able to:

- Understand the meaning of performance
- Explain the kinds or performance
- State the requisites of a valid tender
- Answer the question as to who should perform
- Explain the rules concerning performance of joint promises
- Enumerate the rules relating to time, lay and manner of performance
- List the several manners of discharge of a contract.

INTRODUCTION

You have learnt the rules concerning the formation of a contract. After the formation of the contract the logical thing for parties is to perform their respective promises. When the parties to the contract perform the respective obligations, the contract comes to an end. In this chapter you will learn in relation to the meaning of performance, kinds of performance, performance of joint promises, the time, lay, and manner of performance. You will also learn in relation to the rules concerning performance of reciprocal promises, assignment of contracts and appropriation of payments. Besides these, dissimilar manners of discharge of contract shall also be explained.

MEANING OF PERFORMANCE

You have learnt that every valid contract makes legal obligation on both the contracting parties and this obligation continues fill the contract has been actually performed or otherwise discharged. Performances of the contract are one of the several manners of discharge of the contract and this is the mainly natural, desired, and usual mode of discharging an obligation.

The term 'performance' means that the parties to the contract have fulfilled or accepted out their respective obligations arising out of the contract. For instance, A contracts to sell his book to B for Rs. 50. A delivers the book and B creates the payment, the contract is discharged through performance. Section 37 of the Indian Contract Act lays down the obligations of the parties concerning performance. It gives that, the parties to a contract necessity either perform, or offer to perform, their respective promises, unless such performance is dispensed with or excused under the provision of this Act, or any other law.

Kinds of Performance

From Section 37 you can infer that the performance may be either actual or attempted.

Actual Performance

When a party to a contract has done, what he had undertaken to do and there remnants nothing to be done through him the promise is said to have been actually performed and the liability of such a party comes to an end. For instance A who is indebted to B for Rs. 1,000, promises to repay the amount after two months. A repays the amount on the due date. This is actual performance.

Attempted Performance

Sometimes, when the performance becomes due, the promisor offers to perform his obligation but the promise refuses to accept the performance. This is recognized as attempted performance or 'tender'. For instance, A. promises to deliver sure goods to B. A takes the goods to the appointed lay throughout business hours but B refuses to take the delivery of goods. Therefore , A has done what he was required to do under the contract, It is, an attempted performance. In case of an attempted performance, the promisor shall not be held liable for non-performance as an attempted performance or tender is as good as performing the contract. Section 38 of the Contract Act gives, where a promisor has made an offer of performance to the promise, and the offer has not been accepted, the promisor is not responsible for non performance, nor does he thereby lose his rights under the contract.

Types of Tender

Tender or attempted performance can be of two kinds:

- Tender of goods and services and
- Tender of money.

Tender of Goods and Services

A contract to deliver goods or render some service is totally discharged when the goods are tendered for acceptance just as to, the conditions of the contract. If the goods or services are refused, they need not be offered again and the promisor is discharged from his liability. At the similar time, he may file a suit against the promise for non-acceptance.

Tender of Money

Where the debtor (promisor) creates a valid tender i.e., offers to pay the amount to the creditor and the creditor refuses to accept the similar, the debtor is not discharged from his liability to pay the amount. In' other words, a tender of money does not amount to discharge of the debt. The debtor continues to be liable for the payment of debt. But, the debtor will not be liable for interest from the date of a valid tender i.e., no interest shall become payable from the date of the, rejection of a valid tender of money.

Essentials of a Valid Tender

In the foregoing paragraphs you have seen that a tender of performance discharges a party from further liability, Though, it is necessary that the tender necessity be valid. For a tender to be valid, the following circumstances necessity be satisfied;

- ***It necessity is unconditional:*** An unconditional tender is one which is in accordance with the conditions of the contract. Therefore , a conditional offer of performance is not a good tender and the other party is entitled to reject it. For instance, A, a debtor, offered to pay B,

his creditor, the amount due to him if B sells sure goods to him. It is a conditional tender and. so, invalid.

- ***It necessity is made at a proper time and lay:*** Usually, the time and lay of performance are agreed upon, through the parties and the tender necessity is made accordingly. Therefore , a tender of goods alter the business hours or of goods or money before the due date is not a valid tender. For instance, if the promisor wants to deliver the goods at 1 a.m., this is not a valid tender unless it was so agreed.
- In case of tender of goods, it necessity provide a reasonable opportunity to the promise of ascertaining that the goods offered are the similar as the promisor is bound to deliver. Therefore , a tender of goods at such time when the other party cannot inspect the goods, is not a valid tender.
- ***It necessity is for the whole obligation:*** A piecemeal tender of goods or to pay the amount in installments is not a valid tender. For instance. A promises to deliver 100 bags of rice on a sure day. If on the agreed day and lay A offers to deliver 80 bags only. This is not a valid tender and A is not discharged from his obligation. Though, a minor deviation from the conditions of the contract may not render the tender invalid.
- ***It necessity is made to the promise or his duly authorized agent:*** Therefore, a tender to a stranger is not valid. In case there are joint promises, it is not necessary for the promisor to offer performance to each one of them. A tender may be made to any one of the joint promises. Therefore , a tender made to one of many joint promises has the similar legal effects as a tender to all of them.
- In case of payment of money, tender necessity is of the exact amount due and it necessity is in the legal tender. It should not be in any other form such as foreign currency or cheque. A payment through cheque is a valid tender provided the person to whom it is made is ready and willing to accept it.

Effect of Refusal to Perform Promise Wholly

When a party to a contract has refused to perform, or disabled himself from performing his promise in its entirety, the promise may put an end to the contract. But, if the promise has signified through words or conduct, his acquiescence in the continuation of the contract, he cannot terminate, it. Distant instance, A, a singer, enters into a contract with B, the manager of a theatre, to sing at his theatre two nights every week throughout the after that two months, and B engages to pay her at the rate of Rs. 100 for each night. On the sixth night A willfully absents herself from the ,,theatre. In such a situation, B is at liberty to put an end to the contract, If though, with the consent of B, A sings on the seventh night, B has signified his acquiescence in the continuation of the contract and, so, he cannot now put an end to it. Of course, B is entitled to compensation for damage sustained through him through A's failure to sing on the sixth night.

WHO CAN DEMAND PERFORMANCE?

Promise

Normally, the promise is the only person who can demand performance of the promise under a contract. A third party cannot demand performance of the contract even if it was made for his benefit. For instance, A •promises B to pay Rs. 500 to C. The person who can demand performance is B and not C.

Legal Representative

In the case of death of the promise, his legal representative can demand performance, unless a contrary intention appears from the contract or the contract is of a personal nature. For instance, A agrees to marry B. Though, before marriage takes lay. B dies. Since it is a contract of personal nature the legal representative of B cannot demand performance of the promise from A.

Third Party

In some exceptional cases, the third party can also demand performance of the contract even though he is not a party to the contract.

Joint Promises

When a person has made a promise to two or more persons jointly, then, unless a contrary intention appears from the contract, the performance of the promise may be demanded either (i) through all the promises jointly; or (ii) in case of death of any of joint promises, through the representatives of such deceased person jointly with the surviving promises, or (iii) in case of death of all joint promises, through representatives of all of them jointly. Therefore, the right of joint promises is only joint and any of them cannot demand performance unless it was so agreed. For instance, A for a consideration of Rs. 5,000 lent to him through Group C, promises Group C jointly to repay them Rs. 5,000 plus interest on a specified day. B dies. The right to claim performance rests with B's representative jointly with C throughout his life time, and after C's death it would lie with the representatives of B and C jointly.

WHO NECESSITY PERFORM?

You have learnt who can demand performance. Let us now understand who is to perform the contract. Normally, the contract should be performed through the promisor himself Though, in sure cases, it can also be performed through his mediators or legal representatives. It all depends upon the intention of the parties. Normally a contract can be performed through the following persons.

- ***Promisor himself:*** If from the nature of the contract it appears that it was the intention of the parties that the promise should be performed through the promisor himself, such promise necessity is performed through the promisor. This usually applies to contracts involving personal ability, taste, or art work. For instance, A promises to paint a picture for B. As this promise involves personal ability of A, it necessity be performed through A.
- ***Promisor or Agent:*** Where the contract does not involve personal ability of the promisor, the contract could be performed through the promisor himself or through any competent person employed through him for the purpose, For instance, A promises to pay to B a sum of money, A may perform this promise either through paying the money personally to B or through causing it to be paid to B through his authorized agent.
- ***Legal Representatives:*** The contracts which do not involve any personal ability or taste, may be performed through his legal representative after the death of the promisor. For instance, A promises to deliver goods to B on a sure day on payment of Rs. 2,000. A dies before the said day. A's legal representatives are liable to deliver the goods to B and B is bound to pay Rs. 2,000 to A's representatives. If, though, the contract involves some personal ability or taste, it comes to an end with the death of the promisor.
- ***Third Person:*** In some cases, a contract may be performed through a third person provided the promise accepts the arrangement. Just as to

Section 41, once the promise accepts the performance from a third person, he cannot compel the promisor to perform the contract again.

- ***Performance of Joint Promises:*** Just as to section 42, when two or more persons have made a joint promise, the joint promissory necessity fulfills the promise jointly throughout their life time. And if any one of them dies, then his legal representatives and survivors necessity jointly fulfill the promise. For instance, A, B, and C jointly promise to pay Rs. 3,000 to D. A dies. B and C beside with A's legal representative are jointly and severally liable to pay the amount to D. This rule is described 'devolution of joint liabilities'. It is though, subject to the condition that no other intention appears from the contract. In other words, if a contrary intention appears from the contract then the rule given shall not apply.

In case the joint promissory do not perform their promise jointly, then Section 43 comes into operation. It gives 'When two or more persons create a joint promise, the promise may, in the absence of express agreement to the contrary, compel any one or more of such joint promisors to perform the whole of the promise. Therefore, the liability of joint promisors is joint and many and any of the joint promisors can be compelled to perform. For instance, A, B, and C jointly promised to pay Rs. 3,000 to D. In this case D may compel either A, or B or C to pay the whole amount of Rs. 3,000.

Section 43 further gives that unless a contrary intention appears from the contract, each joint promisor may compel every other joint promisor to contribute equally to the performance of the promise. If any joint promisor creates default in such contribution, the remaining joint promisors necessity bears the loss arising from such default in equal shares. For instance, A, B, and C jointly promise to pay D Rs. 3,000. C is compelled to pay the whole amount, A is insolvent, but his assets are enough to pay one half of his debts. C is entitled to receive Rs. 500 from A's estate and Rs. 1,250 from B.

In the instance if nothing could be recovered from A's estate, then C is entitled to recover Rs. 1,500 from B i.e., the loss of A shall be shared through B and C equally. It should be noted that when a promise releases one of the joint promisors it does not discharge the other joint promisor or promisors. This means that the remaining joint promisors continue to be liable to pay the amount. The released joint promisor remnants liable to contribute to the other joint promisors (section 44).

For instance, A, B, and C jointly promise to pay Rs. 3,000 to D. D releases A from liability, this release of A does not discharge B and C from their liability. If D recovers the whole amount from C, he can claim contribution from A and B.

TIME AND LAY FOR PERFORMANCE?

It is for the parties to a contract to decide the time and lay for the performance of the contract. The rules concerning the time and lay of performance are given in sections 46 to 50 of the Contract Act. These are as follows.

Performance of a Promise within a Reasonable Time

Just as to section 46 where the time for performance is not specified in the contract, and the promisor himself has to perform the promise without being asked for through the promise, the contract necessity be performed within a reasonable time. The question 'what is a reasonable time' is, in each scrupulous case, a question of information. Therefore , it is clear from this provision that if time for performance is not stated, the contract is not bad for want of certainty.

Performance of Promise where Time is Specified

Sometimes, the time for performance is specified in the contract and the promisor has undertaken to perform it without any application or request through the promise. In such cases, the promisor necessity performs his promise on that scrupulous day throughout the usual hours of business and a t a lay where the promise ought to be performed (section 47). For instance, A promises to deliver goods at B's warehouse on January 1, 1990. On that day A brings the goods to B's warehouse, but after the usual hours of closing, and they are not received. A's performance is not valid.

Performance of Promise on an Application through the Promise

It may also happen that the day for the performance of the promise is specified in the contract but the promisor has not undertaken to perform it without application or demand through the promise. In such cases, the promise necessity apply for performance at a proper lay and within the usual hours of business (Section 48)

Performance of Promise where no Lay is Specified and also no Application is to be made through Promise

When a promise is to be performed without application or demand through the promise, and no lay is specified for performance, then it is the duty of the promisor to apply or inquire the promise to fix a reasonable lay for the performance of the promise and to perform it at such lay (Section 49). For instance, A undertakes to deliver 1,000 kilos of jute to B on a fixed day. A necessity applies to B to fix a reasonable lay for the purpose of getting it and necessity deliver it to him at such lay.

Performance of Promise in the Manner and Time Prescribed or Sanctioned through Promise

Sometimes the promise himself prescribes the manner and the time of performance. In such cases, the promise necessity is performed in the manner and at the time prescribed through the promise. The promisor shall be discharged from his liability if he performs the promise in the manner and time prescribed through the promise (Section 50).

Examples

- B owes A R-s, 2,000. A desires B to pay the amount to A's explanation with C, a banker. B, who also has an explanation with Bank C, orders the amount to be transferred to A's credit and this is done through the banker. Afterwards, and before A knows of the transfer, the Bank C fails. There has been a good payment through B and he is discharged from his obligation.
- A desires B, who owes him Rs. 100, to send him a note for Rs. 100 through post. The debt is discharged as soon as B puts into the post a letter containing note duly addressed to A.

TIME AS THE ESSENCE OF THE CONTRACT

The term 'time as the essence of the contract' means that the time is an essential factor and the concerned parties necessity perform their respective promises within the specified time. Now the question arises that if one of the parties fails to perform his promise in time then can the other party rescinds the contract? This can be answered through finding out whether time was or was not the essence of the contract.

The mere information that time is specified for the performance of a contract is not through itself enough to prove that time is the essence of the contract. For this we have to ascertain the real intention of the parties. Time is usually measured to be the essence of the contract in the following cases.

- Where the parties have expressly agreed to treat it as the essence of the contract;
- Where the delay operates as an injury to the party; and
- Where the nature and necessity of the contract requires it to be performed within the specified time.

In mercantile contracts, unless a dissimilar intention appears from the conditions of the contract, time fixed for the delivery of the goods is measured to be the essence of the contract but not the time for the payment of the price. This is so because the prices of goods stay on fluctuating so rapidly that if punctuality is not observed it may result in heavy losses. But in case of the sale of an immovable property, the time is presumed to be not the essence of the contract.

Just as to Section 55 para where time is the essence of the contract and a party fails to perform his/her promise in time the contract becomes voidable at the option of the other party i.e., if the promise wants he can rescind the contract. But in contracts where time is not the essence of the contract, if a party fails to perform the contract in time, then the other party cannot rescind the contract but it has the right to claim damages for delay in performance,

PERFORMANCE OF RECIPROCAL PROMISES

You have learnt that parties to an agreement create mutual promises to do or to abstain from doing something; they are recognized as 'reciprocal promises'. Section 2(f) of the Contract Act defines a reciprocal promise as

promises which form the consideration or part of the consideration for each other. In such cases there is an obligation on each party to perform his own promise and to accept performance of the others' promises.

Kinds of Reciprocal Promises

Reciprocal promises have been classified through Lord Mansfield in Jones V. Barkley case in the following three categories

- ***Mutual and self-governing:*** When each party necessity performs his part of the promise independently without waiting for the performance or readiness to performance through the other party, the promises are described mutual and self-governing.
- ***Conditional and dependent:*** When the performance of one party depends on the prior performance of the other party, the promises are described conditional and dependent.
- ***Mutual and concurrent:*** When the parties have to perform their promises simultaneously, they are said to be mutual and concurrent.

Rules for the Performance of Reciprocal Promises

After having learnt the meaning and kinds of reciprocal promises, let us now talk about the rules concerning the performance of reciprocal promises.

Mutual and Concurrent

Section 51 lays down the rule through saying that when reciprocal promises are to be performed simultaneously, a promisor need not performing his part unless the promise is ready and willing to perform his part. For instance, A and B agree that A shall deliver goods to B to be paid for through

B on delivery. In this case, A need not deliver the goods unless B is ready and willing to pay for the goods on delivery; and B need not pay for the goods unless A is ready and willing to deliver them on payment.

Mutual and Dependent

In such cases, the performance of promise through one party depends on the prior performance of the promise through the other party. If the party who is liable to perform first, fails to perform it, then he cannot claim performance from the other party. Not only that, the party at fault becomes liable to pay compensation to the other party for any loss which the other party may sustain through the non-performance of the contract (section 54). For instance, A contracts with B to execute sure structure work for a fixed price. B is to supply the scaffolding and timber necessary for the work. B refuses to furnish any scaffolding or timber. So, the work cannot be executed. A need not execute the work and B will be bound to create compensation to A for any loss caused to him through the non-performance of the contract.

Mutual and Self-governing

You will notice that as it is clear from the name itself, such promises are to be performed through each party independently without waiting for the other party to perform his promise. If a party fails to stay his promise, the other party cannot excuse himself from performance on the ground of non-performance through the defaulting party. In such a situation, the aggrieved party can claim damages from the defaulting party,

Order of Performance of Reciprocal Promises

Sometimes a problem arises, with regard to the order in which reciprocal promises are to be performed. In this connection section 52 of Contract Act gives that where the order in which reciprocal promises are to be performed is expressly fixed through the contract, they necessity be performed in that order; and where the order is not expressly fixed through the contract, they shall be performed in that order which the nature of the transaction requires. A's promise to build the home necessity be performed before B's promise to pay for it.

Effects of Preventing the Performance of Reciprocal Promises

Sometimes it may so happen that one party to a reciprocal promise prevents the other from performing his promise, In such a situation, the contract becomes voidable at the option of the party so prevented, and he is also entitled to claim compensation from the other party for any loss suffered due to non-performance of the contract. For instance, A and B contracted that B shall execute sure work for A for Rs. 1,000. B was ready and willing to execute the work accordingly. But, A prevents him from doing so. The contract is voidable at the option of B and if he decides to rescind it, he is entitled to recover from A compensation for any loss which he has incurred due to its non-performance.

ASSIGNMENT OF CONTRACTS

Assignment of contract means transfer of rights and liabilities arising out of a Contract to a third party, An assignment to be complete and effective necessity be effected through an instrument in writing. Actually there are no specific provisions in the contract Act dealing with assignment it is a term used in the Transfer of Property Act.

You have already learnt that contracts involving personal ability or taste or skill necessity be performed through the promisor himself. In other words such contracts cannot be assigned. But-where the contrast is not of a personal nature, it can be assigned subject to sure circumstances. Now let us see how the contract can be assigned? Contracts can be assigned in two methods:

- Through the act of parties and
- Through operation of law.

Assignment through Act of Parties

This means that the parties themselves create the assignment. The rules in this regard are as under:

- The liabilities or obligations under a contract cannot be assigned. It means that the promisor cannot compel the promise to accept some other person as the promisor in his lay. For instance, A owes B Rs. 500 and A is also to recover Rs. 500 from P. A cannot compel B to recover the money from P. But, the promisor may transfer his liability to a third person with the consent of the promise and the transferee. In the instance, A can transfer his liability to P with the consent of B and P. This is technically recognized as 'novation'.
- If the contract does not expressly or impliedly gives that the contract shall be performed through the promisor only, the parties can decide that the performance be done through another competent person. But, even then the promisor remnants liable to the promise for proper performance.
- The rights and benefits under a contract, which is not of a personal nature, can be assigned. For instance, A owes B Rs. 1,000. B may assign his right to C. But in such a situation the assignee takes

assignment subject to all equities flanked by the original parties. In the instance if A has already paid a portion of the debt to B, he will be liable to pay to C a correspondingly less amount.

- An actionable claim can always be assigned, But this necessity be done through an instrument in writing. It is also necessary that a notice of assignment has been given to the debtor. An actionable claim is a claim to any debt (except a secured debt) or to any beneficial interest in movable property. Examples of actionable claims are book debts, money debts, right of action arising out of a contract etc.

Assignment through Operation of Law

Contracts which are not of a personal nature get assigned due to operation of law. Upon the death of a party to the contract his rights and obligations automatically pass on to his heirs or legal representatives. In case of insolvency, all the rights and obligations pass on to the official Receiver or Assignee.

APPROPRIATION OF PAYMENT

The term 'appropriation of payment' means the application of payment. When a debtor owes many separate debts to one creditor and creates a payment to the creditor which is insufficient to discharge all the debts, a problem may arise as to which scrupulous debt, should the payment be applied. In some cases the debtor may himself expressly point out to which scrupulous debt the payment be applied, while in others the circumstances may indicate the debt to which the payment is to be applied. But the difficulty arises when neither there is an express indicating nor can it be implied from circumstances. In India, the rules concerning appropriation of payments are given in sections 59 to 61. These rules are as following.

Where there is an Express or Implied Intimation through the Debtor (Section 59)

A debtor has the right to instruct his creditor to which scrupulous debt the payment is to be applied. If the creditor accepts the payment, he is duty bound to follow the instructions. But if there is no express intimation through the debt then the intention should be seen from the circumstances of the case. Let us now explain this rule through the following two examples:

- A owes B, in the middle of other debts, Rs. 1,000 upon a promissory note which falls due on June 1. He owes B no other debt of that amount. On June 1 A pays to B Rs. 1,000. The payment is to be applied to the discharge of the promissory note.
- A owes B, in the middle of other debts, the sum of Rs. 567. B writes to A and demands payment of the sum. A sends Rs. 567. This payment is to be applied to the discharge of the debt of which B had demanded payment.

You should note that if the creditor does not want to apply the payment as per the express or implied instructions of the debtor, he necessity refuse to accept the payment. In no case the creditor can alter the appropriation after accepting the payment.

Where there is no Express or Implied Intimation

If, while creation the payment, the debtor does not intimate and there arc no circumstances indicating to which debt the payment is to be applied, then the creditor has the option to apply the payment to any lawful debt due from the debtor. The amount, in such a case, can be applied even too a debt which has become time-barred. Though, it cannot be applied to a disputed

debt. But, once an appropriation has been made through the creditor and the debtor is informed, the creditor cannot change his option later on.

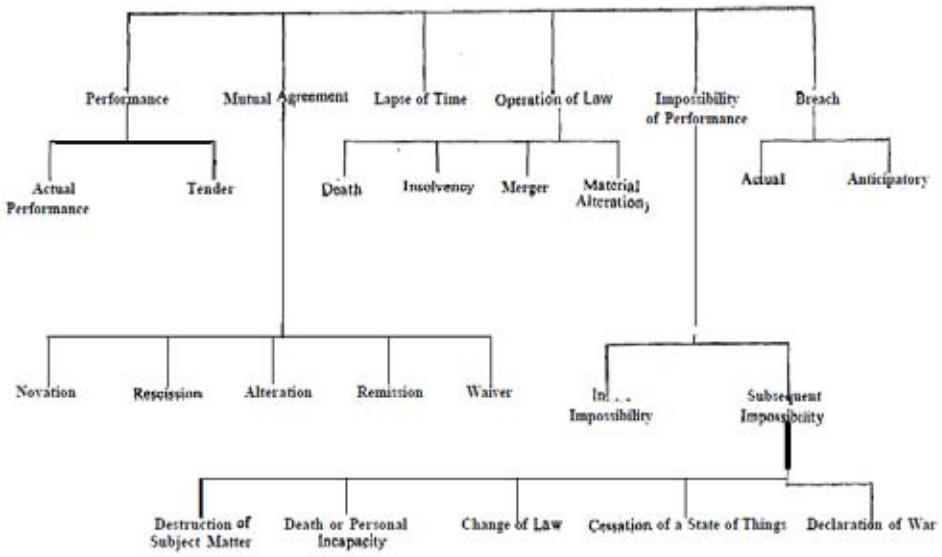
Where Neither Party Appropriates

Where neither the debtor nor the creditor creates any appropriation, the payment shall be applied in discharge of the debts in order of time, whether or not they are time-barred. If the debts are of equal standing, the payment shall be applied in discharge of each proportionately. It should be noted that where moneys are received through the creditor without any definite appropriation on either face, the money so received necessity first be applied in payment of interest and then in payment of principal.

MANNERS OF DISCHARGE OF A CONTRACT

You have learnt that a valid contract makes sure obligations for the contracting parties and the parties become liable to fulfill their respective promises.

Figure 7.1 Modes of Discharge of a Contract



When such promises are performed, the contract is said to be discharged. The term 'discharge of a contract' means that the parties to it are no more liable under the contract. The mainly obvious or desirable method of discharge of a contract is to perform it. Let us now have some thought in relation to the other manners of discharge of a contract. A contract may be discharged in any one of the following methods:

- Through performance
- Through mutual agreement
- Through lapse of time
- Through operation of law
- Through impossibility of performance
- Through breach.

Look at Figure 7.1 for several manners of discharge of a contract. Now we shall revise these manners one through one.

Discharge through Performance

The mainly obvious or natural mode of discharge of a contract is through performance. The performance may be either actual or an attempted one. You have learnt in relation to the performance in section 7.2 of this unit.

Discharge through Mutual Agreement

Presently as a contract is created through means of an agreement, it can be terminated or discharged through mutual agreement. If the parties to a contract agree to create a fresh contract in lay of the original contract, the original contract is discharged. A contract can be discharged through mutual agreement in any of the following methods.

Novation

The term 'novation' means the substitution of a new contract for the existing one. This arrangement may be either flanked by the similar parties or flanked by dissimilar parties. The consideration for the new contract is the discharge of the original contract. Since novation implies a new contract, all the parties to the existing contract necessity agree to it. Examples:

- A owes money to B under a contract. It is agreed flanked by A, B and C that B shall thenceforth accept C as his debtor instead of A. The old debt of A to B is discharged, and a new debt from C to B has been contracted. This is novation involving change of parties.
- A owes B Rs. 10,000. A enters into an agreement with B and provides B a mortgage of his estate for Rs. 5,000 in lay of the debt of Rs. 10.000. This arrangement constitutes a new contract and terminates the old.

Rescission

Rescission means cancellation of the contract. If through mutual agreement the contracting parties agree to rescind the contract, the contract is discharged. A contract can be rescinded before the performance becomes due. Non-performance of a contract through both the parties for a extensive era, without complaint, amounts to implied rescission. Rescission is dissimilar from novation in the sense that in case of novation a new contract is substituted for the original contract whereas in rescission the original contract is cancelled and no new contract is made.

Alteration

It means a change in one or more of the conditions of a contract with consent of all the parties. Alteration has the effect of terminating the original contract. In an alteration there is a change in the conditions of a contract but no change of parties to it. In novation there may be change of parties.

Remission

It means the acceptance of a lesser sum than what was contracted for or a lesser fulfillment of the promise made. Just as to section 63, every promise may (a) remit or dispense with it, wholly or in part, or (b) extend the time of performance, or (c) accept any other satisfaction instead of performance. A owes B Rs. 5,000. A pays to B Rs. 3,000 who accepts it in full satisfaction of the debt. The whole debt is discharged.

Waiver

Waiver means abandonment or intentional relinquishment of a right under the contract. When a party waives his rights under it, the other party is released from his obligation. For instance, A promises to paint a picture for B. B afterwards forbids him to do so. A is no longer bound to perform the promise.

Discharge through Lapse of Time

The rights and obligations under a contract can be enforced only within a specified era described the 'era of limitation'. The Limitation Act has prescribed the era of limitation for several contracts". For instance, era of limitation for exercising right to recover an immovable property is twelve years and right to recover a debt is three years. After the expiry of this

limitation era, the contractual rights cannot be enforced. In other words, if a debt is not recovered within three years of its payment becoming due, the debt becomes time barred and is discharged through lapse of time.

Discharge through Operation of Law

A contract may be discharged through operation of law in the following cases.

- ***Death of the Promisor:*** Contracts involving the personal ability or skill of the promisor approach to an end with the death of the promisor.
- ***Insolvency:*** When a person is declared insolvent through an Insolvency Court, he is discharged from his obligation existing at that time. So, if a promisor is declared insolvent, he is discharged from his liability.
- ***Merger:*** When an inferior right accounting to a party in a contract merges into the superior rights accruing to the similar party, the earlier contract is discharged. For instance, A took a land on lease from B. Subsequently, A purchases that very land. Now A becomes the owner of the land and the earlier contract of lease stands terminated.
- ***Material alteration:*** In a written contract if any party creates some material alteration in the conditions of the contract without the approval of the other party, the contract stands terminated. A material alteration is one which varies the rights, liabilities or the location of the parties as such, You should note that immaterial alterations, such as correcting the clerical errors or the spelling of a name has no effect on the validity of the contract.

Discharge through Impossibility of Performance

You learnt that for a contract to be valid it necessity be capable of being performed. But sometimes, due to some reasons which are beyond the manage of the parties, the performance of a contract becomes impossible. In such cases, the contract is discharged on the ground of impossibility of performance. Section 56 of Contract Act gives that an agreement to do an act impossible in itself is void. This rule is based on the principle that law does not recognize the impossible and what is impossible does not make any obligations. Impossibility may be of two kinds : (i) initial and (ii) subsequent.

Initial Impossibility

It means impossibility at the time of creation the contract. Whether the information of impossibility is recognized or strange to the parties, the agreement is void ab-initio. For instance A agrees with B to discover a treasure through magic. The agreement is void due to initial impossibility. If, though, the promisor alone knows in relation to the initial impossibility while creation the contract, he shall have to compensate the promise for any loss which the promise may suffer on explanation of non-performance. This rule is given in Para 3 of section 56. For instance, A contracts to marry B, being already married to C. Being forbidden through the law of which he is subject to practice polygamy, A necessity compensate B for the loss caused to her through the non-performance of the contract on explanation of impossibility.

You should note that where initial impossibility is strange to both the parties, the contract will become void because of mutual mistake of information. For instance, agrees to sell his horse to B for Rs. 1000. Strange to both the parties, the horse was dead at the time of creation the agreement. This agreement is void.

Subsequent or Supervening Impossibility

Impossibility which arises subsequent to the creation of the contract is described supervening impossibility. If the contract was capable of performance at the time of creation it, but subsequently because of some event (in excess of which neither party has any manage) the performance becomes impossible or unlawful, the contract becomes void and the parties are discharged' from their obligations. You will notice that supervening impossibility is dissimilar from initial impossibility. In case of initial impossibility the agreement is void ab-initio while in case of supervening impossibility the contract becomes void.

The doctrine of supervening impossibility is contained in Para 2 of Sec. 56 which gives; a contract to do an act which after the contract is made becomes impossible, or through reasons of some event which the promisor could nor prevent, unlawful becomes void when the act becomes impossible or unlawful.

The contract will become void on the ground of supervening impossibility only if the following circumstances are satisfied.

- The act should have become impossible.
- The impossibility should be through cause of some event which the romisor could not prevent.
- The impossibility should not be self-induced through the promise: .

The performance of a contract may become subsequently impossible due to any of the following reasons:

- ***Destruction of Subject-Matter:*** If the subject-matter of a contract is destroyed after the formation of the contract, without the fault of either party, the contract becomes void. Examples:
    - A musical hall was agreed to be let out on sure dates, but before those dates the hall was destroyed through fire. The contract

was held to have become void on the ground of impossibility of performance (Taylor v. Caldwell).

  - A person agreed to deliver a part of a specific crop of potatoes. The potatoes were destroyed through a pest through no fault of the party. The contract was held to be discharged (Howell v. Coupland).

- ***Death or personal incapacity:*** When the performance of a contract depends upon the personal ability or skill of a party, the contract stands discharged on the death or incapability of that person. For instance, A agreed to perform at a concert on a specified day. A fell seriously ill and so could not perform on the said day. It was held that the contract is discharged on the ground of impossibility (Robinson v. Davison).
- ***Change of Law:*** A contract which was lawful at the time of creation it but becomes unlawful through reasons of subsequent change in law, the performance becomes impossible and the contract is discharged. Examples:
  - A agreed to transport sure goods belonging to B from one lay to another. Subsequently, A's trucks were requisitioned through the Government under a statutory power. It was held that A was discharged from his obligation (Noor Bux v. Kalyan).
  - A agreed to sell his land to B. Subsequently, the land was acquired through the Government. Now A cannot perform his promise, the contract was held to become void on the ground of impossibility (Shyam Sunder v. Durga).
- ***Cessation of a state of things:*** If a contract is entered into on the foundation of the sustained subsistence or occurrence of a scrupulous state of things, the contract is discharged if the state of things ceases to exist or changes. It should be noted cautiously that the contract is discharged only when the happening of the event was the foundation of the contract, Examples:

- A and B contract to marry each other. Before the time fixed for the marriage, A goes mad. The contract becomes void.
- A took a room on hire in a hotel for viewing the coronation procession of King Edward VII, Because of King's illness the procession was cancelled. It was held that A was not liable to pay the room rent because the very purpose of hiring the room was defeated (Knell v. Henry). This kind of supervening impossibility is also described 'frustration of contract'.

- ***Declaration of War:*** If a war is declared subsequent to the formation of the contract, all pending contracts are either suspended or declared as void. If the war is of a short duration, such contracts may be revived after the end of the war. For instance, A contracts to take in cargo for B at a foreign port. A's Government afterwards declares war against the country in which the port is situated. The contract becomes void when the war is declared.
- ***Exceptions i.e., cases not sheltered through supervening impossibility:*** The rule is not applicable in some cases. When a person has promised do something, he necessity fulfill his promise unless the performance becomes absolutely impossible. Impossibility of performance is, as a rule, not an excuse from performance. Some of the cases which do not approach within the principle of supervening impossibility are as follows:
  - Difficulty of Performance: The contract is not discharged basically because the performance has become more hard, more expensive, or less profitable than stipulated at the time of its formation. Examples:
    - A agreed to supply coal within sure era. Due to government's restrictions on the transport of coal from collieries, he failed to supply in time. But since coal was accessible in the open market from where A could have

obtained it, A will not be discharged on the ground of impossibility.

- A promised to send sure goods from Bombay to Antwerp in September. In August, war broke out and shipping legroom was not accessible except at very high rates. It was held that the augment of freight rates did not excuse performance.

- Commercial Impossibility: Performance cannot be excused on the ground of commercial impossibility. If the raw material is accessible at a very high rate or wages have gone up and the performance becomes less profitable than anticipated, the contract does not become void. Commercial impossibility does not discharge the parties. For instance, A agreed to supply sure goods to B. As a result of an augment in the cost of raw material and wage bill, it is now no longer profitable for A to supply the goods at the agreed rate, A cannot be excused for non-performance,
- Default of a Third Party: If the contract cannot be performed because of the default of a third person on whose work the promisor relied, the promisor is not discharged. For instance, A entered into a contract with B for the supply of sure cotton goods to be manufactured through C, a manufacturer of these goods C did not manufacture those goods. A is not discharged from his obligation and is liable to B for damages.
- Strikes, Lockouts and Civil Disturbances: A strike through the workers or a lockout through the employer or riots etc. will not excuse the parties from performing the contract unless there is a clause in the contract to that effect. For instance, a contract was entered into flanked by two merchants for the sale of sure goods which were to be imported from Algeria. The goods

could not be imported because of riots and civil disturbances in that country. It was held that this was no excuse for non-performance of the contract.

- Partial Impossibility : If the contract is made for many purposes, the failure of one or more of them does not discharge the contract. 'For instance, A agreed to let a boat to H to (i) view the naval review at the coronation of King, and (ii) to cruise round the fleet. Due to the illness of the King, the naval review was cancelled, but the fleet was assembled and the boat could have been used to cruise round the fleet. It was held that the contract was not discharged.

Effects of Supervening Impossibility

- ***Contract becomes void:*** When the performance of a contract becomes subsequently impossible or unlawful; the contract becomes void (section 56 para 2).
- ***Compensation for Non-performance:*** When the promisor alone knows that the performance is impossible or unlawful, he necessity compensates the promise for any loss which he might have suffered on explanation of non-performance (section 56 para 3).
- ***Benefit to be Restored:*** When a contract becomes void, any person who has received any advantage under such contract is bound to restore it, or to create compensation for it, to the person from whom he received it (section 65). For instance, A contracts to sing for B at a concert for Rs. 1,000, which is paid in advance, A is too ill to sing. A necessity refunds the advance of Rs, 1,000 to B.

Discharge through Breach

You have learnt that when a contract is made, the parties to it are expected to perform it, unless they are excused. If any party refuses or fails to perform his part of the contract, a breach of contract occurs and the contract is discharged. In case of breach the aggrieved party is relieved from performing his obligation and gets a right to proceed against the party at fault. A breach of contract may arise in two methods: (i) actual breach and (ii) anticipatory breach.

Actual Breach

Actual breach of contract may take lay either on the due date of performance or throughout the course of performance. For instance, A agreed to deliver 100 bags of rice to B at a sure price on 10th July. If A refuses or fails to deliver the goods on time, there occurs an actual breach. If the promisor has performed part of the contract and then refuses or fails to deliver the remaining goods, it is also actual breach of contract.

Anticipatory Breach

Anticipatory breach occurs when the party declares his intention of not performing the contract before the performance is due. This intention may be declared expressly or impliedly. For instance, A agrees to supply sure goods to B on 10th July. Before this date A informs B that he shall not supply the goods. If, instead of, expressly informing B in relation to the his intention of not performing the contract, A does something which creates it impossible for him to perform, this will also amount to anticipatory breach. If in the instance, A sells all the goods before the said date to P at a higher price, this action of A clearly designates his intention.

REVIEW QUESTIONS

- What do you understand through performance of a contract?
- What is Tender?
- Who can demand performance of the contract?
- When is time the essence of the contract?
- What are reciprocal promises'?
- What is 'Novation'?
- Does death of the promisor discharges the contract in all cases?
- When is the contract discharged through operation of law?

CHAPTER 8

REMEDIES FOR BREACH AND QUASI CONTRACTS

STRUCTURE

- Learning objectives
- Introduction
- Meaning of breach of contract
- Remedies for breach of contract
- Quasi contracts
- Quantum meruit
- Review questions

LEARNING OBJECTIVES

After learning this unit, you should be able to:

- Explain as to what amounts to a breach of contract
- List the remedies in case of breach of contract
- Describe the circumstances under which the several remedies shall be accessible
- Describe quasi contracts and describe several kinds of quasi contracts.

INTRODUCTION

You learnt in relation to the performance of a contract through the parties and consequent termination of the contract. What happens, if the parties refuse or fail to perform the agreed obligation? Such a failure or refusal results in what is described as breach of contract. You will learn in relation to the meaning of breach of contract, types of breach of contracts and the remedies accessible to the other party in case of a breach of contract. You will also learn in relation to the nature and effects of sure transactions described quasi contracts which are not contracts in the strict sense of the term, but generate obligations alike to those created through contracts.

MEANING OF BREACH OF CONTRACT

As you know, the term 'agreement' is defined under section 2(e) as 'reciprocal promises'. Therefore, both the parties are subjected to an obligation to do or not to do something. In case any of the parties fails to carry out his agreed obligation or through his act creates it impossible to perform his obligations under the contract, he is said to have committed the breach of that contract. Breach of contract may arise in two methods: (i) anticipatory breach, and (ii) actual breach.

Anticipatory Breach of Contract

Anticipatory breach of contract occurs when a party repudiates the contract before the time fixed for its performance or when a party through his own act disables himself absolutely from performing the contract. Examples

- A contracts to marry B, before the agreed date of marriage, he marries C; In this case, A has committed anticipatory breach of contract.
- Contracts to supply B with sure articles on 1st of August. On July 20, he informs B that he will not be able to supply the goods. A has committed anticipatory breach of contract.

Section 39 deals with anticipatory breach of contract. It gives when a party to a contract has refused to perform, or disabled himself from performing his promise in its entirety; the promise may put an end to the contract, unless he has signified, through words or through conduct, his acquiescence (willingness) in its continuance. For instance, A who is 2 singer, enters into a contract with B, the manager of a theatre, to sing at his theatre two nights in every week throughout the after that two months. B agrees to pay her 100 rupees for each performance. On the sixth night A willfully absents herself from the theatre. B is at liberty to put an end to the contract. In

this instance, if B permits A to sing on the seventh night, B has signified his willingness in the continuance of the contract. He cannot now put an end to it but is entitled to compensation for the damage sustained through him through A's failure to sing on the sixth night.

Reading through the provisions of Section 39 and the aforesaid instance, you would have noted that in the event of an anticipatory breach i.e., where a party to a contract refuses to perform his part of the contract before the actual date of performance, the promise shall have two options: (i) rescind the contract and sue for damages for breach of contract without waiting until the due date for performance, or (ii) may not rescind the contract but treat the contract as operative and wait for the time of performance and then hold the other party liable for the consequences of non-performance. You should note that in case the promise decides not to rescind the contract, the contract shall remain alive for the benefit of both the parties. But if throughout the intervening era i.e., the date of breach and the due date of the performance, any event happens that intervene (e.g., supervening impossibility) for the benefit of the promisor, the promise shall lose his right to sue for damages. For instance, A agreed to load a cargo of wheat on B’s ship through a scrupulous date,

When the ship arrived, A refused to load the cargo, but B did not accept the refusal and sustained to demand the cargo. Before the last date of loading had expired the war broke out, rendering the performance of the contract illegal. The contract has approach to an end through frustration and B cannot sue A for damages (Avery v. Bowden).

In case of anticipatory breach of contract, the aggrieved party may claim damages either at the time when such a breach is committed or wait till the time when the performance becomes due and claim damages if promise

still remnants unperformed. Though, the amount of damages claimable shall vary in the two cases. This variation can be clarified with the help of an instance; X agrees to sell to Y a sure quantity of wheat at Rs. 300 per quintal to be delivered on August 3. On July 2. X provides notice expressing his unwillingness to sell wheat, and the price of wheat on the date is Rs. 400 per quintal. If Mr. Y repudiates the contract forthwith (which he is entitled to do at his option), he would be able to recover damages @ Rs. 100 per quintal which is the variation flanked by market price and the contract price on July 2. If, instead of taking the action forthwith, he keeps the contract alive till August 3, and in the mean time, the price increases to Rs. 500 per quintal. Y would be able to recover damages @ Rs. 200 per quintal.

Actual Breach of Contract

Actual breach of contract may take lay in any of the two methods: (i) breach at the time when the performance of contract is due, or (ii) breach of contract throughout the performance of the contract.

Actual breach of Contract at the time when performance is due. If a party to contract refuses or fails to perform his part of the contract at the time fixed for performance of that contract, he will be liable for its breach. For Instance, A agreed to sell his car to B on July 2. On July 2 A refused to sell his car to B. On A's refusal to sell the car, there is an actual breach of contract. Now the question is whether it should be accepted or whether the promise can refuse such performance and hold the promisor liable for the breach. The answer depends upon whether time was measured through the parties to be the essence of the contract or not.

In this respect, Section 55, lays down, When a party to a contract promises to do a sure thing or before a specified time, or sure things or before

specified times, and fails to do any such thing at or before the specified timed, the contract, or so much of it as has not been performed, becomes voidable at the option of the promise, if the intention of the parties was that time should be the essence of the contract.

If it was not the intention of the parties that time should be the essence of the contract, the contract does not become voidable through the failure to do such thing at or before the specified time. For instance, A, a singer, contracts with B, the manager of a theatre to sing at his theatre two nights in every week throughout the after that two months, and B agrees to pay her 100 rupees for each night's performance. On the sixth night A willfully absents herself from the theatre and B, in consequence, rescinds the contracts. B is entitled to claim compensation for the damage which he has sustained through the non-fulfillment of the contract through A.

Just as to the aforesaid provisions, if performance beyond the stipulated time is accepted, the promise necessity provides notice of his intention to claim compensation. If he Fails to provide such notice, he will be deemed to have waived that right.

Actual breach of Contract throughout the Performance of the Contract

Actual breach of contract also occurs when throughout the performance of the contract one party fails or refuses to perform his obligation under the contract. For instance, A contracted with a Railway Company to supply it sure quantity of railway chairs at a sure price. The delivery was to be made in installments. After a few installments have been supplied, the Railway Company asked A to deliver no more. Held, A could sue for breach of contract (Cort v. Ambergate etc. Rly Co.).

REMEDIES FOR BREACH OF CONTRACT

When a contract is broken through a party, there are many courses of action (remedies) which the other party may pursue. These remedies contain:

- Rescission of the contract
- Suit for damage
- Suit for specific performance
- Suit for injunction
- Suit upon quantum meruit

Rescission of the Contract

As you have read section 39 of the Act gives that when a party to a contract has refused to perform, or disabled himself from performing his promise in. its entirety, the promise may put an end to the contract. This is described right of rescission. It means setting aside of the contract. In such a case aggrieved party is discharged from all the obligations under the contract. For instance, A promises to supply the furniture for B's new office on a sure day. B promises to pay for the furniture on its receipt. A does not supply the furniture on the agreed date. B is discharged from the liability of paying the price and can rescind the contract.

It should be noted that section 75 of the Indian Contract Act also confers upon a person rightfully rescinding the contract to create a claim for compensation of any loss or damage sustained through the non-fulfillment of the contract. Therefore , in the instance B shall not only be entitled to rescind the contract but also to claim compensation for the damage which he has sustained because of the non-supply of furniture through A on the specified date,

Suit for Damages

In the event of breach of contract; the aggrieved party besides rescinding the contract can claim for damages. Damages are monetary compensation allowed for loss suffered through the aggrieved party due to the breach of contract. The substance of the court in awarding damages for breach is that the aggrieved party may be put in the financial location which would have lived had there been no breach of contract.

The law does not punish a party because he has broken a contract but if, through cause of his wrongful act, the other party has suffered any pecuniary (monetary) loss, the court will compel the party in breach to compensate the loss through paying damages to the other party.

In India, the rules relating to damages are based on the judgment in English case of Hadley v. Baxendale. The facts of this case were: H's mill was stopped due to the breakdown of a shaft. He delivered the shaft to B, a general carrier, to be taken to a manufacturer to copy it and create a new one. H had not made it recognized to B that delay would result in a loss of profits. Through some neglect on the part of B, the delivery of the shaft was delayed in transit beyond a reasonable time. Held, B was not liable for loss of profits throughout the era of delay as the circumstances communicated to B did not illustrate that a delay in the delivery of shaft would entail loss of profits to the mill. The following rule of law was laid down in this case: Where two parties have made a contract which one of them has broken the damages which the other party ought to receive in respect of such breach of contract should be such as may fairly and reasonably be measured either arising naturally i.e., just as to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties, at the time they made the contract, as the probable result of the breach of it.'

Section 73, of the Indian Contract Act which deals with compensation for loss or damage caused through breach of contract is based on the judgment

in the case. It states that the aggrieved party may claim the damages as follows:

- Such damages which the parties knew, when they made the contract, to be likely to result from the breach. This relates to special damages.
- The aforesaid compensation is not to be given for any remote or indirect loss or damage sustained through cause of the breach, and
- Such compensation for damages arising from breach of quasi contract shall be similar as in any other contract,

Rules Relating to Dissimilar Kinds of Damages

Ordinary Damages

Ordinary damages are. those which naturally arise in the usual course of things from such breach. The measure of ordinary damages is the variation flanked by the contract price and the market price on the date of the breach. If the seller retains the goods after the breach, he cannot recover from the buyer and further loss if the market falls, nor is he liable to have the damages reduced if the market rises. For instance A contracts to deliver 100 bags of rice at Rs. 100 per bag on a future date. On the due dates he refuses to deliver. The market price on that day is Rs. 110 per bag. The measure of damages is the variation flanked by the market price on the date of the breach and the contracted price i.e., Rs. 110—100 = Rs. 10.

You should note that section 73 specifically gives for compensation for any loss or damage which arises naturally in the usual course of things from the breach and as such compensation cannot be claimed for any remote indirect loss or damage through cause of the breach. For instance, A Railway passanger's wife caught cold and tell ill due to her being asked to get down at a

lay other than the Railway Station and she had to walk an extensive aloofness in drizzling night to reach house. In a suit through the plaintiff against the railway company, it was held that damages for the personal inconvenience of the plaintiff alone would be granted, but not for sickness of the plaintiff's wife because it was very remote consequence (Hobbs v. London and S).

Special Damages

Damages other than those arising directly from the breach may be recovered if such damages may reasonably be supposed to have beep in contemplation of both the parties as the probable result of the breach of a contract. Such damages are recognized as 'special damages'. Therefore, when there are sure special or extraordinary circumstances present and their subsistence is communicated to the promisor, the non-performance of the promise entitles the promise to not only the ordinary damages but also special damages that may result there from. For instance, A, who is a builder, agrees to erect and finish a home through 1 January in order that B. may provide possession of it at that time to C, to whom B has contracted to let it. A is informed of the contract flanked by B and C. A builds the home so badly that it falls down before 1 January and has to be rebuilt through B. As a consequence, B loses the rent which he was to have received from C, and is obliged to create compensation to C for the breach of his contract. A necessity creates compensation to B for the cost of rebuilding the home, for the rent lost, and for the compensation made to C. Here, you should note that the communication of the special circumstances is a pre-requisite to the claim for special damages. The case of Hadley v. Baxendale which laid down the rules concerning 'special damages' in England is the mainly celebrated illustration on the point. The facts of this case have already been discussed.

Exemplary/Punitive/Vindictive Damages

Exemplary (also described punitive or vindictive damages), are planned to illustrate the court's strong disapproval of the conduct of the defendant in committing the wrong. They are not proportionate to the actual pecuniary loss sustained through the aggrieved party but are inflicted through method of punishment. These are normally awarded in case of (i) a breach of promise to marry, or (ii) wrongful dishonor of a cheque through a banker. The measure of damages in case of breach of promise to marry is dependent upon the severity of the shock to the sentiments and goodwill of the promise. In case of wrongful dishonor of a cheque, the rule is — smaller the amount of the cheque, superior will be the amount of damages awarded and vice versa ft

Nominal Damages

Nominal damages are awarded in case of breach of contract where there is only a technological violation of the legal right, but no substantial loss is caused thereby. The damages granted in such cases are described nominal because they are very little, say, a rupee. It may be noted that the aggrieved party cannot claim these damages as a matter of right. It is always at the discretion of the court whether or not to award nominal damages.

Damages for Deterioration Caused through Delay

In the case of deterioration caused to goods through delay, damages can be recovered from carrier even without notice. The word 'deterioration' implies not only physical damages to the goods but also loss of special opportunity for sale. In the case of Wilson v. Lancashire and Yorkshire Railway Co. the plaintiff had bought velvet for creation caps for sale throughout the spring. But, due to delay in transit, he was unable to utilize it for creation caps for sale throughout the season. It was held that the fall in

value of the cloth arrived after the season amounted to a deterioration for which the plaintiff was entitled to recover damages without notice. ,

Damages for Inconvenience and Discomfort

When a party has suffered physical discomfort and inconvenience as a result of breach of contract, that party can move a suit for claiming compensation. Though, just as to the common rule, the motive or the manner of breach do not affect the measure of damages.

Examples

- A was wrongfully dismissed in a harsh and humiliating manner through G from his employment. Held, a) A could recover a sum on behalf of his wages for the era of notice and the commission which he would have earned throughout that era, b) He could not recover anything for his injured feelings or for the loss sustained from the information that his dismissal made it more hard for him to obtain employment (Addis v. Gramaphone Co. Ltd.).
- H, with his wife and children took a ticket for a midnight train, to be transported to a scrupulous lay where he existed. They were, though, transported to a wrong lay and they had to walk many miles on a drizzling night. H was awarded compensation for inconvenience but nothing for the medical expenses of his wife who caught cold, as this consequence was too remote. (Hobbs v. London & S.W. Pail & Co.).

Liquidated Damages and Penalty

Some time, in order to avoid delay in the assessment and payment of damages, at the time of formation of contract, the parties to a contract mutually agree to stipulate or specify sum, which will become payable through the party guilty of breach. If the specified sum symbolizes a fair and genuine

pre-estimate of the damages likely to result due to breach, then it is described liquidated damages. On the other hand, if the sum fixed at the time of formation of contract is disproportionate to the damages likely to happen, the sum is deemed to be a penalty. The amount is so provided to ensure performance of the contract.

Under English law, liquidated damages are enforceable but penalty cannot be claimed. In India, though, there is no such distinction recognized flanked by penalty and liquidated damages. The courts in India allow only 'reasonable compensation' (section 74).

Stipulations for Interest

The main number of cases decided under section relate to stipulation in a contract providing for payment of interest.

Payment of Interest in Case of Default

A stipulation for payment of interest in case of default is not in the nature of a penalty, if the interest is reasonable. If the court discovers that the rate of interest is exorbitant and is penal in character in may grant some relief.

Payment of Interest at Higher Rate

Such a stipulation occurring in a contract may be of a two fold character:

- It may either give for payment of interest at an increased rate from the date of the contract on failure of the debtor to pay on the due date the interest or principal or an installment of principal; or
- It may give for payment at a higher rate from the date of default only.

A stipulation for increased interest from the date of the bond and not from the date of default is always in the nature of a penalty, and relief may be

granted to the party. The court may award only reasonable compensation (Rameshwar Pd. Singh v. Rai Sham Kishen). Therefore, where a loan is advanced at 15% p.a. with a stipulation that in case of default in payment of any installment, interest shall be raised to 20% P-a- Such a stipulation is a penalty and court may award reasonable compensation only.

A stipulation for increased interest from the date of default may be stipulation through method of penalty. When it is so, relief is granted against it. Whether such a stipulation is penal or not depends on the conditions of the contract and the circumstances of each case. For instance, A provides B a bond for repayment of Rs. 10,000 with interest @ 12% at the end of six months, with a stipulation that in case of default, interest shall be payable @ 75% from the rate of default. This is a stipulation through method of penalty and B is only entitled to recover from A such compensation as the court considers reasonable.

Payment of Compound Interest on Default

A stipulation in a bond for payment of compound interest on failure to pay easy interest at the similar rate as was payable upon the principal is not a penalty. But a stipulation in a bond for the payment of compound interest at a rate higher than that of easy interest is a penalty and the party may be relieved against.

Forfeiture of 'Earnest Money' or 'Security Deposit'

The amount deposited as security for performance of a contract and the similar is supposed to be adjusted against the price on completion of the contract, it is described earnest money. Is a clause in a contract providing for forfeiture of earnest money in the event of failure to perform in the nature of penalty? In a number of judicial decisions, it has been held that such a clause

shall be in the nature of a penalty and only reasonable compensation could be claimed.

Suit for Specific Performance

In sure cases of breach of contract, damages may not be measured as an adequate remedy. The aggrieved party may not be interested in monetary compensation. The court may, in such cases, direct the defaulting party to carry out the promise just as to the conditions of the contract. This is described 'Specific Performance' of the contract.

Specific performance of a contract may, at the discretion of the Court, be enforced where the contract involves the sale of a scrupulous home or some unusual article or any other thing for which monetary compensation is not enough because the injured party will not be able to get an exact substitute in the market. For instance, A agreed to sell an old painting to B for Rs. 10,000. Subsequently, A refused to sell the painting. Here, B may file a suit against A for the specific performance of the contract.

Specific performance is not granted under the following situations:

- When monetary compensation is an adequate relief;
- When the contract is of a personal nature, e.g., a contract to several, a contract to paint a picture, etc. In such contracts injunction is granted in lay of specific performance.
- Where it is not possible for the court to supervise the performance of the contract, e.g., a structure construction contract.
- When the contract is made through a company beyond its powers as lay down in its memorandum of association.
- When the contract is inequitable to either party.

- Where one of the parties is a minor.

Suit for Injunction

Where a party is in breach of a negative term of a contract (i.e., where he does something which he promised not to do) the court may through issuing an order, prohibit him from doing so. Such an order issued through court is described an 'injunction'.

Examples

- G agreed to buy the whole of the electric power required for his home from a sure company. He was, so, restrained through an injunction from buying electricity from any other person. (Metropolitan Electric Supply Company v. Ginder).
- W agreed to sing at L's theatre, and throughout a contract era to sing nowhere else. Afterwards, W made contract with Z to sing at another theatre and refused to perform the contract with L. Held, W could be restrained through injunction from singing for Z. (Lumely v. Wagner).

Suit upon Quantum Meruit

The phrase 'Quantum Meruit' means as much as is merited (earned)'. The normal rule of law is that unless; a party has performed his promise in its entirety, he cannot claim performance from the other. To this rule, though, there are sure exceptions on the foundation of quantum meruit. When a person has done some work under a contract and the other party repudiates the contract, or some event happens which creates the further performance of the contract impossible, then the party who has already performed the work can claim payment for the work he has already done. This right of claiming the

payment for work already done, before the repudiation of the contract or its further performance becoming impossible is described the right to quantum meruit. For instance, X, a writer, was occupied through M who is the editor of a magazine to write a series of twelve articles to be published in the magazine. After X had delivered six articles, the publication of the magazine was discontinued. X is entitled to receive payment for the six articles already written. You will revise more in relation to the quantum meruit later in this unit.

QUASI CONTRACTS

There are several situations in which a person may be required to conform to an obligation, although he has neither broken any contract nor committed any tort. For instance, A has forgotten ton sure articles in B's home. Now B is bound to restore them to A. Such obligations are usually described as 'quasi contractual obligations'.

Quasi contracts are based on the principle of equity and justice. It basically states that nobody shall enrich himself unjustly at the expense of another. In information, a quasi contract is not a contract at all. It is an obligation which the law makes in the absence of any agreement, when the acts of the party or others have placed in the possession of one person, money or its equivalent under such circumstances that in equity and good conscience, he ought not to retain it, and which in justice and fairness belongs to another. He then is placed under an obligation to restore or repay for such a benefit.

Definitions of Quasi Contracts

There is no statutory definition of a quasi contract accessible either under the English Law or under the Indian Contract Act. Pollock describes quasi contracts as "contracts 'in law' but not 'in information', being the subject

matter of a fictitious extension of the sphere of the contract to cover obligations which do not in reality fall within it". Sir William Anson, a noted English author points out that "circumstances necessity happen under any system of law in which it becomes necessary to hold one person to be accountable to another, without any agreement on the part of the former to be so accountable, on the ground that otherwise he would be retaining money or some other benefit which has approach into his hands to which the law regards the other person as better entitled, or on the ground that without such accountability, the other would unjustly suffer loss. The 'Law of Quasi Contract' exists to give remedies in circumstances of this type."

Quasi contracts are also described implied contracts; They are implied because they make such obligations which resemble those created through contracts. The essentials for the formation of a contract are absent but as outcome resembles those created through a contract they are described quasi contracts. Under English Law, they are also termed as

Constructive Contracts or Contracts in Law, etc. Indian Contract Act conditions quasi contracts as sure dealings resembling those created through conti-acts and are establish under sections 68 to 72.

Variation Flanked by Quasi Contracts and Contracts

In case of contracts, it is the consent of the party which produces the obligations. But in quasi contracts there is no question of consent, it is the law alone or natural equity which produces obligations. As noted earlier, a quasi contract is based on the ground that a person shall not be allowed to unjustly enrich himself at the expense of another. There is, though, parallel flanked by quasi contract and contracts in case of claims for damages. In case of breach of a quasi contract section 73 of the Indian Contract Act gives for the similar remedies (claim for damages) as provided in case of breach of a contract. It reads: When an obligation resembling those created through contract has been

incurred and has not been discharged, any person injured through the failure to discharge it is entitled to receive the similar compensation from the party in default, as if such person has contracted to discharge it and has broken his contract.

Kinds of Quasi Contracts

You have studied what is a quasi contract and how it differs from a contract. Now, let us look into several types of quasi contracts recognized under the Indian Contract Act. Sections 68 to 72 deal with five kinds of quasi contractual obligations.

Supply of Necessaries

Just as to section 68, if a person incapable of contracting (which would contain a minor, idiot and lunatic) or anyone whom he is legally bound to support, is supplied through another with 'necessaries' suited to his condition in life such person is entitled to recover the value thereof from the property of such incapable person. You should note that the aforesaid claim for necessaries is based upon' quasi contractual obligations because a contract with a person incompetent to contract is void-ab- initio, The following two points necessity, though, be noted in this regard:

- The amount is recoverable only from the property (if any) of the incapable person and not from him personally true owner could not be established. After some time, A tendered to B the lawful expenses incurred through him for finding the true owner and asked him to return the diamond to him (A). B refused to do so. Held B necessity return the diamond to A as A was entitled to retain it against the whole world, except the true owner (Hollins v. Fowler).

- The finder has lien in respect of any sum which may be due to him on explanation of expenditure incurred through him in respect of the goods (section 168).
- Where the owner has offered a specific reward for the return of goods lost, the finder may sue for such reward, and may retain the goods until he receives it (section 168). This right was re-endorsed in the case of Harbhajan v. Harcharan.
- The finder may sell the goods in the following circumstances :
    - Where the thing establishes is in danger of perishing.
    - Where the owner cannot, with reasonable diligence, be establish out.
    - Where the owner has been established but he refuses to pay the lawful charges of the finder.
    - Where the lawful charges of the finder, in respect of the thing establish amount to 2/3rd or more of the value of the thing establish.

Liability of Person to whom Money is Paid or Thing Delivered through Mistake or Coercion

A person to whom money has been paid, or anything delivered through mistake or under coercion, necessity repay or return it (section 72). For instance:

- A and B jointly in excess of Rs, 100 to C. A alone pays the amount to C. Not knowing this information, B pays Rs. 100 again to C. Now, C is bound to repay the amount to B.
- A railway company refuses to deliver sure goods to the consignee, except upon the payment of illegal charges. The consigner pays the sum charged in order to obtain the goods. He is entitled to recover so much of the charge as was illegally excessive.

You should note that section 72 is based upon the principle of equitable restitution. A person is under a mistake that money is due when, in information, it is not due. Such a person when he pays under mistake necessity is repaid. Money paid under mistake is recoverable whether the mistake is of information or of law. In the case of Sales Tax Officer v. Kanhaiya Lal. The Supreme Court held that section 72 of the Indian Contract Act is wide enough to cover not only a mistake of information but also a mistake of law. In this case, the levy of sales tax on forward transactions was held to be ultra vires through the Allahabad High Court. The respondent, so, claimed a refund of the tax paid under mistake of law under section 72. It was held that the respondent was entitled to the refund.

With reference to the word 'coercion' used in this section, it may be noted that the word is to be interpreted in its popular sense to mean oppression, extortion or such other means (Seth Kanhaiya Lal v. National Bank of India).

QUANTUM MERUIT

As discussed earlier, the phrase 'quantum meruit' means 'as much as merited' or ‚as much as earned'. The common rule of law is that unless a person has performed his obligations in full, he cannot claim performance from the other (Cutter v. Powell). But, in sure cases, when a person has done some work under a contract, arid the other party repudiates the contract or some event happens which creates the further performance of the contract impossible then the party who has performed the work can claim remuneration for the work he has already done. The right to claim on 'quantum meruit' does not arise out of the contract as the right to damages does. It is a claim on the quasi contractual obligations which the law implies in the circumstances (Patel Engg. Co. Ltd. v. Indian Oil Corporation Ltd.). The action of 'Quantum

Meruit' is allowed in Indian Courts under section 70 of the Contract Act. The claim of „Quantum Meruit' arises in the following cases.

When a Contract is Exposed to be Unenforceable

When an agreement is exposed to be void or becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to create compensation for it to the person from whom he received it. For instance, A, a singer, contracts with B, the Manager of a theater to sing at his theatre for two nights every week throughout the after that two months, and B agrees to pay her Rs. 1,000 for each night's performance. On the sixth night, A willfully absents herself from the theatre, and B, in consequence, rescinds the contract. B necessity pays A for the five nights on which she had sung.

When One Party Abandons or Refuses to Perform the get in Touch with

Where there is a breach of contract, the aggrieved party is entitled to claim reasonable compensation for what he has done under the contract. For instance, C, an owner of a magazine occupied P to write a book to be published through installments in his magazine. After a few installments were published, the publication of the magazine was stopped. Held, P could claim payment on quantum meruit for the part already published. (Blanche v. Colburn). In another case S, a structure contract or, agreed to construct a home for H for $565. He did work to the extent of $333 and then abandoned the contract. Afterwards, H gets the work completed another person. Then S cannot recover anything for the work done because he was entitled to the payment only on the completion of the work (Sumpter v. Hedges).

When a Contract is Divisible

When a contract is divisible and the party not in default has enjoyed benefit of the part performance, the party in default may sue on a quantum meruit. But if the contract is not divisible, the party in default cannot claim compensation on this foundation.

When an Indivisible Contract is Totally Performed but Badly

When an indivisible contract for a lump sum is totally performed, but badly, the person who has performed can claim the lump sum less deduction for bad work. For instance, A agreed to decorate B's flat for a lump sum of Rs, 10,000. A did the work but B complained of faulty workmanship. It costs B Rs. 2,000 to remedy the defect. A shall be entitled to recover from B Rs. 8,000 (Rs. 10,000—Rs. 2,000) (Hoeing v. Isaac).

REVIEW QUESTIONS

- What is a breach of contract?
- What is an anticipatory breach of contract?
- Distinguish flanked by a contract and a quasi contract.
- What do you understand through Quantum Meruit?

PART 3. SPECIFIC CONTRACTS AND ARBITRATION

CHAPTER 9

INDEMNITY AND GUARANTEE

STRUCTURE

- Learning objectives
- Introduction
- Meaning of contract of indemnity
- Rights of indemnity holder
- Commencement of indemnifier's liability
- Meaning of contract of guarantee
- Distinction flanked by contract of indemnity and contract of guarantee
- Extent of surety's liability
- Types of guarantee
- Revocation of continuing guarantee
- Rights of a surety
- Discharge of surety from liability
- Review questions

LEARNING OBJECTIVES

After learning this unit, you should be able to:

- Describe a contract of indemnity
- Describe the rights of indemnity holder
- Describe a contract of guarantee
- Distinguish, flanked by a contract of indemnity and a contract of guarantee
- Explain the extent of surety's liability
- Describe the rights of surety
- Explain when a surety is discharged.

INTRODUCTION

You have so distant studied the principles applicable to contracts in common. Let us now take up a scrupulous species of contract viz., Contracts of Indemnity and Contracts of Guarantee. Since these are specific kinds of contract, the common principles of contracts are fully applicable to such contracts. In this chapter you will learn the meaning of contract of indemnity, right of indemnity-holder, and commencement of indemnifies liability. You will also revise the meaning of contract of guarantee, the variation flanked by contract of indemnity and guarantee, kinds of guarantees, rights of a surety, and discharge of surety from liability.

MEANING OF CONTRACT OF INDEMNITY

The term 'indemnity' basically means to create good the loss or to compensate the party who has suffered some loss. The term 'contract of indemnity' is defined in Section 124 of the Indian Contract Act as follows, “A contract through which one party promises to save the other from loss caused to him through the conduct of the promisor himself or through the: conduct of any other person, is described a contract of indemnity.” The person who promises to compensate for the loss is described the "indemnifier" and the person to whom this promise is made: or whose loss is to be made good is recognized as "indemnity-holder" or "indemnified". For instance, A contracts to indemnify B against the consequences of any proceedings which C may take against B in respect of a sure sum of money. This is a contract of indemnity, here A is the indemnifier, and B is the indemnified.

The definition restricts the scope of contracts of indemnity as it covers only the losses caused through the conduct of the promisor himself or through the conduct of any other person. If a strict view is taken of this definition, it will exclude the losses caused through accidents. In that case insurance

contracts should not fall within the purview of contracts of indemnity. But the information is that all contracts of insurance (except life insurance) are also contracts of indemnity. The intention of law makers had never been to exclude insurance contracts from the purview of contracts of indemnity. That is why we follow the English definition which states "a promise to save another harmless from loss caused as a result of a transaction entered into at the instance of the promisor". This definition comprises a promise to create good the loss arising from any cause whatsoever e.g. fire, perils of sea, accidents etc. When a person expressly promises to compensate the other from loss, it is termed as express indemnity. The contract of indemnity is said to be implied when it is to be inferred from the conduct of the parties or from the circumstances of the case. Even Section 69 of the Contract Act implies a duty to indemnity in case a person who is interested in the payment of money which another is bound through law to pay, has paid the amount. Likewise, in an auction sale there is an implied contract of indemnity flanked by the auctioneer and the person who asks him to sell goods. For instance, A, an auctioneer, sold sure goods on the instructions of B. Later on, it is exposed that the goods belonged to C and not B. So, C recovered damages from A for selling the goods belonging to him. Here A is entitled to recover the compensation from B.

In this case there was an implied promise to compensate the auctioneer for any loss which he may suffer on explanation of the defective title of B. As you know that contract of indemnity is a special kind of contract, so, to enforce such contracts it is necessary that all the essentials of a valid contract necessity be present. In case any one of the essential is missing, the contract cannot be enforced. Therefore if the substance or consideration of an indemnity agreement is unlawful, it cannot be enforced. For instance, A asks B to beat C, promising to indemnify him against the consequences this cannot be enforced. Suppose B beats C and is fined Rs. 500, B cannot claim this amount from A, because the substance of the agreement is unlawful.

RIGHTS OF INDEMNITY HOLDER

In pursuance of Section 125 of the Act the indemnity-holder may recover from the indemnified (promisor), the following amounts provided the acts within the scope of his power:

- He is entitled to recover all damages which he may be compelled to pay in any suit in respect of any matter to which the promise to indemnify applied.
- He is entitled to recover from the indemnified all costs which he had paid in bringing or defending any suit in respect of contracts of indemnity. In bringing or defending the suit the indemnity-holder necessity not contravene the orders of the indemnified and he necessity act in the similar method as a prudent man would have acted under alike circumstances in his own case.
- He is entitled to recover from the indemnified, all the amount which he had paid under the conditions of the compromise of such suit. Though, it is essential that the compromise necessity not be contrary to the orders of the indemnified and in compromising the suit, he necessity act as a prudent man. This right is also accessible to the indemnity-holder when he paid any amount under any compromise entered through him and authorized through the indemnified.

COMMENCEMENT OF INDEMNIFIER'S LIABILITY

An significant question in this connection is when do the indemnified become liable to pay, or, when is the indemnity-holder entitled to recover his indemnity? The indemnity-holder is entitled to rights as soon as his liability has become sure although lie has himself paid nothing. Indemnity is not necessarily given through repayment after payment. Indemnity requires that the party to be indemnified shall never be described upon to pay. Therefore, if the indemnity-holder has incurred an absolute liability, he is entitled to inquire

the indemnifier to save him from that liability and pay it off. In easy words, the liability of indemnifier commences as soon as the liability of the indemnity-holder becomes absolute.

MEANING OF CONTRACT OF GUARANTEE

The substance of contract of guarantee is to enable a person to obtain an employment, a loan or goods on credit. Just as to Section 126 of the Indian Contract Act, 'A contract of guarantee' is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who provides the guarantee is described the 'surety' the person in respect of whose default the guarantee is given is described 'the principal debtor'; and the person to whom the guarantee is given is described „the creditor'. A guarantee may be either oral, or written. For instance, if A and his friend B enter a trader's shop, and A asks the trader, "supply the articles required through B, and if lie does not pay you. I will." It is a contract of guarantee. The primary liability to pay is that of B but if he fails to pay, A becomes liable to pay. On the other hand, if A says to the trader, "let him (B) have the goods, I will see you are paid", and the contract is one of indemnity and not a contract of guarantee.

From the definition of guarantee you will notice that in a contract of guarantee, there are three parties recognized as creditor, principal debtor, and surety. A contract of guarantee is shaped when all the three agree. Let us take an instance, A and B enter in a shop, and A orders to deliver sure goods to B on credit, The shopkeeper says "I can provide goods on credit provided A provides the guarantee for the payment". A promises to guarantee the payment. In this instance, B is the principal debtor, A is the surety and the shopkeeper is the creditor and the contract is a contract of guarantee. A contract of guarantee is an agreement and as such all the essentials of a valid contract necessity are present. For instance, the contracting parties should be competent to contract. Suppose in the instance B is a minor i.e., incompetent

to contract. In such a situation A would be regarded as the principal debtor and he will become personally liable to pay. Therefore, the incapacity of the principal debtor does not affect the validity of a contract of guarantee. The requirement is that the creditor and the surety necessity be competent to contract.

Now you may inquire that if a contract of guarantee should have all the essentials of a contract then what is the consideration flanked by surety and the principal debtor. It is not necessary that there should be direct consideration flanked by the surety and the creditor i.e., the surety need not be benefited. It is enough (for the purposes of consideration) that something is being done or some promise is made for the benefit of principal debtor. It is presumed that the consideration received through principal debtor is the enough consideration for the surety. You would appreciate it if you go through the provision of Section 127, which says: Any thing done, or any promise made for. the benefit of the principal debtor may be a enough consideration to the surety for giving the guarantee.

On examining the definition of contract of guarantee, you would discover that as there are three parties, the are three contracts as well. One contract is flanked by the creditor and the principal debtor, out of which the guaranteed debt arises. Second contract is flanked by the surety and the principal debtor who implies that the principal debtor shall indemnify the surety, if the principal debtor fails to pay and the surety is asked to pay. The third contract is flanked by the surety and the creditor through which surety undertakes (guarantees) to pay the principal debtor's liabilities (debt) if the principal debtor fails to pay.

For a valid contract of guarantee, it is essential that there necessity be an existing debt or a promise whose performance is guaranteed. In case there

is no such debt or promise, there can be no. valid guarantee. In information, a contract of guarantee presupposes the subsistence of a liability enforceable through law. For instance, A provides the guarantee to B for the payment of a time-barred debt due from C. This is not a valid contract of guarantee because the primary liability flanked by B and C is not enforceable through law. In case A pays the amount, he cannot recover it from C.

An motivating aspect of the contract of guarantee is that though it is not a contract of uberritnae fidei (a contract of absolute good faith) and so, it is not necessary for the principal debtor or the creditor to disclose all the material facts to the surety before he enters into a contract. Though. the facts which are likely to affect the surety's decision necessity be truly represented to him. Section 142 of the Act gives that any guarantee which has been obtained through means of misrepresentation made through the creditor, or with his knowledge and assent, concerning a material part of the transaction, is invalid.

You should also note that not only there should be no misrepresentation but it is also essential that the guarantee necessity not be obtained through concealing some facts. Section 143 gives that any guarantee which the creditor has obtained through means of keeping silence to material circumstances is invalid. For instance, A employs B as clerk to collect money for him. B fails to explanation for some of his receipts, and A, in consequence, calls upon him (B) to furnish security for his duly accounting C provides the guarantee for B's duly accounting. A did not inform C in relation to the B's previous conduct. B, afterwards, creates default. Here the guarantee given through C is invalid because it was obtained through concealment of facts through A.

From this discussion, let us summaries the essential characteristics of a contract of guarantee as follows:

- Subsistence of a debt, for which some person other than the surety should be primarily liable.
- Consideration, but it is not necessary that the surety should be benefited.
- All the essentials of a valid contract should be present.
- Creditor and surety necessity be competent i.e., principal debtor need not be competent to contract.
- Surety's liability is dependent on principal debtor's default.
- Guarantee necessity not be obtained through misrepresentation.
- Guarantee necessity not be obtained through concealment of material facts.

DISTINCTION FLANKED BY CONTRACT OF INDEMNITY AND CONTRACT OF GUARANTEE

Following are the main points of variation flanked by a contract of indemnity and a contract of guarantee.

- In a contract of indemnity there are only two parties i.e., indemnifier and the indemnified while in a contract of guarantee there are three parties principal debtor, creditor and the surety.
- In a contract of indemnity there is only one contract, whereas in a contract of guarantee, there are three contracts.
- In a contract of indemnity the indemnifier undertakes to save the indemnified from any loss caused to him through the conduct of indemnifier himself or the conduct of any other person, while in a contract of guarantee, the surety undertakes for the payment of debts of principal debtor, if the principal debtor fails to pay it.
- In a contract of indemnity, the liability of indemnifier is primary and self-governing, while in a contract of guarantee the liability of surety is secondary i.e., it arises only on the default of principal debtor. The primary liability is that of the principal debtor.
- In a contract of indemnity, indemnifier's liability arises only on the happening of a contingency, while in a contract of guarantee there is an existing duty or debt, the performance of which is guaranteed through the surety.
- In a contract of indemnity, indemnifier acts independently without any request of the debtor or the third party, while in a contract of guarantee the surety guarantees at the request of principal debtor.
- In a contract of guarantee, if the principal debtor fails to pay and the surety discharge his debt, the surety can proceed against the principal debtor in his own right, while in a contract of indemnity, the indemnifier cannot sue the third party in his own name unless there is

an assignment in indemnifier's favor. If there is no such assignment, the indemnifier necessity bring the suit in the name of indemnified.

EXTENT OF SURETY'S LIABILITY

In the absence of a contract to the contrary, the liability of surety is co-extensive with that of the liability of the principal debtor. It means that the surety is liable to the similar extent to which the principal debtor is liable. For instance. A guarantees to B the payment of a bill of exchange through C, the acceptor. On the due date the bill is dishonored through C. A is liable, not only for the amount of the bill, but also for any interest and charges which may have become due on it.

You have noted that the liability of the surety is equal to that of the principal debtor. But if at the time of giving the guarantee, the surety has given the guarantee for a fixed amount, in that case the liability of the surety can, in no case, be more than the fixed amount. For instance, A lends Rs. 5,000 to B and C provides the guarantee for Rs. 3,000 only. If B creates a default, C shall be liable only for Rs, 3,000.

It is true that the liability of surety is co-extensive with that of the principal debtor, but it does not mean that if due to some cause the principal debtor cannot be held liable then the surety will also not be liable. This is so because the contract flanked by the, surety and the creditor is an self-governing contract and not a collateral one. For instance, when the principal debtor is a minor, the surety is liable. Not only this, if through any act the liability of the principal debtor is reduced or terminated, the surety continues to be liable. If the creditor fails to sue the principal debtor and the debt becomes time barred, the surety continues to be liable.

Though the primary responsibility to pay the debtor or perform the promise is that of the principal debtor, in the absence of a contract to the

contrary, the liability of the surety arises immediately when a default is made through the principal debtor. The surety cannot inquire the creditor to provide a notice of default. The surety cannot even inquire the creditor to first exhaust all the remedies open to him against the principal debtor, before taking action against the surety. Therefore, the creditor is not bound to proceed first against the principal debtor before suing the surety. In a contract, if there is a condition precedent for the surety's liability, the surety would only be liable when that condition is fulfilled first. Section 144 of the Act gives for such situations, that where a person provides a guarantee upon a contract that the creditor shall not act upon it until another person has joined in it as co-surety, the guarantee is not valid if that other person does not join. For instance, your friend A requires a loan of Rs. 10,000 from the bank. You and two of your friends C and D, agree to guarantee the repayment of loan. C does not sign the necessary. documents. You and your friend D are also not liable on this guarantee because it is a condition precedent to your guarantee that the repayment of loan shall be guaranteed through all the three. In case of a continuing guarantee the surety shall be liable for all such transactions which have taken lay upto the time of termination of guarantee. You will learn more in relation to the it in subsequent paragraphs.

TYPES OF GUARANTEE

Contracts of guarantees may be classified into two kinds: Specific guarantee and. continuing guarantee. When a guarantee is given in respect of a single debt or specific transaction and is to approach to an end when the guaranteed debt is paid or the promise is duly performed, it is described a specific or easy guarantee. Though, a guarantee which extends to a series of transactions, is described a continuing guarantee (Section 129). The surety's liability in this case would continue till all the transactions are completed or till the guarantor revokes the guarantee as to the future transactions A fidelity guarantee is a continuing guarantee as it continues for a era of time Examples:

- S is a bookseller who supplies a set of books to P, under the contract that if P does not pay for the books, his friend K would create the payment. This is a contract of specific guarantee and K's liability would approach to an end, the moment the price of the books is paid to S.
- On M's recommendation S, a wealthy landlord, employs P as his estate manager. It was the duty of P to collect rent every month from the tenants of S and remit the similar to S before the 15th of each month. M, guarantee this arrangement and promises to create good any default made through P. This is a contract of continuing guarantee,

In order to understand continuing guarantee, the following points should be noted:

- The mainly significant characteristic of a continuing guarantee is that it applies to a series of separable, separate transactions. So, when a guarantee is given for an whole consideration, it cannot be termed as a continuing guarantee. For instance, K gave his home to S on a lease for ten years on a specified lease rent. P guaranteed that S would fulfill his obligations. After seven years S stopped paying the lease rent. K sued him for the payment of rent. P then gave a notice revoking his guarantee for the remaining three years. P would not be able to revoke the guarantee because the lease for ten years is an whole indivisible consideration and cannot be classified as a series of transactions. This contract, so, cannot be classified as a contract of continuing guarantee.
- In deciding whether scrupulous contract of guarantee is a Specific guarantee or a continuing one, you will have to see the intention of the parties as expressed through the conditions of the contract and the prevailing circumstances. For instance, A guarantees payment to B of the price of five sacks of flour to be delivered through B to C and to be paid for in a month. B delivers five sacks to C, C pays for them.

Afterwards, B delivers four sacks to C for which C does not pay for. Here A cannot be held liable because it is clear from the conditions of the contract that A planned' to guarantee only for the payment of price of the first five sacks of flour.

- A continuing guarantee may be given for a part of the whole debt or for the whole debt subject to a limit. Let us understand this with the help of an instance. S gave guarantee for the loans taken from time to time through P from C. P owe rupees ten thousand to C. S may have given his guaranteed in the following two shapes.
    - I guarantee the payment of the debt of rupees five thousand through P to C. This is a case of guarantee only for a part of the whole debt.
    - I guarantee the payment of any debts of P due to C subject to a limit of rupees five thousand. This is a guarantee for the payment of whole debt subject to a specified limit. You will be wondering as to the distinction flanked by the two shapes because in both the cases, S appears to be liable for presently five thousand rupees. The distinction becomes clear in the event of insolvency of P, the principal debtor. Let us suppose that P has been declared insolvent and his estate can only repay forty paise in a rupee.

In the first case when the guarantee is only for a part of the whole debt, C can recover rupees five thousand from S (the guaranteed amount) and Rs-2,000 from P’s estate (forty percent of the balance of rupees five thousand). C will, so, get Rs. 7,000 in all. After paying five thousand to C, S can claim rupees 2,000 from P's estate. Though, when the guarantee is for the whole amount subject to a specified limit, C will recover rupees five thousand from S (upto the guaranteed limit) and Rs. 4,000 from P (forty per cent of the whole

debt of Rs. 10,000). S would not be able to claim anything from P's estate till the whole amount of rupees ten thousand has been paid to C.

REVOCATION OF CONTINUING GUARANTEE

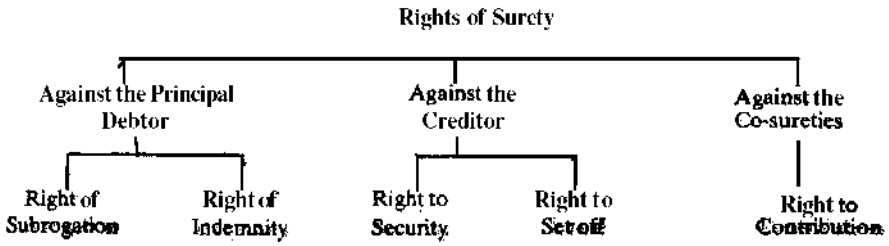
A continuing guarantee may be revoked in any of the following methods:

- Through Notice of Revocation: In respect of future transaction the surety may at any time revoke his guarantee through giving a notice to creditor. In such a case, the surety remnants liable for the transactions which have already taken lay. For instance, A guarantees to B to the extent of Rs. 10,000, that C shall pay for all the goods bought through him throughout the after that three months. B sells goods worth Rs. 6,000 to C. A provides a notice of revocation; C is liable for Rs. 6,000. If any goods are sold to C after the notice of revocation, A shall not be liable for that.
- Through Death of Surety: Unless there is contract to the contrary, the death of surety operates as a revocation of the continuing guarantee in respect to the transactions taking lay after the death of surety.
- In the Similar Manner in which the Surety is Discharged: A continuing guarantee is also revoked under all the circumstances under which a surety is discharged from the liability, such as
    - Novation (Section 62)
    - Variance in conditions of Contract (Section 133)
    - Release or discharge of principal debtor (Section 134)
    - When the creditor enters into an arrangement with the principal debtor (Section 135)
    - Creditor's act or omission impairing surety's eventual remedy (Section 139)
    - Loss of Security (Section 141).

RIGHTS OF A SURETY

After creation a payment and discharging the liability of the principal debtor, the surety gets several rights. These rights can be studied under three heads: (i) rights against the principal debtors, (ii) rights against the creditor, and (iii) rights against the co-sureties. These have been shown in Figure 9.1 and discussed below in detail

Figure 9.1



Rights against the Principal Debtor

The surety has the following two rights against the principal debtor.

- Right of subrogation: The surety acquires all the rights which the creditor had against the principal debtor. Section 140 lays down, where a guaranteed debt has become due, or default of the principal debtor to perform a guaranteed duty has taken lay, the surety, upon payment or performance of all that he is liable for, is invested with all the rights which the creditor had against the principal debtor. This right of the surety is described 'subrogation'. It means that on payment of the guaranteed debt, or performance of the guaranteed duty, the surety steps into the shoes of creditor
- Right of Indemnity: Section 145 of the Act vests in the surety another right i.e., right of indemnity. In every contract of guarantee, there is an implied promise through the principal debtor to indemnify the surety,

and the surety is entitled to recover from the principal debtor whatever sum he has rightfully paid under the guarantee. The surety is not entitled to claim any sums which he has paid wrongfully.

Examples:

- B is indebted to C, and A is surety for the debt. C demands payment from A and, on his refusal, sues him for the amount, A defends the suit, having reasonable grounds for doing so, but he is compelled to pay the amount of the debt with costs. He can recover from B the amount paid through him for costs, as well as the principal debt.
- A guarantees to C, to the extent of Rs. 2,000, payment for rice to be supplied through C to B. C supplies to B rice for an amount which is less than Rs. 2,000 but obtains from A payment of the sum of Rs. 2,000 in respect of the rice supplied. A cannot recover from B more than the rice actually supplied.

Rights against the Creditor

- Right to securities: When the surety has paid off the liabilities of principal debtor to the creditor, he becomes entitled to claim all the securities which were given through the principal debtor to the creditor. Surety has right to all securities whether received before or after the creation of the guarantee (Section 141). It is also immaterial whether the surety has knowledge of those securities or not. For instance, on C's guarantee A lent Rs. 5,000 to B. This debt is also secured through an assignment through deed as security for the debt, the lease of B's home. B defaults in paying the debt and C has to pay the debt. On paying off B's liabilities, C is entitled to receive the assignment deed in his favor.

- Right to set off: When the creditor sues the surety for payment of principal debtor's liabilities, the surety can claim set off, or counter claim if any, which the principal debtor had against the creditor.

Rights against the Co-sureties

When the repayment of debt to the principal debtor is guaranteed through more than one person, they are described Co-sureties. The co-sureties are liable to contribute, as agreed, towards the payment of guaranteed debt. Section 138 provided that where there are co-sureties, the release through the creditor of one of them does not discharge the others, nor does it free the surety so released from his responsibility to the other sureties. Therefore when the payment of a debt or performance of duty is guaranteed through co-sureties and the principal debtor has defaulted in fulfilling his obligation and thereupon the creditor compels only one or more of the co-sureties to perform the whole contract, the co-surety sureties performing the contract are entitled to claim contribution from the remaining co-sureties. Just as to Section 146, in the absence of any contract to the contrary, the co-sureties are liable to contribute equally. This principle will apply even when the liability of co-sureties is joint or many, and whether under the similar or dissimilar contracts, and whether with or without the knowledge of each other. For instance A, B, C, and D are co-sureties for a debt of Rs. 2,000 lent through Z to R. R defaults in repaying the loan. A, B, C and D are liable to contribute Rs. 500 each.

Just as to Section 147 were the co-sureties have agreed to guarantee dissimilar sums, they have to contribute equally subject to the maximum of the amount guaranteed through each one. It is immaterial whether sureties are liable jointly or severally, under one contract or under self-governing contracts and with or without the knowledge, of each ocher. For instance, A, B, and C, as sureties for D, enter into three separate bonds, each in a dissimilar penalty,

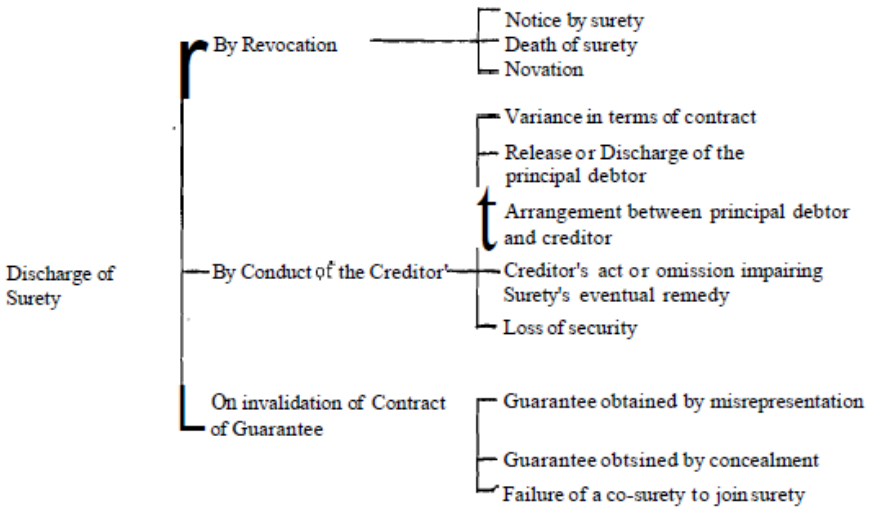
viz., A for Rs. 10,000, B for Rs. 20,000 and C for Rs. 40,000. D creates default to the extent of Rs. 30,000. A, B and C are liable to nay Rs. 10,000 each. Suppose therefore default was to the extent of Rs. 40,000. Then A would be liable for Rs. 10,000 and B and C Rs. 15,000 each.

DISCHARGE OF SURETY FROM LIABILITY

Under any of the following circumstances a surety is discharged from his liability:

- through revocation of the contract of guarantee,
- through the conduct of the creditor, or
- through the invalidation of the contract of guarantee

Figure 9.2
Discharge of Surety



Through Revocation of the Contract of Guarantee

- Notice through surety: You have learnt that a contract of guarantee may be specific or continuing. A specific guarantee cannot be revoked

if the liability has already accrued. Therefore, if A lends B a sure sum of the guarantee of C, then C cannot revoke the contract of guarantee. But, if A has not yet given the sum to B, even though the guarantee has been executed through C, C may revoke the contract through giving notice. Where the guarantee is a continuing one and extends to a series of transactions, it may be revoked through the surety as to future transactions through giving notice to the creditor. The Act contemplates series of separate and separate transactions to constitute a continuing guarantee which can be revoked through notice.

- Death of surety: In the absence of a contract to the contrary, a continuing guarantee is revoked through the death of the surety as to the future transactions, The estate of deceased surety is, though, liable for those transactions which had already taken lay throughout the lifetime of the deceased. Surety's estate will not be liable for the transactions taking lay after the death of surety even if the creditor had no knowledge of surety's death.
- 'Novation: A contract of guarantee is discharged through novation when a fresh contract being entered into, either flanked by the similar parties or flanked by other parties, the consideration being the mutual discharge of the old contract. The original contract of guarantee comes to an end and so the surety stands discharged with regard to the old contract.

Through Conduct of the Creditor

Variance in Conditions of the Contract

A surety is discharged through such conduct of the creditor which has the effect of materially altering the conditions of the contract of guarantee. For instance, C contracts to lend B Rs. 2,000 on 1st January. A guarantees

repayment, C pays the amount to B on 30th August; A is discharged from the liability as the contract has been varied. A surety is liable only for what he has positively undertaken in the guarantee; any alteration made without the surety's consent, in the conditions of contract flanked by the principal debtor and the creditor, will discharge the surety as to transactions subsequent to the difference (Section 133). For instance, A becomes surety to C for B's conduct as a manager in C's bank. Afterwards B and C contract, without A's consent, that B's salary shall be raised, and that he shall become liable for one-fourth of the losses on overdrafts, B allows a customer to overdraw, and the bank loses a sum of money. A is discharged from his surety ship due to the variance made in the conditions without his consent.

Release or Discharge of the Principal Debtor

A surety is discharged if the creditor creates a contract with the principal debtor through which the principal debtor is released, or through any act or omission of the creditor, which results in the discharge of the principal debtor (Section 134). For instance, A supplies goods to B on the guarantee of C. Afterwards B becomes unable to pay and contracts with A to assign some property to A in consideration of his releasing him from his demands on the goods supplied. Here, B is released from his debt, and C is also discharged from his suretyship. Or, to take another instance, where A contracts with B for a fixed price to build a home for B within a specified time, B supplying the necessary timber. C guarantees A's performance of the contract. B omits to supply the timber, A is discharged from performing the contract, and C is discharged from his suretyship. But, where the principal debtor is discharged of his debt through operation of law, say, on insolvency, this will not operate as a discharge of the surety. Also, where there are co-sureties, a release through the creditor of one of them does not discharge other co-sureties nor does it frees the surety so released from his responsibility to other sureties.

Arrangement flanked by Principal Debtor and Creditor

Where the creditor, without the consent of the surety, creates an arrangement with the principal debtor for composition, or promise to provide him time to, or not to sue him, the surety will be discharged (Section 135). Though, when the contract to allow more time to the principal debtor is made flanked by the creditor and a third party, and not with the principal debtor, the surety is not discharged (Section 136). For instance, C, the holder of an overdue bill of exchange drawn through A as surety for B, and accepted through B, contracts with M to provide time to B, A is not discharged. Likewise, mere forbearance through the creditor to sue the principal debtor or to enforce any other remedy against him, in the absence of any provision in the guarantee to the contrary, does not discharge the surety. For instance, A owes Rs. 10,000 to K. The debt is guaranteed through M. The debt becomes payable but K does not sue A for six months after the debt has become payable. This will not discharge M,

Through Creditor's Act or Omission Impairing Surety's Eventual Remedy

'If the creditor does any act which is against the right of the surety, or omits to do any act which his duty to the surety requires, him to do and the eventual remedy of the surety himself against the principal debtor is thereby impaired, the surety is discharged (Section 139). For instance, B, a shipbuilder, contract to build a ship for C for a given sum, to be paid through installments as the work reaches sure stages (the last installment not to be paid before the completion of the ship). A becomes surety to C for B's due performance of the contract. C, without the knowledge of A, prepays the last installment to B. A is discharged through this payment, Take another instance, A puts M as apprentice to B and provides a guarantee to B for M's fidelity. B

promises on his part that he will, at least once a month. B omits to see as promised, and M embezzles. A is not liable to B on his guarantee.

Loss of Security

If the creditor parts with or loses any security given to him at the time of the guarantee, without the consent of the surety, the surety is discharged from liability to the extent of the value of security (Section 141). For instance, A, as surety for B, creates a bond jointly with 3 to C to secure a loan from C to B. Later on, C obtains from B a further security for the similar debt. Subsequently, C provides up the further security. A is not discharged.

Through Invalidation of the Contract

A contract of guarantee, like any other contract, may be avoided if it becomes void or voidable at the option of the surety. A surety may be discharged from liability in the following cases.

- Guarantee obtained through misrepresentation: When a misrepresentation is made through the creditor or with his knowledge or consent, relating to a material information in the contract of guarantee, the contract is invalid (Section 142).
- Guarantee obtained through concealment: When a guarantee is obtained through the creditor through means of keeping silence concerning some material part of circumstances relating to the contracts, the contract is invalid. (Section 143).
- Failure of co-surety to join a surety: When a contract of guarantee gives that a creditor shall not act on it until another person has joined in it as a co-surety, the guarantee is not valid if that other person does not join.

REVIEW QUESTIONS

- Describe a contract of indemnity.
- Describe a contract of guarantee.
- What is a continuing guarantee?
- What is subrogation?
- What do you mean through implied promise to indemnity surety under Section 145 of the Indian Contract Act?

CHAPTER 10

BAILMENT AND PLEDGE

STRUCTURE

- Learning objectives
- Introduction
- Meaning of bailment
- Types of bailment
- Duties of bailor
- Duties of bailee
- Rights of bailor
- Right of bailor and bailee against wrongdoer
- Finder of goods
- Termination of bailment
- Meaning of pawn or pledge
- Who may pledge
- Pledge and bailment
- Pledge and hypothecation
- Rights of pawnee
- Duties of pawnee
- Rights and duties of pawnor
- Pledge through non-owners
- Review questions

LEARNING OBJECTIVES

After learning this unit, you should be able to.

- Describe bailment and distinguish it from other kinds of contracts
- Describe several types of bailmenrs

- Explain rights and duties of bailor and bailee
- Describe the rights and duties of finder of goods
- Describe pledge
- Explain rights and duties of pawnor and pawnee
- Distinguish pledge from other kinds of contracts.

INTRODUCTION

Bailment and Pledge are examples of specific contracts. Indian Contract Act 1872 is not a comprehensive Act, dealing with all kinds of specific contracts. There are several other Acts which deal with specific contracts e.g., The Railways Act 1890, Carriers Act 1865 etc. The word bailment is derived from French word 'bailer' who means "to deliver". In law we use the term bailment in its technological sense which means change of possession of goods from one person to another. Pledge, on the other hand, is a type of bailment for some special purpose such as where the goods ate transferred From one person to another as security for payment of debt or performance of a promise. Pledge is dissimilar from bailment. In this chapter you will learn the meaning of bailment its types, rights, and duties of both bailor and bailee, You will also learn the meaning of pledge, its variation with bailment, and rights and duties of pawnor and pawnee.

MEANING OF BAILMENT

Section 148 of the Indian Contract Act reads: A bailment is the delivery of goods through one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned, or otherwise disposed of just as to the directions of the person delivering them. The person delivering the goods is described the "bailor". The person to whom they are delivered is described the "bailee". For instance, you deliver some gold to a jeweler B to create bangles for your sister. In this case you are bailor

and B is bailee and through delivering gold to B, a connection of bailment is created flanked by you and the jeweler.

Essentials of Valid Bailment

If you analyze the definition of bailment you will discover that for creating a connection of bailment the following characteristics necessity be present:

- Agreement: For creating a bailment the first essential requirement is the subsistence of an agreement flanked by the bailor and the bailee. As you have read presently now bailor is the person who bails the goods and bailee is the person to whom the goods are bailed. The agreement flanked by the bailor and bailee, may be either express or implied.
- Delivery of goods: For bailment, it is necessary that the goods should be delivered to the bailee. It is the essence of the contract of bailment. It follows that bailment can be of movable goods only. It is further necessary that the possession of the goods should be voluntarily transferred and is in accordance with the contract. For instance, A, a thief enters a home and through showing the revolver, orders the owner of the home to surrender all ornaments in the home to him. The owner of the home surrenders the ornaments. In this case although, the possession of goods has been transferred but it does not make bailment because the delivery of goods is not voluntary. Delivery of possession may be actual or constructive. Actual delivery means actual physical transfer of goods from one person to another. For instance, when a person provides his scooter for repair to workshop, it is actual delivery. When physical possession of goods is not actually given but some such act is done which has the effect of putting the goods in the possession of bailee, or putting the goods in the possession of any other person

authorized through the bailee to hold them on his behalf, it amounts to constructive delivery. Sometimes the other person may already be in possession of the goods of the bailor, and subsequently a contract of bailment is entered into, whereby the other person promises to stay the goods as bailee. This also amounts to constructive delivery of the goods. A railway receipt is a document of title to goods, a transfer of the railway receipt affects a constructive delivery of the goods.

- Purpose: In a bailment, the goods are delivered for some purpose. The purpose for which the goods are delivered is usually in the contemplation of both the bailor and the bailee.
- Return of the goods: It is significant that the goods which form the subject matter of the bailment should be returned to the bailor or disposed of just as to the directions of bailor, after the accomplishment of purpose or after the expiry of era of bailment.

Where goods are transferred through the owner to another, in consideration of price, it is a safe. Likewise, where the goods are not to be delivered back in specie but their price is paid, it is not a bailment. Again, where money is deposited through a customer with a bank in a current, savings or fixed deposit explanation, and, so, there is no obligation to return the identical money but an equivalent of it, it is no bailment. But what is therefore created is a connection of creditor and debtor. But if valuables or even coins or notes in a both are deposited for safe custody there is a contract of bailment, for these are to be returned as they are, and not their monetary Value.

Other general examples of a contract of bailment are where a watch is given for repairs, or diamonds are given for being set in a gold ring. In both these cases, the similar watch or the similar diamonds should be returned after the purpose for which they were given, has been fulfilled. A pledge of a jewel on the security of which money is borrowed, gold jewels delivered to a bank

for safe custody, goods delivered to a railway company for being accepted and delivered to the consignee, are all examples of bailment.

TYPES OF BAILMENT

Bailment may be classified on two bases, i.e., reward and benefit.

On the Foundation of Reward

Bailment can be classified as gratuitous and non-gratuitous bailment on the foundation of whether the parties are getting or not getting some value out of the contract of bailment... When there is no consideration involved in the contract of bailment it is described a gratuitous bailment. For instance, when you lend your cycle to your friend so that he can have 3 ride or when you borrow his books to read, it is a case of gratuitous bailment because no exchange of money or any other consideration is involved. Neither you nor your friend would be entitled to any remuneration here. A contract of bailment which involves some consideration passing flanked by bailor and bailee, is described a non-gratuitous bailment. For instance, if your friend hired a cycle from a cycle shop or you borrowed a book from a bookshop on hire, this would be a case of non-gratuitous bailment.

On the Foundation of Benefit

On the foundation of the benefits accruing to the parties, the contract of bailment may be divided into the following kinds:

- Bailment for the exclusive benefit of the bailor: This is the case where a contract of bailment is executed only for the benefit of the bailor, and the bailee does not derive any benefit from it. For instance, if you are going out of station and leave your valuable goods with your neighbor

for safety, it is you as bailor, who alone is being benefited through this contract.

- Bailment for the exclusive benefit of the bailee: This is the case where the contract of bailment is executed only for the benefit of the bailee and the bailor does not derive any benefit from the contract. For instance, if you lend your books to a friend, without charge, So that he can revise for his exams, it is your friend as the bailee, who alone is going to be benefited through this contract.
- Bailment for the mutual benefit of bailor and bailee: In this case both the bailor and the bailee derive some benefit from the contract of bailment. For instance, if you provide your shirt to be stitched through the tailor, both of you is going to be benefited through this contract, while you get a stitched shirt, the tailor gets the stitching charges.

DUTIES OF BAILOR

A bailor has the following duties

- Duty to disclose defects: The law of bailment imposes a duty on bailor to disclose the defects in the goods balled. Bailor is under an obligation to inform those defects in the goods which would interfere with the use of the goods for which the goods being bailed or would expose the bailee to some risk. Bailment of goods may he either gratuitous (in which neither bailor nor the bailee gets any reward) or non-gratuitous (bailment for reward). In case of gratuitous bailment, the law imposes a duty on the bailor to reveal all the defects recognized to him, which would interfere with the use of goods bailed. If the bailor does not disclose the defects and the bailee in consequence suffers some loss, the bailor would be liable to compensate the bailee for the losses so suffered. For instance, A the owner of a scooter allows B, his friend, to take his scooter for a joy ride. A knows that the brakes of the scooter were not working well. A does not discloses this information to B.

Consequently, B meets with an accident. A is liable to compensate B for damages. In case of Non-gratuitous bailment, i.e., bailment for reward, the bailor has a duty to stay the goods in a fit condition. The goods should be fit to be used, for the purpose, they are meant. In such a case the bailor is responsible for all defects in the goods whether he knows the defects or not is immaterial, and if the bailee suffers any loss, the bailee has to bear it. For instance, A hires a tractor from B. for ploughing his field. The shaft of the tractor is broken but B is not aware of the defect. While A was ploughing his field because of the defect, the tractor overturns and A is injured. B is liable for A's losses. You should note that in case of gratuitous bailment the bailor is responsible only for those defects which he is aware of and did not disclose to the bailee. Duty to reveal is all the more significant, where the goods bailed are of dangerous nature, otherwise the bailor would be liable for the resulting consequences. For instance, A delivers to B, sure chemicals, to be accepted to Bombay. These chemicals have a tendency to burst, if not kept below a sure temperature. A does not tell B to take this precaution. While carrying the chemicals, the chemicals burst and injure B. A is liable for all the damages.

- Duty to bear expenses: The common rule in those bailments where the bailee is not to receive any remuneration is that the bailor should bear the usual expenses in keeping the goods or in carrying the goods or to have work done upon them through the bailee for the bailor. The bailor necessity repays to the bailee all the necessary expenses which the bailee has already incurred for the purpose of bailment. For instance if A, a farmer provides some gold to his friend B who is a goldsmith, to create a gold ring. B is not to receive any remuneration for the job. But A has a duty to repay to B any expenses incurred through him in creation the ring. In cases of non-gratuitous bailments (where the bailee is to receive remuneration). bailor has a duty to bear

extraordinary expenses, borne through the bailed. for the purposes of bailment. Though, the bailor is not to bear ordinary or usual expenses. For instance, if a horse is lent for a journey, the expenses for feeding the horse would be payable through the bailee. But, if the horse becomes sick and expenses have to be incurred, or if the horse is stolen and expenses are incurred for recovery. the bailor should pay those expenses.

- Duty to indemnify the bailee: It is the duty of the bailor to indemnify the bailee, for any loss which the bailee may suffer because of the bailor's title being defective. The cause for this is that the bailor was not entitled to create the bailment or to receive back the goods bailed or to provide directions concerning the goods bailed. For instance, A asks his friend B to provide him cycle for one hour. B instead of his own cycle provides C's cycle to A. While A was riding, the true owner of the cycle catches A and surrenders him to police custody. A is entitled to recover from B all costs, which A had to pay in getting out of this situation
- Duty to bear risks: It is the duty of bailor to bear the risk of loss, deterioration, and destruction, of the things bailed, provided the bailee has taken reasonable care to protect the goods from loss etc.
- Duty to receive back the goods: It is the duty of the bailor that when the bailee, in accordance with the conditions of bailment, returns the goods to him. the bailor should receive them. If the bailor, without any reasonable cause, refuses to take the goods back, when they are offered at a proper time and at a proper lay, the bailee can claim compensation from the bailor for all necessary and incidental expenses, which the bailee undertakes to stay and protect the goods.

DUTIES OF BAILEE

Duty to take Reasonable Care of the Goods Bailed

Section 151 of the Indian Contract Act lays down the degree of care, which a bailee should take, in respect of goods bailed to him. The bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under alike circumstances, take of his own goods of the similar bulk, excellence, and value as the goods bailed. The average of care is similar whether the bailment is gratuitous or for reward. So a bailee is liable when the goods suffer loss due to the negligence on the part of bailee.

Though, under Section 152 of the Act, the average of care of ordinary prudent man can be increased through entering into a contract, flanked by the bailor and the bailee. In that situation the bailee, in order to save himself from any liability, would be bound to take as much care, as provided through the conditions of contract. In the absence of any such contract, if the bailee has taken care as an ordinary prudent man of the goods bailed, he is not responsible for the loss, destruction, or deterioration of the goods bailed. To take an instance, if a diamond ring is kept through its owner A for safe custody with another person B and B is not to receive any reward for it. the bailee should stay it locked in an iron safe, or some other safe lay but not stay it in his lumber room, basically because the bailment is gratuitous. Alike, if a cow is delivered for safe custody it is enough if it is kept in the backyard properly enclosed and even if it is for reward, no one would expect it to be kept in the drawing room. If the goods get stolen, lost, or otherwise destroyed, even after the bailee has taken reasonably good care, the bailee would not be liable for this loss. The bailor would have to bear this lass.

Not to Create Any Unauthorized Use of Goods

The bailee is under a duty to use the bailed goods in accordance with the conditions of bailment. If bailee does any act with regard to the goods

bailed, which is not in accordance with the conditions of bailment, the contract is voidable at the option of the bailor. Besides it, the bailee is liable to compensate the bailor for any damage caused to the goods. through an inconsistent use of the goods bailed. If he creates unauthorized use of goods, bailee would not be saved from his liability even if he has taken reasonable care of the ordinary prudent man. For instance, A lends his car to B to be taken to Delhi from Hyderabad. The car was to be driven through B himself. B takes beside with him a friend C, who has been driving his car for the last 10 years. B instead of going to Delhi goes to Calcutta. The contract becomes voidable at the option of the bailor. On method to Calcutta, B allows C to drive the car. Inspite of the information that C, in accordance with the directions of B, drives the carat a very slow speed, an accident takes lay and the car is damaged. A is entitled to be compensated for the loss.

Duty not to Mix Bailor's Goods with his Own Goods

After that duty of the bailee is to stay the goods of the bailor separate from his own. Sections 155 to 157 of the Act lay down this duty in the following methods:

- If the bailee, with the consent of the bailor, mixes the goods of the bailor with his own goods, the bailor and the bailee shall have an interest, in proportion to their respective shares, in the mixture therefore produced (Section 155.);
- If the bailee, without the consent of the bailor, mixes the goods of the bailor with his goods, and the goods can be a separated or divided, the property in the goods remnants in the parties respectively; but the bailee is bound to bear the expense of separation or division, and any damages arising from the mixture (Section 156). For instance, A bails 100 bales of cotton marked with a scrupulous spot to B. B, without A's consent, mixes these 100 bales with other bales of his own, bearing a

dissimilar spot, A is entitled to have his 100 bales returned, and B is bound to bear all expenses incurred in the separation of the bales, and any other incidental damage.

- If the bailee, without the consent of the bailor, mixes the goods of the bailor with his own goods, in such a manner that it is impossible to separate the goods bailed from the other goods and deliver them back, the bailor is entitled to be compensated through the bailee for the loss of the goods (Section 157). A bails a barrel of cape flour worth Rs. 50 to B. B without A's consent mixes the flour with country flour of his own, worth Rs. 20 a barrel. B necessity compensates A for the loss of his flour. Where a bailee mixed his own goods with those of the bailor and when ordered to return the goods of the bailor he offered to return the goods without sorting them out. It was held that the bailor was entitled to refuse to take delivery in toto and claim compensation for loss or damage.

Duty not to Set up Adverse Title

The bailee is duty bound not to do any act which is inconsistent which the title of the bailor. He should not set up his own title or the title of a third party on the goods bailed to him.

Duty to Return the Goods

It is the duty of the bailee to return or to deliver the goods just as to the directions of bailor, without demand, on the expiry of the time fixed or when the purpose is accomplished. If he does not return or deliver as directed through the bailor, or tender the goods at the proper time, he becomes liable to the bailor for any loss, destruction, or deterioration of the goods from that

time. He is liable even without his negligence. For instance, a book binder kept books beyond the time allowed to him for binding, and they were lost in an accidental fire, the binder is liable. If though, the bailment is gratuitous, then the bailee will have to return the goods loaned, at any time on demand through the bailor, even though the goods were lent for a specified time or purpose. But if on the faith of such loan made for a specified time or purpose, the borrower has acted in such a manner that the return of the thing lent before the time agreed upon would cause him loss exceeding the benefit actually derived through him from the loan the lender necessity, if he compels the return, indemnify the borrower for the amount in which the loss so occasioned exceeds the benefit so derived.

Duty to Return Accretions to the Goods

In the absence of any contract to the contrary, the bailee necessity deliver to the bailor, or just as to his directions, any augment or profit which have accrued from the goods bailed. For instance, A leaves a cow in the custody of B to be taken care of. The cow has a calf. B is bound to deliver the calf as well as the cow to A.

RIGHTS OF BAILOR

A bailor has the following rights.

- Enforcement of bailee's duties: You have presently now read the duties of the bailee. Duties of the bailee are the rights of the bailor. For instance, when the bailee returns the goods bailed, he should also return all natural accretions to the goads. This is a duty of the bailee and it is the right of the bailor to receive all natural accretions in the goods baited, when the goods are returned to him.

- Right to claim damages: It is an inherent right of the bailor to claim damages for any loss that might have been caused to the goods bailed, due to the bailee's negligence (Section 151).
- Right to avoid the contract: If the bailee does any act, in respect of the goods bailed, which is inconsistent with the conditions of bailment, the bailor has a right to avoid the contract. For instance, A lends his car to B for B s personal use. B starts by the car as a taxi. A can avoid the contract (Section 153).
- Right to claim compensation: If any damage is 'caused to the goods bailed because of the unauthorized use of the goods, the bailor has a right to claim compensation from the bailee. In the similar method the bailor has a right to claim compensation, if some loss is caused to the goods bailed, due to unauthorized mixing through bailee, of bailee's own goods with the goods of the bailor (Sections 154. 155 and 156).
- Right to demand return of goods: It is a sight of the bailor to compel the bailee, to return the goods bailed, when the time of bailment has expired or when that purpose for which the goods were bailed has been accomplished.

You have presently now read that in the case of a gratuitous bailment, even if the goods have been bailed for a fixed time or for a fixed purpose, the bailor has a right to compel the bailee to return them, before the agreed time.

RIGHT OF BAILOR AND BAILEE AGAINST WRONGDOER

If a third person wrongfully deprives the bailee of the use or possession of the goods bailed, or does them any injury, the bailee is entitled to use such remedies as the owner might have used in the like case if no bailment had been made; and either the bailor or the bailee may bring a suit against a third person for such deprivation or injury. Section 180 of the Act enables a bailee to sue any person who has wrongfully deprived him of the use or possession of

the goods bailed or has done them an injury. It says: If a third person wrongfully deprives the bailee of the use of possession of the goods bailed, or does them any injury, the bailee is entitled to use such remedies as the owner might have used is the like case if no bailment had been made; and either the bailor or the bailee may bring a suit against a third person for such deprivation or injury.

Section 181 gives for apportionment of the relief obtained through the bailee and reads: Whatever is obtained through method of relief or compensation in any such suit shall, as flanked by the bailor and the bailee, be dealt with just as to their respective interests. For instance, A, forcefully takes possession of a color T. V. from B's repair shop. Now either the owner of the T.V. or B may sue A. If B files the suit, he shall hand in excess of the amount received, after deducting his repair charges, to the owner of the T.V.

FINDER OF GOODS

A person who discovers some goods, which do not belong to him, is described, finder of goods. It is his duty to discover out the actual owner and surrender the goods to him. He has no right to sue the owner for compensation for trouble and expenses voluntarily incurred through him, in finding the owner and in preserving the goods establish. But he has a right to retain the goods against the owner until he receives such compensation from the owner. If the owner has offered some specific award on the lost goods, the finder may sue the owner for the award and till then can exercise his right to lien in excess of the goods.

As against every one save the true owner, the ownership of goods establish in a public lay, vests in the finder. Therefore, a person who picks upon the floor of a shop, a packet of bank notes accidentally dropped through a stranger, is entitled to the notes, as against the whole world except the true owner.

Rights of a Finder of Goods

Rights of a finder of goods are as follows:

- Right of lien: A finder of goods has the right to stay the goods in his possession till he is paid his expenses. He can exercise the right of lien against the goods establish. This right is accessible against the true owner until the finder of goods receives compensation for expenses and trouble incurred through him is finding out the true owner and in preserving the goods establish. Though, he has no right to sue the real owner for such compensation.
- Right to sue for reward: If the true owner of goods has declared some award for the return of lost goods, the finder can sue the owner for such award. He will have the right of lien, in excess of the goods till he receives the award.
- Right of sale: A finder of goods has a right to sell the goods establish through him under. the following circumstances: where the owner cannot, with reasonable diligence, be establish and if establish, refuses to pay the lawful charges of finder of goods, or the goods establish are such as is commonly the subject of sale, or the thing is in danger of perishing or of losing the greater part of their value, or when the lawful charges of the finder for preservation and finding out the owner, amount to two-thirds of the value of the thing.

Duties of a Finder of Goods

Under Section 71 of the Contract Act, a finder of goods has similar duties with regards the goods establish, as that of a bailee. Hence,

- The finder should take reasonable care of the goods establish.

- He should not put the goods for his personal use.
- He should not mix the goods establish with his own goods.
- It is the duty of the finder of goods to discover the real owner of the goods and then to entrust the goods to him. For instance, if at a birthday party, a guest discovers a gold ring and he tells the host and few other guests in relation to the it, he has performed his duty to discover the owner. If he is not able to discover the owner he can stay the ring as bailee.

TERMINATION OF BAILMENT

A contract of bailment comes to an end under the following cases:

- On the expiry of fixed 'era: If the goods are bailed for a fixed time, the bailment is terminated at the end of that era.
- On the fulfillment of the substance: If the goods are bailed for some specific purpose or purposes, the bailment is terminated on fulfilling the substance.
- Inconsistent use of goods bailed: If the bailee uses the goods in contravention of the conditions of bailment, the bailor may terminate the bailment even before the term of bailment
- Destruction of the subject matter: A bailment is terminated if the subject matter of the bailment is destroyed or because of some change in the nature of goods bailed if the goods become incapable of being used for bailment.
- Termination of gratuitous bailment: As you have already read, a gratuitous bailment can be terminated through the bailor at any time even though the bailment was for a fixed era or purpose. But in such a case, the loss to be suffered through the bailee from such premature termination should not exceed the benefit he had derived from the bailment. If the loss exceeds the benefit, the bailor shall indemnify the bailee.

- Death: A gratuitous bailment is terminated through the death of either the bailor or the bailee.

MEANING OF PAWN OR PLEDGE

Pawn or Pledge is a special type of bailment where a movable thing is bailed as security for the repayment of a debt or for the performance of a promise. For instance, if you borrow rupees one hundred from B and stay your cycle with him as security for repayment, it is a contract of pledge. The person taking the loan is described the pledger or pawnor and the person with whom goods are pledged is described the pawnee. Ownership of the pledged goods does not pass to the pledgee. The common property remnants with the pledger but a "special property" in it passes to the pledgee. The special property is a right to the possession of the articles beside with the power of sale on default. Delivery of the goods pawned is a necessary element in the creation of a pawn. The property pledged should be delivered to the pawnee. Therefore, where the producer of a film borrowed a sum of money from a financier-distributor and agreed to deliver the final prints of the film when ready, the agreement was held not to amount to a pledge, there being no actual transfer of possession. Delivery of possession may be actual or constructive. Delivery of the key of the godown where the goods are stored is an instance of constructive delivery. Where the goods are in the possession of a third person, who, on the directions of the pledger, consents to hold them on the pledgee's behalf, that is enough delivery. A railway receipt is a document of title of the goods and a pledge of the receipt operates as a pledge of the goods.

WHO MAY PLEDGE

Any of the following persons may create a valid pledge:

- The owner, or his authorized agent, or
- One of the many co-owners, who is in the sole possession of goods, with the consent of other owners, or

- A mercantile agent, who is in possession of the goods with the consent of real owner, or
- A person in possession under a voidable contract, before the contract is rescinded, or
- A seller, who is in possession of goods after sale or a buyer who has obtained possession of the goods before sale, or
- A person who has a limited interest in the property. In such a case the pawn is valid only to the extent of such interest.

PLEDGE AND BAILMENT

Pawn and bailment have several similarities. In both the cases only the movable goods are delivered with the condition that the goods shall be delivered back after the purpose of contract is in excess of or after the expiry of stipulated time. Both pawn and bailment contracts are created through agreement flanked by the parties,

Though, pawn differs from bailment in the sense that pawn is bailment of goods for a specific purpose i.e., repayment of a debt or performance of a duty. Whereas, the bailment is for a purpose of any type. Secondly, the pawnee cannot use the goods pawned, but in bailment the bailee use the goads bailed if the conditions of bailment so give. Thirdly, pawnee has aright to sell the goods, pledged with him after giving notice to pawnor, in case of default through the pawnor to repay the debt, whereas bailee may either retain the goods or sue bailor for his dues.

PLEDGE AND HYPOTHECATION

Both pledge and hypothecation are created through an agreement flanked by the parties. In both, movable property is delivered as a security for repayment of loan or for the performance of a promise. The variation in hypothecation and pledge is that, that in hypothecation the debtor continues to enjoy the possession of goods. The debtor has a right to deal in the goods but

only subject to the conditions of contract. He has to send to the creditor, details of property hypothecated. The creditor, in hypothecation, has a right to inspect the goods, at his convenience, whereas, in case of pledge, the pawnor loses the possession of the property as well as his rights to deal in the property pledged.

RIGHTS OF PAWNEE

As you already know pledge is an extension of bailment, so the pawnor and pawnee have approximately the similar rights and duties as those of the bailor and bailee.

Right of Retainer

The pawnee has right to retain the pledged goods till his payments are made (Sections 173 and 174). He can retain the goods for the following payments:

- For the payment of the debt or performance of the promise,
- Interest on the debt, and
- For all necessary expenses incurred through him in respect of the possession or for the preservation of the pledged goods. This right of the pawnee to retain the pledged goods till he is paid, is recognized as pawnee's right of scrupulous lien, In the absence of a contrary contract, the pawnee cannot retain the goods pledged for any debt or promise other than the debt or promise for which the goods are pledged. Though, in the absence of any thing to the contrary, such a contract shall be presumed when subsequent advances are made without any further security. If fresh security is provided for the fresh advance, this presumption will not apply.

Right to Extraordinary Expenses (Sec. 175)

The pawnee is entitled to receive from the pawnor extraordinary expenses incurred through him for the preservation of the goods pledged. This right does not entitle the pawnee to retain the goods for recovery of such expenses, though, he can sue the pawnor to pay such amount.

Right to Sale (Sec. 176)

Upon a default being made through the pawnor in the payment of the debt or performance of the promise, the pawnee gets two separate rights. Firstly, the pawnee may bring a suit against the pawnor for the recovery of the due amount or for the performance of the promised duty and in addition to it he may retain the goods as a collateral security. Secondly, he may sell the goods pledged but only after giving reasonable notice of the planned sale, to the pawnor.

If the proceeds of such sale are less than the amount due in respect of the debt or promise, the pawnor is still liable to pay the balance, If the proceeds of the sale are greater than the amount so due, the pawnee shall pay in excess of the surplus, to the pawnor. Further the pawnee cannot sell the goods to himself. If he does so the sale is void and the pawnor can take back the goods after paying the amount due.

Right against the True Owner of Goods (Sec. 178 A)

When the pawnor has acquired, possession of pledged goods, under a voidable contract, but the contract has not been rescinded, at the time of pledge, the pawnee acquires a good title to the goods, even against the true

owner, give! the pawnee had no notice of the pawnor's defect in title and he acts in good faith.

DUTIES OF PAWNEE

A pawnee has the following duties:

- Duty to take reasonable care of the pledged goods.
- Duty not to create unauthorized use of goods pledged.
- Duty to return the goods when the debt has been repaid or the promise has been performed.
- Duty not to mix his own goods with the goods pledged.
- Duty not to do any act which is inconsistent with the conditions of pledge.
- Duty to deliver augment(if any), to the goods pledged.

RIGHTS AND DUTIES OF PAWNOR

Rights of Pawnor

If a time is stipulated for the payment of the debt, or performance of the promise, for which the pledge is made, and the pawnor creates default in payment of the debt or performance of the promise at the stipulated time, he may redeem the goods pledged at any subsequent time before their actual sale; but he necessity, in that case, pay in addition, any expenses which have arisen from his default. Besides this, all the duties of a pawnee are the rights of a pawnor and so he has the right to get pawnee's duties duly enforced.

Duties of Pawnor

Following are the significant duties of a pawnor:

- It is the duty of pawnor to comply with the conditions of pledge and repay the debt on the stipulated date or to perform the promise at the stipulated time.

- It is the duty of pawnor to compensate the pawnee for any extraordinary expenses incurred through him for preserving the goods pawned.

PLEDGE THROUGH NON-OWNERS

As you know that normally only the owner of goods can pledge them and that no one can pass a better title to the goods than what he himself has. But in order. to facilitate mercantile transactions, the law has recognized sure exceptions. These exceptions are for bonafide pledges made through those persons who are not the actual owners of the goods, but in whose possession the goods have been left. You will now read those situations in which a non-owner too can create a valid pledge of the goods.

Pledge through a Mercantile Agent

Where a mercantile agent is, with the consent of the owner, in possession of goods or, the documents of title to goods, any pledge made through him, when acting in the ordinary course of business of a mercantile agent, shall be valid, provided that the pawnee acts in good faith and has, at the time of pledge, no notice of the information that the agent has no power to pledge. The necessary circumstances of validity under the section are as follows:

- The person pledging the goods necessity be a mercantile agent,
- Mercantile agent necessity be in possession either of the goods or the documents of title to goods,
- Such possession necessity be with the consent of the owner. If possession has been obtained dishonestly or through a trick, a valid pledge cannot be effected,

- Pledge necessity have been made through the mercantile agent, when acting in the ordinary course of business of a mercantile agent,
- The pledgee necessity act in good faith; and
- The pledgee should have no notice of the pledger's defect of title. If the pledgee knows that the pledger has a defective title, the pledge will not be valid.

Pledge through Person in Possession under Voidable Contract

You have already read under earlier units that for the formation of a contract, the consent of parties should be free, i.e., the consent necessity not have been caused because of coercion, misrepresentation, fraud, undue power, or mistake or because of any of them. If the consent is caused because of any of them, such contract is voidable under Section 19 or 19 A of the Indian Contract Act, at the option of person, where consent was so obtained. Section 178 A of the Contract Act gives that where goods are pledged through a person who has obtained their possession under a voidable contract, the pledge is valid, provided that the contract has not been rescinded at the time of the pledge and the pledgee has acted in good faith and without notice of the pledger's defect of title.

Pledge where Pledger has only a Limited Interest

Where the pawner is not the absolute owner of the goods, but has only a limited interest and he pawns it, the pledge is valid to the extent of that interest. A finder of goods, a mortgagee or a person who has lien in excess of the goods, may create a valid pledge of such goods, to the extent of his interest in the goods. For instance, A discovers a defective watch lying on the road. He picks it up, gets it repaired and pays Rs. 50 for the repairs Later on he pledges

the watch for Rs. 25. The true owner can recover the watch only on paying Rs. 50 to the pledgee.

Pledge through a Co-owner in Possession

Where the goods are owned through several persons and with the consent of other owners, the goods are left in the possession of one of the co-owners. Such a co-owner may create a valid pledge of the goods in his possession.

Pledge through Seller or Buyer in Possession

A seller, in whose possession, the goods have been left after sale or a buyer who with the consent of the seller, obtains possession of the goods, before sale, can create a valid pledge, provided the pawnee acts in good faith and he has no knowledge of the defect in title of the pawnor. For instance, A buys a cycle from B. But leaves the cycle with the seller. B then pledges the cycle with C, who does not know of sale to B, and acted in good faith. This is valid pledge.

REVIEW QUESTIONS

- To make a valid bailment is it essential that the goods necessity be transferred physically from the bailor to the bailee?
- Describe any three duties of a bailor.
- Describe any four rights of a bailee.
- Describe the right of retainer of a pawnee.

CHAPTER 11

AGENCY

STRUCTURE

- Learning objectives
- What is a contract of agency?
- Variation flanked by agent, servant and self-governing contractor
- Agency connection flanked by husband and wife
- Classification of mediators
- Scope and extent of power
- Delegation of power through agent
- Subagent and substituted agent
- Agency through ratification
- Rights of an agent
- Duties of an agent
- Personal liability of an agent
- Review questions

LEARNING OBJECTIVES

After learning this unit, you should be able to:

- Describe an agent; differentiate flanked by an agent, servant and an self-governing contractor and dissimilar classes of an agent.
- Explain how agency is created, and when an agent can delegate his power.
- Describe rights, duties, and extent of power of an agent.

WHAT IS A CONTRACT OF AGENCY?

Just as to Section 182 of the Contract Act An 'agent' is a person employed to do any act for another or to symbolize another in dealings with

third persons. The person for whom such act is done, or who is so represented, is described the 'principal'. Therefore , it is clear from the definition, that an agent is a connecting link flanked by his principal and third parties. Merely because one person provides advice to another in matters of business, the former does not become an agent of the latter. A company promoter's status is not that of an agent as he is acting for a company which is yet to approach into subsistence. A person employed through another to invest money on his behalf and to symbolize him with debtors is an agent within the meaning of Section 132. Since an agent is employed mainly to bring in relation to the 2 contract flanked by the principal and third parties, it is absolutely essential that both the principal and the third party necessity he persons capable of entering into a contract.

Who can Appoint an Agent?

Section 183 gives as follows: Any person who is of the age of majority just as to the law to which, he is subject, and who is of sound mind, stay employ an agent. Therefore a minor, or a person of unsound mind cannot act as a principal. Though the section prohibits a minor from appointing an agent, does not preclude the guardian of a minor from appointing an agent to the minor.

Who may be an Agent?

Section 184 of the Act gives answer to this question, which says As flanked by the principal and the third persons any person may become an agent, but no person who is not of the. age of majority and of sound mind can become an agent, so as to be. responsible to his principal just as to the provisions in that behalf herein contained. From this section it becomes clear

that "as flanked by the principal and third persons, any person may become an agent". Now the question arises, can a minor or a person of unsound mind also become an agent? The answer is yes. In view of the language used through this section even a minor or person of unsound mind is not debarred from being appointed as an agent. But as a rule of caution, they should not be appointed as agent because if the principal appoints them, he undertakes a great risk. Because whatever such incompetent person does shall be binding on the principal, but the principal shall not be able to proceed against the agent for his misconduct or negligence. Therefore , any person can be appointed as an agent. For instance, where A, a principal, entrusts to B, a minor a diamond ring worth Rs. 11,000 and instructs him not to sell the similar for credit or for any amount less than Rs. 9,000. If B sells the similar to C on credit for Rs. 5,000, this transaction will certainly be binding as flanked by A and C but A will have no right to claim damages as against B for his misconduct, since B happens to be a minor, But, if B were an adult, he would be liable to A for damages sustained due to his misconduct.

Consideration for Agency

As you know, consideration is essential for the validity of every contract, and consideration, in the sense of detriment, is enough to support a contract. Section 185 expressly gives that no consideration is necessary to make an agency. The information Chat the principal has agreed to be bound through the acts of the agent is a enough detriment to the principal. So, it is not necessary that there should be a separate consideration. For instance, when A employs B as his agent in as much as A's affairs are placed in B's hands, A suffers a detriment, and so, no further consideration in the form of remuneration need be present. Therefore , it means that there can be a gratuitous contract of agency and a gratuitous agent will be as much bound through his contract as a paid agent,

Constitution and Proof of Agency

The connection of principal and agent may be created through

- Express appointment through the principal, or through a person duly authorized through the principal to create such appointment;
- Through implication of law, from the conduct or situation of the parties or from the necessity of the case; or
- Through subsequent ratification through the principal of the acts, clone on his behalf.

As to proof of agency, the actual status of the parties necessity be determined with reference to all the circumstances and not merely with reference to the words used. The crucial test of the status of an agent is that his acts bind the principal.

VARIATION FLANKED BY AGENT, SERVANT AND SELF-GOVERNING CONTRACTOR

There is too much of parallel flanked by an agent and a servant as both are employed to act for and on behalf of principal. Though, there is a lot of variation flanked by the two. An agent has the power to make contractual connection flanked by the principal and a third party, but a servant ordinarily, has no such power. A servant usually serves only one master but an agent may work for many principals at the similar time. A servant is usually paid salary or wages, whereas an agent may be paid on commission foundation. Therefore , we discover that an agent is not a servant.

As for as the self-governing contractor is concerned he undertakes to produce a given result but in the actual execution he is not under the order or manage of the person for whom he does it, and may use his own discretion.

An agent work under the manage and supervision of the principal. An agent symbolizes his principal and can bind the principal through his acts but a contractor is self-governing and cannot bind his employer through his acts.

AGENCY CONNECTION FLANKED BY HUSBAND AND WIFE

Marriage does not of itself make the relation of agent and principal: A wife, in order to bind her husband through her dealings, necessity receive power from the husband either expressly or through implication from his conduct. The following principals may be noted in this connection:

- If husband and wife are livelihood jointly, and the wife is charged with the duty of looking after the Household, presumption is raised that she has got the power to pledge her husband's credit for necessaries. But this presumption may be rebutted in the following cases:
    - Where the wife is forbidden from purchasing anything on credit or from contracting debts;
    - Where the goods purchased on credit are not necessaries;
    - Where the wife is given enough money for purchasing necessaries, and forbidden from pledging his credit or where an adequate allowance is made to her, or she has means of her own, either in money or in earning capability;
    - Where the trader has been expressly warned not to provide credit to his wife.
- When the wife lives separately from the husband under justifiable circumstances, the husband would, in law, be liable to uphold her, and he would be bound to pay her bills for maintenance throughout that era. But if she is livelihood separately without any valid reasons, then she cannot pledge her husband's credit even for necessaries.

CLASSIFICATION OF MEDIATORS

Mediators are classified in many methods. From the point of view of power given to them, they can be divided into common mediators and special mediators. Common mediators have the power to act in all matters concerning a deal or profession, or of a scrupulous nature or to do some act in the ordinary course of his deal or profession. Special mediators have power only to act in a scrupulous transaction, for instance, when an agent is appointed to sell a car or sell a home. The power of a special agent is limited to that scrupulous act only and his power comes to an end when the work is in excess of, Therefore , the persons dealing with such agent are under an obligation to correctly ascertain from the principal the extent of his power. On the other hand, a common agent has the power to do all legal acts for the purpose of carrying on that deal or business, on behalf of his principal. It should be noted that unlike special agent, the power of a common agent is continuous unless it is terminated.

A common agent is not the similar thing as an universal agent, An universal agent can do all such things which the principal can lawfully do and delegate. He is authorized to transact all the business of his principal of every type. He has an unlimited power to bind the principal.

The mainly significant classification of mediators, though, is based on the nature of work performed through them. They can be classified as i) mercantile or commercial mediators, and ii) non-mercantile or non-commercial mediators. Mercantile mediators may be of many types, e.g., brokers, factors, auctioneers, del credere mediators; commission mediators, insurance mediators; bankers. Non-commercial mediators may be estate mediators home mediators, lawyers, election mediators, etc. Here we are mainly concerned with mercantile mediators who are explained below.

- Broker: A broker is one who creates bargains for another', and receives commission (brokerage) for so doing. He is an agent whose ordinary

course of business is to negotiate and create contracts for the sale and purchase of goods etc., of which he has neither possession nor manage. He acts in the name of his principal.

- Factor: A factor is a person who is entrusted with the possession of goods, and who has the power to buy, or sell or otherwise deal with the goods or merchandise, or to raise money on their security. A factor, usually, sells goods in his own name, he has a common lien on the goods.
- Auctioneer: An auctioneer is an agent who is entrusted with the possession of goods for sale to the highest bidder at a public auction. He has the power to deliver the goods on receipt of the price. He can sue for the price in his own name, Though, unlike a factor, he has only a scrupulous on the goods for his charges.
- Del Credere Agent: A del credere agent is one, who in consideration of an extra remuneration described the Del Credere Commission, guarantees to his principal that the third person with whom he enters into contracts shall perform their obligations. Therefore such an agent guarantees to his principal the payment of the price.
- Commission Agent: A mercantile agent who buys and sells goods on behalf of his principal and receives commission for his services. Actually, it is not a dissimilar category agent because brokers, factors may also act as commission, agent.
- Banker: Usually, the connection flanked by a banker and customer is that of a creditor anti debtor, Though, when he collects cheques or buys or sells securities on behalf of his client, he acts as an agent of the customer. A banker has the right of common lien in respect of the common balance of explanation.

SCOPE AND EXTENT OF POWER

An agent has the power to do all things necessary for carrying out that scrupulous purpose fur which he has been appointed. When a person 3s held out as an agent for a scrupulous purpose or business, persons dealing with him are entitled to presume that he has the power to do all such acts as are necessary or incidental to such a business. Such power is described apparent or ostensible power of the agent, as distinguished from actual or real power. Actual power is created through agreements to which the principal and agent alone are parties.

It is ostensible power that determines the scope of an agent's power. The ostensible power of an agent may be curtailed through his principal. The Indian law is laid down in Sections 188 and 237 as follows:

- An agent having an power to do an act has power to do every lawful thing which is necessary in order to do such act; An agent having an power to carry on a business has power to do ever lawful thing necessary for the purpose, or usually done in the course of conducting such business (Section 188). For instance, A employs B as his agent to carry on his business of a shipbuilder. B may purchase timber and other materials, and hire workmen for the purpose of carrying on the business.
- "When an agent has, without power, done acts or incurred obligations to third persons on behalf of his principal, the obligations to third persons on behalf of his principal, the principal is bound through such acts or obligations if he has through his words or conduct induced such third persons to consider that such acts and obligutions were within the scope of the agent’s power” (Section 237). For instance, A consigns goods to B for sale, and provides him instructions not to sell below a fixed price. C, being ignorant of B’s instructions enters into a contract with B to buy the goods at a price below the reserved price. A is bound through the contract.

- Though the scope of power of an agent under normal, circumstances is defined in Section 188, still, in cases of emergency he would have superior powers and Section 189 so enacts as fallows: " An agent has power, in an emergency, to do all such acts for the purpose of protecting his principal from loss as would be done through a person of ordinary prudence, in his own case, under alike circumstances". In such cases the power is deemed to be conferred through what has been as agency through necessity. In Sims & Co. v. Midland Rail Co,, where butter which was in danger of becoming useless owing to delay in transit was sold through the railway company for the best accessible price and it was establish that it was impossible to obtain instructions of the principal, the sale was held binding upon the principal.

DELEGATION OF POWER THROUGH AGENT

An agent, being himself a person who has got delegated power from the principal, cannot further delegate except with the permission of the principal. This is expressed through the Latin maxim 'delegatus non potest delegate': a delegate cannot further delegate, i.e., one cannot delegate that which one has himself undertaken to do. Agency is a matter of trust and confidence and an agent is appointed only because the principal has got full confidence in his integrity or skill. So, the agent cannot without the permission of the principal, delegate his power and inquire some other person to do the work. To this rule the following are the exceptions:

- Where the duties of the agent do not require any ability or discretion, and can satisfactorily be performed through any one;
- Where the custom of the deal permits delegation;
- Where the principal knows that the agent intends to delegate;
- Where the nature of the business requires delegation;
- Where an emergency creates it necessary to delegate.

An agent cannot lawfully employ another to perform acts which he has expressly or impliedly undertaken to perform personally, unless through ordinary custom of deal a sub-agent may, or, from the nature of the agency, a sub-agent necessity be employed. A legal practitioner is permitted through the usage in the profession, to authorize any other practitioner to appear for him. But, in cases in which he has expressly undertaken to 'appear personally, he has no such right to delegate his power.

Sub-agency

Where an agent having power expressly or impliedly to delegate mis power appoints another person to act in the matter of the agency, such other person is described a 'sub-agent', provided he acts under the manage of the original agent; and a 'substituted agent, if the original agent drops out of the transaction and the newly appointed person carries on the business of the agency.

- Connection flanked by principal and sub-agent: You have seen that in sure circumstances an agent can appoint a sub-agent. In such cases the principal is bound through the acts of the sub-agent, since the sub-agent is not responsible to the principal but he is responsible for his acts to the original agent only. The principal cannot take action against sub-agent, except in cases of fraud or willful wrong. As flanked by the original agent and the sub-agent, the connection is that of the principal and agent.

In case the appointment of a sub-agent is not proper, the principal shall not be bound through the acts of the sub-agent. The original agent will, in such cases, be personally liable to both the principal as well as the third parties for

the acts of the sub-agent. In such cases, the sub-agent is not responsible to the principal for any of his acts.

SUBAGENT AND SUBSTITUTED AGENT

A sub-agent has been defined through Section 191 of the Indian Contract Act : "A sub-agent is a person employed through and acting under the manage of the original agent in the business of the agency)'. A substituted agent is defined through Section 194 therefore "Where an agent, holding an express or implied power to name another person to act for the principal in the business of agency, has named another person accordingly, such person is not a sub-agent, but an agent of the principal for such part of the business of the agency as is entrusted to him".

Therefore the main variation flanked by the two is that an agent not only appoints a sub-agent but the sub-agent works under his manage, and the agent himself is liable for the acts of the sub-agent. But in case of substituted agent. the duty of the agent ends with appointing or naming a scrupulous person for being appointed as a "substituted agent". The moment the substituted agent is appointed. privities of contract is recognized flanked by him and the principal, and the original agent disappears from the scene altogether. The care that ought to be exercised through an agent in selecting a substituted agent is that which a man of ordinary prudence would exercise in his own case.

AGENCY THROUGH RATIFICATION

Sometimes a person may act for another person without any express or implied power from that other person. The person in whose name the act has been done may either disown the act of that person or may approve the actions. This act of affirmation through the person in whose name the act has been done is recognized as "ratification". For instance, A may act as B's agent

although A has no prior power from B. When B comes to recognized of it, he may either disown the acts of A or may subsequently accept them. The effect of ratifying the unauthorized act is that it spaces the parties in that location in which they would have been if the agent had principal's power at the time he made the contract. Likewise, where an agent exceeds his power, the principal may either reject it or accept it. If the principal accepts the work done through agent, he will be liable for the acts of the agent. For instance, A appointed B as his agent to buy wheat for him. In addition to buying wheat, B buys 10 bags of rice for A. 'Afterwards, A agrees to take the delivery of rice as well. A is liable to pay the price of rice. This is a case of ratification of unauthorized acts.

Section 196 of the Contract Act gives where ore done through one person on behalf of another acts, but without his knowledge or power, he may elect to ratify or to disown such acts. If he ratifies them, the similar effects will follow as if they have been performed through his power. Further, Section 197 gives that ratification may be express or may be implied in the conduct of the person on whose behalf the acts are done. For instance, A, without power, buys goods for B, Later on, B sells those goods to C and deposits the sale proceeds in his bank explanation. B’s conduct implies a ratification of the purchase made through A.

Here you should note that ratification relates back to the date when the act was done through the agent, i.e., it tantamount to prior power. Hence the connection of agency shall be deemed to have approach into subsistence from the time the agent first acted and not from the time when the principal ratified the act. For instance, in Bolton Partners v. Lambert the managing director of a company, without prior power from the company, but acting on behalf of the company, accepted an offer made through B, B, later on, revoked the offer but the company ratified managing director's acceptance.

It was held that because ratification relates back to the time of acceptance through managing director, B is bound through ratification and he cannot revoke his offer. Essentials of a Valid Ratification: You have learnt that an agency may be created through ratification. Though, for a valid ratification, following circumstances should be fulfilled:

- The agent act on behalf of another person who is identifiable! When the agent enters into a contract, he should expressly contract as an agent. Further, the contract should specify an identifiable person as principal. Distant instance. A on behalf of himself to be an agent of B, but without power or knowledge of B, entered into a contract with C to buy 100 bales of cotton on behalf of B, Subsequently, the prices of cotton bales go up. B on becoming aware of the transaction purported to have been done on his behalf, ratifies it. C refuses to perform the contract. B can compel C to perform the contract. If the purported agent does not mention that he is acting on behalf of another person, although in his mind he might be contemplating to act on behalf of the purported principal, such act cannot be ratified. It follows that acts done through the agent in his own name cannot be ratified later on.
- Subsistence of the principal: For valid ratification it is necessary that the principal should be in subsistence at the time of when the act is done in his name. It is for this cause that when the promoters of a new company enters contracts for the company which has not yet approach into subsistence, the company cannot ratify such contracts, when contract was entered into, the company (principal) was not in subsistence.
- Principal should be competent to contract at the time when the act was done as well as at the time of ratification: For a valid ratification it is necessary that the principal should be competent to contract when the contract was made and also at the time of ratification. You would recall that a minor is nor competent to contract, hence on attaining

majority he cannot ratify the contracts made on his behalf throughout his minority.

- Full knowledge of all relevant facts: No valid ratification can be made through a person whose knowledge of the facts of the case is materially defective (Section 198). For valid ratification It is necessary that the ratifier should have the full knowledge of the acts of the case. For instance, A employs B to take a home on reasonable rent in Delhi, B lets out his own home at a rent which is much higher than the prevailing rentals in that region. A starts livelihood in the home. Later on, A comes to know that the home belonged to B. A's ratification is not binding upon himself.
- Within reasonable time: The ratification necessity be done without any unreasonable delay. If the ratification is not done within a reasonable time, it will not be binding.
- Ratification mainly he of whole transactions: The ratification necessity be made for the whole transaction. A unifier cannot ratify a part which is beneficial to him and reject the rest. When a person ratifies a part of the unauthorized transaction, it is treated as the ratification of whole transaction (Section 199).
- No damage to third party: Section 200 puts a restriction on the power of the ratifier. It says, An act done through one person on behalf of another, without such other person's power, which if done with power, would have the effect of subjecting a third person, to damages, or of terminating any right or interest of a third person, cannot, through ratification, he made to have such effect. So any ratification which might cause any damage to third party or terminate any right or interest of a third party cannot be ratified.

RIGHTS OF AN AGENT

- Right to Receive Remuneration: You know that an agent is a person employed to do any act for another, and for his services, he is entitled to receive remuneration. The amount of remuneration shall be such as may be fixed through the conditions of agency. In case the remuneration has not been fixed, the agent is entitled to receive a reasonable remuneration. In the absence of a contract to the contrary, agent's tight to receive remuneration would accrue only on the completion of the work. An agent is entitled for his remuneration when he has done what he had undertaken to do, even though the contract is not completed. For instance, A was appointed as an agent through an export organisation to secure export orders. A secured some orders for the firm, but firm was dissolved. A is entitled to his commission, though the orders secured through him have not been executed. Section 219 gives that in the absence of any special contract, payment for the performance of any act is not due to the agent until the completion of such act, bur an agent may detain money received through him on explanation of goods sold although the whole of the goods consigned to him for sale may not have been sold, or although the sale may not be actually complete. So the pertinent question arises, when is the act complete? This is a question of information depending upon the facts and circumstances of each case. But it is necessary that the transaction (act) should be the direct or indirect result of efforts of the agent. For instance, A, a factory owner, employs a broker B, to arrange some raw material for A's factory. B introduced the supplier of that taw material to the supplier demanded some advance money which A was unable to pay. Later on, A directly contacted the supplier and entered into a contract for supply of raw material. B is entitled to his remuneration. Though, under Section 220, an agent who is guilty of misconduct in the business of agency, is not entitled to any remuneration in respect of that part of the business, which he has mis-mannered. For instance, A

employs B to recover Rs. 20,000 from C and to invest the money in good securities, B recovers the money from C, invests Rs. 15,000 in good securities and Rs. 5,000 in securities which he ought to have recognized to be bad, whereby A loses Rs. 1,000. Here B is entitled to remuneration for recovering Rs. 20,000 and for investing Rs. 15,000. He is not entitled to receive any remuneration for investing Rs. 5,000 and he necessity create good the loss of Rs. 1,000 to A.

- Right of Retainer: Section 217 of the Contract Act empowers the agent to retain, out of any sums received on explanation of the principal in the business of the agency for the following payments:
    - all moneys due to himself in respect of advance made,
    - in respect of expenses properly incurred through him in conducting such business, and
    - such remuneration as may be payable to him For acting as agent.
- Right of Lien: You have presently now noted that the agent may retain principal's money until his proper payments have been made. Agent has another right i.e., right to retain his principal's goods, papers and other movable or immovable properties received through him until he is paid or accounted for his commission, disbursements and service charges. This lien of the agent is the scrupulous lien. The right of lien has the following limitations:
    - This right is accessible to the agent if there is no contrary to the contract.
    - This right is accessible on those properties which have approach into agent's possession lawfully. If the agent obtains possession through unlawful means, say through misrepresentation, or without power from the principal, the agent cannot exercise lien.

- The lien is only a scrupulous lien, Through scrupulous lien we mean that the agent can detain only such goods in respect of which some remuneration is due.
- Right of lien can be exercised subject only to all rights and. equities of third parties against the principal. For instance, if the agent has sold sure goods belonging to his principal, he cannot refuse to deliver the goods to the buyer.
- Since the lien is a possessory right, it cannot be exercised once the possession is lost.

- Right to be Indemnified: Sections 222 and 223 grant right to indemnify to an agent against his principal for the consequences of all lawful acts done through the agent in performing his obligations. Section 222 gives, the employer of an agent is bound, to indemnify him against the consequences of all lawful acts done through such agent in exercise of the power conferred upon him. For instance, B at Singapore, under instructions from A of Calcutta contracts with C to deliver sure goods to him. A does not send the goods to B, and C sues B for breach of contract. B informs A of the suit, and A authorises him to defend the suit. B defends the suit, and is compelled to pay damages and costs, A is liable to B for such damages, costs, and expenses. Agent's right to be indemnified extends even for those acts which are apparently lawful but are in information unlawful or injurious to a third person. Though, the right to indemnify is not accessible against those acts which on the face of it are unlawful or are criminal in nature, even if there is an express or an implied promise to indemnify the agent against the consequences of that act. For instance, A employs B to put to fire C’s rising crop and agrees to indemnify B against all consequences of the act. B, accordingly put to fire, B's rising crop and is made to pay damages to C. A is not liable to indemnify B. Where one person employs another to do an act, which may cause an injury to

the rights of a third person and the agent does the act in good faith, the principal is liable to indemnify the agent. For instance, B at the request of A, sells goods in the possession of A, but which A had no right to dispose of. B does not know this, and hands in excess of the proceeds of the sale to A. Afterwards C, the true owner of the goods, sues B and recovers the value of goods and costs. A is liable to indemnify B for what he has been compelled to pay to C and for B's own expenses.

- Right to Compensation : The agent has the right to receive compensation for the injuries or losses suffered due to the principal's neglect or want of ability (Section 225). For instance, A employs B as a brick layer in structure a home, and puts up the scaffolding himself. The scaffolding is unskillfully put and B is, in consequence, hurt: A necessity pay compensation to B. It should though, be noted that if the injury is caused through the negligence of the agent himself, then he cannot claim any compensation.

DUTIES OF AN AGENT

Following are the statutory duties of the agent:

- Duty to Act Just as to the Instructions or Custom of Deal: Section 211 lays down that it is the duty of an agent to conduct the business of the agency strictly just as to the directions given through the principal. For instance, if an agent is asked through his principal to insure the goods, the agent failed to do so and the goods are destroyed through the fire. The agent is liable to compensate the principal for the loss. Though, when the principal has not given any directions, in that case the agent should conduct the business just as to the custom of the deal. For instance, B, a broker in whose business it is not the custom to sell goods on credit, sells goods of his principal on credit. Before creation the payment, the buyer becomes insolvent. The broker, B is liable to pay for the loss. When the agent acts otherwise, if any loss incurred,

the agent necessity create it good to the principal, and if any profit accrues, the agent necessity explanation for it. For instance, A, the principal, instructed his agent B to put sure goods in a scrupulous warehouse. Ignoring A's directions, B puts the goods in another equally safe warehouse. The goods were destroyed through fire without any negligence on the part of B. Here the agent was held liable to create good his principal's loss.

- Duty to Act with Reasonable Care and Ability: It is the duty of an agent to conduct the busies of the agency with reasonable care and ability. The degree of care and ability required from the agent depends upon the nature of business and circumstances of each case. For instance, A, livelihood in Bombay asked B at Delhi, to collect Rs. 10,000 from C. B collects the money and sends the amount through bank draft, placed in a letter sent through register post to A. B has done his duty as a man of ordinary prudence would have done in his own case. Though, if instead of sending the draft through registered post, B sends the draft through ordinary post, B would be responsible for acting negligently. The agent is required to act with reasonable diligence, to use ability as he possess and to compensate the principal in respect of the direct consequence of agent’s own neglect, want of ability or misconduct. For instance, A, an insurance broker, was employed through B to effect an insurance on a ship. A insured the ship but failed to see that 'usual clauses' are inserted in the policy. The ship was lost in storm. Due to omission of the 'usual clauses' in the policy, nothing could be recovered from the insurance company. A is liable to create good the loss suffered through B. It follows from the that the agent is not liable to compensate the principal in respect of loss or damage which are indirect or remotely caused through such neglect, want of ability, or misconduct.

- Duty to Render Accounts: An agent is bound to render proper accounts to his principal on demand and to pay overall sums received on principal's behalf subject to any lawful deduction for remuneration or expenses properly incurred through him.
- Duty to Communicate with the Principal: Section 214 enjoins an agent, in case of difficulty, to use all reasonable diligence in communicating with his principal, and in seeking to obtain his instructions.
- Not to Deal on His Own Explanation: An agent is not to deal on his own explanation in the business of agency, as no agent is permitted to put himself in the location where his interest conflicts with his duty. If an agent desires to deal on his own explanation in the business of agency, he necessity create a full and frank disclosure of all the material circumstances, which have approach to his knowledge on the subject, to the principal and obtain his consent. If, though, he fails to obtain such consent, and carries on the said business on his own explanation, or after giving the consent, the principal discovers that either any material facts has been dishonestly concealed from him through the agent to his interests, the principal has two options. He may (i) repudiate the transactions entered into through agent and disclaim all losses, or (ii) claim from the agent benefit resulting from the transaction. For instance, A directs B to sell his estate. B, on looking in excess of the estate before selling it, discovers a mine on the estate which is strange to A. B informs A that he wishes to buy the estate for himself, but conceals the detection of the mine. A on discovering that B knew of the mine at the time he bought the estate, may either repudiate, or adopt the sale at his option, Take another instance. A directs B, his agent, to buy a sure home for him. B tells A that the home cannot be bought and buys the home for himself. A may, on discovering that B has bought the home, compel him to sell it to A at the price he (B) gave for it.

- Not to Use Information Obtained in the Course of the Agency against the Principal: Where an agent has obtained information throughout the course of the agency, it is the duty of the agent not to use the similar prejudicially to the interests of the principal. Where an agent does create use of such information, the principal may restrain him from doing so through an injunction.
- Not to Set Up Adverse Title: Where an agent has obtained goods or property from the principal as an agent, it is his duty not to set up his own title or the title of a third person. In other words, the agent should not dispute the ownership of the principal.
- Not to Create Secret Profits: As you know that the connection of principal and agent is based on mutual confidence, it is the agent's duty not to create any secret profits in the business of agency. For instance, A appointed B, an auctioneer to sell sure goods belonging to him. B sold the goods to C, and received some secret commission from C in addition to the commission from A. It was held that B was bound to hand in excess of the secret commission to A.
- Duty to Exercise His Power Personally: Section 190 of the Act requires an agent to perform acts personally which he has expressly or impliedly undertaken to perform personally. In other words, an agent necessity not delegate the power given to him. Though, under sure circumstances, this power can be delegated.
- Duty on the Death or Insanity of the Principal: Section 209 requires that when an agency is terminated through the principal dying or becoming of unsound mind. the agent is bound to take, on behalf of the representatives of his late principal, all reasonable steps for the protection and preservation of the interests entrusted to him.

Rights and Duties of Principal towards Agent

As should be clear to you from what you have studied so distant that the rights of the principal are the duties of the agent and duties of the agent are the rights of the principal.

PERSONAL LIABILITY OF AN AGENT

Ordinarily in a contract of agency, an agent being a person employed to make connection flanked by his principal and the agent, the agent can neither enforce the contract personally nor is he personally liable on the contract unless there is a contract to the contrary gives. In the absence of any contract to that effect, an agent cannot personally enforce contracts entered into through trim on behalf of his principal, nor is he personally bound through them. Such a contract shall be presumed to exist in the following cases:

- Where the contract is made through an agent for the sale or purchase of goods for a merchant resident abroad;
- Where the agent does not disclose the name of his principal;
- Where the principal, though disclosed, cannot be sued.

Though, there are circumstances when the agent becomes personally liable. These are as follows:

- When the Agent Expressly Agrees: Sometimes the third party when contracting with an agent may specifically stipulate that the agent will be personally liable if the contract is not performed, in such a situation the agent will be personally liable. For instance, A, an agent entered into an agreement with B to grant a lease of a home. In the lease deed it was mentioned that A was acting as an agent of the owner of the home C. Though, in the subsequent portion of the lease deed it was provided that the agent would execute the lease. In this contract the

agent will be personally liable if the contract is not performed, although the home belonged to C. Likewise, auctioneer of property signing agreement of sale in their own name without qualification necessity be understood to contract personally and not as mediators.

- When Acting for a Foreign Principal: Where an agent enters into a contract for a foreign principal (a merchant residing abroad), the presumption is that the agent is personally liable for such contracts. This presumption came into subsistence because in earlier times it was hard to sue foreign principal, hence it became customary that when the agent into a contract on behalf of a foreign principal, the agent would be personally liable. But now because of changed atom sphere of international deal, although the rule still exists, but the agent do not undertake personal liability and the contracts are entered manifestly laying that the liability would be that of the principal if the contract is not performed.
- When Acting for an Undisclosed Principal: When a contract is made through an agent for an undisclosed principal, the agent is personally liable. The cause for it is that because the third party while creation the contract, relied upon the credit of the recognized agent and consequently, the agent becomes responsible for the transactions.
- Where the Principal though Exposed cannot be Sued: When the agent enters into a contract on behalf of a person who cannot be sued, as for instance, where the principal is a foreign sovereign or an ambassador, or a minor or a lunatic, the presumption is that the third party gave credit to the agent, hence the agent is personally liable upon the contract.
- When Principal is a Company which is yet to Approach into Subsistence: When the promoters of a company enter into any contract on behalf of a company not yet incorporated, the promoters are personally liable for the obligation they make through any contract

with any one. The cause for this is that the company, being not in subsistence at the time of formation of contract, cannot be sued.

- When Agent's Power is "Coupled with Interest”: Where an agent has a special interest in the subject-matter of the contract, his power is said to be coupled with interest. He is really a principal to the extent of his interest and may sue in his own name or be sued but only to the extent of his interest in the subject matter. For instance, M authorises N to sell his land and out of the sale proceeds to pay himself the debts due to him from M. N’s power is coupled with interest.
- When There is a Custom or Deal Usage: An agent may be held personally liable on contract entered through him, if there is some deal usage or custom, provided there is no contract to the contrary. For instance, in the business of stock exchange it is a custom that a broker is personally liable for the contracts entered into through him, so a jobber may hold the broker personally liable.
- Money Paid through Mistake or Fraud: When a person untruly symbolizes himself to be the authorized agent of another and thereby induces a third party to deal with him as such agent, or the agent exceeds his power, and the (alleged) principal does not ratify his acts, the alleged agent is personally liable to the third party and the third party may recover from him compensation in respect of any loss or damage suffered through them (Section 235).
- When He Enters into Contract in his Own Name: If an agent enters into contract with the third party in his own name i.e., without disclosing that he is contracting as an agent. For instance, A took a loan from B and executed a hundi in his favor. The hundi appeared to be drawn through a firm. A did not sign the hundi as agent of the firm nor did he disclose to B the name of the principal who was the proprietor of the firm. The agent was held personally liable on the hundi. A s you have already read in Section 233 in case where the

urgent is personally liable, a person dealing with him may either hold him or his principal or both of them liable.

REVIEW QUESTIONS

- WHAT IS A CONTRACT OF AGENCY?
- Describe an agent.
- What is agency through ratification?
- Ratification is tantamount to prior power'. Explain.
- Can an agent have the business dealing on his own explanation? If not, why?

CHAPTER 12

CARRIAGE OF GOODS

STRUCTURE

- Learning objectives
- Carriage through lam
- Carriage through rail
- Carriage through sea
- Carriage through air
- Review questions

LEARNING OBJECTIVES

After learning this unit, you should be able to:

- Describe a carrier and classify carriers.
- Describe the rights, duties and liabilities of a general carrier and the responsibilities and liabilities of railways as carriers of goods.
- Explain the several kinds of bill of lading and charter party.
- Describe the duties end liabilities of carriers through sea.

CARRIAGE THROUGH LAM

Goods are accepted through land either through road or through inland waterways or through railways. There are two laws dealing with coinage of goods through land. These are :

- The Carriers Act 1865
- The Indian Railways Act 1890

The Carriers Act 1865 deals with carriage of goods in excess of land and inland waterways and does not apply to carriage of passengers. The Indian Railways Act 1890 deals with carriage of goods through railways. First we

shall talk about the provisions of the Carriers Act 1865. The Indian Railways Act, 1890, which deals with carriage of goods through railways will be discussed later.

Classification of Carriers

Carriers are classified into two kinds:

- General carrier
- Private carrier

General Carrier

A general carrier, as defined under the Carriers Act, 1865, is any individual, firm or company (other than government) who transports goods, as a business, for money, in excess of land or inland waterways, without discrimination flanked by dissimilar consignors.

Features of a General Carrier

From this definition the following features of a general carrier emerge:-

- General carrier may be an individual, firm, or a company. The government is not incorporated in this definition. A post office is not a general carrier. Railways are not governed through the Carriers Act 1865 but through Indian Railways Act 1890.
- The general carrier should be occupied in the business of transporting goods, not passengers.
- The general carrier transports goods for hire, i.e., carry goods as a business for money, One who carries goods free of charge is described 'gratuitous carrier' and is not a general carrier. Likewise if ally one

carries goods or passengers occasionally and not as business is not a general carrier

- Goods may be transported overland or inland waterways, not through air.
- The general carrier is bound to carry goods of any person, who chooses to employ him for the purpose, without discrimination, provided that there is accommodation in the carnage. If he reserves the right to reject or refuse to carry goods, he is not a general carrier.

A general carrier, though, can refuse to canny the goods of any person in following cases:

- If there is no legroom or room accessible in his vehicle.
- If the goods are not of the kind he usually professes to carry.
- If the goods are of dangerous nature and he is put to some extraordinary risk.
- If the destination, to which the goods are to be accepted, is not on his normal route.
- If the goods have not been packed properly.
- If reasonable charges for hire are not paid.
- If the consignor refuses to disclose the nature of goods.

Private Carrier

A private carrier carries goods for selected persons on special conditions mutually agreed upon flanked by him and sender of goods. He has the discretion to accept or reject the offer to carry goods. He carries goods only occasionally and not as a regular business. He may carry the goods not for money.

Carriers as Bailee

As you know, a bailee is responsible only when the goods entrusted to him are lost or damaged due to his fault. A private carrier is not governed through the Carriers Act, 1865. His location is that of a bailee. He is governed through Indian Contract Act 1872. Though, carrier has to take care of goods as his own.

A general carrier, on the other hand, takes upon himself the responsibility of safe delivery of the goods. It is immaterial if the loss or damage is due to negligence of his or some one else. The general carrier is responsible even if goods are stolen or destroyed or damaged not because of his fault or if the goods are handed in excess of to a wrong person. Therefore you note that a private carrier is like a bailee and rules of Contract Act 1872 apply to him. If he is a general carrier then the Carriers Act, 1865 will apply. The rights, duties, and liabilities of a general carrier are governed through the Carriers Act 1865.

Rights of a General Carrier

The rights of a General Carrier are as follows:

- To get remuneration: He is entitled to the agreed remuneration or reasonable remuneration if the amount was not already agreed. If no remuneration is payable he is 'gratuitous carrier and not a general carrier.
- Lien on goods : He has a right of lien on goods accepted for his charges which can be enforced against the consignor or the consignee who has to pay his charges. He has a scrupulous lien in excess of the goods, He can refuse to deliver the goods unless Ids charges have been paid.

- Recover damages: He can recover damages from the consignor if goods are of a hazardous nature, or not properly packed and the carrier suffers injury there from. If the consignor discloses the nature of goods then damages cannot be recovered.
- Refuse to carry goods: He is not bound to carry goods of all kinds under all circumstances. There are sure circumstances where the general carrier can refuse to carry goods. This we have already discussed.
- Recover reasonable expenses: If the consignee refuses to take delivery of goods, he can recover reasonable expenses incurred through him. But he necessity take reasonable steps as are necessary under the circumstances.
- Limit his liability : He can limit his liability under sure circumstances through entering into a special contract with consignor.

Duties of a General Carrier

A general carrier has the following duties:

- To carry goods for every person who chooses to employ him.
- To carry goods safely. If goods are damaged he is responsible,
- To follow the agreed route or the customary and usual route if no route is agreed flanked by him and the consignor.
- To deliver the goods in time or within a reasonable time if no time is agreed upon.
- To deliver the goods just as to the instructions of the consignor. If the consignee refuses to take delivery of goods, the general carrier becomes a bailee.

Liabilities of a General Carrier

In order to determine the liabilities of a general carrier, goods may be classified into two kinds. These are ; a) Scheduled goods, b) Non scheduled goods. The liability of a general carrier depends upon whether the goods are "Scheduled goods" or "Non scheduled goods". Scheduled goods are goods as enumerated in the schedule of the General Carriers Act 1865, all other goods are recognized as “Non scheduled goods". Scheduled goods contain, inter nlia, gold and silver coins, ornaments, valuable stones, clocks and timepieces of any descriptions, bills, hundies, bank notes, maps, writings, paintings, photographs, sculptures, works of art, glass, - china or marble, silk, shawls, furs, opium, articles of ivory, coral, sandalwood or ebony and musical and scientific instruments.

A carrier is not liable for kiss or damage of scheduled goods in excess of Rs. 100 if at the time of delivery their account and value are not expressly made recognized to the carrier. But he is liable if the goods are lost or damaged through gross negligence or any criminal act of the carrier himself, his servant or agent, and for unlawful act or misfeance, whether goods are scheduled or non scheduled. He cannot limit his liability in respect of scheduled goods through any special clause or contract with the consignor. Such limit shall be null and void. He is though entitled to charge extra freight for carrying scheduled goods.

As regards non-scheduled goods, accepted through him, the liability of a general carrier is that of an insurer. He is liable for loss or damage to the goods while they are in transit, except when the loss is caused under exceptional circumstances. These circumstances are:

- An act of God,
- Damage caused through country's enemies,
- Defective packing,
- Fraud through the consignor,

- Inherent vice in the things accepted.

In case of non-scheduled goods, the carrier may limit his liability through a special clause or contract with the consignor. In case of loss or damage, the claimant necessity inform in writing to the carrier his claim within six months of the date when he first knew of such loss or injury. Therefore , in case of scheduled goods, the carrier cannot limit his liability, but in case of non scheduled goods, he can limit his liability through a special contract or clause. The carrier is always liable for loss or damage to goods, caused through him or his agent's servant's negligence or unlawful acts.

As regards goods of dangerous character, the consignor is under a duty to inform the carrier. The consignor is liable, if an implied warranty exits to the effect that the goods are fit to be accepted, even though the consignor is unaware of dangerous character of goods. If such implied warranty does not exist, the consignor is not answerable for loss, if the carrier knew in relation to the dangerous character of the goods accepted.

CARRIAGE THROUGH RAIL

You have already read that carriage of goods in excess of land may be through railways as well. Carriage through rail in India is regulated through the Indian Railways Act, 1890, as amended in 1961, 1972 and 1975. The 'Railway Management' is the legal power set up to look after the management and working of railways. Goods are transported through railways normally through 'goods train'. Goods may be transported also in 'passenger trains' to ensure quick delivery. Perishable goods and little packages are transported through passenger trains but the freight charges for passenger trains are. higher than goods train. Before we talk about the management of railways, let us note that there are two significant documents used in carriage of goods through railways. These are : (a) Forwarding Note and (b) Railway Receipt.

Forwarding Note

Just as to Section 72 of the Indian Railways Act 1890, every consignor of goods or animals has to execute a note in the form prescribed through the railway management and approved through the central government. This note is described 'Forwarding Note or Consignment Note' and the required particulars are filled in through the consignor. For dissimilar kinds of goods there are dissimilar shapes of consignment note. The consignment forwarding note contains account of the goods, the train that is to carry the goods or animals, the number of packages, weight, the names, and addresses of the consignor and the consignee, articles accepted at owner's risk or railways risk. The note is also to contain particulars of articles of special value, goods with defective packages, or perishable goods or articles of dangerous nature. It may be marked either 'freight paid' or 'freight to pay' accordingly as consignor has paid the freight or consignee will pay the freight. The conditions and circumstances on which goods or animals are accepted are printed on the back of the note.

Railway Receipt (R/R)

After the consignor has submitted the forwarding note to the railway parcel office, the consignor is given a receipt through the railways, The receipt is described R/R (railway receipt). This receipt is the acknowledgement of the goods and is an undertaking to carry them just as to the circumstances printed at the back of the receipt and the instructions given through the consignor. This receipt is a document of title to the goods and a semi-negotiable instrument. This receipt is sent through the consignor to the consignee so that on presenting it at the destination to the railway office, the consignee can take the delivery of the goods.

Duties of the Railway Management

Now we shall talk about the duties of the Railway Management. The duties of the Railway management laid down under Sec. 27,27A, 28 and 42A of the Indian Railways Act. 1890 are as follows:

- To afford all reasonable facilities for the getting, forwarding and delivery of traffic without unreasonable delay.
- Not to provide any undue or unreasonable preference or advantage to, or in favor of, any scrupulous person or any scrupulous account of traffic, in respect whatsoever or subject any scrupulous person or any scrupulous account of traffic to any undue or unreasonable prejudice or disadvantages in any respect whatsoever.
- To comply with any directions given through central government with regard to transport of goods. The central government is empowered to provide special facilities or preference to the transport of any goods or class of goods consigned to central or state governments or such other goods or class of goods as may be specified in the order. Any order so made shall cease to have effect after the expiry of six months from the date thereof. It may be renewed from time to time.
- The Railway Management is bound (like a general carrier) to carry goods of every person who is ready and willing to pay the freight and observes the other necessities.

Liabilities of the Railway Management

You should note that railways are like general carriers in India and their liabilities are also like those of a general carrier. We shall now talk about their liabilities throughout and after transit and liabilities in case of goods of special value and in case of defective condition or packing, etc.

Liabilities throughout Transit

The Railway Management is liable for loss, destruction, damage, or deterioration of goods in transit. But the liability depends upon the instructions of the consignor in the forwarding note as to whether goods or animals are to be accepted at 'railway's risk' (ordinary rate) or at 'owner's risk' (reduced rate). The rate of the former are higher than that of the latter. The goods or animals shall be deemed to have been tendered to be accepted at 'owner's risk' rate unless the consigner or his agent elects in writing to pay the 'railway risk' rate. A certificate is issued through the railways for railway risk rate.

- Railway's Risk: If the goods are accepted at 'Railway's Risk', the Railway Management is liable for any loss or destruction etc., in transit in respect of goods, arising from any cause except the following: (1) act of God, (2) act of war, (3) act of public enemies, (4) arrest, restrain or seizure under legal procedure, (5) order or restrictions imposed through the government, (6) Act or omission or negligence of consignor or the consignee or the agent or servant of either, (7) latent defects, (8) fire, explosion or any unforeseen risk. Owner's Risk : The Management cannot be made liable for any loss, destruction or damage, in transit of such goods, from whatever cause arising except upon proof that such loss or damage was due to negligence or misconduct on the part of the Management or any of its servants. The location of the Management is that of a bailee. Therefore there are two major differences flanked by owner's risk and railway's risk, In case of owner's risk the liability of railways it is that of a bailee and in case of railway's risk it is that of an insurer. In case of the former the railway is liable only if the loss is caused through its negligence and in case of the latter the railway is liable unless it proves that it had used reasonable foresight and care in the carriage of goods or animals.
    - Liability for delay or detention throughout transit: The Management shall be responsible for loss etc, of goods or

animals if the owner protest that such loss or destruction, damage or deterioration, was caused through delay, or detention in transit. It can, though, escape liability through proving that the delay or detention arose without negligence or misconduct on its part or on the part of its servants

Responsibility of Deviation of Route

The Railway Management shall not be guilty of breach of contract if due to causes beyond its manage or due to the congestion in the yard or other operational reasons, goods or animals are accepted in excess of a route other than the route through which they are booked (the usual or customary route) .

Responsibility for Wrong Delivery

When the Railway Management delivers the goods in good faith to the person who produces the original railway receipt, it shall not be responsible on the ground that such person is not legally entitled thereto or that endorsement on the R/R is forged or otherwise.

Liability after Termination of Transit

Transit terminates on the expiry of the free time allowed (after the arrival of consignment at destination) for its unloading from railway wagon without payment of demurrage and where such unloading has been completed within free time so allowed, transit terminates on the expiry of free time so allowed for removal of goods from railway premises without payment of wharf age.

Free time means time within which delivery of goods necessity be taken on arrival through the consignee. Demurrage is an extra charge to be paid if delivery of goods is taken after free time and wharf age is rent paid for accommodation occupied at railway godown.

Liability in Case of Articles of Special Value

Where any articles mentioned in second schedule of the Act (Articles of special value like gold, silver,.) are contained in a parcel or packages delivered for carriage and the value of such articles exceeds Rs. 500, the railways shall not be responsible for the loss, destruction etc. unless the consignor declared the value and contents thereof in the forwarding note and had paid higher freight, if required.

Liability for Damage to Goods in Defective Condition or Packing

The Railway Management shall not be liable for any loss goods are in a defective condition or defectively packed and such defect was noted through the consignor or his agent on the forwarding note. But it shall be liable if loss or damage etc., in such case was clue to the negligence or misconduct on the part of management or its servants.

Exoneration of Responsibility in Sure Cases

The Railway Management shall not be responsible for any loss, destruction, or non delivery of goods in the following cases:

- Where the goods have been dispatched with a false account and the loss or damage is, in any method, brought in relation to the through false account.
- Where a fraud has been committed through the consignee or consignor or agent of either. Where it is proved through the Management that loss or damage has been caused through or has arisen from either (i) improper loading or unloading through consignor or consignee or their agent, or (ii) riot civil commotion, strike, lock out, stoppage or restraint of labour from whatever cause, whether common or partial.

- Where there is any indirect or consequential damage or loss of scrupulous market.

Notice of Claim

The claim for damages can be made through the consignor The claim necessity be made within six months from the delivery of goods for carriage through the railways. The notice necessity be in writing and may be given to the Chief Commercial Superintendent or manager of railways. The claim for refund of any overcharge can be made either to the management to which goods or animals were delivered or on whose railway the destination station lies or the loss, damage or destruction occurs.

CARRIAGE THROUGH SEA

Contract of Affreightment

In international deal, goods are mostly accepted through sea, i.e., through ship. A contract of carriage of goods through sea is described 'contract of affreightment'. The consignor is described shipper and the consideration is described 'freight' i.e., the price of carriage of goods. A contract of affreightment may take either of two shapes :

- Charter Party,
- Bill of Lading.

Both these contracts are mainly governed through the Carriage of Goods through Sea Act 1925 and the Bill of Lading Act 1856. Note that two other related Acts to carriage through sea are Merchant Shipping Act 1958 and the Marine Insurance Act 1963. A charter party is a contract where an whole, or a principal part, of a ship is hired. A bill of lading is a contract where the goods are accepted in a common ship. There are sure 'Implied warranties', in

both these shapes of contract. Let us talk about these warranties in detail before discussing charter party and bill of lading.

Implied Warranties

A warranty may be express or implied. Express warranties are those warranties which are decided through the parties and implied warranties are implied through law: In a contract of affreightment, the following implied warranties are provided under Marine Insurance Act, 1963:

- The ship is seaworthy and reasonably fit to encounter the 'perils of sea'. The ship should be seaworthy at the commencement of each stage of the voyage. It means that the ship is worthy to undertake the scrupulous voyage and to carry the scrupulous cargo. Just as to the Merchant Shipping Act 1958, a ship is unworthy when the materials of which she is made, her construction, the qualifications of the master, the number, the account and the qualification of the crew including officers, and the weight, account and storage of the cargo and ballast, the condition of her hull and equipment, boilers and machinery are not such as to render her in every respect lit for a proposed voyage or service.
- The 'ship shall be ready to commence the voyage agreed on and to load the cargo to be accepted and shall proceed upon and complete the voyage without all reasonable dispatch.
- The ship shall carry out the voyage in the usual and customary manner. It shall not deviate from the prescribed or usual course, Deviation takes lay even if the ship starts on a usual course, deviates later on and again resumes the usual course.
- The shipper shall not ship dangerous goods or illegal cargo. Breach of warranty before the commencement of voyage provides right to

repudiate the contract and claim damages, and after the commencement, provides a right to claim damages only.

Charter Party

You know that the contract of affreightment may take the form of (a) Charter Party or (b) Bill of lading. A Charter party is a contract of affreightment entered into for hiring the whole ship or a part of it to carry the goods, at the disposal of chartered, It binds the ship owner to carry the goods to a scrupulous lay on payment of freight. It also refers to the formal written document in which the contract of hiring of the whole or part of the ship is expressed.

You should note the following points:

- The charter party may be under seal, but it necessity be stamped.
- A bill of lading is issued as an acknowledgment of the receipt of goods in case of common ship and a charter party is a receipt of goods in case of a chartered ship. Therefore bill of lading is dissimilar from charter party.
- The bill of lading in case of a common ship necessity be signed through the owner or master of ship.

Types of Charter Party

A Charter party may be :

- 'Time Charter party, or
- Voyage Charter party
- Time Charter Party is for a scrupulous era.
- Voyage Charter party is for a scrupulous Voyage.

Sometimes the conditions of a charter party may operate as a lease (also described demise) of a ship. The ship is given on lease to the charterer through the ship owner. The charterer pays 'rental' to the ship owner. Along with the ship the master and crew also become the servants of the charterer. Such a contract of lease of a ship is not a contract of carriage but hiring of the ship itself.

Shapes and Clauses of Charter Party

There is no specific form of a charter party. It differs from deal to deal depending upon the prevailing customs. There may be a special form used in a deal. Though, it usually contains the following clauses:

- Name and account of the ship owner and the 'charterer and the information of their agreement.
- The name of the ship, its rating (i.e. A or B etc.) with Lloyds Register and tonnage (measurement of the ship).
- The site of the ship, lay of loading and unloading.
- The ship owner's guarantee that the ship is sea worthy and fit for the contemplated voyage.
- The statement that the cargo shall be lawful merchandise both at the port of dispatch and the port of discharge. The weight and volume of cargo.
- The names and spaces where the ship is to go in flanked by.
- The liability of the charterer to pay freight i.e. to be paid in advance or on completion of voyage. The charterer is under an obligation to pay the freight for full carrying capability even if it is used not for only the quantity agreed upon. He has to pay ‚dead' freight if he fails to produce or load the agreed amount of cargo.

- Cesser Clause: Under this clause the charterer is exempted from liability when the cargo is loaded. The ship-owner acquires a lien on cargo for nonpayment of freight and demurrage.
- The duties of the Master or the captain of the ship.
- Prosecution of the Voyage: A clause stating that the voyage shall be prosecuted with all convenient speed i.e., voyage shall commence soon after the clearance from port authorities has been obtained.
- Delay through break down: In cases where delay is caused through break down of the machinery or other damage to the ship or the deficiency of the crew for 24 hours, the hire ceases till such time as the ship is again fit to sail.
- Excepted Perils and Negligence: This clause contains those risks for which ship-owner is not liable for the loss. Such risks are described 'excepted perils'. These perils arise from 'Act of God', the action of foreign enemies, restraints of princes and rulers, fire and every other dangers and accidents of the seas, rivers and navigation, of whatever nature and type. The ship owner has to exercise reasonable care and diligence to avoid such perils.
- Circumstances under which the contract shall be deemed as cancelled and the penalties to which the parties shall be liable for breach of contract.
- Lay days and demurrage: Lay days are the days allowed for loading and unloading the ship, The charterer is liable to pay demurrage if loading or unloading takes more than lay days.
- Delivery of goods in the usual manner: The master of the ship should have the ship properly moved when it reaches the port. He has to get the cargo out of the ship's and put them on the deck. Thereafter the charterer has to take the goods off the ship.

Bill of Lading

This is a very significant document in the carriage of goods through sea. A bill of lading is a document issued through the ship-owner or his servant when the cargo is delivered for carriage to a common ship, The location of a ship-owner is that of a general carrier. When the goods are delivered on board a ship, a receipt is issued through the master of the ship. This receipt is described “MATE’S Receipt”. A bill of lading may also be issued when whole ship is chartered. In that case, the bill of lading presently serves as a receipt of goods. A bill of lading necessity be stamped and signed through the ship-owner. It necessity sure the following particulars:

- The main conditions of contract.
- The leading marks necessary for identification of the goods; the marks necessity be legible till the end of the voyage.
- The number of packages, pieces or the quantity or weight in writing.
- The apparent order and condition of the cargo.

Features of a Bill of Ladling

A bill of lading is prime facie proof of the following:

- It is an acknowledgment of the receipt of goods on board. It is a symbol of goods throughout transit and remnants till goods are delivered.
- It is an proof of the contract for the carriage of goods.
- It is a document of title to goods. It is a "key which in the hands of a rightful owner is planned to unlock the door of the warehouse, floating or fixed, in which goods may be".
- It contains the conditions and circumstances of the carriage of goods.

- It is a semi Negotiable Instrument. It can be transferred to another person through endorsement and delivery, if the goods under the bill of lading are deliverable to a scrupulous person or 'his order', and through mere delivery if the goods under the bill of lading are deliverable to the bearer, This feature of a bill of lading resembles that of a negotiable instruments, In strict legal sense it is not a negotiable instrument because the transferee takes it subject to all the defects of the transfer even though transferee took it bonafide and for value. It is negotiable in commercial sense.

Bill of Lading and Charter Party – Comparison

Now you are in a location to know that a Rill of Lading and 'Charter Party' are dissimilar. Following are the differences flanked by the two

- A bill of lading is an acknowledgment of the receipt of goods, on board the ship. A charter party is presently receipt of goods.
- A bill of lading is a document of title to the goods but the charter party is not such a document.
- A bill of lading is not issued on lease of a ship, whereas a charter party contract is made on lease (demise) of a ship or part thereof.
- A bill of lading can be transferred through endorsement and or delivery whereas a charter party cannot he transferred.
- A bill of lading is for a scrupulous destination and charter party may be for a scrupulous voyage or time.

Shapes and Types of Bill of Lading

There is no special form of a bill of lading. It differs from deal to deal and just as to

- means of carriage. The bill of lading may be of the following kinds:
- Clean bill of lading : Where the cargo is in apparent good order and condition and the bill of lading acknowledges this, it is described clean.
- Foul or dirty or caused bill of lading: When condition of the goods received for shipping is not good the words "shipped in good order and condition" are cancelled out. In such a case the bill of lading is foul (dirty or caused) bill of lading.
- Through bill of lading : When goods are partly accepted through sea and partly through land, the bill of lading issued is described "through bill of lading"
- Stale bill of lading : It is that bill of lading which is retained through the consignor for a longer time than necessary.
- Received Bill of Lading and On Board Bill of Lading: The received Bill of Lading is issued before the cargo has been loaded on board the ship and "on board" when the cargo has been loaded on board the ship.

Right of Stoppage in Transit

A consignor has right to stop the goods in transit. If a bill of lading is lawfully transferred to any person as buyer or owner of goods, and that person transfers the documents through method of sale to one who takes it in good faith and for value, the right of lien and stoppage in transit is defeated. But if the transfer is merely through method of pledge, the consignor has right to stop the goods in transit, subject to the payment or tender to the pledgee the amount of the advance.

Duties of a Carrier through Sea

In every contract of carriage of goods through sea, the carrier is subject to the following responsibilities:

- The ship-owner shall be bound, before and at the beginning of the voyage, to exercise due diligence to
    - create the ship seaworthy
    - properly man, equip and supply the ship
    - create holds, refrigerating and cool chambers, and all other parts of the ship in which goods are accepted, fit, and safe for their reception, carriage, and preservation.
- The carrier necessity properly and cautiously load, handle, stow, carry up, stay care for and discharge the goods accepted.
- The master or agent or the ship-owner has to issue a bill of lading after the goods have been received.

Liabilities of a Carrier through Sea

- Loss or damage due to negligence: The carrier of goods through sea is liable only for loss or damage arising from his negligence, fault or failure in the duties and obligations provided in the Act and not otherwise, He is not liable even for the loss caused through neglect or default of the master mariner, pilot or the crew in the navigation or in the management of the ship.
- No limitation: The carrier cannot limit or lessen his liability arising from his negligence or failure in the duties and any clause in the contract to that effect shall be null and void,
- No liability for misstated value: The carrier shall not be liable for any loss or damage to goods if the nature or value thereof has been knowingly misstated through the shipper in the

- - Bill of Lading.
- Extent of liability: The carrier shall not be liable for loss or damage in any event to the goods in an amount exceeding £ 100 per package or unit, unless the nature and value of such goods have been declared through the shipper before shipment and, through agreement, fixed another maximum amount.
- Liability in case of dangerous goods: Goods of an inflammable, explosive or dangerous nature to the shipment, where of the carrier, master or agent of the carrier, has not consented, with knowledge of their nature and character, may, at any time before discharge, be landed at any lay or destroyed or rendered innocuous through the carrier without compensation. The shipper of such goods shall be liable for all damages and expenses directly or indirectly arising out of or resulting from such shipment.
- Time Barred liability : The carrier shall be discharged from all liability for loss or damage unless suit is brought within one year after delivery of the goods or the date when the goods shall have been delivered.

Ship-owners' Lien and Maritime Lien

There are two kinds of rights accessible in case of carriage of goods through sea: (a) Ship-owners', lien - this right is of ship-owners, and (b) Maritime Lien - this right is accessible against the ship, cargo, and freight. Let us explain them.

A ship-owners' lien is the right of a ship-owner to retain possession of goods curried through him until freight and other charges due to him under the contract of carriage have been paid. It is a possessory lien.

A "maritime lien" is a claim on ship, cargo and the freight in respect of services rendered to them. This right is given through law to all persons who

have rendered some services to save the ship or cargo in time of danger. Through virtue of this right, the parties can recover their charges from the ship-owner or cargo owner. Until their charges are paid, the ship is not allowed to leave the port and ship or cargo may be ordered through the court to be sold. This right of lien is accessible to seamen for their wages, the holder of “bottomery bond" for his dues, persons who rescue ship or property from the charges in connection with salvage, and persons who have a claim against the ship, for damages caused through collision due to negligence.

A maritime lien can be exercised independently of possession of cargo or ship through filing a suit in a court.

Bottomry and Respondentia Bond

When a ship needs urgent repairs in course of its voyage and it is not possible for the master of the ship to communicate with ship-owner to arrange the necessary funds, the captain of the ship may borrow money on the security of the ship or cargo through executing a bond. If only cargo is given as security, the bond is described “Respondentia Bond". If the ship, cargo and freight are hypothecated, the bond is described 'Bottomry Bond”.

CARRIAGE THROUGH AIR

In modem days, as you know, the goods can be accepted through air quickly and to extensive distances. But carriage through air is expensive as compared to carriage through land or sea. The carriage of goods and passengers through air in India is governed through the Carriage through Air Act 1972. This Act is based on Warsaw Convention 1929, as amended through the Hague Protocol signed in 1955.

The Carriage through Air Act 1972 contains two schedules. Schedule I contains the Warsaw convention rules, which are applicable to international carriage through air of countries which have not yet signed the Hague

Protocol. Schedule II contains the amended rules (as amended in 1955) applicable to international carriage through air of countries which have signed the Hague Protocol. The Central government is empowered to create the rules contained in these schedules as may be applicable to internal (domestic) carriage through air.

Definitions

There are sure definitions of some special conditions used in carriage through air. Some of these definitions are given below:

- Convention : It means the convention for the unification of sure rules relating to international carriage through air signed at Warsaw on 12-10-1929 " Amended Convention" means Warsaw convention as amended through the Hague Protocol signed on 28-91955.
- High Contracting Party: It means all the parties originally signatories to that convention, jointly with those who adhere thereto subsequently. India is a signatory to the amended convention.
- International Carriage: It means any carriage in which just as to the agreement flanked by the parties the lay of departure and the lay of destination, whether or not there be a break, in the carriage or transshipment, are situated either within the territories of two high contracting parties or within the territory of a single high contracting party if there is an agreed stopping lay within the territory of another state, even if that state is not a High Contracting Party. Carriage flanked by two points within the territory of a single High Contracting party, without an agreed stopping lay within the territory of another state is not international carriage.

Documents of Carriage

Presently as there are sure significant documents used in carriage through land or through sea, likewise there are some significant documents used through carriage through air. These are mainly Passenger Ticket, Baggage check, and Air Method Bill. In Chapter II of the Second Schedule to the Act the documents of carriage have been mentioned.

- Passenger Ticket : This ticket is issued for carriage of passengers, indicating the lay of departure and destination (embarking and disembarking) and lay of one or more agreed stopping spaces. This ticket is a prima facie proof of the conclusion, and circumstances of the contract of carriage. The absence, irregularity, or loss of the passenger ticket does not affect the subsistence of the validity of the contract of carriage (Rule 3).
- Baggage Check (Luggage Ticket): This check is issued for the carriage of luggage, other than little personal objects of which passenger takes charge himself. It is made out in duplicate, one part is for the passenger and the other part for the carrier. The ticket constitutes prima-facie proof of the registration of the luggage and circumstances of the contract of carriage. The absence, irregularity, or loss of baggage check does not affect the subsistence or the validity of the contract of carriage. But if the carrier accepts baggage without delivering a baggage check, he shall not be entitled to the benefit of the provisions which limit his liability in respect of loss of, or damage to, the baggage.
- Airway Bill (Air Consignment Note): This note is prepared through the consignor, in triplicate, one copy for the carrier, one for consignee, and one for consignor. The airway bill is signed and stamped through the carrier. The absence, irregularity, or loss of airway bill does not affect the subsistence or the validity of the contract of carriage. But, if the

carrier allows the loading of cargo on board the aircraft without an airway bill, his liability shall not be limited.

The airway bill contains several details including the name and address of the consignor and consignee, the nature of goods, the amount of freight, circumstances of goods, number of packages, lay of departure and destination, value of goods and other documents handed in excess of along with the airway bill. The consignor is responsible for the correctness of the note and liable to pay for loss suffered through the carrier for incorrect airway bill. The airway bill may be negotiable. It is the prima facie proof of the conclusion of the contract.

Right of Disposition of Cargo

The consignor has the right to dispose of or call back or stop the cargo at any time before it is handed in excess of to the consignee. He can change the name of the consignee as well. He has a right to dispose of or call back the cargo if the consignee declines to accept the airway bill or cargo.

Rights of the Consignee

Unless it is otherwise agreed, the consignee has the right to receive notice from the carrier as soon as the cargo arrives at the port of destination. The consignee has right to receive the airway bill and on payment of charges to take delivery of the cargo. On loss or arrival of cargo after seven days from the date on which it ought to have arrived, the consignee may enforce the right as agreed upon in the contract.

Liabilities of a Carrier

The carrier through air is liable to pay damages if (a)destruction, loss, or damage is caused to any registered baggage or any cargo throughout the carriage, i.e., era throughout which the baggage or cargo is in charge of the carrier in any lay; (b) the damage is occasioned through delay in the carriage of baggage or cargo.

Limit to Carrier's liability

The carrier is not liable to pay damages if he proves that the damage was caused or contributed to through the negligence of the injured person or he and his servants or mediators have taken all necessary events to avoid the damage or that it was impossible for him or them to take such measure. The maximum liability in case of loss or damage or delay is limited to a sum of 250 Franks per kilogram, unless the consignor has made a special declaration showing the value of the package and has paid additional freight if the case so requires. The carrier will be liable to pay a sum not exceeding the declared sum, unless the declared value is greater than the real value. In case of loss or damage or delay of part of registered baggage or cargo the amount of liability of the carrier is limited to the damaged part of the cargo ratably unless the damaged cargo affects the value of other packages sheltered through the similar airway bill.

In Case of Passengers

Though we have to read only in relation to the liabilities of the air carrier for cargo, yet for common information you should know in relation to the liabilities of air carrier in case of passengers,

- In the event of death or bodily injury: The carrier is liable for damage sustained in the event at the death or injures of a passenger or any other bodily injury suffered through a passenger, if the accident which caused the damage so sustained took lay on board the aircraft or in the course of operations of embarking or disembarking. The liability of the carrier for each passenger is limited to 1,25,000 Francs (raised in the second schedule to 2,25,000 Francs).
- Luggage in charge of the passenger: As regards objects of which the passenger takes charge himself, the liability is limited to 5000 Francs per passenger. The carrier's liability cannot be lower or he cannot be relieved of this liability. An action can be taken for damages, in case of death of the person liable in accordance with these rules, against those legally on behalf of his estate.

You should note the following points:

- These rules apply equally to gratuitous carriage through aircraft performed through an air transport carrier.
- These rules do not apply to carriage of mail and postal packages
- These rules apply notwithstanding anything contained in rule of law in force in any part of India.
- Receipt through the person entitled to delivery of luggage or goods without complaint is prima facie proof that the similar have been delivered in good condition.
- In the case of damage of cargo, the person entitled to delivery necessity lodge a complaint within three days from the date of receipt of goods and in case of delay within fourteen days from the date on which luggage or goods have been placed at his disposal. If no complaint is lodged within prescribed time, no action lies except in case of fraud on the part of the carrier.

REVIEW QUESTIONS

- What is owner's risk?
- Describe Charter Party and Bill of Lading.
- Who prepares an airway bill ?
- What is the minimum liability of a carrier through air '?

PART 4. PARTNERSHIP

CHAPTER 13

Definition and Registration of Partnership

STRUCTURE

- Learning Objectives
- Partnership Law in India
- Types of Partnership and its advantages and disadvantages
- Kinds of Partners
- Review Questions

LEARNING OBJECTIVES

After learning this chapter you should be able to:

- Describe partnership and explain its features.
- Determine whether a group of persons is or is not a partnership.
- Partnership law in India

A partnership is an arrangement where parties agree to cooperate to advance their mutual interests. Since humans are social beings, partnerships flanked by individuals, businesses, interest-based organizations, schools, governments, and varied combinations thereof, have always been and remain commonplace. In the mainly regularly associated instance of the term, a partnership is shaped flanked by one or more businesses in which partners (owners) co-labor to achieve and share profits and losses. Partnerships exist within, and crossways, sectors. Non-profit, religious, and political organizations may partner jointly to augment the likelihood of each achieving their mission and to amplify their reach. In what is usually described an alliance, governments may partner to achieve their national interests,

sometimes against allied governments who hold contrary interests, such as occurred throughout World War II and the Cold War. In education, accrediting agencies increasingly evaluate schools through the stage and excellence of their partnerships with other schools and a diversity of other entities crossways societal sectors. Partnerships also happen at personal stages, such as when two or more individuals agree to domicile jointly, while other partnerships are not only personal but private, recognized only to the involved parties.

Partnerships present the involved parties with special challenges that necessity be navigated unto agreement. Overarching goals, stages of provide-and-take, regions of responsibility, rows of power and succession, how success is evaluated and distributed, and often a diversity of other factors necessity all be negotiated. Once agreement is reached, the partnership is typically enforceable through civil law, especially if well documented. Partners who wish to create their agreement affirmatively explicit and enforceable typically draw up Articles of Partnership. It is general for information in relation to the formally partnered entities to be made public, such as through a press release, a newspaper ad, or public records laws.

While partnerships stand to amplify mutual interests and success, some are measured ethically problematic. When a politician, for instance, partners with a corporation to advance the corporation's interest in exchange for some benefit, a disagreement of interest results. Outcomes for the public good may suffer. While technically legal in some jurisdictions, such practice is broadly viewed negatively or as corruption.

Governmentally recognized partnerships may enjoy special benefits in tax policies. In the middle of urbanized countries, for instance, business partnerships are often favored in excess of corporations in taxation policy, since dividend taxes only happen on profits before they are distributed to the partners. Though, depending on the partnership structure and the jurisdiction in which it operates, owners of a partnership may be exposed to greater personal liability than they would as shareholders of a corporation. In such

countries, partnerships are often regulated via anti-trust laws, so as to inhibit monopolistic practices and foster free market competition. Enforcement of the laws, though, is often widely variable. Domestic partnerships recognized through governments typically enjoy tax benefits, as well.

PARTNERSHIP LAW IN INDIA

The Indian Partnership Act, 1932 defines a partnership as "the relation flanked by persons who have agreed to share the profits of a business accepted on through all or any of them acting for all." Persons who have entered into partnership with one another are described individually, "partners" and collectively "a firm", and the name under which their business is accepted on is described the "firm-name". Partnerships may be in the form of Partnership-At-Will (where no provision is made through contract flanked by the partners for the duration or the determination of their partnership) or Scrupulous Partnership (where a person may become a partner with another person for the accomplishment of a scrupulous project). In India, a minor may not be a partner in a firm, but, with the consent of all the partners for the time being, he may be admitted to the benefits of partnership.

TYPES OF PARTNERSHIP AND ITS ADVANTAGES AND DISADVANTAGES

Common Partnership

In a common partnership, the liability of each partner is unlimited. It means that the firm's creditors can realize their dues in full from any of the partners through attaching their personal property if the firm's assets are establish to be inadequate to pay off its debts. An exception is made in the case of a minor partner whose liability is limited to the amount of his share in the capital and profits of the firm. In India all partnership firms are common

partnerships. Each partner of a common partnership is entitled to take active part in the management of the firm, unless otherwise decided through the other partners.

Limited Partnership

A limited partnership is a partnership consisting of some partners whose liability is limited to the amount of capital contributed through each. The personal property of a limited partner is not liable for the firm's debts. He cannot take part in the management of the firm. His retirement, insolvency, lunacy, or death does not cause dissolution of the firm. There is at least one partner having unlimited liability. A limited partnership necessity be registered. Limited partnership is now allowed in India under the Limited Liability Partnership Act. In England limited partnership can be shaped under the Limited Partnership Act, 1907 and in the USA under the Partnership Act, 1890. The chief features of a limited partnership are as follows:

- There necessity be at least one partner with unlimited liability. The liability of the remaining partners is limited to their capitals in the firm. Therefore , a limited partnership consists of two kinds of partners, common partner, and limited partner.
- The limited partner cannot take part in the management of the firm. He has no implied power to symbolize and bind the firm. Though, he is allowed to inspect the books of accounts of the firm.
- The limited or special partner cannot assign his share to an outsider without the consent of the common partner.
- The limited partner cannot withdraw any part of his capital.
- A limited partnership necessity be registered.

Advantages

Limited partnership offers the following benefits:

- It enables people to invest in a business without assuming unlimited risk and without devoting much time and attention in management of business.
- It permits the mobilization of superior financial possessions from careful and conservative investors.
- It gives an opportunity to able and experienced persons to manage the business without any interference from other partners. Complete manage and personal supervision help to ensure prompt decisions and uniform actions.
- It is more stable than common partnership because it is not dissolved through the insolvency, retirement, incapacity, or death of limited partner.

Disadvantages

Limited partnership suffers from the following drawbacks:

- The limited partners are deprived of the right to manage. They remain at the mercy of the common partner.
- The common partner may misuse his power to use the limited partners.
- A limited partnership enjoys small credit standing as the liability of some partners is limited. It has to be registered.

Partnership at Will

It is a partnership shaped for an indefinite era. The time era or the purpose of the firm is not mentioned at the time of its formation. It can continue for any length of time depending upon the will of the partners. It can be dissolved through any partner through giving a notice to the other partners of his desire to quit the firm.

Scrupulous Partnership

It is a partnership shaped for a specific time era or to achieve a specified objective. It is automatically dissolved on the expiry of the specified era or on the completion of the specific purpose for which it was shaped.

KINDS OF PARTNERS

There can be the following kinds of partners:

- Active or working partner: Such a partner contributes capital and also takes active part in the management of the firm. He bears an unlimited liability for the firm's debts. He is recognized to outsiders. He shares profits of the firm. He is a full-fledged partner.
- Sleeping or dormant partner: A sleeping or inactive partner basically contributes capital. He does not take active part in the management of the firm. He shares in the profits or losses of the firm. His liability for the firm's debts is unlimited. He is not recognized to the outside world.
- Secret partner: This kind of partner contributes capital and takes active part in the management of the firm's business. He shares in the profits and losses of firm and his liability is unlimited. Though, his connection with the firm is not recognized to the outside world.
- Limited partner: The liability of such a partner is limited to the extent of his share in the capital and profits of the firm. He is not entitled to take active part in the management of the firm's business. The firm is not dissolved in the event of his death, lunacy, or bankruptcy.
- Partner in profits only: He shares in the profits of the firm but not in the losses. But his liability for the firm's debts is unlimited. He is not allowed to take part in the management of the firm. Such a partner is associated for his money and goodwill.
- Nominal or ostensible or quasi partner: Such a partner neither contributes capital nor takes part in the management of business. He does not share in the profits or losses of the firm. He only lends his

name and reputation for the benefit of the firm. He symbolizes himself or knowingly allows himself to be represented as a partner. He becomes liable to outsiders for the debts of the firm. A nominal partner can be of two kinds:

- Partner through estoppels: A person who through his words (spoken or written) or conduct symbolizes himself as a partner becomes liable to those who advance money to the firm on the foundation of such representation. He cannot avoid the consequences of his previous act. Suppose a rich man, Mohan, is not a partner but he tells Sohan that he is a partner in a firm described Shipra Enterprises. On this impression, Sohan sells good worth Rs. 20,000 to the firm. Later on the firm is unable to pay the amount. Sohan can recover the amount from Mohan. Here, Mohan is a partner through estoppels.
- Partner through holding out: When a person is declared as a partner and he does not deny this even after becoming aware of it, he becomes liable to third parties who lent money or credit to the firm on the foundation of such a declaration. Suppose, Shipra tells Sohan in the attendance of Mohan that Mohan is a partner in the firm of Shipra Enterprises. Mohan does not deny it. Later on Sohan provides a loan of Rs. 20,000 to Shipra Enterprises on the foundation of the impression that Mohan is a partner in the firm. The firm fails to repay the loan to Sohan. Mohan is liable to pay Rs. 20,000 to Sohan. Here, Mohan is a partner through holding out.

- Minor as a partner: A minor is a person who has not completed 18 years of age. A minor cannot become a partner because he is not qualified to enter into a contract. But he may be admitted to the benefits of partnership with the mutual consent of all the partners. On being so admitted, a minor becomes entitled to a share in the profits of

the firm. He can inspect and copy the books of explanation of the firm but he cannot take active part in the firm's management. His liability is limited to the extent of his share in the capital and profits of the firm. He cannot file a suit against the firm or its partners to get his share except when he wants to disassociate himself from the firm. After becoming a major, the minor necessity provide a public notice within six months if he wants to break off his connections with the partnership firm. If he does not provide such a notice within six months or if he decides to remain in the firm, he becomes liable to an unlimited extent for the debts of the firm from the date he was admitted to the benefits of partnership. He also becomes entitled to take active part in the management of the firm's business.

- Sub partner: He is a third person with whom a partner agrees to share his profits desired from the firm. He does not take part in the management of the firm. He is not liable for the firm's debts.

Rights and Obligations of Partners

The rights and obligations of partners are usually laid down in the partnership deed. In case the partnership deed does not specify them, then the partners will have rights and obligations prescribed in the Partnership Act.

Rights of Partners

- Every partner has a right to take part in the conduct and management of the firm's business.
- Every partner has a right to be consulted and express his opinion on any matter related to the firm. In case of variation of opinion, the decision has ordinarily to be taken through a majority. But vital issues like admission of a new partner, change in the firm's business,

alteration of profit- sharing ratio, etc., necessity be decided through unanimous consent of all the partners.

- Every partner has a right to have access to, inspect, and copy any books of accounts and records of the firm.
- Every partner has the right to an equal share in the profits of the firm, unless otherwise agreed through the partners.
- Every partner has the right to receive interest on loans and advances made through him to the firm. The rate of interest should be 6 per cent unless otherwise agreed through the partners.
- Every partner has the right to be indemnified for the expenses incurred and losses sustained through him in the ordinary conduct of the firm's business.
- Every partner has a right to continue in the firm unless expelled in accordance with the conditions of the partnership agreement.
- Every partner has a right to retire in accordance with the conditions of the partnership agreement or with the consent of other partners.

REVIEW QUESTIONS

- Describe Partnership and describe the essential features of a partnership.
- Explain how you will determine whether a group of persons is a partnership or not.
- Explain the circumstances under which a person can be made liable as a partner even if he is not a partner.
- Explain the rights of partners.

CHAPTER 14

RIGHTS. DUTIES AND LIABILITIES OF PARTNERS

STRUCTURE

- Learning objectives
- Mutual dealings of partners
- Property of the firm
- Relation of partners with third parties
- Location of incoming and outgoing partners
- Review questions

LEARNING OBJECTIVES

After learning this chapter you should be able to:

- Describe the mutual rights and duties of partners
- Explain the concept of the property of the firm
- Explain the extent of implied power
- Describe the rights and duties of incoming and outgoing partners

MUTUAL DEALINGS OF PARTNERS

It is usually whispered that since partnership comes into subsistence through an agreement, the mutual rights and duties of partners will he determined only through the provisions made in the agreement. But, this is not the true location. The partnership agreement may not specifically give for all rights and duties of partners. In that case, the provisions of the Act will become applicable. That there arc sure rights and duties given in the Act which cannot be changed through agreement. They are mandatory and arc binding on all the partners. Therefore , the mutual rights and duties of partners are governed through the partnership agreement as well as the Partnership Act Sections 9 to 13 and Sections 16 to 25 of the Partnership Act lay down the majority of rules that govern the mutual rights and duties of partners. As

indicated earlier, except sections 9 and 10 which lay down absolute duties of partners, all other provisions given in the Act can be changed through an agreement amongst the partners, Let us now talk about the main provisions of the Act governing the mutual rights and duties of partners.

Rights of Partners

Unless otherwise agreed through the partners, every partner has following rights :

- Right to take part in the conduct of business : Each partner can participate in the conduct and management of the business of the firm.
- Right to be consulted : Each partner has the right to express his opinion and be heard in all matters affecting the business of the firm. All decisions will, though, be made through majority with the exception of sure matters like change in the nature of business and reconstitution of the firm.
- Right to have access to books : Each partner has the right to inspect and copy any of the books of the firm. But, a minor admitted to the benefits of the firm can inspect and copy only the books of explanation. He cannot claim access to other books of the firm.
- Right to share profits equally : Each partner will share the profits of the business of the firm equally.
- Right to claim interest on capital: Normally, no interest is allowed on the capital contributed through the partners. But, if the partnership agreement gives for the payment of interest on capital, it shall be payable only out of the profits.
- In other words, if there are losses, the interest on capital will not be allowed.

- Right to interest on advances : If partner has advanced some amount as loan to the firm, he will be entitled to interest at a rate agreed upon, and where no rate is decided, at six per cent per annum. Interest on loan will be payable even if there are losses.
- Right to be indemnified: A partner has to be indemnified through the firm in respect of all expenses and liabilities incurred through him in the ordinary and proper conduct of business. He will also be entitled to claim reimbursement for all payments made through him in an emergency for protecting the firm from loss provided he acted in a manner as a person of ordinary prudence would have acted in alike circumstances in his own case.
- Right to use partnership property : Every partner is, as a rule, a joint owner of the partnership property and is entitled to have held and applied exclusively for the purpose of the business.
- Right in emergency : A partner has the right in an emergency to do all such acts as are reasonably necessary for protecting the firm from loss.
- Right to stop the admission of a new partner : Every partner is entitled to prevent the introduction of a new partner into the firm. As per rules, unless otherwise agreed, no new partner can be admitted without the consent of all the partners,
- Right to retire : Each partner has the right to retire from the partnership either as per the conditions of the partnership agreement or with the consent of all the partners, or if the partnership is at will through giving notice of his intention to retire.
- Right not to be expelled : Every partner has a right to continue in the partnership. He cannot be expelled from partnership through majority of partners unless such power is conferred through partnership agreement and is exercised in good faith and for the benefit of the firm.
- Right to do competing business: Every outgoing partner has a right to carry on a competing business. But, he cannot

- use the firm's name
- solicit the firm's customers, or
- symbolize the firm.

- Right to share profits after retirement : Unless otherwise agreed, an outgoing partner has the right to claim a share in the profits of the firm or claim interest @ 6% per annum on his share in the property of the firm till his explanation is finally settled. This rule is also applicable in case of the death of a partner.

Duties of Partners

As stated earlier, sure duties are mandatory while others are subject to agreement amongst the partners.

Mandatory Duties

The partnership is based on mutual trust and confidence. Hence, each partner necessity act in good faith and carry on the business of the firm for mutual benefit and not for his personal benefit. Section 9 has clearly stated that all partners are bound

- To carry on the business of the firm to the greatest general advantage,
- To be presently and faithful to each other, and
- To render true accounts and full information of all things affecting the firm to any partner or his legal representative. Likewise,

Section 10 lays down that every partner shall indemnify the firm for loss caused to it through his fraud in the conduct of the business of the firm. These duties given in Section 9 and 10 are absolute provisions of the Act and are mandatory. They cannot be changed through an agreement amongst the partners.

Duties Subject to Agreement through Partners

Besides the provisions of Sections 9 and 10, the other duties of partners as provided in the Act are subject to the agreement through partners. They can be changed through partners through creation necessary provisions in their agreement. Such duties are

- To attend diligently to his duties in the conduct of the business.
- To perform partner's duty without getting any remuneration for taking part in the conduct of the business.
- To contribute equally to the losses sustained through the firm.
- To indemnify the firm for any loss suffered through the firm due to willful neglect in the conduct of the business of the firm.
- To ensure that the property of the firm is held and used through the partners exclusively for the business of the firm.
- To explanation for and to pay to the firm any private profits derived through the partner from any transactions of the firm or from the use of property or business connections of the firm.
- To explanation for and to pay to the firm all profits made through a partner through carrying on any private business, Normally, there is no restriction on the partner to carry on any business other than and of the firm. But, if the partners have agreed that no partner shall do any business other than that of the firm, he should not carry on any other business, whether competing or not competing with that of the firm, without the consent of other partners.
- To act as an agent of the firm for the purposes of the business of the firm
- To act within the scope of actual or apparent power. In case a partner exceeds his power and the other partners do not approve of it, he will be liable to other partners for the loss suffered on explanation of his such acts.

- Not to assign his rights and interests in the firm to the outsiders without the consent of all other partners.
- To be liable jointly with all other partners and also severally for all acts of the firm done while he is a partner. This means that the creditors of the firm can realize their dues from any partner.

PROPERTY OF THE FIRM

You know that all partners are joint Owners of the property of the firm (unless there is ah agreement to the contrary) and it should be held and used exclusively for the firm through the partners, Hence, it becomes necessary to ascertain what constitutes the property of the firm. Normally the partners, through an agreement, are free to determine as to what shall be the property of the firm and what shall be treated as a separate property of one or more of the partners. But, when there is no such agreement, and you want to know whether a sure property is the property of the firm or not, you will have to ascertain the source from which the property had been acquired, the purpose for which it was acquired and the manner in which it has been dealt with. Just as to Section 14, when there is no contract to the contrary, the property of

- All properties, rights and interests originally brought to the stock of the firm,
- The property acquired through purchase or otherwise through or for the firm,
- The property acquired with money belonging to the firm, and
- The goodwill of the business of the firm.

Therefore , whatever is brought to the general stock of the firm and whatever is added to or obtained through means of this general stock throughout the continuance of partnership either directly or through conduct of business, is incorporated in the property of the firm unless a contrary intention can be shown. Though, if a partner's property is used for the purpose of the

business of the firm it does not automatically become the property of the firm. It can only become the property of the firm if the partners illustrate an intention to create it so. For instance, a piece of land which is bought in the name of one partner but is paid for through the firm (or out of the profits of the firm) shall be deemed to be the property of the firm unless there is an intention to the contrary. Likewise, if two persons take a lease of a coal mine for the purpose of working it in partnership, the lease will be treated as the property of the firm.

RELATION OF PARTNERS WITH THIRD PARTIES

Each partner acts both as the agent and the principal. It is this location of the partners which governs their connection with the third parties. Section 18 clearly states that from the point of view of the third parties, a partner is an agent of the firm for the purposes of the business of the firm. In that capability, he binds all other partners through his acts done on behalf of the firm provided these are done in the ordinary course of business and in the name of the firm. So, all partners are liable to third parties for such acts.

Implied Power of a Partner

In the context of a partnership firm, the power of a partner means his power to bind the firm through his acts. This power may be express or implied. The power conferred on a partner through mutual agreement is described an express power. But, where there is no agreement or where the partnership agreement is silent, the act of a partner which is done to carry on, in the usual method, business of the type accepted on through the firm, binds the firm. This capability of a partner to bind the firm through his acts is described the 'implied power of a partner'. In order that his act may fall within the scope of his implied power, the following circumstances necessity be fulfilled.

- The act done through the partners necessity relate to the normal business of the firm. If it is of a nature which is not general in the kind of business accepted on through the firm, it will not bind the firm even if it has been done in the name of the firm. For instance, an exporter of readymade garments spaces an order for a vast quantity of liquor in the name of the firm. As this act does not relate to the normal business of the firm, it will not fall within the scope of implied power. The firm, so, will not be bound through it.
- The act necessity have been done in the usual method of carrying on the firm's business. In other words, the act should be such as is usual in the kind of business accepted on through the firm. For instance, X and Y are partners in a retail business. Goods were sold on credit to Z. Lafer on, X received the amount from him (Z) on behalf of the firm. Y does not know of this receipt and X utilizes this amount for his personal use. Getting money from debtors is an act done in the usual course of business.
- Hence, the firm cannot claim the amount from Z on the plea that X had no power to receive the amount. It is hard to clearly lay down as to what is usual and what is unusual in a business. It will depend on the nature of business and the usage of deal. For instance, buying and selling of goods, drawing and accepting bills of exchanges, taking loan, etc. are measured normal behaviors in case of a trading concern. But, in case of an auctioneering firm or a firm of solicitors, taking loan is not measured to be a usual action. The act necessity be done in the firm's name or should, in some manner, imply an intention to bind the firm. For instance, A and B are partners in a stationery business. A goes to a wholesaler and buys on credit sure quantity of pencils in the firm's name. He uses these pencils for the family. Since this act is of the type usually done in the stationery business and is done in the firm's name, it will bind the firm.

Act within the implied power of a partner: The implied power of a partner shall normally contain :

- Purchasing, on behalf of the firm, goods in which the firm deals or which are used in the firm's business;
- Selling the goods of the firm;
- Getting payment of the debts due to the firm and giving receipt therefore
- Settling accounts with third parties dealing with the firm;
- Employing servants necessary for carrying on the firm's business;
- Borrowing money in the credit of the firm;
- Pledging goods of the firm as security for the purpose of getting loans;
- Drawing, accepting and endorsing negotiable instruments on behalf of the firm; and
- Employing solicitor to defend action against the firm

Acts outside the implied power of a partner: Sections 19(2) has restricted the scope of implied power of a partner. Just as to this section, in the absence of any

- Usage or custom of deal to the contrary, the implied power of a partner does not

Submit to arbitration a dispute relating to the business of the firm;

- Open a bank explanation on behalf of the firm in partner's own name;
- Compromise or relinquish any claim or portion of the claim through the firm;
- Withdraw a suit or proceedings filed on behalf of the firm;
- Admit any liability in a suit or proceedings against the firm;

- Acquire immovable property on behalf of the firm;
- Transfer immovable property belonging to the firm, and
- Enter into partnership on behalf of the firm.

Though, the partners, through mutual agreement, can restrict or extend the implied power of a partner. Partner's power in an emergency : Just as to Section 21, in an emergency a partner will have an power to do all such acts to protect the firm from loss as a prudent man would undertake under alike circumstances in his own case. These acts do not form part of the implied power of the partner but, nevertheless, they would bind the firm. For instance, the partners of a trading firm through an express contract decided that no partner would have the power to sell goods of the firm above the value of Rs. 10,000 without consulting all other partners. Owing to a sudden slump in market, the prices, crashed. One partner, in order to save the firm from loss, sold all the stock worth Rs. 1,00,000 without consulting any other partner. The firm is bound through such act of the partner.

Implied Power and Third Parties

All partners are liable to third parties for all acts of a partner which fall within the scope of his express or implied power. Their liability to the third parties for such acts can be discussed under the following heads.

- Extension or restriction of partner's implied power : As stated earlier, the partners of a firm through mutual agreement, may extend or restrict the scope of implied power of any partner. But, the third party is not bound through any restriction imposed on the implied power of a partner unless it has the knowledge of such restriction. In other words, the third party remnants unaffected through any secret restriction on the implied power of any partner. For instance, a trading firm limited the power of partners to purchase goods on credit upto Rs. 1,000. A

third party who had no knowledge of such restriction sold goods worth Rs, 1,500 on credit to a partner of the firm. The firm is liable to pay the full amount to the third party.

- Effect of admission through a partner ; Since, for the purpose of the business of the firm, a partner is an agent of the firm, any admission or representation through a partner in relation to the affairs of the firm is enough proof against the firm, provided the admission is made in the ordinary course of business.
- Effect of notice to an asting partner: You already know that a notice to an agent on matters relating to agency is notice to the principal. The similar rule applies to partnership. Therefore a notice of any matter relating to the affairs of the firm, when given to a partner who habitually receives it in the ordinary course of business of the firm, is taken to be a notice to the firm. This rule would not apply in case of a fraud committed through the partners and the third party against the firm.
- Liability of partners for acts of the firm: For all acts of the firm, done while he is a partner, every partner is jointly and severally liable to third parties. This means that for every act of the firm, the third party can sue each partner individually and also jointly with other partners.
- Liability for wrongful acts of a partner : When a partner, in the ordinary course of business, commits a wrongful act, the firm is liable for such an act. Section 26 specifically gives that if on explanation of the wrongful act or omission of a partner acting in the ordinary course of business or with the power of other partners, some loss, or injury is caused to any third party. or any penalty is incurred, the firm is held liable to the similar extent as the partner. For instance, A, B, and C are partners in a newspaper business. A is also the editor of the newspaper. A allows the publication of a defamatory article in relation to the a prominent person P, without checking its validity. P sues the firm for

libel. The firm will be liable for this act of the editor partner as the omission which caused loss of goodwill to P was done in the usual course of business.

- Liability of firm for misapplication through partners : Section 27 gives that the firm is liable to the third parties where (i) a partner, acting within his apparent power, receives money or property from a third person and misapplies it, or (ii) the firm in the course of its business receives money or property from a third party and the money is misapplied through any of its partners while it is in the custody of the firm. For instance, X, Y, and Z are partners in a business. K, a debtor of the firm repays his debts of Rs. 10,000 to Z who does not inform Y and Z in relation to the repayment and misuses the money. K would be discharged of the debts on explanation of payment made to X.

LOCATION OF INCOMING AND OUTGOING PARTNERS

When there is any charge in the composition of the partnership, it is described ‚reconstitution of the partnership firm'. The reconstitution takes lay when

- A new partner is admitted
- A partner retires
- A partner is expelled
- A partner is declared insolvent
- A partner dies
- A partner transfers ms interest to another person.

On the happening of the events there is some change in the rights and liabilities of partners. Let us now revise the relevant provisions of the Act which govern the situations and know their effect on the rights and liabilities of partners.

Admission of a Partner

A person cannot be admitted as a partner in an existing firm without the consent of all the partners. This rule is though, subject to any provision to the contrary in the partnership agreement. For instance, the partnership agreement flanked by A, B and C gives that A could introduce into partnership any of his sons on attaining the age of majority. In such a situation, there is no need for the consent of B and C if A decides to admit his son (who has attained majority) as a partner.

An incoming partner is not liable for any debts of the firm, incurred before his admission as partner. His liability is limited only to those acts of the firm which are done after he becomes a partner. This common rule has to two exceptions which are as follows.

- Through mutual agreement, he may undertake to share the liabilities for the past acts of the firm. But, this does not entitle the creditors to proceed against the new partner for the recovery of old debts unless
    - The new firm has assumed the liabilities of the old firm, and
    - The creditors have accepted the new firm as their debtor and discharged the old firm from its liability.
- A minor admitted to the benefits of the firm who, on attaining majority decides to become a partner, shall be personally liable to third parties for all acts of the firm done since he was admitted to the benefits of partnership.

Retirement of a Partner

Any partner may retire from the firm in any of the following methods :

- With the consent of all the other partners; or
- In accordance with an express agreement in the middle of the partners; or

- Where the partnership is at will, through giving a notice in writing to all other partners of his intention to retire,

Liabilities

A retiring partner continues to remain liable for all the acts of the firm done before retirement or acts pending at the time of his retirement. He may, though be discharged from his liability towards the third parties through mutual agreement. Such agreement should be entered into flanked by the three parties viz., all members of the reconstituted firm, the retiring partner, and the concerned third party. Such an agreement may be express or implied.

Until public notice of the retirement of a partner is given, the retiring partner continues to be liable to third parties for any act done through any of the partners even after his retirement, which would have been an act of the firm if done before his retirement. Though, the retired partner will not be liable to any third party who deals with the firm without knowing that he was not a partner. This would usually hold good in case of the retirement of a sleeping partner.

Rights

A retiring partner has the following two rights. He can carry on business competing with that of the firm and may advertise such business. But, in the absence of any agreement to the contrary, he cannot

- Use the name of the firm;
- Symbolize himself as carrying on the business of the firm, or
- Solicit the old customers.

Through mutual agreement, though, some more restrictions can be imposed on the retiring partner. For instance, he may be restrained from

carrying on the competing business in a specified region for a specified era. This shall not be treated as restraint of deal. If there is no final resolution of accounts flanked by the retiring partner and the remaining partners and they continue to carry on business with the property of the firm, the retiring partner is entitled to claim :

- Such share of the profits earned after his retirement which is attributable to the use of his share of the property of the firm, or
- Interest at the rate of 6% p.a. on the amount of his share in the property.

He can choose any of these two alternatives.

Expulsion of a Partner

Normally a partner cannot be expelled from partnership. Though, the expulsion of a partner is possible if following three circumstances are satisfied.

- The power to expel a partner is accessible through an express agreement flanked by the partners;
- The power has been exercised through a majority of the partners, and
- The power has been exercised in good faith and for the benefit of the firm.

A partner who is expelled from the firm is subject to the similar right and liabilities as those of a retired partner.

Insolvency of a Partner

Where a partner of a firm is declared insolvent through a court of competent, jurisdiction, he ceases to be a partner in the firm on the date on which the order of adjudication is made. It is not necessary that the firm is dissolved when a partner is declared insolvent. If, in accordance with the provisions of the partnership contract, the firm is not dissolved on the insolvency of a partner, the estate of the insolvent partner is not liable for any act of the firm, and the firm is not liable for any act of the insolvent, done after the date on which the order of adjudication is made.

Death of a Partner

Normally the firm is dissolved on the death of any of its partners. But, if the partnership contract gives that on the death of any partner the firm will not be dissolved, the remaining partners can continue with the firm's business. In that case, the estate of a deceased partner can be held liable only for those acts of the firm, which were done throughout the life time of the deceased partner. It shall not be liable for any act of the firm clone after the date of his death. No public notice is required on the death of a partner.

Transfer of Partner's Interest

A partner has the right to transfer his interest in the firm, fully or partially, to a third person. But, such a person (the transfree) is not treated as a partner. Neither he can take part in the conduct of the business of the firm not inspect its explanation books. He can basically claim his share in the profits of the firm.

If, though, the partner transfers his share in the firm on its dissolution or on ceasing to be a partner, the transferee will be entitled to claim the share

of the transferring partner in the assets of the firm and for the purpose of ascertaining that share he can inquire for on explanation as from the date of dissolution.

As a matter of information, no partner can transfer his interest in the firm with the intention of creation him a partner in the firm without the consent of all the other partners. You should note that whenever some change takes lay in the constitution of the firm, the mutual rights, and liabilities of the old partner in the reconstituted firm continue to remain the similar as they were before the reconstitution took lay. For instance, A,B,C, and D are partners who share profits in the ratio of 4:3:2:1. They admit a new partner E who is entitled to one-third share in the profits of the firm. In this situation, unless the partners decide otherwise. A, B, C and D shall continue to share the remaining two-third of the firm's profits in the ratio of 4:3:2; 1, the new profit sharing ratio being 5:4:3;2:1.

REVIEW QUESTIONS

- What is meant through the implied power of a partner to bind the firm.
- Talk about the mutual rights and duties of partners in the absence of any express agreement flanked by them.
- Are the partners absolutely free to lay down their rights and duties? If not, state the provisions that cannot be changed through agreement amongst partner?
- What is partnership property?

CHAPTER 15

DISSOLUTION OF PARTNERSHIP FIRMS

STRUCTURE

- Learning objectives
- Dissolution of partnership and dissolution of firm
- Manners of dissolution of firm
- Consequences of dissolution of firm
- Resolution of accounts
- Review questions

LEARNING OBJECTIVES

After learning this chapter you should be able to:

- Distinguish flanked by dissolution of partnership and dissolution of firm
- Describe the manners of dissolution of firm
- Explain the rights and liabilities of partners consequent to dissolution of firm
- Explain how accounts are settled in the middle of partners on dissolution.

DISSOLUTION OF PARTNERSHIP AND DISSOLUTION OF FIRM

The Indian Partnership Act creates a distinction flanked by dissolution of partnership and dissolution of firm,

Dissolution of Partnership

Dissolution of partnership basically means a change in the relation of the partners. Such a change is usually caused when a firm is reconstituted i.e., when a new partner is admitted or when an existing partner retires, dies, becomes insolvent or is expelled. The dissolution of partnership may or may not involve the dissolution of a firm. A firm, after a change in relation of the partners, may decide to continue as a reconstituted firm. But, when a firm is dissolved, it necessarily involves the dissolution of partnership.

For instance, A, B, C, and D are carrying on trading business as a partnership firm. A, is declared insolvent through the court. The partnership flanked by A, B, C and D comes to an end and a new partnership flanked by B, C and D comes into subsistence. This new partnership flanked by B. C and D shall be recognized as 'reconstituted firm'. Therefore , on declaration of A as insolvent, the partnership stands dissolved, but the firm continues with the remaining partners B, C, and D.

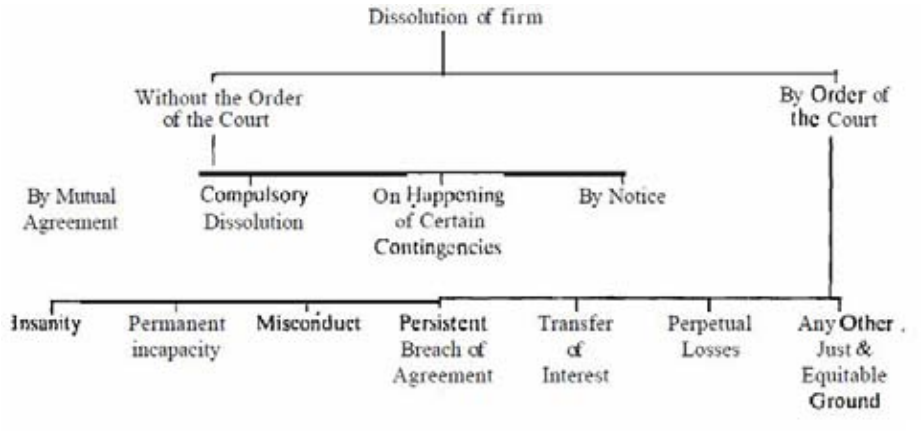
Dissolution of a Firm

Dissolution of a firm means the dissolution of partnership flanked by all the partners of a firm (Section 39). It occurs when there is complete breakdown of connection flanked by all the partners. In such a situation, the business of the firm is totally stopped, its assets are realized, the liabilities paid off and the surplus distributed in the middle of the partners just as to their share in the property of the firm. Therefore , the partnership is totally discontinued.

MANNERS OF DISSOLUTION OF FIRM

The dissolution of firm may take lay either without the order of the court or through an order of the court. The circumstances under which such dissolutions take lay are shown in Figure 15. 1.

Figure 15.1 Modes of Dissolution of Firm



Dissolution without the Order of Court

Dissolution of firm without the order of the court may take lay in the following methods:

- Dissolution through mutual agreement : You know that a firm comes into subsistence through mutual agreement, It can also be dissolved through mutual agreement in the middle of the existing partners.
- Compulsory dissolution : A firm is automatically dissolved.
    - if all the partners, or all but one partner, of the firm are declared insolvent, or
    - if some event takes lay which creates it unlawful for the business of the firm to be accepted on? For instance, a war breaks out and some partners of the firm are declared alien enemies, In such a situation, it becomes unlawful for the business of the firm to be accepted on. Take another case where a firm is carrying on the business of trading in sugar and a law

is passed through which trading in sugar is prohibited. In this case also the business of the firm becomes unlawful and so the firm will have to be compulsorily dissolved. In this connection, you should also note that where a firm is carrying on more than one business, the illegality of one or more shall not necessitate the dissolution of the firm. The firm can carry on those ventures which remain lawful.

- Dissolution on the happening of sure contingencies : Just as to Section 42, in the absence of a contract to the contrary, a firm will be dissolved on the happening of the following contingencies :
    - where the firm 'is constituted for a fixed term, it is dissolved through the expiry of the fixed term,
    - where the firm is constituted for completion of one or more adventures or undertakings, the firm is dissolved when those adventures or undertakings have been completed.
    - on the death of a partner, and
    - on the adjudication of a partner as insolvent.
- Dissolution through notice : When a partnership is at will, the firm may be dissolved through any partner through giving notice in writing to all the other partners of his intention to dissolve the firm.

If the partners has, in his notice, mentioned some specific date for the dissolution of the firm, the firm is dissolved from that date. But if no date has been mentioned, the firm is dissolved from the date when the notice is communicated. It should be noted that a notice once given, cannot be withdrawn without the consent of all other partners.

Dissolution through an Order of Court

Section 44 of the Partnership Act deals with those situations where the court may, on receipt of a petition through a partner, order for the dissolution of the firm, provided it is satisfied that in the interest of justice, it is necessary to order for the dissolution of the firm. Under this section, the court can order even for premature dissolution when the firm is created for a fixed era. When a petition is brought before the court, the court will provide other partners an opportunity to put forward their defense against passing an order for dissolution of firm. It is only after evaluating all the evidences before the court that the court shall pass an order for dissolution of the firm. Let us now revise the grounds on which a petition can be presented before the court for obtaining a dissolution order. These grounds are :

- Insanity : When a partner becomes insane, he is incapable of forming a rational judgment. Hence, it is treated as a valid ground for the dissolution of the firm. On this ground a suit may be filed either through any other partner of the firm or through the after that friend of the partner who has become of unsound mind. In either case the court may order dissolution of the firm. In the case of a dormant partner, though, the court may not order dissolution because such a partner does take an active part in the conduct of firm's business.
- Permanent incapacity : When a partner has become permanently incapable of performing his duties as a partner, any other partner can file a petition for the dissolution of firm. Though, the court will not pass an order for dissolution if the incapacity of a partner is only temporary. For instance, a partner in a firm had an attack of paralysis. Another partner of the firm filed a petition for dissolution of the firm. The court refused to pass on order, just as to doctors, paralysis was of a temporary nature and the patient's condition was improving. (Whitwell v. Arthur)

- Misconduct : When a partner, other than the partner suing, is guilty of misconduct which is likely to adversely affect the carrying on of the business, the court may dissolve the firm. In determining the gravity of misconduct to order dissolution, regard is to be had to the nature of business. For instance, an immoral conduct of a partner in a firm of medical men may be measured an adequate ground for dissolution but it may not be so in case of a firm trading in Coal.
- Persistent]breach of agreement: When a partner, other than the partner suing, willfully or persistently commits breach of agreement relating to the management of the affairs of the firm or he conducts himself in such a manner or that it is not practicable for other partners to reasonably carry on the business in partnership with him. Therefore , embezzlement, fraudulent breach of trust, or keeping erroneous accounts may be enough ground for the court to order dissolution of the firm.
- Transfer of interest : The court, at the instance of any other partner, may dissolve the firm when a partner has in any method
    - transferred the whole of his interest in a firm to a third party, or
    - allowed his share to be charged on explanation of a decree passed through a court towards payment of liabilities of that partner, or
    - allowed his share to be sold in the recovery of arrears of land revenue.
- Perpetual losses : When the firm is continuously suffering losses and it is apparent that in future also the business cannot be accepted on except at a loss, the court may order for the dissolution of the firm at the instance of any partner.
- Any other presently and equitable ground : If, on any other ground, it can be proved to the satisfaction of the court that it is presently and equitable to dissolve the firm, the court may order dissolution of the

firm. Examples of such ground are sustained quarrelling flanked by the partners, refusal to meet on matters of business.

CONSEQUENCES OF DISSOLUTION OF FIRM

Consequent to the dissolution of a partnership firm, the partners have sure rights and liabilities.

Rights of a Partner on Dissolution

- Right of equitable sharing of firm's property : Just as to Section 46 of the Act, every partner is entitled to have the property of the firm applied in payment of debts to the third parties and the other liabilities of the firm and have the surplus distributed amongst the partners or their representatives just as to their rights. This right is also described as partner's common lien.
- Right to return of premium on premature winding-up : If a partner joined a firm for a fixed term, and had paid a premium (goodwill), and the firm is dissolved before that fixed time, he has a right to the return of the whole or part of the premium. The amount of premium will depend upon (i) the conditions upon which he became a partner, and (ii) the length of the time throughout which he was a partner. For instance. Ram entered into partnership of a firm for a era of 10 years and paid Rs. 1,000 as premium. The firm was dissolved after expiration of two years because of the insolvency of a partner. Ram shall be entitled to Rs, 800 as return of the premium. Though, such a partner will not be entitled to claim any return of the premium when the premature dissolution is (i) due to death of a partner, due to the misconduct of the partner who paid the premium, and (iii) where the firm has been dissolved just as to an agreement which had no provision for the return of premium or any part thereof.

- Right in the event of dissolution on explanation of fraud or misrepresentation: Like any other contract, the partnership contract can also be rescinded on grounds of fraud or misrepresentation and the aggrieved partners, besides other rights, will have the right to claim damages. Section 52 of the Act provides the following rights to partners where the partnership is rescinded on grounds of fraud or misrepresentation.
- Lien of surplus assets : For any sums paid through him for purchase of a share in the firm or for the capital contributed through him, the partner rescinding the partnership contract has right of lien on the surplus 'assets left after the debts of the firm have been paid.
- Right of subrogation : For all payments made through him towards the debts of the firm, the partner rescinding the partnership ranks as a creditor of the firm. In other words, if he has used his personal assets to pay off the debts of the firm, he becomes a creditor of the firm for that amount.
- Right to be indemnified : The partner rescinding the partnership contract has the right to be indemnified through the partner or partners guilty of fraud or misrepresentation against all the debts of the firm.
- Rights to restrain any partner or his representatives from use of firm name or firm property : Subject to contract flanked by the partners, a partner throughout the continuance of winding up has the right to restrain every other partner or his representative from carrying on a alike business in the firm name or creation use of any of the property of the firm for his own benefit till the accounts of the firm are totally settled and the affairs of the firm have been totally wound up. Of course, where a partner has bought the goodwill of the firm, he can carry on the business in the firm's name and cannot be restrained through other partner or his representative from by the firm's name even throughout the tendency of winding up.

Liabilities of a Partner on Dissolution

Liability fur Acts of Partners done after Dissolution

For third parties, partnership continues till a public notice is given of its dissolution. So, each partner of the dissolved firm continues to be liable to third parties for any act done through any of them even after the dissolution and such acts are deemed to be acts done before dissolution. For instance, A, B and C are partners in a firm trading in rice, They decide to dissolve the firm from August 1,1989 but fail to provide a public notice of its dissolution and continue the business of the firm even after that date. On August 10, A enters into 3 contract with D in firm's name to deliver 5 quintals of rice to D. The firm is liable for the consequences of the contract.

It should be noted that the following shall not be liable for acts done after the dissolution of the firm even though no public notice has been given.

- The estate of a partner who died
- The estate of a partner who is adjudicated as insolvent, and
- A sleeping or dormant partner who has retired from the firm.

Liability for Winding up the Affairs of the Firm and Completing Unfinished Transactions

Just as to Section 47, after dissolution of a firm, the power of partners to bind the firm as well as their mutual rights and obligations continue to operate, as distant as may be necessary for the following purposes.

- To complete the winding up of the affairs of the firm. For instance to realize the dues from the debtors, to pay off the creditors, and dispose off the partnership property, etc.
- To complete all unfinished transactions that had begun before dissolution. For instance, supplying goods for orders received through

the firm before dissolution. Therefore , the partner's liability in respect of the matters continue even after the dissolution of the firm.

RESOLUTION OF ACCOUNTS

The manner for settling partnership accounts after dissolution of the firm, is usually provided in the partnership contract itself. If, though, the partnership contract is silent on the matter, the accounts of the dissolved firm shall be settled just as to the rules given is sections 48, 49 and 55 of the Act. These rules are as follows :

Sharing of Deficiency

Just as to Section 48(a) the losses including deficiencies of capital, shall be paid first out of profits after that out of capital, and lastly, if necessary, through the partners individually in the proportion in which they were entitled to share profits. This implies that if the assets of the firm are insufficient to discharge the liabilities of the firm, the partners shall bear the deficiency in their profit sharing ratio and pay them out of their private assets, if necessary.

- Instance : A, B, C, and D are partners in a business sharing profits and losses equally. A dies and the firm is dissolved. On the date of dissolution it was establish that the capitals of A and B were Rs. 20,000 each and that of C and D Rs. 10,000 and Rs. 5,000 respectively. The outside liabilities stood at Rs. 6,000 and the total value of assets at Rs. 41,000. Therefore , the deficiency works out at Rs. 20,000 (61,000 — 41,000). This would be equally shared through B, C and D and the legal heir of A i.e., Rs. 5,000 each.

Application of Assets

The assets of the firm including any sums paid through the partners to create up deficiencies of capital shall be applied in the following order :

- in paying off the debts of third parties, .
- in paying to each partner ratably what is due to him from the firm-for advances as distinguished from capital,
- in paying to each partner ratably what is due to him on explanation of capital, and
- the surplus, if any shall be divided in the middle of the partners in the proportion in which they were entitled to share profits.

Let us understand this with the help of an instance. A, B and C were partners in a firm sharing profits and losses equally. The accounts illustrate that, on the date of dissolution, partners' capital was A-Rs. 20,000, B-Rs. 10,000, and C - Rs. 2,000.

A had advanced Rs. 2,000 as loan to the firm, the outside liabilities were Rs. 13,000. The asset could realize Rs. 50,000. This amount shall be utilized first to pay Rs. 13,000 of outside liability, after that Rs, 2,000 to A for repayment of his loan then Rs. 32,000 to A, B and C for their capital (Rs. 20,000 to A. Rs. 10,000 to B and Rs. 2,000 to C), and the remaining amount of Rs. 3,000 shall be shared equally (profit sharing ratio) through A, B and C.

Suppose. the assets realized Rs. 42.500 only resulting in a loss of Rs. 4,500 (Rs. 47,000 - Rs. 42,500). This loss shall be shared through A, B and C equally reducing their capital balances to Rs. 18,500, Rs. 8,500, and Rs. 500 respectively. So, the amount of Rs. 42,500 shall be used as follows :

- Rs. 13,000 to pay outside liabilities
- Rs. 2,000 to pay A's loan, and
- Rs. 27,500 to pay the capital balances of A, B, and C.

Payment of Firm's Debts and Separate Debts of Partners

You know that the partners are jointly and severally liable to pay the debts of the firm. This means that even the private assets of the partners can be utilized for payment of firm's debts, if necessary. Not only that, the third party has the right to realize the whole amount from any partner. This though is subject to the provision of Section 49 which states that the private assets of any partner shall be applied first, to pay his private debts, and then, if there is any surplus, it can be applied to pay the debts of the firm, if necessary. Therefore , partner's private assets can be used for payment of firm's debts only after his private liabilities have been paid off and that too if firm's assets are insufficient to pay firm's debts.

It should be noted that firm's assets are also used first for payment of firm's liabilities and then the surplus, if any, can be used for payment of the private debts of a partner only to the extent of his share in the property of the firm.

Loss Arising from Insolvency of a Partner

If, on sharing of the final amount of loss on dissolution, a partner's capital explanation shows some deficiency, he shall bring in the amount of deficiency in cash so that the other partners can be paid their amounts of capital. But, if the partner whose capital explanation shows deficiency is insolvent, he may not be able to bring in the necessary amount (fully or in part) resulting in additional loss to other partners. In such a situation, the question arises in relation to the ratio in which the. other partners are to share such loss. This is done in the light of a prominent English case of Garner v. Murray which states that the loss arising from the deficiency of an insolvent

partner's capital should be borne through the solvent partners in proportion to their respective capitals as they stood on the date of dissolution. To continue with the similar instance of A, B and C who share profits equally, if the assets realize Rs. 35,000 only this would result in a loss of Rs. 12,000 (Rs. 47,000 - Rs. 35,000). When this amount of loss is shared through A, B and C their capital balances will reduce to : A - Rs. 16,000, B - Rs. 6,000 and C-Rs. (-)2,000. After paying Rs. 13,000 for outside debts and Rs. 2,000 for A's loan, we are left with Rs. 20,000 as against Rs. 22,000 to be paid to A - Rs. 16,000 and 13 - Rs. 6,000. There is no problem if C can bring in Rs. 2,000 due from him.

But if he becomes insolvent and only Rs. 500 can be realized from him, then there will be a deficiency of Rs. 1,500 which will be shared through A and B in the ratio of their capitals i.e.. 2:1 (not equally as per their profit sharing ratio). Therefore their capitals will stand reduced to A - Rs.15,000 (Rs. 16,000- Rs. 1,000) and B. Rs. 5,500 (Rs. 6,000 - Rs. 500) which can now be paid to them with the help of the amount (Rs. 20,000) left after paying outside debts and A's loan plus Rs. 500 realized from C’s estate.

Sale of Goodwill

Just as to Section 55, in settling the accounts of a firm after dissolution, goodwill shall, subject to contract flanked by the partners, be incorporated in the assets, and it may be sold either separately or beside with other property of the firm.

When, after dissolution of the firm, the goodwill of the firm has been sold, a partner may (i) carry on a business competing with that of the buyer i.e., the partner of the dissolved firm can carry on the similar business as that of the dissolved firm, and (ii) advertise such business.

But, subject to agreement flanked by him and the buyer, he may not

- Use the firm's name
- Symbolize himself as carrying on the business of the old firm, or
- Solicit the business from the customers of dissolved firm.

Though, any partner may enter into an agreement with the buyer of goodwill that such partner will not carry on any business alike to that of the dissolved firm within a specified era or within the specified local limits. Such agreement shall be valid if restrictions imposed are reasonable as it would not be barred through Section 27 of the Indian Contract Act, which deals with the agreements in restraint of deal.

REVIEW QUESTIONS

- What do you understand through dissolution of firm? How can a firm be dissolved?
- Under what circumstances the court can order dissolution of the firm on a suit through a partner?
- Describe the rights and liabilities of partners on dissolution of a firm.
- What are the rules concerning resolution of accounts of a firm after dissolution? Explain fully.
- Describe the rights of a partner when the firm has been dissolved on the grounds of fraud or misrepresentation of a partner.

PART 5. SALE OF GOODS

CHAPTER 16

NATURE OF CONTRACT OF SALE

STRUCTURE

- Learning objectives
- Meaning of a contract of sale
- Essentials of a valid contract of sale
- Sale and agreement to sell
- Sale and hire-purchase agreements
- Meaning and kinds of goods
- Effect of destruction of goods
- Review Questions

LEARNING OBJECTIVES

After learning this unit, you should be able to:

- Explain the meaning of a contract of sale and describe its essential characteristics
- Distinguish sale from an agreement to sell and hire-purchase agreement
- Explain the meaning of the term goods and identify dissimilar kinds of goods
- Describe the effect of destruction of goods.

MEANING OF A CONTRACT OF SALE

Just as to Section 4 of the Sale of Goods Act, "a contract of sale of goods is a contract whereby the setter transfers or agrees to transfer the property in goods to the buyer for a price". A Contract of sale may be absolute or conditional just as to the desire of the contracting parties. The term 'contract of sale' is a generic term and, so, broader than 'sale'. It comprises 'sale proper'

and 'an agreement to sell'. Where under a contract of sale, the property in goods has passed from the seller to the buyer, it is described a 'sale', but where the transfer of property in goods is to take lay at a future time or subject to some circumstances thereafter to be fulfilled, it is an 'agreement to sell'. You should keep in mind that an agreement to sell becomes a sale when the time elapses or the circumstances are fulfilled subject to which the ownership in the goods, is to be transferred.

Examples:

- A enters into a contract with B to buy 100 quintals of potatoes, from B's cold storage for 8s. 2,000. It shall amount to a sale if the seller authorises A to approach to his cold storage and take absent the potatoes whenever A desires.
- A agrees to sell his scooter to B after ten days for Rs. 5,000. B agrees to buy it after ten days, for Rs. 5,000. It is an 'agreement to sell' and it will become sale after ten-days. The specific points of distinction flanked by 'sale: and 'agreement to sell' shall be discussed a small later in this unit.

Formalities of a Contract of Sale

A contract of sale is regulated through the common law of contract. Accordingly, there necessity be an offer to buy or sell goods and an acceptance of that offer, parties necessity be competent to contract and there should be free consent. The subject matter of such contract is goods the property in which is transferred or is to be transferred for a money consideration described the price-paid or promised to be paid. As per Section 5 of the Sale of Goods Act, a contract of sale may be made in any of the following manners:

- There may be immediate delivery of the goods;

- There may be immediate payment of the price but the delivery to be made at some future date;
- There may be immediate delivery of goods and also immediate payment of price;
- It may be agreed that the delivery or payment or both are to be made in installments; or
- The delivery or payment or both may be made at some future date.

Except where specially provided through some law for the time being in force, no specific, formalities are required to constitute a valid contract of sale of goods. Though, the buyer and the seller should mutually agree for the transfer of property in goods. A contract of sale may be express or implied from the conduct of the parties and in the case of express contract, it may be oral or in writing or partly in writing and partly through wards of mouth.

A written offer to sell goods may be accepted verbally or through writing, likewise, a verbal offer may be accepted in writing. In case of a contract made with a company, the contract may have to be in writing.

ESSENTIALS OF A VALID CONTRACT OF SALE

A contract of sale is a special kind of contract, so all the essentials of a valid contract necessity be fulfilled. If any of the essential element of a valid contract is missing, then the contract of sale will not be valid. For instance, A agreed to sell his scooter to B without any consideration. This contract of sale is not valid since there is no consideration.

From the definition of Contract of Sale as per Section 4 of the Sale of Goods Act, the following essential characteristics may be noted.

- There necessity be two parties: There necessity be two parties, one seller, and the other buyer. A person cannot be a seller as well as a buyer. A person cannot buy his own goods. For instance, X is the

owner of sure goods, but he is not aware of this information. A pretends to be the owner of the goods and sells them to X. There is no sale, for X cannot buy goods which are already his own. Though, a part-owner may sell to another part-owner. Partners are not regarded as separate persons for the purpose of sale of the partnership property. They are the joint owners of the goods and as such they cannot be both seller and buyer. But a partner may buy goods from the firm or sell goods to the firm.

- Subject matter of sale necessity be 'goods': The subject matter of a contract of sale necessity be goods and the goods necessity be movable. Sale and purchase of immovable property is not sheltered through this Act, but is regulated through the Transfer of Property Act. Likewise, contracts relating to services are not treated as contract of sale.
- Transfer of Property in the goods: In every contract of sale, it is the ownership that is transferred and in an agreement to sell the ownership is agreed to be transferred as in case of pledge. Just as to Section 2 (II) of the Act, property means the common property in the goods and not merely a special property. In a contract of sale the common property is transferred from seller to the buyer. On the other hand, when the goods are pledged, it is only the special property which is transferred i.e., possession of the goods is transferred to the pledgee while the ownership rights remain with the pledger. You should note that for transferring the ownership of goods, the physical delivery of the goods is not essential.
- Consideration in Price: Consideration in a contract of sale has necessarily to be money. Therefore , if for instance, goods arc offered as consideration for goods, it will not amount to sale, but it will be described a 'barter'. Likewise, in case there is no consideration, it

amounts to gift and not sale. Though the consideration may be partly in money and partly in goods.

Sale and Contract for Work and Labour

A contract of sale of goods has to be distinguished from a contract for work and labour, involving the exercise of ability or labour on some material. The dividing row flanked by the two is very minute. The distinction essentially rests on whether the rendering of the service and exercise of ability is the essence of the contract or the delivery of the goods is the essence of the contract, although some labour on the part of the seller might also have been out. In case of the former, it is a contract of work while in the later case it will be a contract of sale of goods. The distinction flanked by the two may be understood through referring to the case of Robinson v. Graves. In this case A occupied an artist to paint a portrait. Canvas, paint and other necessary articles were to be supplied through A to the painter. On the other hand, a contract for providing and fixing four dissimilar kinds of windows of sure mass just as to specifications, designs, drawings and instructions set out in the contract and a contract for creation and supplying of wagons or coaches on the under frame supplied through Railways have been held through the Supreme Court to be contracts for work and labour and not a contract of sale.

It should become clear to you that in a contract of gale ownership and possession of goods is transferred, while in a contract for work and labour though there may be delivery of goods, yet the emphasis is on the exercise of ability and labour upon the goods. Does providing food in a restaurant amount to sale of goods? The Punjab High Court while delivering judgment in Northern India Caterers (India) Ltd., v, Lt.

Governor of Delhi observed that the supply of meals, whether to residents or stray customers is essentially in the nature of service and not a transaction of sale. The customers approach there not to buy food and drinks bur to discover bodily satisfaction that service of food in the setting of a restaurant can afford to provide.

SALE AND AGREEMENT TO SELL

As noted earlier in this chapter itself, contract of sale is a generic term and comprises both sale and an agreement to sell. The two, though, have dissimilar legal ramifications. The rights and obligations of the parties vary with the information whether the transaction is a sale or an agreement to sell. Distinction flanked by the two is, so, of prime importance. The vital point of distinction flanked by the two is that in a sale the buyer becomes the owner of the goods as soon as the contract of sale is made, whereas in an agreement to sell, the seller continues to be the owner of the goods agreed to be sold, till it becomes a sale and as you have already read an agreement to sell becomes a sale on the expiry of the stipulated time or when the circumstances arc fulfilled subject to which the property in goods is to be transferred. Other points of distinction flanked by the two may be noted as under :

- A 'sale' is an executed contract whereas an agreement to sell is always an executory contract. Executed means that the ownership of the goods has been transferred to the buyer, while executory means that something remnants to be done i.e., ownership shall pass on some future date.
- An agreement to sell is a contract, pure and easy, and makes merely jus in personam, i.e., provides a right to either buyer or seller against the other for any default in fulfilling his part of the agreement. A 'sale' is a contract plus conveyance, and makes jus in rem, i.e., provides right to the buyer to enjoy the goods as against the whole world including the seller.

- In a sale, if the buyer wrongfully refuses to accept the goods, and pay the price, the seller can sue for the price, even if the goods are in his possession and he can exercise the right 'of lien, stoppage of goods in transit and of resale. But in an agreement to sell only remedy accessible to the seller is to sue for damages if buyer fails to accept and pay for the goods. For instance, A sells ten bags of rice to B for Rs. 3,000. If B refuses to accept the goods, A can file a suit against B for price even though the goods are in A's possession. But instead if it was an agreement to sell, then A's only remedy is to claim damages from B because the ownership has not yet passed to B.
- In an agreement to sell, the seller being still the owner, he can dispose of the goods as he likes and the buyer's remedy against the seller's breach is a suit for damages. For instance, A agreed to sell a scrupulous horse to B for Rs. 5,000. Subsequent A sells the similar horse to C for Rs, 6,000. B's remedy is to claim, damages from A. B cannot recover the horse from C. In a 'sale' breach through the seller provides the buyer a double remedy; a suit for damages against the seller, and the right to follow property in the hands of the subsequent buyer. Therefore in sale if the goods are resold, the buyer can recover them as the owner from the subsequent purchaser. If, in the instance where A sells a scrupulous horse to B for Rs,-5,000 and subsequently it is sold to C for Rs, 6,000, B shall have the right to recover the horse from C, because at the time of sale A was no longer the owner of the said horse. B can also claim damages from A for wrongful conversion.

- 'Risk follows ownership' is the golden rule i.e., whosoever is the owner of the goods at the time of loss, will bear the loss.
- In case of 'sale', if there is any loss to the goods, the loss will fall on the buyer, even though the goods are in the possession of the seller. On the other hand in case of 'an agreement to sell', the loss shall be borne

through the seller, even though the goods are in the possession of the buyer. It is because, ownership in case of agreement to sell continues to vest in the seller.

- Insolvency of the seller: If in a sale the seller becomes insolvent while the goods are still in his possession, the buyer shall have a right to claim the goods from the official Receiver or Assignee because the ownership of poods has passed to the buyer. Though, in case of an agreement to sell, the buyer cannot claim the goods even when he has paid the price. Buyer's only remedy in this case is to claim ratable dividend for the money paid from the estate of the insolvent seller.
- Insolvency of the Buyer: In case of sale, if the buyer becomes insolvent before paying the price, the ownership having passed to the buyer, the seller shall have to deliver the goods to the Official Assignee or Receiver. For the unpaid price, the seller will rank as an unsecured creditor and thereby entitled to ratable dividend out of the estate of the insolvent buyer. In case of an agreement to sell, where the seller continues to be the owner c goods, the seller can refuse to deliver the goods to the Official Assignee or Receiver unless he is paid full price of the goods.

SALE AND HIRE-PURCHASE AGREEMENTS

A transaction of sale has to be distinguished from another apparently alike but dissimilar transaction, described hire-purchase 'agreement'. A hire-purchase agreement is an agreement under which the owner delivers his goods on hire foundation to a person described 'hirer' and the hirer has the option to buy the goods through paying the agreed amount in specified installments.

The hirer, under this agreement, is required to pay every month a scrupulous sum of money, and if he pays in that method for an agreed number of months, the hirer will become the owner of the goods on the payment of the

last installment. But if the hirer fails to pay any scrupulous installment, the owner can terminate the contract and take absent the goods because the ownership continues to remain with him. The hirer has two option: i) he may buy the goods after paying all the agreed installments or ii) he may return the goods at any time. In case he decides to return the goods he shall not be liable for further payment of installments, the amount already paid is treated as hire charges for the use of goods.

A hire-purchase agreement, so, entitles the hirer only to possession of the goods. He cannot accordingly pass a good title to any buyer from him. A hire purchase agreement is separate from 'sale' in which price may be payable through installments. In case of sale, the property in goods passes as soon as the contract is made, though price may not yet have been paid. A hire-purchase agreement, on the other hand, does not result in passing of the property unless the option to purchase is exercised, usually through payment of all the installments. Till such time, it continues to be a bailment. Therefore , it is primarily the option on the part of the hirer to buy or to terminate the hiring that marks the distinction. In K.L. Johan & Co. v. Dy. Commercial Tax Officer, the Supreme Court observed as follows:

The essence of a sale is that the property is transferred front he seller to the buyer for a price, whether paid at once or paid later in installments. On the other hand, a hire-purchase agreement has two characteristics. There is first an aspect of bailment of goods subject to the hire-purchase agreement, and there is after that, an element of sale which fructifies when the option to purchase is exercised through the intending purchaser.

You should note that in a contract in which the person taking the goods does not have the option to return the goods, it will be an 'agreement to buy' and not an agreement of hire-purchase, even though the price is payable in installments and the seller has the power to take the goods back in case of

default. In Les v. Butler, a lady hired sure furniture from the plaintiff. The contract provided that the hirer has no option to return the goods and owner can take the furniture back if any installment was not paid. Before the last installment was paid, the lady sold the furniture to the defendant. It was held, that the defendant had acquired a good title, the lady being in possession of the furniture under an ‚agreement to buy' and not under an agreement of 'hire-purchase', because the lady did not have the option to return, but was under compulsion to buy.

Therefore , in case of sale through installment, the buyer cannot terminate the contract and as such is bound to pay the price of the goods. The hire-purchaser, on the other hand, has an option to terminate the contract at any stage and cannot be forced to pay the further installments. Further, if the agreement is an agreement to sell and under it if the buyer obtains possession of the goods, with the consent of the seller, he can validly sell or pledge the goods and thereby provide the transferee or pledgee a good title on the goods provided they have acted in good faith. Though, in a contract of hire purchase, the hirer cannot transfer ownership to such buyer even if the latter acts in good faith, because the location of the hirer is that of a bailee only. He becomes the owner when all the installments are paid.

In this connection the following points should also be noted:

- A hirer cannot claim the benefit of implied circumstances and warranties unless it becomes a sale. Though, circumstances implied under Hire-Purchase Act, 1972 do apply.
- Sales-Tax is not livable on a hire-purchase until it becomes a sale,
- A contract of sale may be made orally or in writing, but the hire-purchase agreement necessity be in writing.

MEANING AND KINDS OF GOODS

You have already learnt that the Sale of Goods Act does riot extend to the sale and purchase of immovable property;. The subject-matter of a contract of sale is goods. Let us, so, understand the meaning of the term 'goods' and explain its several kinds relevant, to the contract of sale.

Meaning of Goods

Goods are defined to mean every type of movable property other than actionable claims and money. The term comprises stock and shares, rising crops, grass, and things attached to, or forming part of the land which are agreed to be severed before sale or under the contract of sale. Stock and shares have been expressly incorporated in the definition of goods primarily to avoid any misunderstanding because they are excluded from the term 'goods' under English Law.

You will have noticed that ‚money' and 'questionable claims' have been expressly excluded from the term 'goods'. 'Money' means the legal tender, it excludes old coins and foreign currency, as they can be sold or bought as goods. Sale and purchase of foreign currency is, though, regulated through the Foreign Exchange Regulation Act. 'Actionable claims' like debts arc things which a person cannot create use of, but which can be claimed through him through means of a legal action. Actionable claims cannot be sold or purchased like goods, they can only be assigned.

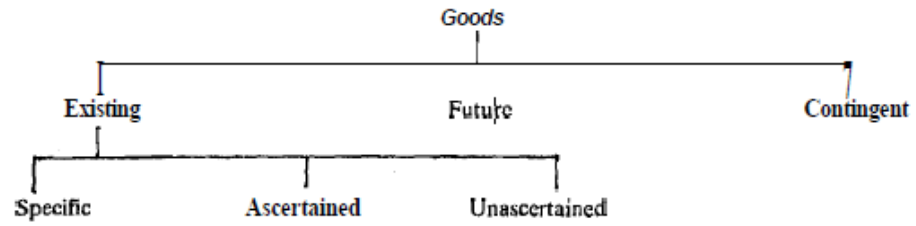
Therefore , you should note the goods contain every type of movable property, i.e., things which can be accepted from one lay to another. Though, all such things which form part of the land itself but are agreed to be served from the land under the contract of sale, are measured as goods. Therefore , grass, rising crops, trees to be cut and their log wood to be delivered are goods as per the definition, likewise things like goodwill, copyright, deal spot,

patents, water, gas, electricity are all goods and may be the subject-matter of a contract of sale.

Kinds of Goods

The goods forming subject-matter of the contract of sale may be classified into following kinds as shown in Figure 16.1.

Figure 16.1: Types of Goods



Existing Goods

As per Section 6 of the Act, existing goods are those goods which are owned or possessed through the seller at the time of contract of sale, The seller is either the owner of goods, or he is in possession of goods. For instance A, a manufacturer of fans, sells a fan to B. It is a contract of sale of existing goods because A owns the fan. Likewise when a person sells goods possessed buy not owned through him such as sale through an agent, it is a sale of existing goods. For instance in the instance, if the manufacturer sends the fans to his agent in Delhi and sells them through the agent it is a sale of existing goods because the dealer possesses the goods, although he is not the owner of them, at the time of the contract of sale. The existing goods may be

- Specific goods: These are the goods which are recognized and agreed upon through the parties at the time a contract of sale is made, for instance, a specified watch, ring, or a car.
- Ascertained goods: Though normally used as synonym for specific goods, ascertained goods are planned to contain goods which have become ascertained subsequently to the formation of the contract. In re Wait. Lord Atkin observed that ascertained almost certainly means "recognized in accordance with the agreement after the time a contract of sale is made." When the 'unascertained goods' are recognized and agreed upon through the parties, the goods are described 'ascertained'. You should note that ascertainment involves unconditional appropriation of the goods as the subject-matter of a scrupulous contract. Therefore when out of a mass of unascertained goods, the quantity contracted for is recognized and set aside for a given contract, the goods arc said to be ascertained.
- Unascertained goods: These are the goods which are not recognized and agreed upon at the time when the contract is made. They are recognized only through account. For instance, A, who owns and Ambassador car illustrate room, has 50 cars, and agrees to sell any one of them to B. The contract is for unascertained goods, because which scrupulous car shall be sold to B has not been recognized at the time of the contract at sale.

Future Goods

As per of the Act future goods' means goods to be manufactured or produced or acquired through the seller after creation the contract of sale. Therefore , future goods are goods which either are not in subsistence at the time of Contract of sale or hey may be in subsistence when the agreement of

their sale is entered upon but have of yet been acquired through the seller through that time.

Contingent Goods

Contingent Goods are the goods the acquisition of which through the seller depends upon contingency which may or may not happen. For instance, A agrees sell to 3 a sure painting only if C, its present owner, sells it to him. Here the contract is for the sale of contingent goods as the availability of the painting depends its sale through C.

EFFECT OF DESTRUCTION OF GOODS

You have learnt that a contract becomes void on the destruction of the subject-matter. Likewise a contract of sale becomes void on the destruction of goods We can revise the effect of destruction of goods under following two heads.

- Goods perishing before creation of the contract: Sometimes, the goods might, have perished before creation of the contract of sale. In such a situation the contract of sale is void. Section 7 of the Act gives that a contract for the sale of specific goods is void, if at the time when the contract was made, the goods have without the knowledge of the seller, perished or become so damaged as no longer answer to their account in the contract. This is based on the principle of impossibility of performance of the contract. Therefore , the contract of sale shall avoid on the destruction of goods, if the following circumstances are satisfied:
    - It necessity be a contract of sale for specific goods;
    - The goods necessity have perished before creation of the contract; and

- The seller necessity not be aware in relation to the destruction of goods.

- Sometimes, only part of the goods may be destroyed. In such a situation, the deciding factor would be whether the contract is divisible or indivisible. If the contract is divisible and only a part of the goods are lost, then the contract remnants valid for that part which is in good condition. In Barrow Lane & Ballard v. Philips, A agreed to sell to B a parcel of 700 bags of groundnuts lying in his godown. Strange to A, 10 bags had been stolen at the time of the contract. A, so, tendered delivery of the parcel containing 591 bags. It was held that the contract had become void and B cannot be compelled to accept 591 bags because the contract was indivisible.
- Goods perishing before sale but after agreement to sell: It is also possible that the goods might perish after an agreement to sell is made but before it becomes a sale. In this connection Section 8 of the Act gives that in an agreement to sell specific goods, the agreement becomes void if the goods are destroyed without any fault of the seller or the buyer. This rule is based on the information that it was only an agreement to sell and the goods were lost before the passing of the risk.
- In Eliphic v, Barnes, a horse was delivered on trial for eight days. Though, the hors died on the third day, without any fault of either the seller or buyer. It was held that this agree mentis void and the seller could not recover the price from the buyer.
- You should note that Section 7 and 8 are applicable only in case of specific goods. So, if unascertained goods are destroyed either before or after creation the agreement, the contract shall not become void. Therefore , in an agreement to sell unascertained goods, even if the whole stock of goods is destroyed, the contract shall not become void and the seller will have to perform his promise. For instance, A agreed to sell to B 100 bags of wheat from his stock of 1,000 bags in his

godown. The whole stock was destroyed through fire. A is bound to deliver 100 bags of wheat or else he will be liable for damages.

REVIEW QUESTIONS

- Describe a contract-of sale. How is a contract of sale dissimilar from an agreement to sell?
- Explain the essentials of valid contract of sale.
- How is a contract of sale made? State briefly with illustrations the necessary formalities of such a contract.
- What is meant through goods? What are the several kinds of goods?

CHAPTER 17

CONDITIONS AND WARRANTIES

STRUCTURE

- Learning objectives
- Meaning and definition of condition and warranty
- Distinction flanked by condition and warranty
- Types of conditions and warranties
- When breach of a condition is to be treated as a breach of a warranty?
- Doctrine of caveat emptor
- Review questions

LEARNING OBJECTIVES

After learning this chapter you should be able to:

- Describe the meaning of the conditions 'condition' and 'warranty' in relation to sale and purchase of goods.
- Distinguish flanked by a condition' and a 'warranty'.
- Talk about as to when a condition may be treated as a warranty

MEANING AND DEFINITION OF CONDITION AND WARRANTY

Several a times a seller of goods creates sure claims in relation to the goods he offers for sale. These claims may relate to the excellence, use, suitability, utility, etc., of those subject-matter of the contract. These assurances may be a mere expression of opinion of the seller and may not form part of the contract. But, sometimes they may form part of the contract and the buyer buys the goods on the faith of such assurances. In such a case they have legal effect on the contract. An assurance or representation which shapes part of the contract of sale is tanned as 'stipulation'. All such stipulations cannot be treated at the similar footing. Some may be planned to

be of a fundamental nature whereas others may be subsidiary or merely an expression of an opinion. Depending upon whether a representation is fundamental or subsidiary, it ranks as a 'condition' and 'warranty'. If a stipulation shapes the very foundation of the contract, it is a 'condition'. On the other hand, if the stipulation is collateral to the main purpose of the contract, i.e., is of a lesser importance, then it is recognized as a 'warranty'.

Definition of Condition

The term 'Condition' is defined under Section 12(2) of the Sale of Goods Act, 1930. Just as to this Section, a condition is a stipulation essential to the main purpose of the contract, the breach of which provides rise to a right to treat the contract as repudiated.

Therefore , a condition is that stipulation which goes to the root of the contract and therefore shapes the foundation of the contract. It is essential to the main purpose of the contract. It is that obligation the non-fulfillment of which may fairly be measured as a substantial failure to perform the contract at all. So, if a condition is not fulfilled, the buyer has a right to put an end to the contract and also recover damages for the breach of contract.

The aforesaid account of condition is well illustrated through the case of Baldry v. Marshall. In this case 'B' consulted 'M', a motor car dealer, for a car appropriate for touring purposes. M suggested a „Bugatti' car and B accordingly bought it. The car turned out to be unfit for the touring purpose. It was held that the term that 'car should be appropriate for touring purposes was a condition of the contract. It was so vital that its non-fulfillment defeated the very purpose fur which B bought the car. He was, so, entitled to reject the car and have refund of the price.

Definition of Warranty

Just as to Section 12(3) of the Sale of Goods Act, 1930, a warranty, is a stipulation collateral to the main purpose of the contract, the breach of which provides rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated. In other words, warranty is a stipulation which is not essential to the main purpose of the contract i.e., it is of a subsidiary or collateral nature. If there is a breach of warranty, the buyer cannot repudiate the contract, but he can only claim damages from the seller. In the case, if the buyer had asked for a good car and while selling the car the dealer said that it could run for 15 kms per liter of petrol. But it was exposed that it could run only 12 kms per liter of petrol. Here, the statement made through the seller would amount to a warranty and the buyer could not terminate the contract and he was entitled to claim damages only.

DISTINCTION FLANKED BY CONDITION AND WARRANTY

From the aforesaid discussion, you necessity have noted that the variation flanked by the two conditions viz., 'Condition' and 'Warranty' is not that of a degree and not that of type. The crux of the decision shall lie on the information as to whether a stipulation shapes the foundation of the contract or is only a collateral promise. Therefore , where the buyer wouldn't have purchased those goods but for that stipulation, it shall be construed as a condition. On the other hand, if the buyer would have so purchased and the stipulation is only intended to give an assurance as to the excellence or suitability of the goods, it shall be a warranty. The distinction flanked by the two stipulations is to be measured from the point of view that if the stipulation is such that its breach would create the rights of the aggrieved party nugatory, then such a stipulation is condition and where the stipulation is only auxiliary, it is a warranty. One may, so, say that whether a stipulation in a contract of sale is a condition or a warranty depends in each case on the construction of

the contract as a whole. The court is not to be guided through the terminology used through the parties to the contract, but is to be guided through the intention of the parties which can be gathered from the conditions of the contract and conditions. Section 12 (4) endorses this view and gives that a stipulation may be a condition, though described a warranty in the contract.

The point may be clarified with the help of the following instance:

- 'A', who desires to purchase a horse, goes to a horse dealer, and asks the horse dealer to provide him a quiet and non vicious horse. The horse which the dealer supplies him turns out to be a hostile horse and on the very first ride throws him down resulting in broken limbs. In this case, the statement made through the buyer that he wants a quiet horse was a condition essential to the main purpose of the contract.

So, A can reject the horse and get back the price. The buyer can also claim damage for the injuries suffered through him. But, if 'A', himself selects a scrupulous horse and then seeks the seller's assurance as to its being quiet and non-vicious, the stipulation shall be a 'warranty' and the only remedy of the buyer shall be a claim for damages, he cannot return the horse and claim the price.

On the foundation of the discussion, the points of distinction flanked by the two can be summarized as follows :

	Condition		Warranty
1	A condition is a stipulation (in a contract) which is essential to the main purpose of the contract.	1	A warranty is a stipulation which is only collateral to the main purpose of the contract.
2	A breach of condition gives the aggrieved party a right to sue for damages as well as the right to terminate the contract.	2	A breach of warranty gives only the right to claim damages. The contract cannot be terminated.
3	In the event of the breach of a condition, the aggrieved party may choose to treat the breach of condition as a breach of warranty. A buyer may for instance, like to retain the goods and claim only damages.	3	A breach of warranty cannot be treated as a breach of condition.

TYPES OF CONDITIONS AND WARRANTIES

Condition and warranties may either be express or implied.

Express Condition and Warranties

They are said to be express when the conditions of the contract expressly give for them. Therefore , where a buyer desires to buy 'While Maruti Car', the color of the car becomes an express condition. If the two contracting parties desire they may put the contents of any specific statement or promise which has taken lay flanked by them at par as the account of the thing contracted for. This then shall be treated as express condition. The parties are at liberty to impose any condition or warranty through an express agreement in a contract of sale.

Likewise, you necessity have noticed companies advertising their products carrying guarantee for a sure era, for instance, 'Orient Fans — Guaranteed for Two Years'. 'Binatone TVs — Three Years Guarantee on Picture Tube'. All these are instance of express warranties.

Implied Conditions

Conditions and Warranties are said to be implied when the law infers their subsistence as implicit in the contract even without their actually having been put in the contract. Hence, unless otherwise is agreed upon flanked by the parties, every contract of sale of goods shall be subject to these implied conditions and warranties. But the parties do have the right to exclude any of the implied conditions or warranties through specifically and expressly providing otherwise. The implied conditions and warranties are enforced because the law deem: that in the circumstance of the contract the parties desired to add these stipulations to their contract but did not put them

expressly. These implied conditions and warranties are contained in Sections 14 to 17 of the Act and are as follows :

Conditions as to Title (Ownership)

Sale involve transfer of ownership and possession. So, Section 14 (a) gives that in a contract of sale, unless the conditions of the contract are such as to illustrate a dissimilar intention, there is an implied condition on the part of the seller that he has a right to sell the goods, and that in the case of an agreement to sell, he will have a right to sell the goods at the time when the property (ownership) is to pass.

The aforesaid provision, you should note, is based upon a easy logic that only an owner has the right to effect a valid sale of goods, since only he (subject, though, to sure exceptions which you will revise later under 'Sale through Non-owners') can confer ownership. The rule of law is Nemo dat quod non-habat, i.e., one cannot provide what one does not have'. In every contract of sale there is an implied condition that the seller has a valid title to the goods.

This condition is very essential to protect the interest of innocent buyers.

The following instance will clarify the point further :

- A purchased a car from B who had no title to it. A used the car for many months. After that, C, the true owner, spotted the car and demanded it from A. Held, that A was bound to hand in excess of the car to its true owner. A's remedy is to sue B, the seller without title, for the recovery of the price and damages even though many months had passed.

Though, this condition like other implied conditions, may be negative through an express conditions. Therefore , where a thief goes to a 'Chor Bazar'

to sell the stolen goods to the knowledge of the buyer thereof, the buyer may not get the refund of sale price if those goods are to be restored to its real owner. Likewise, when the custom authorities, sell any confiscated items they are absolved from any responsibility with respect to the owners title. It should further be noted that the seller should have the right to sell the goods. The term 'light to sell' is wider than 'right to pass ownership'. Therefore , a seller has no right to sell, if he infringes the deal spot of another person.

So if the seller sells the goods in contravention of deal spot laws, it is regarded as a breach of implied condition as to title. In such a case the buyer will have a right to terminate the contract of sale. In Niblett Ltd. v. Confectioner's Materials Co. sure tins of condensed milk bearing the label “Nissly Brand" were sold through A to B. In order to save themselves from any liability under the deal spot laws, B had to remove the labels and sold the naked tins at loss. A was held liable for breach of implied conditions that they had a right to sell.

Sale through Account

Sometimes, the goods arc sold through account. In such a case, Section 15 lays down that there where there is a contract of sale of goods through account, there is an implied condition that the goods shall correspond with account. The term 'correspond with ‚account’ means that the goods supplied necessity be similar as were described through the seller. If it is establish that the goods supplied do not correspond with the account, the buyer has a right to reject the goods and claim damages. The term 'sale of goods through account' is wide and shall contain several situations.

- It will contain a case where the buyer has never seen the goods and buys them only on the foundation of the account given through the seller. For instance, in a sale of a reaping machine, the seller described

it to be only one year old and used only to cut 50 to 60 acres. On delivery, the buyer establish that the machine was very old. The buyer was entitled to reject the machine as it did not correspond with the account given through the seller. Likewise, where a person orders for a „Philips Juicer-made in Japan' it will not be a enough compliance if a „Philips Juicer-made in Hongkong' is supplied to him,

- Even where the buyer has seen the goods, it may be treated a sale through account, if he purchases those goods not on what he has seen but what was stated to him. Therefore , where a person orders 100 bags of a scrupulous diversity of „Punjab Wheat' and the wheat supplied to him is establish to be 'Gujarat Wheat', condition as to account shall be deemed to have been violated inspite of the information that buyer was shown the wheat to be delivered. Likewise, in an auction sale, a set of linen napkins and table cloths were described as "dating from seventeenth century". The buyer, who was a dealer in antiques, purchased the similar after seeing it, but later establish it to be an "eighteenth century set". It was held that they having relied on the account, the buyer had a right to return the similar for not conforming to the account..
- The methods of packing may also form part of the account, For instance, where a seller agrees to deliver 5,000 tins of canned fruit to be packed in cases each containing 50 tins, the buyer shall have a right to reject the goods if the cases contain 'more' or 'less' than 50 tins.

Sale through Example

Sale through example means that the seller has shown a example of the goods to the buyer and has agreed to supply the goods just as to the example. It cannot be assumed that in all cases, where example is shown, the sale shall be a sale through example. In cases where there is no term to that effect, it is

assumed that the example is not shown as a warranty, but only to enable the buyer to form a reasonable judgment in relation to the goods to be bought. The goods supplied may marginally differ. They may be inferior or superior to the example shown,

In case of a contract of sale through example, law assumes the sale to be subject to the following three implied conditions:

- The goods necessity correspond in excellence with the example, i.e., the buyer shall have a right to reject goods inferior or superior to the example.
- The buyer shall have a reasonable opportunity of comparing the goods with the example. Therefore , the seller will have to take the goods back, if they are not establish to be just as to the example. In information, depending upon the nature and volume of the goods involved, opportunity to compare the goods with the example shall be accessible to the buyer. For instance, in a sale of 100 bags of wheat, the buyer is given an opportunity to look at the contents of three bags only. The buyer can terminate the contract.
- The goods shall be free from any defects rendering them unmerchantable, which would not be apparent on reasonable examination of the example, i.e., latent defects. Such defects are exposed when the goods are put to use. Though, seller will not be liable for apparent or visible defects which could be easily exposed through an ordinary prudent person. For instance, A sold to B sure quantity of worsted coating equal to example. The coating was equal to example but had a latent defect as a result of which the cloth was establish to be unfit for creation coats. It was held that the buyer could reject the goods. The cause for this was that though the example also contained the defect was not apparent on an examination of example.

Sale through Example as well as through Account

If the sale is through example as well as through account, Section 15 requires that the goods necessity not only correspond with the example but should also correspond with the account. The following examples explain the point:

- In Wallis v. Prall Case the agreement was for the sale of 'English Sainfoin Seeds', exhibited through example and described as general English Sainfoin. Though seller did not provide any warranty concerning the growth account or any other matter. The seeds supplied did correspond to the example but both the example and the seeds supplied were establish to be 'Gaint Sainfoin', in altogether dissimilar diversity. Held, there was a breach of condition as to account and so the buyer may recover damages from the seller.
- 'Foreign refined rape-seed oil' was sold which was warranted to be equal to example. The oil which was supplied through the seller was just as to the sample. The example was actually not 'foreign rape-seed oil' but contained a mixture of rape oil and hemp oil Held, the buyer could reject the oil.

Condition as to Excellence or Fitness

The common rule in respect of the sale of goods is that a buyer is supposed to satisfy himself in relation to the excellence as well as the suitability of the goods. Therefore , later on, if the goods turn out to be unsuitable or unfit for the purpose he purchased them for, he shall not be entitled to return or exchange them or seek compensation. There are, though, sure exceptions to this rule. It is in these exceptional conditions that implied condition as to fitness applies.

Where the buyer, expressly or through implication, creates recognized to the seller the scrupulous purpose for which the goods are required so as to

illustrate that the buyer relies on the seller's ability or judgment, and the goods are of a account which it is in the course of the seller's business to supply there is an implied condition that the goods shall be reasonably fit for such purpose. Therefore , to avail of the condition as to fitness, all the three conditions necessity be satisfied, viz.,

- The exact purpose for which the goods are being bought necessity have been disclosed through the buyer to the seller,
- The buyer necessity have relied upon the seller's ability or judgment with respect to the fitness of the goods for any scrupulous purpose, and
- The seller's business necessity be to sell such goods.

Therefore , in Priest v. Last, a draper went to a chemist shop and asked him to provide a hot water bottle. He told him the purpose also for which it was required. The Chemist gave the hot water bottle but told him only to use hot water because the bottle would not stand the boiling water. While the bottle was being used, it burst and injured her. Held, breach of condition as to fitness was committed and the Chemist was liable for refund of price as well as damages because the bottle was unfit for being used as a hot water bottle.

When the goods can be used only for one scrupulous purpose, the buyer need not tell the seller the purpose which the goods are being bought. Therefore , a refrigerator that failed to create ice would be rejected on grounds of breach of this condition. A set of false teeth bought from a dentist may be rejected if they do not fit the buyer's mouth.

The problem may arise where the goods are capable of being put to multiple uses. In such a case, to avail the relief under the aforesaid condition, the buyer necessity illustrate that he had explained to the seller the exact purpose for which the goods were purchased. For instance, in Re : Andrew Yule & Co., Hessian cloth, which is usually used for packing purposes, was

supplied to buyer in accordance with his order. The buyer establish it unfit for his purpose of packing foodstuffs because this cloth has a peculiar smell, although it was good as a packing cloth. Held, the buyer cannot reject it because he had not disclosed to the seller, the scrupulous purpose for which he required the cloth. The buyer need not disclose the exact purpose for which he is buying the goods when the goods are fit only for a specific purpose or where the nature of the goods itself through implication tells the purpose for which they are being bought. In those conditions the purpose is deemed to have been impliedly told. For instance, if the buyer demands a cold drink from the seller, it is implied that the buyer needs it for consumption and subsequently, if it is establish to contain BVO or some other unhealthy contents, it is a breach of implied condition as to fitness and creates the seller liable to pay damages.

Though, condition as to fitness shall not be applicable in the following cases :

- Where the buyer fails to disclose to the seller any abnormal conditions. In Griffith v. Peter Conway Ltd., a woman with abnormally sensitive skin asked for a warm tweed coat and was supplied a 'Harris Tweed Coat'. She got rashes on wearing the coat. Her claim for return of price and damages was struck down because there was nothing in the Harris tweed which would have affected the skin of a normal person and she had failed to inform the seller in relation to the her abnormally sensitive skin.
- When the buyer buys the goods through a patent or other deal name. Therefore , where a person goes to a chemist and purchases „Bournvita' as a health drink, he cannot claim any compensation if he discovers no improvement in his health in spite of its prolonged use.

Condition as to Merchantable Excellence

Section 16(2) of the Act gives that where the goods are bought through account from a seller who deals in goods of that account (whether he is the manufacturer or producer or not), there is an implied condition that the goods shall be of merchantable excellence. The expression 'merchantable excellence' in easy words means that the excellence of the goods shall be such that they are capable of being used as the goods of that account and should be free from any latent or hidden defects. If the goods are purchased for resale, then they should be resalable in the market under the account through which they arc ordinarily recognized in the market. There should be no defect in the goods which renders them unfit for sale. For instance, if sugar becomes syrup (Sharbat) it is no longer merchantable. The term 'merchantability' also means that the goods necessity be properly packed. For instance, A purchased wine from B. While opening its cork in the normal manner, the bottle broke off and injured A's hand. It was held that the bottle was not of merchantable excellence and A could recover damages from B.

Implied Warranties

There are only two implied warranties under the Act and both of them are in information necessary corollaries to the 'implied condition as to title'.

Warranty as to Quiet Possession

In every contract of sale, unless contrary intention appears from the conditions of the contract, there is an implied warranty that the buyer shall have and enjoy quiet possession of the goods. Therefore , if the right of enjoyment or possession of the buyer is disturbed through the seller or any other person, the buyer shall be entitled to sue the seller for damages. Breach

of this warranty shall arise where the title of the seller is not exclusive and he has not been conferred a clear right to effect the sale or where his title is defective. This implied warranty can be understood through referring to the case of Niblett Ltd, v. Confectioner's Materials Co. Ltd. which you have already read in this unit. In that case the seller were held responsible for two things. Firstly that they had committed a breach of implied condition as to their title and secondly, for committing breach of implied warranty that the buyers would have quiet possession of the goods sold.

Warranty of Freedom from Encumbrances

Under his warranty, the buyer is entitled to assume that the goods are free from any charge or encumbrance in favor of any third person, not declared to or recognized to him before or at the time when the contract is made. Therefore , this clause will not be applicable where the buyer has been informed of the encumbrances or has notice of the similar. Further, it was held in Collinge. v. Heywood case that the claim under this warranty shall be accessible only when the buyer discharges the amount of encumbrance. If the possession of the buyer is disturbed due to such charge in favour of a third person, he can claim damages from the seller. For instance, A sells sure goods to B. A had already taken a loan of Rs 500 from X on the security of those goods-B was not aware in relation to the this charge on the goods. B had to pay Rs 500 to X in order to enjoy the goods. Now B can claim this amount from A.

WHEN BREACH OF A CONDITION IS TO BE TREATED AS A BREACH OF A WARRANTY?

Section 13 gives for sure conditions where a condition may be reduced to the status of a warranty. Consequently, the buyer loses his right to reject the

goods. His only remedy in such case shall be to claim damages. This shall happen in the following cases:

- Waiver through buyer: Where a contract of sale is subject to any condition to be fulfilled through the seller, the buyer may: (i) waive the condition; or (ii) elect to treat the breach of condition as a breach of warranty. You know that the conditions, express or implied, are for the benefit of the buyer. He has, so, the option to waive the breach of a condition and accept the performance short of it. In that case, he remnants liable for the price but may only recover damages if there is any breach. Once the buyer exercises his option, he cannot later on compel the seller for its fulfillment.
- Compulsory treatment of breach of condition as breach of warranty: When the contract of sale is not severable and the buyer has accepted the goods or part thereof, the breach of any condition to be fulfilled through the seller can only be treated as a breach of warranty. As per Section 42 of the Act, a buyer is deemed to have accepted the goods:
    - When he intimates to the seller that he has accepted them, or
    - When the goods have been delivered to him and (a) he does any act in relation to them which is inconsistent with ownership of the seller (say, pledges the similar), or (b) when, after the lapse of a reasonable time, he retains the goods without intimating to the seller that he has rejected them,

But if the contract is severable, and the buyer has accepted part of the goods, he can still exercise his right to reject the remaining goods.

DOCTRINE OF CAVEAT EMPTOR

„Coveat Emptor' is a fundamental principle of the law relating to sale of goods. It means „Caution Buyer', i.e., Let the buyer beware'. In other words,

it is no part of the seller's duty to point out defects of the goods he offers for sale. The buyer necessity look at the goods and discover out their suitability for the purpose he buys them for.

Examples:

- A person buys a readymade shirt for his son, he will not have a right to return or exchange the similar if the shirt doesn't exactly fit his son, i.e., too tight or loose.
- Pigs were sold 'subject to all faults', and these pigs, being infected, caused typhoid to other healthy pigs of the buyer. It was held that the seller was not bound to disclose that the pigs were unhealthy.

Exception

The doctrine of 'Caveat Emptor' is. though, subject to the following exceptions:

- Where the seller creates a misrepresentation and the buyer relies on that representation, the rule of „Caveat Emptor' will not only apply and the contract entered flanked by the parties would be a contract voidable at the option of the buyer.
- Where the seller actively conceals a defect in the goods, so that on a reasonable examination the similar could not be exposed, or where the seller malces a false representation amounting to fraud, and the buyer, relying upon the false representation, enters into a contract with the buyer, in both these conditions the resulting contract would be a voidable contract. The buyer's remedy in that is that he can put the contract to an end and can also claim damages from the seller for fraud.
- Where the buyer creates recognized to the seller the purpose for which he is buying the goods, so as to illustrate that the buyer relies on the

seller's ability or judgment and the seller happens to be a person whose business is to sell goods of that account, then there is an implied condition that the goods shall be reasonably fit for such purpose. The rule of 'Caveat Emptor' will not apply in such cases.

- In case of sale through account where the goods are bought from a seller who deals in such goods there is an implied condition as to their being of a merchantable excellence, i.e., they should be capable of being used as such goods. For instance, a cricket bat should be fit enough to play cricket with a „cricket ball'. If the goods are not establish to be of merchantable excellence, the seller cannot take the defense of the doctrine of Caveat Emptor. But, if the buyer has examined the goods, there is no implied condition as regards defects which such examination ought to have revealed, i.e., in such cases the rule of Caveat Emptor will be applicable.
- An implied warranty or condition as to excellence or fitness for a scrupulous purpose may be annexed (attached) through the usage of deal Section 16(3). This exception may be explained through the facts of Jones v. Bowden's case as follows:
    - It was usual in the sale of drugs through auction that if the goods were sea damaged, it should be declared.
    - This usage in effect created an implied condition that when the drug were sold without such declaration, they were free from sea damage. In this case the seller exhibited the example without disclosing that the drugs were sea damaged, The rule of Caveat Emptor would, so, not apply here.
- Where the goods are sold through account and the goods supplied through the seller do not correspond to the account, this doctrine would not apply.
- If the goods are sold through example and the bulk of the goods supplied do not correspond with the example, this doctrine would not

apply. In addition to it, when the goods are delivered and the buyer is not provided an opportunity to compare the goods with the example or where there is any latent defect in the goods, the doctrine will not apply.

REVIEW QUESTIONS

- Describe and distinguish 'condition' and 'warranty'.
- What is the doctrine of 'Caveat Ernptor'? What are the exceptions to this doctrine?
- Talk about the provisions of Sale of Goods Act relating to the implied conditions in a contract of 'Sale through example'.
- Under what conditions does a 'Condition' descend to the stage of a 'Warranty'?

CHAPTER 18

TRANSFER OF OWNERSHIP AND DELIVERY

STRUCTURE

- Learning objectives
- Meaning of transfer of ownership
- Rules concerning transfer of ownership
- Sale through non-owners
- What is delivery
- Review questions

LEARNING OBJECTIVES

After learning this chapter, you should be able to:

- Explain the meaning of transfer of ownership
- Describe the significance of transfer of ownership
- State the rules concerning, transfer of ownership,
- Explain the cases where a non-owner can pass on a better title
- Outline the meaning and kinds of delivery of goods
- Describe the rules concerning delivery of goods and liability of the buyer.

MEANING OF TRANSFER OF OWNERSHIP

In the Sale of Goods Act, the word property is used for the 'ownership'. When the goods are sold, it is the property in the goods which is transferred to the buyer, term 'property in the goods' should not be confused with the physical 'possession of goods'. A person may be in possession of goods but he may not be the owner of those goods. For instance, an agent, or servant or a bailee may be in possession of goods, but is not the owner because the properly in the goods does not vest in him, he is holding the goods for his principal master or the bailor. Likewise, a person may be the owner of the

goods but he may not be in possession of goods, for instance, the principal, master or bailor may not be in possession of the goods but the property in goods vests in him. Therefore , the transfer of possession of goods is not the similar thing as the transfer *of* ownership, You will notice that the, ownership of the goads may pass with or without the transfer of possession.

RULES CONCERNING TRANSFER OF OWNERSHIP

You learnt the importance of knowing the time of transfer of ownership from seller to buyer. Now the after that significant thing is to determine the time of transfer of ownership. The rules concerning the transfer of ownership are contained in Sections18 to 24 of the Sale of Goods Act, 1930. The common rule is that the 'property in goods is transferred to the buyer at such time as the parties intend it to be transferred'. Therefore the whole question of transfer of ownership is left to the intention of the parties. The parties are free to fix any time for the, transfer of ownership from seller to the buyer. But sometimes the intention of the parties may not be clear from the contract itself. In such cases, the intention could be ascertained just as to the rules laid down in Section 20 to 24 of the Sale of Goods Act.

For the purposes of knowing the time of passing of ownership from seller to the buyer, the goods have been classified into three classes, viz.,

- Specific or ascertained goods,
- Generic or unascertained goods; and
- Goods send 'on approval' or 'on sale or return' foundation,

Let us now talk about the rules for each of the class separately.

In Case of Specific or Ascertained Goods

Specific goods means goods recognized and agreed upon at the time a contract of sale is made. Just as to Section 19(1) of the Act where them is a

contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred. It further gives that for the purpose of ascertaining the intention of the parties regard shall be had to the conditions of the contract, the conduct of the parties and the circumstances of the case.

For knowing the intention of the parties with respect to the time when the properly in the goods is to pass to the buyer, the following rules are applicable:

- Specific goods in a deliverable state: Where there is an unconditional contract for the sale of specific goods and the goods are in a deliverable state, the property in the goods passes to the buyer when the contract is made, you should note that it is immaterial whether the time of payment of the price or the time of delivery of goods or both, is postponed (Section 20). On analyzing this section you discover that the ownership shall pass at the time of creation the contract if the goods are specific, the contract is an unconditional one, and the goods are in a deliverable state. Through an unconditional contract we mean that there is no condition concerning the transfer of ownership of goods. For instance, A sells some specific goods in a deliverable state to B on the condition that the property in the goods shall pass only when B accepts the bills of exchange. This is a conditional contract and the property in goods shall be transferred only when the condition is fulfilled. Another significant point in this section is that the goods necessity be in a deliverable state. Now the question arises as to when goods can be said to be in a deliverable state, Just as to Section 2(3) of the Act, goods are said to be in a deliverable state when they are in such state that the buyer would, under the contract, be bound to take delivery of them. In easy words it means that the goods are in such a

condition that the buyer can take absent the goods then and there. It is possible when the goods are ready and the seller i s not required to do anything with the goods.

Examples:

- A offers to sell his car to B for Rs 60,000 the price to be paid after 20 days. B accepts the offer and a contract is made. The property in the car passes to B immediately when the contract is made, the payment of the price is immaterial.
- A selects some books from B's book-shop and agrees to pay the price on the first day of the after that month' and the books are to Be delivered at A's home on the following day. As a result of an accidental fire in the shop, the books selected through A were destroyed. A shall be liable to pay the price, as the property in the books Has passed from B to Aon creation the contract. You should note that in this case neither the price has been paid nor the goods have been delivered, even then the ownership has passed from seller to the buyer.

SALE THROUGH NON-OWNERS

You learnt the rules concerning the transfer of ownership from the seller to the buyer, wherein you have noted that once the goods are sold, the buyer becomes the owner of such goods. Here we have presumed that the seller is the owner of the goods. Now what will happen if it turns out that the seller was not the owner of the goods? Our answer will be that since the seller was not the owner, so, the buyer does not become the owner thereof.

The common rule as to transfer of property is that it is only the owner of the goods who can transfer the ownership in the goods to the buyer. In easy words, a person who is not the owner of the goods can not sell them and transfer the ownership to the buyer even though the buyer has purchased them in good faith and for value. No one can sell the goods and provide a good title

thereof unless he is the owner of such goods. This common rule is expressed through the maxim: "Nemo dat quid non habet", which means that "no one can provide what he himself has not got". So, if a person deals with the goods of another person and without the owner's power, such transaction is of no value in the eyes of law. If the seller's title is defective, the buyer's title will also be defective. This is so because the buyer acquires his title to the goods from the seller. For instance, A discovers a ring of B and sells it to C who buys it in good faith and for value. The true owner (B) can recover the ring from C, since A had no title to the ring.

This common rule is contained in Section 27 of the Act which lays down that. *Subject to the provisions of this Act and of any other law for the time being in force, where goods are sold through a person who is not the owner thereof and who does not sell them under the power as, with the consent of the owner, the buyer acquires no better title to the goods than what the seller had.* Therefore , it can be stated that a person who is not the owner of the goods cannot create a third person owner of the goods.

But the rule is subject to some exceptions where seller may confer a better title than what he himself possess. These exceptions are as follows:

- Title through estoppel: You are already well-known with the principle of estoppel. Applying this principle to a contract of sale of goods, when the owner of the goods, through his statement or conduct, leads the buyer to consider that the seller has the power to sell later on he may be estopped from denying the seller's power to sell. For instance: A says to B, in the attendance of C that he (A) is the owner of the goods and *C,* who is the real owner of the goods does not contradict the statement. B buys the goods from A. Here, B will get a better title. In this instance if the real owner C wishes to deny A's power to sell the goods The (C) may be estopped from doing so.

- Sale through a mercantile agent: 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, and he sells those goods in the ordinary course of business as a mercantile agent the buyer will get a good title to the goods provided he (the buyer) buys them in good faith and for value. Section 2(9) defines a mercantile agent as an *agent having in the customary course of business as such agent power 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.* In a sale through mercantile agent the buyer will acquire a good title to the goods only if the following circumstances are satisfied:
    - The goods are sold through a mercantile agent who is in possession of goods or of a documents of title to the goods with the consent of the owner;
    - The agent sells the goods in the ordinary course of his business as a mercantile agent;
    - The buyer necessity have acted in good faith i.e., the buyer necessity have no knowledge that the agent had no power to sell.
- Sale through person in possession under voidable contract: Just as to Section 29 of the Act, where a seller is' in possession of goods under a voidable contract, and he sells the goods to a bonafide buyer before the contract is rescinded the buyer gets a good title to the goods. This exception is limited to contract of sale of goods obtained under a contract voidable under Section 19 or 19A of the Contract Act, i.e., voidable on the ground of coercion, undue power misrepresentation or fraud. For the application of this exception it is necessary that:
    - The seller necessity be in possession of goods under a voidable contract;

- The goods necessity be sold before the contract is rescinded; and
- The buyer necessity buy in good faith and without notice of the seller's defect of title.

Sale through seller in possession after sale: Sometimes, the buyer after buying the goods, leave them with the seller. Section 30(1) of the Act gives that where a person having sold the goods continues or is in possession of the goods or of the documents of the title of the goods, after sale and lie resells the similar goods to another buyer, the buyer shall get a good title to the goods provided the buyer buys them in good faith and without notice of the previous sale.

WHAT IS DELIVERY

You learnt the procedure of creation the contract of sale and the transfer of ownership from seller to the buyer. Separately from transferring the ownership to the buyer, it is the duty of the seller to deliver the goods. Let us now revise the meaning and kinds of delivery of goods.

Delivery is defined in the Act as a *voluntary transfer of possession from one peron to another*. If the transfer of possession of goods is not voluntary i.e. if the possession of goods is taken through force or through fraud or through theft, there is no delivery in the strict legal sense. If B steals goods from A, there is no delivery from A to B though possession is transferred.

Delivery of goods sold may be made through doing anything which the parties agree shall be treated as delivex7 or which has the effect of putting the goods in the possession of the buyer or of any person authorized to hold them on his behalf (Section 33).

Kinds of Delivery

Delivery of goods may be of three types, viz., (1) actual, (2) symbolic, (3) constructive.

- Actual Delivery: In this case the goods are physically handed in excess of to the buyer or his authorized agent. For instance, A sells a scooter to B and delivers it to B, it amounts to actual delivery of the goods.
- Symbolic Delivery: In cases where the goods are bulky and heavy and it is not possible to physically hand them in excess of to the buyer, some symbol which carries with it the real possession or manage in excess of the goods is handed in excess of to the buyer. For instance, delivery of the keys of godown where goods are lying or transferring the bill of lading or railway receipt to the buyer, amount to symbolic delivery of the goods. In this case even though there is no change in possession of goods, but it amounts to delivery.
- Constructive Delivery: In this case neither actual nor symbolic delivery is made. When a person who is in possession of the goods, acknowledges to hold the goods on behalf of the buyer, it amounts to constructive delivery. For instance, A sells to B 100 bugs of wheat lying in C's warehouse. A orders C to deliver the wheat to B. C agrees to hold the 100 bugs on behalf of B and creates the necessary entry in his books. In this case, there is constructive delivery of goods from A to B.

Rules Concerning Delivery of Goods

After learning the meaning and kinds of delivery, let Us now revise the rules concerning the delivery of the goods. These rules are as follows:

- Delivery of the goods may be made in any of the kinds. The significant point to keep in mind is that it should have the effect of putting the goods in the possession of the buyer or his authorized agent.
- Delivery and payment are concurrent circumstances: Unless otherwise agreed, the delivery of goods and payment of price are concurrent circumstances. The seller should be ready and willing to provide possession of the goods to the buyer, and the buyer should be ready and willing to pay the price (Section 32).
- Effect of part delivery: Sometimes when goods in big quantity are to be delivered, then throughout the procedure of delivery when part of the goods are delivered, it is treated as the delivery of the whole, for the purpose of passing the property in the goods. But where delivery part is made with the intention of separating it from the whole lot, then it does not amount to the delivery of the whole of the goods (Section 34). You should, though, note that part delivery should not be confused with installment delivery.
- Buyer to apply for delivery: Unless some contract exists the seller of goods is not bound to deliver them until the buyer applies for delivery (Section 35). In case the goods are to be subsequently obtained or procured through the seller, then the duty of the seller is to intimate the buyer that the goods have been obtained through him, even then, the buyer should apply for delivery. The buyer can have no cause of action against the seller, if he fails to apply for delivery.
- Lay of delivery: The lay where goods are to be delivered is usually agreed flanked by the parties. Where the lay of delivery is agreed upon, the goods necessity be delivered at that lay throughout business hours on a working day. But if nothing specific is agreed upon them.
    - The goods sold are to be delivered at the lay at which they are at the time of the sale, and

    - Goods agreed to be sold are to be delivered at the lay at which they are at the time of the agreement to sell, or
    - If the goods are not in subsistence at the time of the agreement to sell, they are to be delivered at the lay at which they are manufactured or produced Section 36(1).
- Time of delivery: Where under the contract of sale the seller is bound to send the goods to the buyer; but no time for sending them is fixed, the seller is bound to send them within a reasonable time. What is a reasonable time is a question of information depending upon the facts and circumstances of each case.
- Manner of delivery: Where the goods at the time of sale are in the possession of a third person, there is no delivery through seller to buyer unless and until such third person acknowledges to the buyer that he holds the goods on his behalf (Section 36(3)).
- Expenses of delivery: Unless otherwise agreed, the expenses of and incidental to putting the goods into a deliverable state shall be borne through the seller (Section 36(3)).
- Delivery of wrong quantity: Wrong quantity may be either 'short delivery', 'excess delivery' or 'mixed delivery'. Following are the rules, but they are subject to any usage of deal, special agreement or course of dealing flanked by the parties.
    - Short delivery: Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them. But if the buyer accepts the goods so delivered, he shall pay for them at the contract rate. Through accepting a lesser quantity, the buyer is not debarred from suing for damages on the ground of short delivery.
    - Excess delivery: Where the seller delivers to the buyer a quantity of goods superior than contracted for, the buyer has the option:-

- To accept the contracted quantity and reject the excess; or
- To accept the whole, in this case, he shall become liable to pay for all the goods at the contract rate; or
- To reject the whole quantity.

- Installment deliveries: In the absence of an agreement to the contrary, the buyer is not bound to accept delivery through installments Section 38(1). For instance, A agrees to deliver to B 100 quintals of wheat in April. But A delivers only 80 quintals in April and the remaining 20 quintals in the first week of May. B is entitled to reject the whole 100 quintals. Sometimes, there may be a contract for the supply of goods in installments which are to be separately paid for. In such a case a problem arises when there is a breach either through the seller or the buyer. In such a situation it is a question of information whether the whole contract is to be treated as repudiated or only one installment is repudiated for which the party may claim damages and the remaining installments are to be duly delivered and accepted.
- Delivery to a carrier or wharfinger: Just as to Section 39(1), where the seller is authorized or required to send the goods to the buyer, delivery of the goods to a carrier for the purpose of transmission to the buyer or the delivery of the goods to a wharfinger for safe custody, is prima facie deemed to be a delivery of goods to the buyer. The seller necessity create a reasonable get in touch with the carrier or wharfing for the safe transmission or custody of the goods, and if he fails to do so, and the goods are lost or damaged, the buyer may either decline to treat the delivery to the carrier or wharfinger as a delivery to himself, or hold the seller liable for damages .

REVIEW QUESTIONS

- Does delivery of goods to a carrier amount to transfer of ownership?
- What is meant through delivery of goods?
- What is constructive delivery?
- Delivery of goods to the carrier amounts to delivery to the buyer. Do you agree?

CHAPTER 19

Rights of an Unpaid Seller

STRUCTURE

- Learning objectives
- Meaning of an unpaid seller
- Rights against the goods
- Rights of the buyer
- Auction sales
- Review questions

LEARNING OBJECTIVES

After learning this chapter you should be able to

- Describe an unpaid seller
- State the rights of an unpaid seller
- Explain the right of lien and when it comes to an end
- Explain the rules of en auction sale.

MEANING OF AN UNPAID SELLER

In easy words, a seller who has not received the full price of goods sold is termed as an unpaid seller. Section 45 of the Sale of Goods Act, 1930 has defined an unpaid seller as follows: The seller of goods is deemed to be an unpaid seller

- When the whole of the price has not been paid or tendered; or
- When a bill of exchange or other negotiable instrument has been received as conditional payment and it has been dishonored.

Therefore to be described an unpaid seller, the following circumstances necessity be satisfied:

- The goods have been sold and the price necessity be due;

- The full price has not yet been paid;
- A bill of exchange or other negotiable instrument, such as cheque, was received as payment of the price, but the similar has been dishonored.

You should note that where a major pail: of the price has been paid and only a little portion remnants to be paid, even then the seller shall be described an unpaid seller. But you should keep in mind that it is only for the non-payment of the price that a seller is termed as an unpaid seller. Therefore , if the price has been paid but some other expenses remain to be paid, the seller is not an unpaid seller. Likewise, where the seller has sold the goods on credit, he cannot be terined as an unpaid seller. If the seller does not receive the price in full after the expiry of the credit era, then he will become an "unpaid seller". Where whole of the price has been tendered through the buyer, and the seller has refused to accept it, the seller cannot be described an unpaid seller.

Rights of an Unpaid Seller

The rights of an unpaid seller can broadly be discussed under the two heads:(l) rights against the lzoods; and (2) rights against the buyer personally. The rights against the goods are as follows:

- Where the property in goods has passed to the buyer:
    - Right of lien;
    - Right of stoppage of goods-in-transit; and
    - Right of resale.
- Where the property in goods has not yet passed to the buyer, he has an additional right of withholding delivery.

The tights against the buyer personally as follows:

- Right to file a suit fix price;

- Right to file a suit for damages; and
- Right to file a suit for interest.

RIGHTS AGAINST THE GOODS

Where the Property in the Goods has Passed to the Buyer

As stated earlier the rights of an unpaid seller when the property in the goods has passed to buyer are as follows:

Right of Lien

The right of lien is a possessory right and can be exercised through the unpaid seller only when the goods are in his possession. An unpaid seller has the right of lien in excess of the goods until the full price is paid or tendered. Just as to Section 47(1) of the Sale of Goods Act, "the unpaid seller of goods who is in possession of them, is entitled to retain possession of them until payment or tender of the price in the following cases, namely:

- Where the goods have been sold without any stipulation as to credit;
- Where the goods have been sold on credit, but the term of credit has expired;
- Where the buyer becomes insolvent."

Therefore , it is clear that the unpaid seller can exercise his right of lien on goods only when the goods are in his actual possession. For exercising this right of lien, transfer of property, title or ownership is immaterial. The unpaid seller may exercise his right of lien notwithstanding that he is in possession of the goods as agent or bailee for the buyer. Right of lien is not affected even where the seller has delivered to the buyer, the documents of title to the goods such as bill of lading or any other kind of delivery: order provided the goods

are in his possession. For instance; A sold sure goods to B for Rs. 5,000 and allowed him to pay the price within one month, B becomes insolvent throughout this era of credit. A, the unpaid seller can exercise his right of lien.

You should note that the term 'insolvent' in the Sale of Goods Act means "a person who has *ceased to pay his debts in the ordinary course of business, or cannot pay his debts* as *they became due, whether he* has *committed, an* act *of insolvency or not*

Right of Stoppage of Goods in Transit

You learnt that when the unpaid seller parts with the possession of the goods, the right of lien is iost. If after delivering the goods to the carrier, the buyer becomes insolvent, the seller has got another right i.e. to stop the goods-in-transit. He can prevent the goods from being delivered lo the buyer or to his agent. The right of stoppage in transit basically means the right of stopping the goods while they are in transit. This right arises only when the lien is lost. In this sense it is said that the tight of stoppage in transit is an extension of the right of lien. Through exercising this right, the unpaid seller regains possession in excess of the goods.

Just as to Section 50 of the Act, *"Subject to the provisions of this Act, when the buyer of goods becomes insolven6 the unpaid seller who has parted with the possession of the goods, has the right of stopping them in transit, that is to* say, *he may resume possession of the goods as extensive as they are in the course of transit, and may retain them until payment or tender of the price."*

You will notice that the right of stoppage-in-transit Fan only be exercised in the following cases:

- The seller necessity be unpaid;
- The property in goods necessity have passed to the buyer;
- The goods necessity be in the course of transit i.e., the goods are neither in the possession of the seller nor in the possession of the buyer or his agent;
- The buyer of the goods has become insolvent; and
- The goods-in-transit can be stopped only for the payment of the price of the goods.

Duration of Transit

As you have learnt that the goods can be stopped only when they are in the course of transit. Now the question arises as to how extensive and up to what time the goods can be said to be in transit? In easy words, it can be said that the goods are deemed to be in transit when they are neither in the possession of the seller nor in the possession of the buyer, but they are in the possession of a carrier who is holding them in his own name for the purpose of transmission to the buyer.

If the carrier is holding the goods as an agent for the seller, there is no question of exercising the right of stoppage-in-transit because the seller can exercise lien in excess of them. In case the carrier is holding the goods as an agent of the buyer, the seller cannot exercise the right of stoppage in transit, because the delivery to the carrier amounts to delivery to the buyer.

Section 51(1) of the Sale of Goods Act, explains the duration of transit, It gives that "goods are deemed to be in the course of transit from the time when they are delivered to a carrier or other bailee for the purpose of

transmission to the buyer, until the buyer or his agent takes delivery of them from such carrier or other bailee" From this provision it becomes very clear that the goods are said to be in transit when they are in possession of the carrier who is acting as an self-governing person Though, the transit does not mean that the goods should be actually moving.

Sometimes, the buyer asks the seller to deliver the goods at a dissimilar lay other than the agreed one, the goods are in transit until they are received through the buyer or his agent at that lay. Likewise if the goods are rejected through the buyer and they are in the possession of the carrier, the transit is not deemed to be at an end, even if the seller had refused to receive them back.

Termination of Ttransit

You know that the unpaid seller can stop the goods while they are in transit. In other words, this right will be lost when transit ends. Let us now revise the cases when the transit comes to an end. Transit comes to an end in the following circumstances:

- Buyer taking the delivery: Once the goods reach the hands of the buyer or his agent the transit comes to an end. Sometimes, the buyer or his agent obtains delivery of goods before their arrival at the appointed destination, the transit is at an end [Section 51 (2)]. For instance, A of Delhi sold sure goods to B of Bombay. The goods reach Bombay and the buyer, after taking the delivery of the goods, was loading them in his truck. Though the truck was still in the premises of station, the transit has ended because B has taken the delivery.
- Carrier's acknowledgement to the buyer: If, after the arrival of the goods at the appointed destination, the carrier or bailee acknowledges to the buyer or his agent, that he holds the goods on his behalf, the transit ends. It should be noted that this acknowledgement necessity be

in clear conditions. It is immaterial that a further destination of the goods was indicated through the buyer. Therefore , in the instance, B ,went to the railway authorities and after presenting the railway receipt, told : them that he would collect the goods within a week. In the meanwhile, B becomes insolvent and A wants to stop the goods. A will not succeed since the transit came to an end when the railway authorities agreed to stay the goods on behalf of B.

- Carries wrongful refusal to deliver the goods to the buyer: Where the carrier or bailee wrongfully refuses to deliver the goods to the buyer or his agent, the transit is deemed to be at an end [Sec. 51(6)]. Here, it should be noted that the transit will approach to an end only when the carriers refusal is wrongful.
- Delivery to the ship: When the goods are delivered to a ship, 'the question arises whether the transit ends or not. The answer to this question depends on the circumstances of each case. If the ship is chartered through the buyer, i.e., the buyer is the owner of the ship, the transit ends as soon as the goods are loaded on the ship. On the other hand, if the carrier is acting independently, the transit continues.
- Part delivery of goods: Where part delivery of the goods has been made to the buyer or his agent, the remainder of the goods may be stopped in transit, unless such part delivery has been given in such circumstances as to illustrate an agreement to provide up possession of the whole of the goods [S&on 5 1(7)].
- How stoppage in transit is effected: The unpaid seller may exercise his right of *52* stoppage in transit either: (a) through taking actual possession of the goods; or (b) through giving notice of his claim to the carrier in whose possession the goods are [Section 52(1)]. Such notice may be given either to the person in actual possession of the goods or to his principal. In case the notice is given to the principal, to be effective, it necessity be given at such time and in such circumstances

that the principal, through the exercise of reasonable diligence, may communicate it to his servant or agent in time to prevent a delivery to the buyer [Section 52(1)]. In other words, the notice to the principal shall be effective only, if there is enough reasonable time with him to further pass on the information to his agent. The notice need not necessarily be in writing and no scrupulous form for it is laid down. *All* that is required is to provide a clear notice to the principal or carrier not to deliver the goods to the buyer and it necessity reach the carrier before he delivers the goods to the buyer.

When the carrier or the bailee who is in possession of goods receives such a notice from the seller, it becomes his duty to re-deliver the goods to, or just as to the directions of the seller. The expenses of such re-delivery shall be borne through the seller [Sec.52(2]]. If the carrier, after getting notice, delivers the goods to the buyer or his agent, he shall be liable to the seller for conversion.

RIGHTS OF THE BUYER

- To have delivery of the goods as per contract. (secs. 31 & 32)
- To reject the goods when they are not of the account, excellence or quantity as specified in the contract (Sec 37).
- To repudiate the contract when goods are delivered in installments without any agreement to that effects [Sec. 38 (1)]
- To be informed through the seller, when the goods are to be sent through sea route, so that he may arrange for their insurance [Sec 39 (30]
- To have a reasonable opportunity to look at the goods for ascertaining whether they are in conventionality with the contract. (sec. 41)
- To sue the seller for recovery of the price, if already paid, when the seller fails to deliver the goods.

- To sue the seller for damages if the seller wrongfully neglects or refuses to deliver the gods to the buyer (sec 57)
- To sue the seller for specific performance
- To sue the seller for damages for breach of a warranty or for breach of a condition treated as breach of a warranty (Sec 59)
- To sue the seller the damages for anticipatory breach of contract (Sec 60)
- To sue the seller for interest where there is a breach of contract on the part of the seller and price has to be refunded to the buyer (sec 61)

AUCTION SALES

Auction sales are events whereby personal or commercial property and merchandise are sold at the highest price to bidders who lay monetary offers on the items. Auction sales can take several shapes from selling wholesale merchandise on an online auction location to holding an auction at a scrupulous site to sell off unwanted belongings or settle debts. Some auction sales are mannered remotely through unseen bidders via the computer or telephone while other auctions sales are live and bidders lay their bids in person in a fast-paced fashion.

Auction sales usually use alike formats, in that property is presented as accessible for viewing and purchase to others. The property can be anything from personal or household belongings to vehicles, real estate and promised goods or services. Several times, auctions are good methods for buyers to discover bargains on the items they mainly want and create purchases that are distant below current market value.

In some cases sales for merchandise, real estate and online car auctions are mannered entirely online by the Internet or some form of auction software on a computer. The auction software comprises a means to list pictures and descriptions of the items for sale, stay track of bids placed through interested parties and a timer which counts down to the end of each auction listing. Once

the highest bid is placed at the very end of the auction sale, the winning bidder creates payment to the seller and the thing is released or shipped to the winning buyer.

In several cases, auction sales are held in person such as with public auto auctions, tax or estate sales. The announcer of the auction, described the auctioneer, presents each thing accessible for sale to the interested parties then conducts a verbal promotion of the thing to obtain the highest bid from the crowd of bidders. This can often be a very fast-paced and loud banter, but it's the method traditional auction sales have been mannered for centuries.

An auction sale gives the owner of property the opportunity to offer items to a multitude of buyers with the hopes of obtaining the highest selling price. Once the items are sold, buyers are obligated through legal guidelines and ethical behavior to purchase the items for the price that they decided in the bidding procedure. An auction is a straightforward means for sellers to get the mainly financial return for the property being sold.

REVIEW QUESTIONS

- Describe an unpaid seller. What are his rights?
- Explain the rights of an unpaid seller (i) against the goods and (ii) against the buyer personally.
- "Right of stoppage in transit is an extension of the right of lien". Comment.
- Distinguish flanked by the right of lien and stoppage-in-transit.

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