

B.Com., First Year

BUSINESS LAW

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INTRODUCTION

Introduction

Business law refers to the laws which are applied to business entities such as partnerships and corporations. These are used as reference when putting up businesses whether big or small from sole proprietorship to corporation. Business laws specify how different business can be set up, how taxes apply to them, registrations, documentations and requirements; define different terms pertaining to business, making by-laws, and articles of organization among many others. The text book titled “Business Law” encompasses various important topics related to Indian Contract Act 1872, Breach of Contract, Negotiable Instrument Act, 1881, Consumer Protection Act, 1986, and Foreign Exchange Management Act 2000 (FEMA).

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The act prescribes the law relating to contracts in India and is the key act regulating Indian contract law. The Act is based on the principles of English Common Law. It is applicable to all the states of India. It determines the circumstances in which promises made by the parties to a contract shall be legally binding. Contract is a legally binding document between at least two parties that defines and governs the rights and duties of the parties to an agreement. A contract is legally enforceable because it meets the requirements and approval of the law. An offer is a promise to act or refrain from acting, which is made in exchange for a return promise to do the same. Some offers anticipate not another promise being returned in exchange but the performance of an act or forbearance from taking action. Acceptance occurs when an offeree agrees to be mutually bound to the terms of the contract by giving consideration, or something of value like money, to seal the deal. Free consent is provided under the Indian Contracts Act is Consent that is free from Coercion, Undue Influence, Fraud, Misrepresentation or Mistake. Consideration in the law of contracts is something of value given by one party in return for the promises of the other party to the contract. Consideration is an important element of contract. Void agreement means the contract or agreement is no longer enforceable. While precise definitions vary by jurisdiction, void agreements are generally categorized as being void from the beginning and were never valid at any point. Performance of contract means that both, the promisor and the promisee have fulfilled their respective obligations, which the contract placed upon them.

Breach of contract may occur when a party to a valid contract has failed to fulfill their side of the agreement. This can occur as either a partial or a complete breach. A court will also assess whether the breach was a substantial one or only a minor one. In this unit, various topics explained in details about breach of contract, remedies of breach of contract, indemnity and guarantee contracts, special contracts, bailment, pledge and agency. Contract of indemnity is a contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person, is called a contract of indemnity. Specific contract is an equitable remedy in the law of contract, whereby a court issues an order requiring a party to perform a specific act, such to complete performance of the contract. Specific contract is commonly used in the form of injunctive relief concerning confidential information or real property. A quasi contract

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is a contract that is created by a court order, not by an agreement made by the parties to the contract. For example, quasi contracts are created by the court when no official agreement exists between the parties, in disputes over payments for goods or services. Section 148 of the Contract Act defines bailment as the delivery of goods by one person to another person for some purpose, upon a contract that they will either return those goods or dispose of the goods according to the instructions of the person who delivered the goods when the purpose is accomplished. According to Section 172 of the Contract Act, when goods are bailed as security for the payment of a debt or performance of a promise, the bailment is a pledge.

Negotiable Instruments Act, 1881 is an act in India dating from the British colonial rule that is still in force largely unchanged. A negotiable instrument is a piece of paper which entitles a person to a sum of money and which is transferable from one person to another by mere delivery or by endorsement and delivery. Various topics described in this unit related to promissory note, bill of exchange and cheques, holder and holder in due course, crossing of cheque, types of crossing, dishonor and discharge of negotiable instruments. A promissory note is an instrument in writing (note being a bank-note or a currency note) containing an unconditional undertaking, signed by the maker, to pay a certain sum of money to or to the order of a certain person, or to the bearer of the instruments. A bill of exchange is an instrument in writing containing an unconditional order, signed by the maker, directing a certain person to pay a certain sum of money only to or to the order of a certain person or to the bearer of the instrument. Cheque is an instrument in writing, containing an unconditional order, drawn on a specified banker, signed by the drawer, directing the banker, to pay, on demand, a certain sum of money only, to a certain person or to his order or to the bearer of the instrument. Commercial Paper is an unsecured promissory note issued with a fixed maturity, short-term debt instrument issued by a corporation approved by RBI, typically for the financing of accounts receivable, inventories and meeting short-term liabilities. Maturities on commercial paper rarely range any longer than 270 days. Treasury bill is a kind of finance bill or promissory note issued by the government of the country to raise short term funds. Holder in Due Course is one holding a cheque or promissory note, received for value, in good faith, and with no suspicion that it might be no good, claimed by another, overdue, or previously dishonoured. Such a holder is entitled to payment by the maker of the cheque or note. Special crossing implies the specifications of the name of the banker on the face of the cheque. The object of special crossing is to direct the drawee banker to pay the cheque only if it is presented through the particular bank mentioned.

Consumer Protection Act was enacted in the year 1986 to provide a better protection of the interests of consumers and encourage the consumer movements through consumer councils and other authorities for the settlement of consumer's disputes and for matters connected therewith.

In this unit, the authors explained about consumer disputes, consumer dispute redressal agencies, MRTP act – meaning, scope, importance and main provisions. According to Section 2(1)(e) of the Consumer Protection Act, 'a Consumer Dispute' means a dispute where a person against whom a complaint has been

made, denies or disputes the allegations contained in the complaint. If the other party agrees to the complaint, dispute ceases. Monopolistic and Restrictive Trade Practice as such practice indicates misuse of one's power to abuse the market in terms of production and sales of goods and services. Firms involved in monopolistic trade practice tries to eliminate competition from the market. RTPs are activities that block the flow of capital or profits in the market. Some firms tend to control the supply of goods or products in the market either by restricting production or controlling the delivery. MRTPA discourages and prevents the firms from indulging in RTPs. UTP is basically an act of false, deceptive, misleading or distorted representation of facts pertaining to goods and services by the firms. Section 36-A of the MRTPA prohibits firms from indulging in Unfair Trade Practices (UTPs).

The Foreign Exchange Management Act (1999) or in short FEMA has been introduced as a replacement for earlier Foreign Exchange Regulation Act (FERA). FEMA became an act on the 1st day of June, 2000. FEMA was introduced because the FERA didn't fit in with post-liberalization policies. Intellectual property rights (IPR) refers to the legal rights given to the inventor or creator to protect his invention or creation for a certain period of time. These legal rights confer an exclusive right to the inventor/creator or his assignee to fully utilize his invention/creation for a given period of time. Copyright is a collection of rights that automatically vest to someone who creates an original work of authorship like a literary work, song, movie or software. Patent is the granting of a property right by a sovereign authority to an inventor. This grant provides the inventor exclusive rights to the patented process, design, or invention for a designated period in exchange for a comprehensive disclosure of the invention. Trademark is a visually perceptible sign used in relation to goods services. The primary purpose of a trademark is to identify commercial or trade origins of the goods or service such a trademark distinguishes a particular product from another product.

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UNIT 1 INDIAN CONTRACT ACT, 1872

Indian Contract Act,
1872

Structure

- 1.0 Introduction
- 1.1 Objectives
- 1.2 Indian Contract Act, 1872 – Definitions, Nature of Contract
- 1.3 Offer and Acceptance, Capacity Parties to Contract
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1.0 INTRODUCTION

Law is a main contributory factor for man's welfare and wellbeing. The study of law is of enormous practical value and vital and ever-present force in modern life. Every individual and even more a business man needs even more through knowledge of the law than the person not so engaged. As he carried his business, he is confronted with problems arising out of contract, sale of goods, bailment, agency, negotiable instruments, cyber-crimes environmental issues, international dealing and so on. At present situation business are facing a lot of formidable problems as every activity of the business is vigilantly watched by the public and law. In economics is started developing in the positive direction and exposed to global competition and followed the path of economic liberalization to the greater extent. This made compulsory to study 'Business Law' or to the knowledge of various legal aspects as a part of commerce, management and business study curriculum with different titles.

With the growth of people's social and economic behavior has assumed a multi-dimensional character. Most civilized societies, therefore, provide and enforce different set of rules, regulations and principles for different kind of social behavior. In this connection there are different branches of law both for social, individual and business such as constitutional law, civil procedure codes, criminal procedure codes, International law, Mercantile law/Business law and so on. The mercantile law is referred to the branch of law which comprises laws concerning trade, industry, business or commerce with the increasing complexities of modern business world, the scope of mercantile law has enormously widened. Since the business is related to society, any activity related society and man's welfare are directly related, hence it is now termed as business law or legal aspects of business or business regulations.

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Prior to the enactment of the various Acts like the Contract Acts, Sales of Goods Acts, Companies Act, The Negotiable Instrument Act, Insurance Act, etc., business transactions were regulated by the personal laws of the parties to the suit. The rights of Hindus and Muslims were governed by their respective laws and usages. Where both parties were Hindus, they were regulated by the Hindu Law and where both parties were Muslims, the Mohammedan Law was applied. In cases where one party was a Hindu and the other was of Muslims, the personal law of the defendant was applied. In case of persons other than Hindus and Muslims and also where laws and usages of Hindus and Muslims were silent on any point, the courts generally applied the principles of English law.

In the present era the General law applicable to all sort of persons in the society irrespective of any religious differences. The applications are based on nature and type of situation faced by every man in the society. Hence the study on different activity and the practices of an individual man is essential.

Man is a rational and social being who comes into contact with various types and varieties of people with different capabilities and dimensions.

The Role of a man in the society given is below:

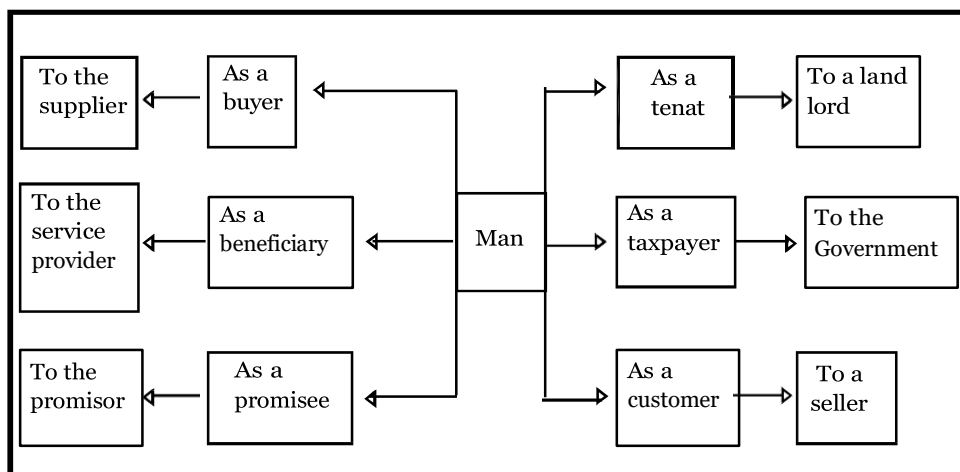


Figure 1.1: Role of a man in the society

The above role of the man is the different contacts and the associations which are inevitable for the modern world. Man as a buyer, beneficiary, promisee, tenant, taxpayer, customer and so on, is expected to observe a set of rules or code of conduct. The object of these rules is to make human associations possible and conducive to the state and its people.

1.1 OBJECTIVES

After going through this unit, you will be able to:

- Explain the Nature of Contract, Offer and Acceptance
- Describe the Capacity parties to contract, Free consent and Consideration
- Discuss the Expressly declared void agreement
- Explain the Performance of contracts

1.2 INDIAN CONTRACT ACT, 1872 – DEFINITIONS, NATURE OF CONTRACT

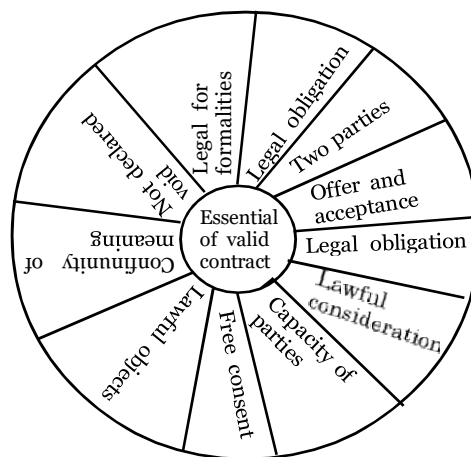
Indian Contract Act,
1872

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Sec. 2(h) “An agreement enforceable by law is a contract.”

Elements = Agreement + Legal obligation
 Agreement = Offer + Acceptance
 Contract = Agreement + Legal obligation

“All contracts are agreements but all agreements are not contract”-
 To make all agreements are contracts, the following essentials to be
 present: [Sec. 10]



Types/Classifications:

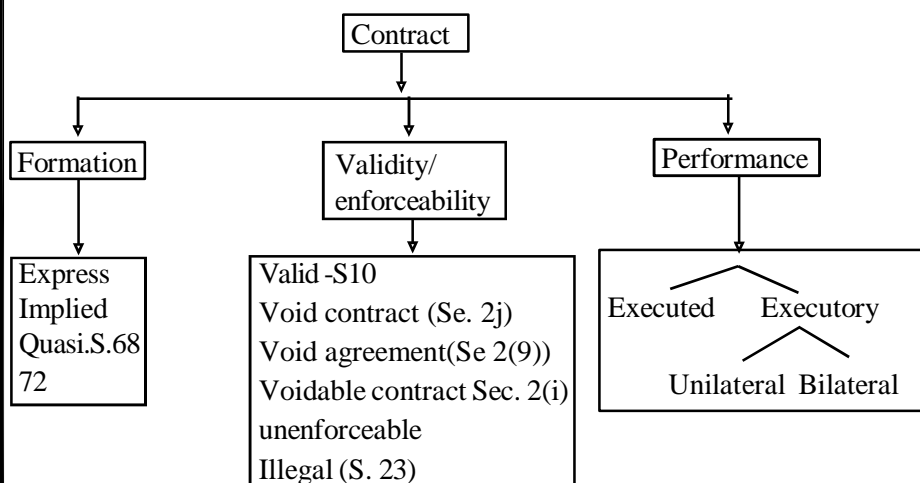


Figure 1.2: Indian Contract Act, 1872

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Introduction to the Indian Contract Act, 1872

The Indian Contract Act, 1872 prescribes the law relating to contracts in India. The Act was passed by British India and is based on the principles of English Common Law. It is applicable to all the states of India except the state of Jammu and Kashmir. It determines the circumstances in which promises made by the parties to a contract shall be legally binding and the enforcement of these rights and duties.

The law of contract is that branch of law which determines the circumstances in which a promise or an agreement shall be legally binding on the person making it. The law relating to contracts in India is confined to the Indian Contract Act, 1872. The Act came into force on the first day of September 1872.

Originally this Act was included with general principles of law of contract, contracts relating to sale of goods, special kinds of contracts like indemnity, guarantee and so on. Later the Indian Contract Act has been divided into two, Part I as general principles of Law of Contract and Sale of goods Act, where as in Part II it is Partnership Act and so on.

Unlike other branches of law, law of contract does not apply, but it determines the circumstance in which a Promise has been made. The parties to an agreement may lay down their own terms and conditions. The Indian Contract Act does not declare to be a complete and exhaustive code, it deals with the general principles of the law of contract and with special contracts only.

The law of contract differs from other branches of law. The Act does not lay down a number of rights and duties which the law will enforce.

In this Act the party themselves creates rights and duties which will be supported with a limited principles.

Meaning and Definitions of Contract

Sir John Salmond defines a contract as, "An agreement creating and defining obligations between two parties."

According to Sir William Anson, "A contract as a legally binding agreement made between two or more persons, by which rights are acquired by one or more to acts or forbearance on the part of the other or others."

According to Halsburey, "A contract is an agreement between two or more persons which is intended to be enforceable at law and is constituted by the acceptance by one party of an offer made to him by the other party to do or abstain from doing some act."

Sir Fredrick Pollock defines, "Every agreement and promise enforceable at law is a Contract."

According to the Indian Contract Act, Section 2 (h) "An agreement enforceable by law is a Contract."

Characteristics of Contract

Indian Contract Act,
1872

1. **There must be offer and acceptance:** The offerer is the party that makes the offer and the offeree is the person that the offer is being made to. There must be a clear offer and clear acceptance for a contract to be binding.
2. **Consideration:** Consideration is the price paid by one party for the promise of the other. Thus if one party promises to provide goods or services, something of value must be given in exchange. This may be in the form of money, goods, services or it may be an act of forbearance.
3. **The capacity to contract:** Parties to the contract must be over 18 years, of sound mind, not under the influence of drugs or incarcerated.
4. **There must be no force, misrepresentation or fraud:** Persons should not be forced to sign a contract e.g. blackmail. They should not be laid to e.g. giving the wrong year of a car. Fraud may involve forging someone's signature.
5. **There must be an obvious intention to create legal relations:** This is based on the actions of the parties e.g. offer, acceptance and consideration.
6. **A contract must be legal:** A contract must be legal thus, agreements made between parties concerning illegal drugs and any other illegal activity is not a contract.

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Kinds of Contract

The types of contract can be grouped on the basis of the classification. This can be classified differently connected to Indian Contract Act and English Law.

Classification under English Law:

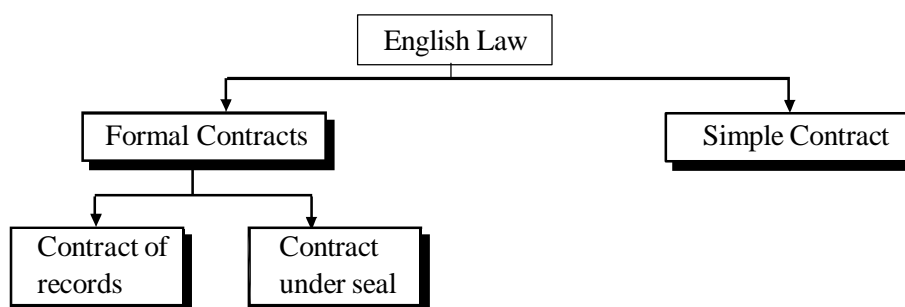


Figure 1.3: Kinds of Contract

According to the Indian Contract Act contracts may be classified on the basis of their **Validity, formation or performance**. The classification of the same is given below:

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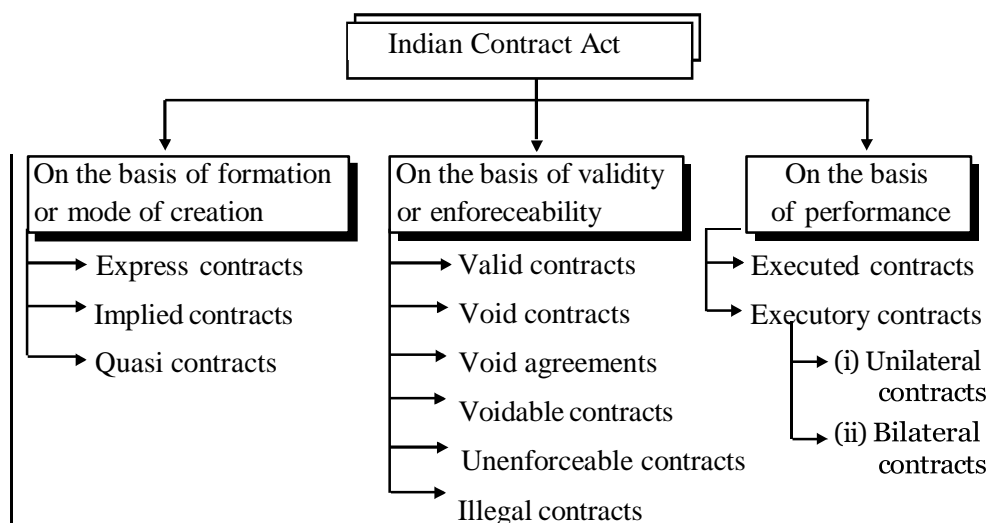


Figure 1.4: Indian Contract Act

A brief explanation of the above classification is as follows:

1. On the basis of formation or mode of creation

(i) Express Contract

An express contract is entered into by words which may be either spoken or written, where the proposal and acceptance is made in words, then it is an express contract.

(ii) Implied Contract

When both offer and acceptance is constituted, a contract is made, other than the **words**, the contract is said to be implied contract. Many a times the implied contracts are understood out of the surrounding circumstances and the conduct of the parties who made them; and is followed with various legal obligations. So, where a person employs another person to do some work, the law implies that the former agrees to pay for the work.

Example:

Mr. A, a coolie in uniform takes up the luggage and carried it out of the railway station without being asked by Mr. B, and B allows him to do so, then the law implies that Mr. B agrees to pay for the services of Mr. A.

(iii) Quasi Contract

It is also known as constructive contract. Quasi contract is a contract in which there is no intention on either side to make a contract, but the law imposes a contract. In other words quasi contract or constructive contract is not a contract at all. It is created by law and not intentionally entered into by the parties, i.e. 'Quasi-contractual obligations' are imposed by law without offer and acceptance. To be clear in understanding of Quasi contract, under certain circumstances, a person may receive a benefit to which the law regards another person as better entitled, or for which the law considers he should pay to the other person, even

though there is no contract between the parties. In this case the parties are put in the same position as if these were formed a contract between them.

Example:

A, a merchant, leaves goods at B's house by mistake, B treats the goods as his own. Here B is bound to pay A for the goods used.

The Quasi contract or constructive contract is used in English Law whereas under Indian Contract Act, from section 68 to 72, is explained this sort of situations and ground, in the name of "of certain Relations Resembling those created by contract." In other sense it aims at "**nemo debet locupletari ex-Liena justua**" that means "a person shall not be allowed to rich himself unjustly at the expenses of another".

Quasi-contracts under Indian Contract Act: The Indian Contract Act refers the Quasi-contract under the heading.

Certain relations resembling those created by contract, (Section 68 to 72).

1. Claim for necessities supplied to a person incapable of contracting on his account (Sec. 68).
2. Reimbursement of a person paying money due by another in payment of which he is interested (Sec. 69).
3. Obligation of person enjoying benefit of a non-gratuitous act (Sec. 70).
4. Rights and liabilities of the finder of lost goods (Sec. 71).
5. Liability of persons to whom money is paid or things delivered, by mistake or under coercion (Sec. 72).

2. On the basis of Validity or enforceability

(i) Valid Contract

An agreement becomes enforceable by law when all the essential elements of a valid contract are present. In other words an agreement enforceable at law is a valid contract. According to the Contract Act, under Sec. 10, "all agreement are contracts if they are made by the free consent, competent parties, lawful consideration and lawful object. Such of the contract should not declared to be void."

(ii) Void Contract

Void contracts are contracts which not enforceable by law. According to Sec 2(j) of the Contract Act, "Void contract is a contract which cease to be enforceable by law becomes void, when it ceases to be enforceable." According to this section it is clear that, a void contract is a contract which was valid originally, i.e.. at the time of formation but the same becomes void subsequently. The following are the different situation or circumstances to make a contract a void:

- (a) **Supervening impossibility [Sec. 56]:** Example: A enters into a contract to import goods from a foreign country. It becomes void subsequently when a war breaks out between the country of import and export.

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(b) **Subsequent illegality:** A contract also becomes void by subsequent illegality, for *Example:* A agrees to sell B 1000 bags of wheat at ₹ 800 per bag. Before delivery, the Government bans private trading of paddy. In this case the contract become void.

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(iii) Void Agreements

Void agreement is agreements which does not create any legal rights and obligations According to Sec 2(g), “void agreement is an agreement not enforceable by law.” Hence the void agreement confers no rights on any person and, creates no obligations. Such an agreement without any legal effect is **void-abinitio** i.e. void at the very beginning

Example:

An agreement with a minor and an agreement without considerations, an agreement in restraint of marriage, trade, legal proceedings and so on are void agreements.

(iv) Voidable Contracts

It is a contract which can be enforced or avoided at the option of the aggrieved party. According to Sec 2 (i), “An agreement which is enforceable by law at the option of one or more of the parties there to, but not at the option of the others is a voidable contract.” From this section it is clear that the word used here is ‘**contract**’ and not just ‘**agreement**’. That is so because the rights and duties are created and contract is valid unit the option to avoid and it is exercised by the person whose consent to the agreement was not free but was obtained by coercion, undue influence, fraud and mis-representation. That is why it is expected to enter into a contract by a person who comes into Equity (i.e. before law) must come with clean hands.”

Thus a voidable contract is valid and enforceable until it is repudiated or avoided by the party entitled to avoid it.

A voidable contract continues to be valid till it is avoided or repudiated by the aggrieved party. According to Sec 64, when the aggrieved party avoids the contract, the other party need not to perform any promise, and party avoiding the contract should restore any benefit he has received, under the contract to the other party.

Example:

A by misrepresentation forces B to sell 100 bags of rice at ₹ 100 per bag and pays ₹ 4,000 in part payment of the price. B, being the aggrieved party, can rescind or cancel the contract. However, he has to pay back ₹ 4,000 to B and B need not pay the balance. So here the option is left to B to make it a valid or cancel the contract.

(v) Unenforceable Contracts

An unenforceable contract is a contract which is valid in itself, but cannot be enforced in the court of Law due to some technical defects, like absence of written form or absence of a proper stamp. Such contracts must be sued upon by one or

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both of the parties. According to Sir William Anson, “An unenforceable contract is one which is good in substance, though by reason of some technical defect, one or both the parties cannot be sued on it. Many a times the court of law cannot enforce it for the reason for the expiry of date, registration and attestation along with the other reasons given above. If the technical defect could be cured, the contract becomes enforceable, if it cannot be cured, the contract remains unenforceable.

Example:

A borrows ₹ 20,000 from B and makes a promissory note and a one rupee stamp is pasted on the pro-note. The agreement though complete is unenforceable because of the technical defect. i.e., Promissory note not being stamped properly and it is undervalued.

(vi) Illegal Contracts

Illegal contracts are also termed as unlawful contracts. Illegal contract is a contract which is either prohibited by law or otherwise against the policy of law. According to Sec.23, “the consideration or object of an agreement is unlawful if it is forbidden by law, or is of such a nature that if permitted, it would defeat the provisions of law, or is fraudulent or involves or implies injury to the person or property of another, or the court regards it as immoral or opposed to public policy.”

Example:

A borrows ₹ 1,00,000 from B for the purpose of smuggling goods. B knows the purpose of loan by A, the agreement between A and B is collateral to the main agreement which is illegal.

An illegal agreement is void-ab-initio. All illegal agreements are void but all void agreements are not illegal. The money paid or Property transferred under an illegal agreement cannot be recovered. No action can be taken for breach of an illegal agreement. With the example given above that the illegal agreement in this collateral transaction, is also void.

3. On the basis of performance

1. Executed Contract

An executed contract is one when both the parties have performed their obligations or carried out the terms of the contract. It is referred as a complete contract. In other sense when offeror and acceptor have completely performed their respective obligations under the contract, then such contract is said to be executed contract. That is, it is a contract where under the terms of the contract nothing remains to be done by both the party. For instance, in case of cash sales, the contract is executed at once.

Example:

A agrees to sell certain goods to B at a certain price. A delivers the goods and B pays the price. Thus both the parties have performed their respective obligations. Then this contract becomes an executed contract.

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2. Executory Contract

In this type of contract the obligations of the parties are to be performed at a later time or where the contract is yet to be performed either wholly or partially when one or both parties have their obligation, then such contracts are called as executory contract.

Example:

A agrees to make a painting for B for ₹ 10,000. Mr. A has yet to make a painting and Mr. B has not made any payment. So, both the parties are yet to perform their obligations. Suppose if A has made the painting, but B yet to make payment in such cases, it is executed on A's part and executory on B's part.

Thus, executory contract may be:

- (a) Unilateral
- (b) Bilateral.

(a) **Unilateral Contract:** Unilateral contract is one sided contract. In this type, one party would have discharged the obligations. In certain contracts one party has to fulfil his obligations, where as the other party has already performed his obligations. Such contract may also be termed as 'contract with executed consideration' along with 'unilateral' and 'one sided' contracts. Thus, in case of unilateral contract the obligation is outstanding only against one of the parties at the time of formation of contract.

Example:

Mr. A has lost his documents which are very valuable. He offers by advertisement a reward of ₹ 1,00,000 to any person, who will find and bring the documents very safely and hand over to him. Mr. B who comes across the advertisement, searches and finds the documents and hand it over to Mr. A. As soon as B does this act, the contract comes into existence. Now only, A has to perform his obligation by paying ₹1,00,000 to B, as B had already performed his part of obligation by finding the documents.

(b) **Bilateral Contract:** Bilateral contracts are the contracts in which the obligation on the part of both the parties to the contract are outstanding at the time of formation of the contract. In such contracts, promise on one side is exchanged for a promise on the other. Thus bilateral contracts, under executory contracts are also known as contracts with executory consideration.

Example:

A manufacturer agrees to supply certain goods at a certain price to a retailer after certain time. The payment is to be made at the time of delivery of goods. This is a bilateral contract as the obligations of both the parties are outstanding at the time of formation of the contract.

Essentials of a Valid Contract

Indian Contract Act,
1872

All agreements are contracts where as all contracts are not agreement. Hence the word agreement is wider than the contract. To make the agreement to be contract there need to is a the legal obligations. This is clearly given under Sec 10, Chapter II of the Contract Act as, “All agreements are contracts if they are made by the free consent of parties, competent to contract, for a lawful consideration and with a lawful object, and are not hereby expressly declared to be void.” “From this it is obvious to make a contract void or valid, there need to be certain conditions to be followed. These conditions are termed as elements which are essential for an agreement into contract.

NOTES

1. Plurality of Parties
2. Offer and Acceptance
3. Legal obligation
4. Lawful consideration
5. Capacity of parties
6. Free consent
7. Lawful object
8. Certainty of meaning
9. Possibility of performance
10. Agreement not declared void or illegal
11. Legal formalities

1. **Plurality of Parties:** An agreement is constituted by means of an offer by one party and an acceptance to that offer by the other party, which is known as plurality of parties for a valid contract. Here, one party may be an offeror and the other party may be the acceptor.
2. **Offer and Acceptance:** An agreement is the result of an offer and its acceptance. In order to create a valid contract both ‘lawful offer’ and ‘Lawful acceptance’ are essential. Thus, in agreement there should be two parties i.e. offeror, one who is making the offer and another person acceptor who is accepting or giving his assent for the offer. There are certain rules laid down by the Contract Act to make both offer and acceptance to be valid.
3. **Legal obligation:** An agreement to become a contract must give rise to a legal **obligation**. Section. 10 of the Act, which lays down the essentials of a valid contract does not specify ‘intention to create legal relations,’ as one of the ingredients. This is also considered as one of the necessary contractual ingredient in English Law. Under Indian Contract Act, an obligation is the legal duty to do or abstain from doing a definite act or acts.

If the parties do not intend to create legal obligations, there is no contract between them, whereas an agreement for social obligations cannot be a contract.

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As previously referred to Balfour Vs Balfour (1919) In this case, there is an agreement between husband and wife and agreement without the intention of creating legal obligations (refer page 17) same is hold good for the agreement to have lunch at a friend's house.

In case of commercial transactions, an intention to create legal obligation is presumed. If the parties expressly declare and resolved that their agreement is not intended to create legal relationships, then even a business transaction will not amount to contract.

4. **Lawful consideration:** The legal meaning of consideration is 'quid-pro-quo' or something in return. Consideration is one of the essential elements of contract. Contradiction is defined as, "Consideration is the price for which the promise of another is brought." (Black stone). Promises made without consideration is not enforceable contract. According to Sec 25 of the Act, that an agreement without consideration is void. An agreement which is not supported by consideration is considered as 'nudum pactum' (a nude or bare agreement). So it should be supported by the parties. Each party to the agreement must give or promise something and receive something or a promise in return.

Example:

If A offers to sell his vehicle for ₹ 1,00,000 and B accepts the offer, then for A- ₹ 1,00,000 is the consideration and for B-vehicle is the consideration. Consideration may take in the form of money, goods or services. Consideration may also be past, present and future, whereas it must be real and unlawful.

5. **Capacity of parties:** When an agreement is formed to make it to be a valid contract, there arises, question of contractual capacity of parties who make the agreement. The parties to an agreement must be competent to a contract, otherwise it cannot be enforced by Court of Law. If either of the parties does not have the capacity to contract, the contract is not valid. Section 11 of the Contract Act also says that, "every person is competent to contract, who is in the age group of majority, according to the law to which he is subject, and who is sound mind, and not disqualified from contracting by any law to which he is subject." (For more detail refers the topic 'capacity of parties').
6. **Free consent:** The word consent means the parties must have agreed upon the same thing in the same sense. So, the consent should come from both the parties, that is the offeror and the acceptor. The consent must be free and genuine. When the agreement is made between the parties, both the parties should agree upon same-thing with the same sense. This is known as "**Consensus-ad-idem**" in English Law. The consent of the parties should not be obtained by mis-representation, fraud, undue-influence, coercion or mistake, otherwise such of the agreement is invalid under law. Hence an agreement must be made with free consent.

NOTES

7. **Lawful object:** Object is nothing to do with consideration but it should be lawful. The object for which the agreement has been entered must not be illegal or immoral or opposed to public policy. The purpose or design of the contract is lawful, but, when a party hires a house and use it as a gambling house, then the object of the contract is to run a gambling house, then it is unlawful and it not accepted under law. Hence the object which is not agreeable under law or for defeat of any law, intention of creating fraud, any injury to person and property, any act against the public policy are not lawful objects.

8. **Certainty of meaning:** Agreements to form valid contracts must be certain. As per section 29 of the Act, “Agreements, the meaning of which is not certain, or capable of being made certain, are void. The terms of the contract must be precise and certain. It cannot be left vague. A contract may be void on the ground of uncertainty.

Example:

If A agrees to sell to B, a white horse for rupees five thousand or rupees ten thousand, there is nothing to show which of the two prices was to be given. This sort of agreement will become invalid.

9. **Possibility of performance:** If the act is impossible to act by itself, both physically or legally, it cannot be enforced at law.

Example:

If A agrees with B to discover treasure by magic, such agreement is unenforceable.

10. **Agreement not declared void or illegal:** The agreements must have been expressly declared to be void by any law in force in country, when such agreements if entered into, shall not be enforceable by courts of Law. According to the Law, agreement in restraint of marriage, trade, legal proceedings, uncertainty of meaning and wagering agreement are void, unlawful or illegal.

11. **Legal formalities:** There is no specification for the agreement or contract which should be made in oral or written. An oral contract is a perfectly valid contract, except in those cases where writing, registration etc., are required for some statutes. In India agreement in writing is required in cases of sale, mortgage, lease or gift of immoveable property and so on. If the legal formalities are not followed then there cannot be a valid agreement to form a contract.

Hence from the above essential, it is clear that all the agreement of offer and acceptance alone will not form the contract. To form a valid contract the above mentioned eleven elements, are essentially to be present. Hence it is said that, “**All contracts are agreement but all agreements are not contract.**”

Nature of Contract

Nature of contract can be summarized as follows:

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1. A contract is a binding agreement and the promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty; contracts arise out of agreements; hence a contract may be defined as an agreement creating an obligation.
2. The substance of the definition of a contract is that by mutual agreement or assent the parties create enforceable duties or obligations that are legally binding. That is each party is obligated to do or to refrain from doing certain acts. The substance of the definition of a contract is that by mutual agreement or assent the parties create enforceable duties or obligations that are legally binding.
3. 'Contract' is the most usual method of defining the rights and duties in a business transaction. This branch of law is different from other branches of law in a very important respect. It does not prescribe so many rights and duties, which the law will protect or enforce; it contains a number of limiting principles subject to which the parties may create rights and duties for themselves.
4. The Indian Contract Act, 1872 codifies the legal principles that govern 'contracts' and identifies the ingredients of a legally enforceable valid contract in addition to dealing with certain special type of contractual relationships like indemnity, guarantee, bailment, pledge, quasi contracts, contingent contracts etc.
5. All agreements are not studied under the Indian Contract Act, 1872, as some of those are not contracts. Only those agreements, which are enforceable by law, are contracts. This unit refers to the essentials of a legally enforceable agreement or contract. It sets out rules for the offer and acceptance and revocation thereof.
6. The contract states the circumstances when an agreement is voidable or enforceable by one party only, and when the agreements are void, i.e. not enforceable at all.

Check Your Progress

1. Discuss about Indian Contract Act, 1872.
2. Explain the Nature of Contract.

1.3 OFFER AND ACCEPTANCE, CAPACITY PARTIES TO CONTRACT

NOTES

1.3.1 Offer

An offer is a promise to act or refrain from acting, which is made in exchange for a return promise to do the same. Some offers anticipate not another promise being returned in exchange but the performance of an act or forbearance from taking action. For example, a painter's offer to paint someone's house for ₹ 1000 is probably conditioned on the homeowner's promise to pay upon completion, while a homeowner's offer to pay someone ₹ 1000 to have his or her house painted is probably conditioned upon the painter's successfully performing the job. In either case, an offeree's power of acceptance is created when the offeror conveys a present intent to enter a contract in certain and definite terms that are communicated to the offeree.

Courts distinguish preliminary negotiations from formal legal offers in that parties to preliminary negotiations lack a present intent to form a contract. Accordingly, no contract is formed when parties to preliminary negotiations respond to each other's invitations, requests, and intimations. Advertisements and catalogues, for example, are treated as forms of preliminary negotiations. Otherwise, the seller of the goods or services would be liable for countless contracts with consumers who view the ad or read the catalogue, even though the quantity of the merchandise may be limited.

However, sellers must be careful to avoid couching their advertisements in clear and definite terms that create the power of acceptance in consumers. For example, sellers have been found liable to consumers for advertising a definite quantity of goods for sale at a certain price on a "first come, first serve" basis, after consumers showed up and offered to pay the advertised price before the goods sold out. In such situations, the seller may not withdraw the offer on grounds that market factors no longer justify selling the goods at the advertised price. Instead, courts will compel them to sell the goods as advertised.

The rejection of an offer terminates the offeree's power of acceptance and ends the offeror's liability for the offer. Rejection might come in the form of an express refusal to accept the offer or by implication when the offeree makes a counteroffer that is materially different from the offeror's original proposal. Most jurisdictions also recognize an offeror's right to withdraw or revoke an offer as a legitimate means of terminating the offer.

Offers that are not rejected, withdrawn, or revoked generally continue until the expiration of the time period specified by the offer, or, if there is no time limit specified, until a reasonable time has elapsed. A reasonable time is determined according to what a reasonable person would consider sufficient time to accept the offer under the circumstances. Regardless of how much time has elapsed following an offer, the death or insanity of either party before acceptance is communicated normally terminates an offer, as does the destruction of the subject

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matter of the proposed contract and any intervening conditions that would make acceptance illegal.

Sometimes offerees are concerned that an offer may be terminated before they have had a full opportunity to evaluate it. In this case, they may purchase an “option” to keep the offer open for a designated time. During that time the offer is deemed irrevocable, though some jurisdictions allow the offeror to revoke the offer by paying the offeree an agreed upon sum to do so.

Meaning of Offer

Any activity or understanding of two persons begins with some proposal from one person to another. This proposal in turn will be understood as ‘Offer’. At the inception of every agreement, there must be a definite offer by one person to another and acceptance of the same person to whom the offer is made.

The term proposal and offer are considered synonymous and are used interchangeably. The word ‘Proposal’ is used under Indian Law, whereas the same is used as ‘Offer’ under English Law.

Offer is basis and one of the major elements of essentials of valid contract.

From the above definition the word ‘**offer**’ can be understood as lender:

Proposal turns to Promise turns to Offer

The word offer is the other meaning of Proposal

Promise, Section 2(b) defines a Promise as, “When the person to whom the proposal is made signifies his assent there to, the proposal is said to be accepted. A proposal when accepted becomes a promise”.

Definition of offer

According to the Indian Contract Act, Section 2(a), “When one person signifies to another his willingness to do or to abstain from doing anything with a view to obtain the assent of that other to such act or abstinence, he is set to make a proposal”

How an offer is made?

An offer can be made by expression of words, spoken or written which is called as “Express offer” “Will you buy my business at Mumbai for 5 crores?” or when A advertises in a newspaper, offering ₹ 5,000 to anyone who returns his lost documents, these are express offer.

An offer may also be implied from the conduct of the parties or the circumstances of the case. This is referred as “implied offer”. Thus, when a company runs a cab on a particular route, there is an implied offer by the company to carry passengers for a certain fare. The acceptance of the offer completes as soon as passenger boards the cab. An offer may be made to a specific person or general public.

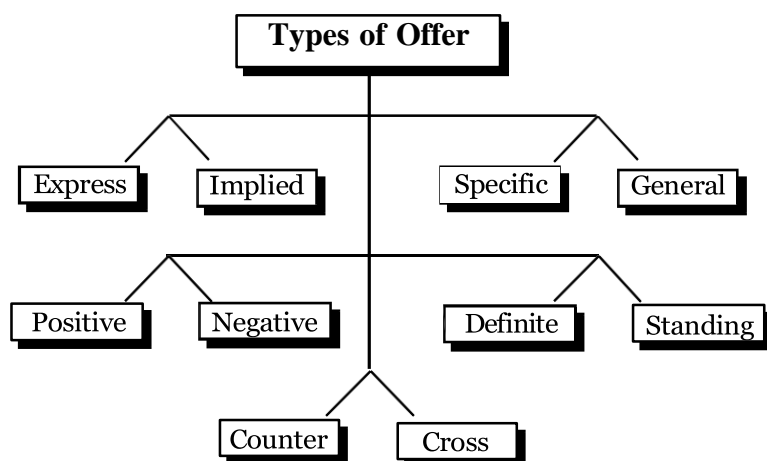


Figure 1.5: Types of Offer

Various types of offers are as follows:

1. **Express Offer:** When an offer is communicated by words, spoken or written, then it is termed as an express offer. It can also be communicated through advertisement telephone, messenger or telegram.
2. **Implied Offer:** An offer communicated by conduct or act is an implied offer. When a person goes to a consultant for an advice his conduct implies an offer to pay the usual fee to the consultant.
3. **Specific Offer:** An offer made to a specific or definite person or class of persons is known as specific offer. Specific offers are also referred to "Offer to individuals", (Case Boulton Vs Jones).
4. **General Offer:** An offer made to the world or "Public at large" is known as general offer. It can be accepted by any member of the public. According to Salmond, it is to be referred as "offer at large". An offer of reward for some information, made to the public at large through a public advertisement is an example of general offer.

In respect this a popular case is,

Carlill Vs Carbolic Smoke Ball Co (1983)

The company advertised in several newspapers that a reward of £ 100 would be given to any person who contract influenza. After using the smoke balls which is medicine in the form of capsules, which is the company's product, according to the printed direction. One, Mrs. Carlill used the smoke balls according to the directions of the company, but contracted influenza; then, Mrs. Carlill demanded the reward, but the company refused to pay the reward. (compensation) She then filed a suit in the court of law. Then the court held that she could recover reward offered on the ground that the company's offer through public advertisement amounted to a general offer, and a general offer may be accepted by any member

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of the public. In return the company filed the petition, pleading that Mrs. Carlill had not communicated her intention to accept, then the judge refusing the petition, pointed that in cases like this, communication is not necessary, since, her doing the required act amounted to an acceptance of the offer.

This case is referred to both general offer and Implied offer.

- (i) **Positive Offer:** When an offer is to do something focused, then the offer is said to be positive. i.e. an offer is to act or intention to do some act certainly.

Example: X offers to sell his van for a certain price, with the intention to sell the van, is positive offer.

- (ii) **Negative Offer:** When an offer with the intention to not to do or abstain from doing something, this offer is known as negative offer.

Example: A creditor says to his debtor that he will not file a suit, if the debtor is prepared to pay interest on the debt at 15% p.a, then this offer amounts to be negative.

- (iii) **Definite Offer:** If a tender (quotation) is submitted for goods or services in specified quantity, the tender offer is known as a definite tender or offer.

- (iv) **Standing Offer:** It is also known as 'open' or "Continuing" offer or tender. When a concern requires large quantities of goods or services from time to time, it is accepted by the supplier over a definite period and price, such tender or offer is called as standing offer.

- (v) **Cross Offer:** When two parties make identical offers to each other, in ignorance of each other's offer, such offers are known as cross offers. They shall not constitute acceptance of one's offer by the other.

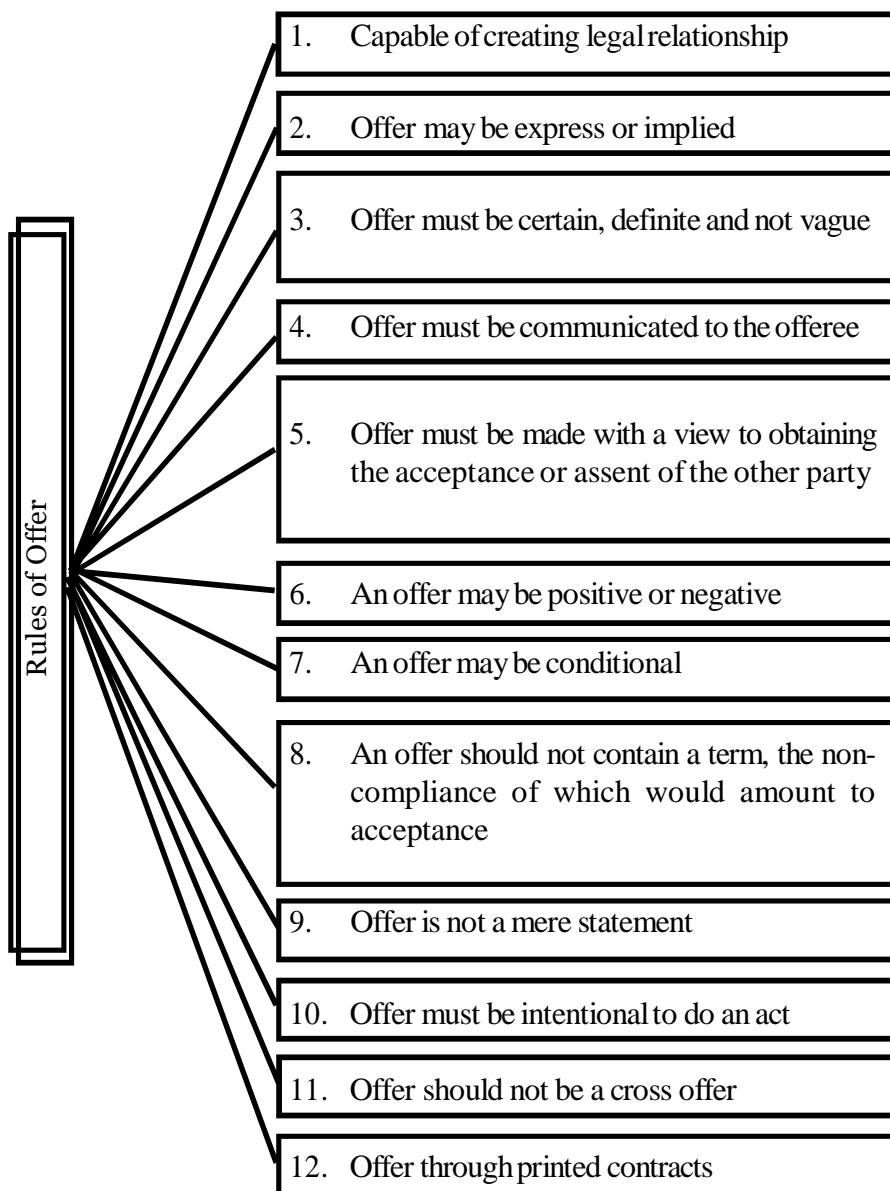
Example:

A wrote to B on 28th Dec 2005, offering to sell 1,000 tons of irons at ₹ 7,000 per ton. On the same day B wrote to A offering to buy 1,000 tonnes of iron ₹ 7,000 per ton. The two letters crossed in post and neither of them knew anything about the offer to the other. B contended that there was a good contract. It was held that B was not bound as a result of the simultaneous offers, each being made in ignorance of the other.

- (vi) **Counter Offer:** A counter offer is a rejection of original offer, it is a new offer which needs acceptance by the original promisor before a contract is made. In case of Hyde Vs Wrench; An offer to sell a form for £1,000 was rejected by the plaintiff, who offered

£ 950 for it. This was turned down by the offeror and then the plaintiff agreed to pay

£ 1,000. It was held that the defendant was not bound by any such acceptance as the original offer was conditionally accepted.



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Figure 1.6: Rules of Offer

1. **Capable of creating legal relationship:** Offer must be such that it should create legal relationship. An offeror must intend to create legal bindings and legal relationships. Not all offers will create legal binding like a social invitation, even if it is accepted, and does not create legal relationship, as it is not intended.

Example:

A accepts an invitation to dine at B's place on a certain date, but fails to turn up on the appointed date. Here A cannot be sued for a breach of contract because in contracts regulating social invitation or domestic arrangements cannot create legal binding or legal relationships and it do not intend legal consequences to follow from the breach of a contract.

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The essential elements is that, an offer therefore must be such as would result in a valid contract when it is accepted.

2. ***Offer may be express or implied:*** There is no legal rule that how it must be made. It can be express, which means mere by a word of mouth or implied through understanding. The Contract Act is not giving any specification regarding the mode of making contract. Hence it may be express or implied.
3. ***Offer must be certain, definite and not vague:*** Terms of offer must be definite, certain, unambiguous and clear or not loose and vague. Both offeror and offeree should be clear about the legal consequences arising out of contract. Any vague offers does not convey or communicate what it exactly means. According to the famous case, **Taylor Vs Portington (1855)**; A offered to take a house on lease for three years at £ 284 per annum if the house was put into through repair and drawing rooms handsomely decorated according to the present style. It was held that, the offer was too vague to result in a contractual relationship because the term 'Present style' may mean one thing to A and another to B. Hence here the agreement is void.

Example:

- (a) A says B, "I will sell a house" whereas A owns 5 houses. The offer is not definite.
 - (b) In case of **Gould Vs Gould (1970)**, A husband on divorce and leaving his wife promised to pay her £ 154 a week, 'So long as I can manage it'. It was held that although the husband and wife who lived apart because of break-up of their marriage, could enter into a legally binding agreement, the vague and discretionary terms of the agreement indicated an intention not to create legal relations.
4. ***Offer must be communicated to the offeree:*** Offer cannot be made by a person to himself. It must be always be communicated to the offeree. "No communication, no offer", i.e. if there is no communication of an offer, there is no acceptance resulting in the contract. e. g: A writes a letter to B offering to sell his bike for ₹ 40,000 but not posting the letter he keeps it in his bag, here it is not an offer and B can never accept it.
- Again a person cannot accept an offer about which he is not aware. In case of **Lalman Shukla Vs Gauri Dutt (1913)**; A sent his servant B to trace his missing nephew. A in the meantime announced a reward for providing information about the missing boy. B in ignorance of the announcement traced the boy and informed A. B later on came to know of the reward and he claimed it. Held – the claim was dismissed, since he cannot be held to accept an offer of which he is unaware. Another case in connection with this '**Fitch Vs Snedakar (1868)**', A offered a reward to anyone who returned his lost dog. B brought the dog to A without having heard of the offer. Held, B will not be able to claim the reward, since he cannot be held to accept an offer of which he is unaware.

5. ***Offer must be made with a view to obtaining the acceptance or assent of the other party:*** The offer to do or not to do something should have the focus of getting assent from the other party and it is not an offer when it is made merely with a view to disclosing the intention of making an offer.

Announcement of notice of auction sale of certain articles at a certain place on a certain date is merely an invitation of offer and not an actual offer.

The case related to this is, **Harris Vs Nickerson 1873**, according to this, A advertised in the newspaper to effect sale of his goods on a particular day at a particular place. Mr. B, travelled a long distance to bid for the things. On arrival, he found that the sale was cancelled. He sued Mr. A for the breach of contract. It was held that advertisement was merely expression of an intention and not an offer and B could not recover his expenditure.

6. ***An offer may be positive or negative:*** A positive offer is an offer to do something. A negative offer is, on the other hand, is an offer not to do something or abstain from doing something and both are accepted.
7. ***An offer may be conditional:*** An valid offer can also be conditional. Such offers are offer that can be accepted only subject to that conditions. A conditional offer lapses when the condition is not accepted. In this, a conditional offer by the management of a company to the trade union to pay a certain amount lapses when condition is not accepted. In connection to his there is a case, **Thomson Vs LMS Railway Company (1930)**, according to this case, Mr. Aa traveler takes a ticket for a railway journey. On the front of the ticket, it was printed as “for conditions see back”. One of the conditions was that the Railway Company would not be liable for the personal injuries to the passengers. A the traveler was injured by a railway accident and sued for the injury. It was held that the travelers were bound by the conditions and could not recover any damages. In this case, the LMS Railway Company is not bound to pay any of the compensation due to the accidents.

Again, one of the recent case in India connected to this is, **Lily white Vs Munuswami (AIR 1966)**, Adelivered one new saree to a laundry for washing, on the back of the printed receipt it was stated that the customer would be entitled to recover only 15% of the market price of the article in case of loss. The saree was lost owing to the negligence of the laundry. In a suit by A, it was held that the laundry showed its negligence and is against the public interest. It was held the laundry is to pay full value of the saree.

8. ***An offer should not contain a term, the non-compliance of which would amount to acceptance:*** While making the offer should not presumed to be accepted, one cannot say while making the offer that if the offer is not accepted before a certain date, it will be presumed to have been accepted. Thus, an offeror cannot say that if acceptance is

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not communicated upto a certain date, the offer would be presumed to have been accepted. If the offeree does not reply, there is no contract, as no obligation to reply can be imposed on to him on the ground of justice.

9. ***Offer is not a mere statement:*** A mere statement without any intention is not an offer. An invitation or an answer to a question and a statement of price list does not constitute a valid offer. i.e. a price lists, window displays, tenders, invitation by a company to public to subscribe to its shares, railway displays, sign boards, hoarding and so on are not an offer.
10. ***Offer must be intentional to do an act:*** An offer without intention of the offeror to commit something is not an offer. That is offeror may not be serious in his expression and the offer is made just like that, but it does not constitute a valid offer.
11. ***Offer should not be a cross offer:*** Cross offer does not constitute a valid offer as here two persons make identical offer. The court does not approve one person is offer an offer and another persons offer is not an offer.
12. ***Offer through printed contracts:*** An offer through printed matters for the special purpose formulate a valid offer/contract

Example:

Life Insurance Corporation of India, Indian Railways, Nationalised banks, Credit Co-operative societies and so on. These are some of the examples of organisation where in thousands of people enter into agreement for their own benefits. It is difficult to make organisations to stand with the different types of offer to different people. This type of offer or contracts are also known as Standard Forms of Contracts.

1.3.2 Acceptance

Acceptance

Offer and acceptance go hand in hand, as a contract is formed when an offer is accepted. Acceptance signifies the willingness of the receiving party to whom the offer has been made. The dictionary meaning of acceptance refers to the willingness to accept or affirmative answer to an invitation or approval. When a person to whom the proposal is made signifies his assent, it is an acceptance of the proposal. An accepted proposal is called a promise or an agreement. According to the Section 2(b) of the Indian Contract Act, acceptance is defined as, “when the person to whom the proposal is made signifies his assent thereto, the proposal is to be accepted. A proposal when accepted becomes a promise”. Thus, acceptance is the assent or consent given to proposal. The offeree will become acceptor or promisee when he accepts the offer.

Thus, acceptance is the manifestation by the offeree of his assent to the term. The acceptor should do something to signify his intention to accept. A common example of an act amounting to acceptance is the fall of the hammer in the case of

an auction sale. No mental acceptance will form an acceptance, except where a proposal prescribes a particular mode of acceptance. The acceptance may be made in several different ways.

Example: A offers to sell his vehicle for ₹ 5 lakhs, B accepts the offers to purchase the vehicle for the same amount. This is acceptance.

The acceptance must be from the person to whom the offer is made. The offer cannot be accepted by another without the consent of the person making it. Thus, where an offer is made by X to Y, the acceptance by Z would be inoperative.

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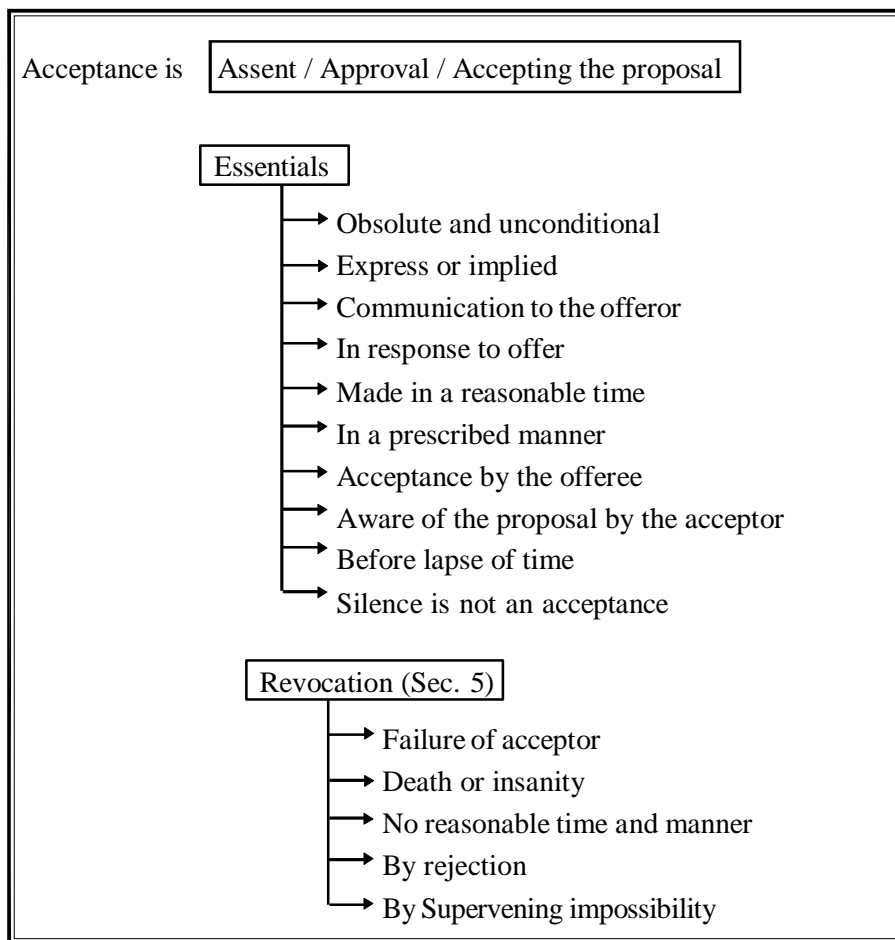


Figure 1.7: Acceptance

Meaning of Acceptance

Acceptance occurs when an offeree agrees to be mutually bound to the terms of the contract by giving consideration, or something of value like money, to seal the deal.

Definition of Acceptance

According to Indian Contract Act, 1872, “Acceptance is the expression of assent by the person to whom the offer is made. To constitute a valid acceptance, the assent must be communicated to the offeror. Acceptance may be express conduct or may be in implied circumstances”.

1.3.3 Rules of Acceptance

Offer and acceptance are the back-bone of the contract. The acceptance of an offer is the very essence of a contract. For the validity and legal effectiveness the following are the essential conditions of an acceptance:

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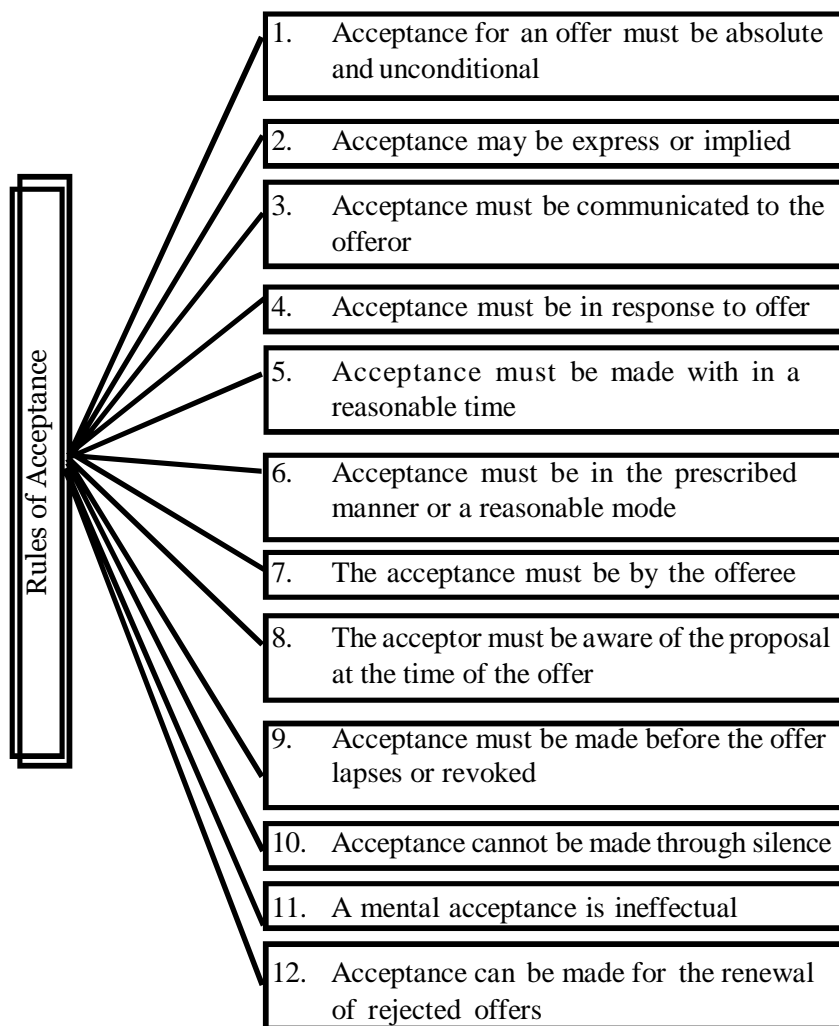


Figure 1.8: Rules of Acceptance

1. Acceptance for an offer must be absolute and unconditional:

Section 7(1) of the Act says, “The acceptance must be absolute and unqualified” that is absolute or in full and unqualified or unconditional. A qualified and conditional acceptance amounts to a counter offer and rejection of the original offer. Any alteration or variation, however, small of the offer will make the acceptance invalid. In the case of;

Jordan Vs Norton (1838)

A wrote to B offering to buy his horse if he warranted her sound and quiet in harness by which the horse is fastened and also controlled. B wrote back to A that he accepted the offer and warranted her sound and quiet in double harness. It was held that A was not bound by his

offer as B's reply was, in effect, a counter offer and not an unqualified acceptance of A's offer.

Another case, **Neale Vs Merret (1930)** M offered to sell a piece of land to N at £ 280. N accepted and enclosed £ 80 with a promise to pay the balance by monthly installments of £ 50 each. It was held, there is no contract between M and N, **as the acceptance was not absolute.**

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2. **Acceptance may be express or implied:** When an acceptance is express in words, spoken or written i.e. by word of mouth, by post, by telephone, telegram or through messenger or through any means, it is express acceptance.

When the acceptance is given by conduct, it is implied acceptance. When an acceptance is to be inferred from the circumstances of the case or from the conduct of the parties it is referred to implied acceptance.

In case of **V. Rao Vs A. Rao (1916)**, A widow promised to settle some immovable property to her niece if the niece stayed with her in her residence. Thus, niece stayed with her in her residence till her death. It was held that the niece was entitled to the property.

3. **Acceptance must be communicated to the offeror:** The acceptance must be communicated to the offeror through some means. Instead if the offeree remains silent and does nothing to show that he has accepted the offer, then no contract is formed. The acceptor should signify his intention to accept. Thus where a person accepts an offer but fails to post the letter of acceptance, it is no acceptance. In case of **Brogden Vs Metropolitan Railway Company (1877)** A draft agreement relating to the supply of coal was sent to the manager of a Railway Company for his acceptance. The manager wrote the word 'approved' and put the draft in the drawer of his table intending to send it to the Company's solicitor for a formal contract to be drawn up. By oversight the document remained in the drawer. It was held there is no contract. The offeror need not to communicate his acceptance in respect of implied offer and acceptance. It happens when performance of certain conditions takes place, or some required act is done. For this situation the example is **Carlill Vs Carbolic smoke ball Co. (1893)**. In this case, Carlill used smoke balls of the company according to its directions and contracted influenza, it amounted to acceptance of the offer by doing the required act and could claim the reward.
4. **Acceptance must be in response to offer:** There can be no acceptance without offer. Acceptance cannot be made before the offer. For example, no allotment of shares in a company can be made unless the allottee has applied for them before hand. As such, acceptance should follow the offer.
5. **Acceptance must be made within a reasonable time:** A valid acceptance will be made within the reasonable time allowed by the offeror. When there is no mention of time by the offeror then it can be made within a reasonable time. What is reasonable time is a question of fact

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depending on a particular circumstance. Acceptance may be made at anytime till the offer is alive otherwise such of the acceptance are invalid.

6. ***Acceptance must be in the prescribed manner or a reasonable mode:*** Where the offeror prescribes mode of acceptance then the acceptor should adopt the same mode. Section 7(2) states that if the acceptance is not made in the manner prescribed, the proposer may within a reasonable time after the acceptance is communicated to him, insist that the acceptance must be made in a manner prescribed. Otherwise the acceptance can be made through other reasonable manner in which it is communicated to the offeror.

In case of, **Surendra Nath Vs Kedarnath AIR(1936)** An offer was made in the following terms, "I intend to sell my house for ₹ 1,00,000, if you are willing to have it, write to 'A' at his address". Instead of writing to A, the purchaser sent an agent to A and agreed to purchase. It was held that the seller was bound by the acceptance and there was no violation of Section 7, when the purchaser, instead of writing to the particular person, met him personally to communicate his acceptance.

7. ***The acceptance must be by the offeree:*** An offer can be accepted only by the person or persons to whom it is made. A valid contract arises only if its acceptance is communicated by a person who has the authority to accept. If it is communicated by the unauthorised person, it is not valid acceptance.

In case of, **Powel Vs Lee (1908)**, A applied for the post of a Head master in a school. He was selected by the appointing authorities. But the decision of his appointment was not communicated to him. One of the members of the appointing committee informed him of his appointment. But the member was not authorised to communicate the decision and he is communicated the decision in his individual capacity. Subsequently, the appointing authority cancelled his selection. A brought a legal action for the breach of contract. His action was rejected by the court and it was observed that, "There must be notice of acceptance from the contracting party. Information from an unauthorised person is as insufficient and it is considered as over hearing from behind the door".

8. ***The acceptor must be aware of the proposal at the time of the offer:***

(a) Acceptance is made when the offer is created. When an acceptor is not aware of existence of the offer and conveys his acceptance, then there is no valid contract. There must be knowledge of the offer before anyone could consent to it. An act done out of ignorance of the offer for a reward cannot be called an acceptance. Another examples is, case, **"Lalman Shukla Vs Gauri Datt". (1913)**

(b) A sold his business to his manager B without disclosing the fact to his customers. C a customer, who had running an account with A, sent an order for the supply of goods to A by name. B received the order and executed the same. C refused to pay the price. It was held that there

was no contract between B and C because C never made any offer to B and as such C was not liable to pay the price to B. The same kind of example is also taken from the case **Boulton Vs Jones (1857)**.

9. Acceptance must be made before the offer lapses or revoked:

Acceptance must be given when the offer is in force. Due to the reasons offer may be lapsed or revoked, but the acceptance is to be before the lapse or revoke of an offer.

10. Acceptance cannot be made through silence: Silence is not a mode of acceptance. No contract is formed if the offeree remains silent and does nothing to show that he has accepted the offer.

Silence is not always accepted. Generally speaking, the person to whom the offer is made need not to reply. But his silence cannot be regarded as an acceptance of the proposal. For *Example*: If A expresses to B that if “I don’t hear from you by next Monday, I shall presume that you have bought the goods”. Here, there is no contract and silence is not acceptance.

11. A mental acceptance is ineffectual: No acceptance can be made by mind without expression or implied. Such of the acceptance is not valid or not effected.

12. Acceptance can be made for the renewal of rejected offers: The acceptor can give his acceptance for the rejected offer, if the same is reviewed.

1.3.4 Capacity of Parties to Contract

All persons cannot be entered into a contract. For a valid contract, the parties to a contract must have capacity i.e. competency to enter into a contract. Section 10 of the Indian Contract Act requires the parties to be competent to make a valid contract. According to this Section, which states as, “All agreement are contract, if they are made by the free consent of the parties competent to contract”. In this, the question of party’s competency arises. So all the parties who entered into a contract must be verified with competency or incompetency of entering into a contract. Every person is presumed to have capacity to contract but there are certain persons whose age, condition or status render them incapable of binding themselves by a contract. In-capacity must be proved by the parties to get the benefits under the contract.

The term capacity to a contract is defined clearly under Section 12 of the contract Act, under the heading as who are competent to contract as, “Every person is competent to contract who is in the age of majority avoiding to the law to which he is subject, and who is of sound mind and is not disqualified from contracting by any law to which he is subject.”

From Sec. 11 of the Act, one can draw the conclusion that the following are the persons who are not capable to enter into a contract:

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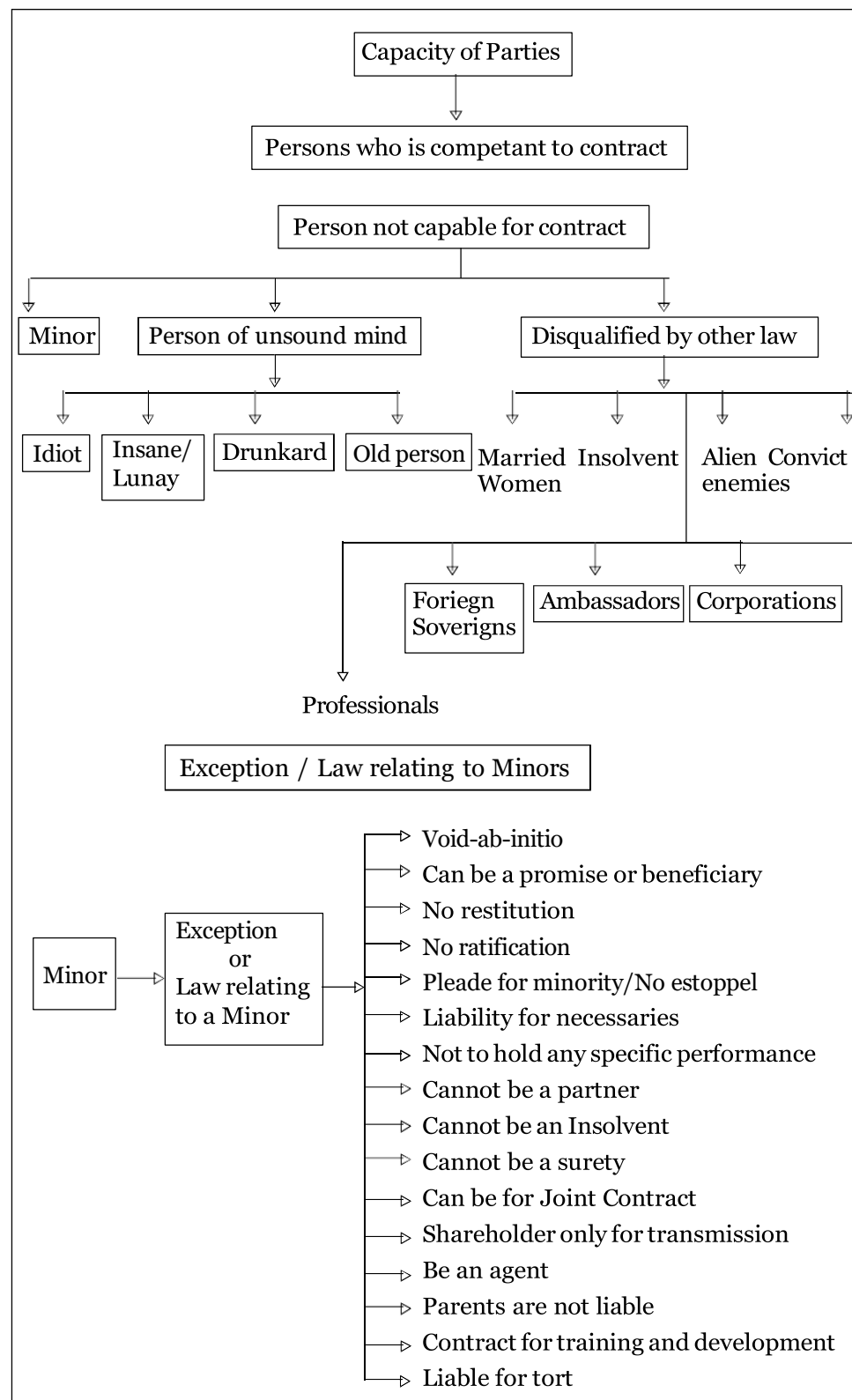


Figure 1.9: Capacity parties to contract

(i) Minor

(ii) Persons of unsound mind

- (a) Idiot
- (b) Insane/Lunacy
- (c) Drunkard
- (d) Old person

(iii) Persons disqualified by any law to which they are subject, they are:

- (a) A married women
- (b) Insolvent
- (c) Alien enemies
- (d) A convict (who is imprisoned)
- (e) Foreign sovereigns and ambassadors
- (f) Corporations
- (g) Professionals.

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1. Minor

Who is a minor? A minor is a person who has not attained the age of majority. For the purpose of entering into a contract, the age of majority is eighteen years. The Indian Majority Act, 1875, provides the meaning for majority under Sec. 3 as, “A minor is a person who has not completed eighteen years of age”. However for some reasons the person continued to be a minor upto his age of 21 years. The following are the two reasons, for the age of majority at 21 years:

- (i) In case of a minor of whose person or property or both, a guardian is appointed by the court
- (ii) The property of the minor is under the superintendence of a court of wards.

From above two exceptional cases the minor attains majority only at the age of 21 years. In England, a person becomes major on the completion of 18 years for all the purposes.

Law relating to a Minor

The law is protecting a minor in all respect. Why should minor be protected? This is a general question. It is presumed as a minor has an immature mind and cannot think what is good or bad to him. Minor is considered as infant and infancy is said to have disability. Hence in practice the protection is granted by the court of law. As minors are often exploited, the law is protecting them from any exploitation. The courts of law giving them by justifying their act by observing this as, “The law protects their (infants) persons, preserves the right and estates, excuse their laches, and assists them in their pleadings, the judges are their counsellors, the jury are their servants and law is their guardian”. Thus it is understood as in case of a minor, judges are counsellors, Jury is his servant and the law is his guardian, who take care of his needs and security.

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Minor under the Indian Law

The Indian Contract Act gives special privileges and special position to a minor. Contracts made with minors are either void or voidable. Minor binds others, but he is never bound by others. i.e. a minor is allowed to take the advantages but not the obligations. There is no personal liabilities for any of this wrongs. No legal action can be taken against a minor, even for this misbehavior and false promises. The parents of minors are also not responsible for the contract, unless they act as an agent.

The following are rules protecting the minor under the Indian Contract Act:

1. An agreement with a minor is void-ab-initio

Entering a contract with a minor is void-ab-initio i.e void right from the beginning. Section 10 of the Contract Act requires that the parties to a contract must be competent and Section 11 says that a minor is not competent. But both Sec. 10 and 11 of the Act is not giving a clean picture that entering into a contract with a minor is either void nor voidable. This was made clear under the leading case, **“Mohori Bibi Vs Dharmo Das Ghose” in the year 1903.**

According to this case, a minor mortgaged his house in favour of a money-lender to secure a loan of ₹ 20,000 out of which the mortgagee (the money-lender) paid the minor a sum of ₹ 8,000. Subsequently the minor sued for setting aside the mortgage, stating that he was underage when he executed the mortgage. It was held that the mortgage was void, and therefore, it was cancelled. Further the money lender's request for the repayment of the amount advanced to the minor as part of the consideration for the mortgagee was also not accepted.

However if the minor has carried out his obligation by other party, then he can bring in a suit against such party for enforcement of the such party's obligation.

Example:

A, a minor under a contract of sale delivered goods to the purchase. It was held that he was entitled to maintain a suit for the recovery of the price. A minor enters into agreement and attains majority during the course of contract. He cannot enforce even to protect his obligation.

2. Minor can be a promisee or beneficiary

Incapacity or incapability of a minor to enter into contract is incapacity to bind himself to a contract. Where as, if a contract is beneficial to a minor it can be enforced by him. Minor can be a beneficiary or a promisee and there is no restriction being a promisee or payee or a beneficiary.

Example:

A, a minor aged 17 years, agreed to purchase a second-hand scooter for ₹ 10,000 from B. Minor paid ₹ 1,000 as advance and agreed to pay the balance the next day and collect the scooter. When he came with the money on the next day, B told him that he had changed his mind and offered to return the advance. Here B cannot avoid the contract.

3. No ratification and minor's agreement cannot be ratified by him on attaining the age majority

Ratification refers to something related to before. Here when an agreement is made by a minor it is void. But the agreement for consideration, one cannot enforce the same with the minor after he attains majority i.e a minor cannot ratify the agreement even on attaining majority, because a void agreement cannot be ratified. Case Arumugam vs Duxri Singhia (1914).

Example:

A minor borrowed a sum of money executing a simple bond for it, and after attaining majority executed a second bond in respect of the original loan and interest. It was held that suit upon the second bond was not maintainable.

Where as, if on becoming major, a new promise for fresh consideration, then this new promise will be binding.

4. No restitution

Restitution refers resorting of a thing to its proper owner. Here a minor need not be made compensated for a benefit obtained under a void agreement. Under Section 64 and 65 of the Contract Act, the obligation of persons who has received advantage should compensate such advantage when once the contract become void. This is applicable only in respect of competent parties to the contracts and not the minors. So a minor not liable to pay any money or compensate for any benefit that he might have received under a void agreement.

Example:

A a minor sold a shop to B, the consideration was paid to A, but the sale deed could not be registered as A was a minor. B filled a case against the minor A, to recover the consideration paid by him. It was held that the agreement is void and A need to pay back the consideration received to B.

5. A minor can always plead minority or No Estoppel against a minor

Where a minor by mis-representing his age has induced the other party to enter into a contract with him, he cannot be made liable on the contract and he can always plead for his minority. In other words there is no estoppel against a minor. Estoppel refers to an impediment (hindrance or obstruction) that prevents from assertion or act. Here a minor is not estopped or obstructed from pleading his infancy in order to avoid contract. A minor has got his right to protect himself but he has no liberty to cheat anybody.

Example:

A, a minor, borrowed ₹ 1,000 on a fraudulent representation, saying that he was a major. Here the creditor cannot sue to get his money back.

6. Minor's liability for Necessaries

Minor is liable for necessities supplied or 'necessary services' rendered to him or his minor dependents. In other words, if a person supplies necessities to a person who is incapable of entering into a contract or to anyone when such incapable person is legally bound to support, then he can claim re-imbursement from the

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property of such incapable person. In case, he cannot be held liable personally for such contracts, and all that his property or estate alone will be liable.

7. Minor need not hold any specific performance except in certain cases

Since an agreement by a minor is absolutely void, the court will never direct 'specific performance' of any contractual agreement by a minor. A guardian of a minor cannot bind the minor by an agreement for the purchase of immovable property. Here even a minor cannot ask for the specific performance of the contract where the guardian had no power to enter into it. But a guardian can enforce the contract only when it is beneficial to the minor.

8. Minor cannot be a partner

Basic principle of partnership is agreement. A minor being incompetent to enter into a contract, cannot enter into a partnership agreement. However he can enter into an agreement only for the benefit of the firm. According to the Indian Partnership Act 1932, under Sec. 30(1), it is observed that, "A person who is a minor, according to the law to which he is subject may not be a partner of a firm, but with the consent of all the partners for the time being he may be admitted to the benefits of partnership."

9. Minor cannot be an insolvent

A minor cannot be declared insolvent as he is incapable of contracting debts and dues are payable from the personal properties of a minor and he is not personally liable. In other words, even for necessities supplied to him, he is not personally liable, only his property is liable.

10. Minor cannot be a surety

As a minor is considered an incapable person for contracting a transaction, he cannot act as a surety and he is not liable to pay or compensate anything under a contract.

11. Joint contract by minor and adult

In this case of joint contract, the adult will be liable for the contract and not a minor. In case, "**Sain Das Vs Ramchand**," where there was a joint purchase by two purchasers, one of them was a minor. It was held that the vendor could enforce the contract against the major purchaser and not a minor.

12. Minor as a share holder

A minor cannot be a member or share holder of any company. When he is holding partly paid-up shares, the partly paid up shares are subject to various number of calls. However he can be a share holder in respect of fully paid-up shares of a company. Since membership of a company arises on the basis of contract, a minor cannot be a member of a company. A company can also refuse to register transfer or transmission of shares in favour of a minor unless the shares are fully paid.

13. Minor cannot stand as a surety

A minor cannot be a surety as he is not liable to pay or compensate anything under a contract.

14. Minor can be an Agent

The concept of agency is merely connecting link between the agent and his principal. Here the question of contract does not appear in agency. Therefore a minor can be appointed as an agent. But he will not be liable for any of his act under Sec 184 of the Indian Contract Act. which explains that who may be an agent, runs as “As between the principal and 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 principle according to the provisions in that behalf herein contained”.

15. A minor can be beneficiary

Minor is considered as an incompetent person and also incompetency to enter into contract, which means incompetency to bind himself to a contract. But there is no provisions under the Act which debars him from becoming a beneficiary. *Example:* a payee, an endorsee or a promisee in a contract. The contract which are enforced at the option of a minor and not at the option of the other party, then the minor can choose the benefit of the contract to his favour. Here the law does not regard him as incompetent for accepting a benefit. This is clear in the **Case Sharafat Ali Vs Noor Mohamad (1924)**. Here the Rangoon High Court held that a minor may enforce a promissory note executed in his favor. A minor may become a promisee.

16. Minor and the position of his parents

No liability has been imposed on the parents even if the contracts are for necessities. The parents or the guardians of the minor may pay money borrowed by him just out of moral obligations. But the parents or guardians can be held liable when the minor child is acting as an agent of his parents or guardians.

17. Minor's Contract of Apprenticeship and Service

Entering, into a contract for the training of apprenticeship is valid since, it is the beneficial to the minor. The Apprentice Act, 1961, is also protecting the minor to enter into a contract with the employer to get training and employment to meet his livelihood. But the terms of the contract must fall within the terms of the Act and it also provides that the minor must not be less than **fourteen years** of the age and the contract must be entered into on behalf of the minor by his guardian. The main aim of Act is to provide full training to learn trades, crafts and employment, by which, when they come to full age, the minors may gain a livelihood. But a contract of service is not binding by or against a minor.

18. Minor's liability for torts

A tort means a 'civil wrong'. A minor is liable for tort unless the tort in reality is a breach of contract. Here for guilty of civil wrong, he is liable. However if a minor in the course of doing, what is entitled to do under the contract is found guilty of negligence, he can be made liable for the tort. This is clear in the leading case **“Bornad Vs Haggis (1863)**.

According to this case, a minor hired a horse for riding under expressed instructions that, not to jump on it. He rented the horse to one of his friends, who

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jumped on it for a long distance, where by the horse became sick and ultimately died.

It was held that the minor is liable for tort since it was a bare trespass and not within the object and the purpose of hiring.

On the whole the contract with a minor is given below on the basis its situation/circumstance/provision.

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2. Others persons who are not capable

As explained earlier as to who are competent persons for valid contract, as per section 11 of the Contract Act, each party to the contract must have a sound mind and other party who have unsound mind cannot form the valid contract.

Persons of unsound mind:

Next to the minor towards the disqualification for the purpose of forming of a valid contract, **the persons of unsound mind are placed.** As per the Contract Act, contracts made by persons of unsound mind are void. For the purpose of valid contract, the essentials is "Free Consent", A person of unsound mind cannot give his assent for a contract. Under Sec. 12, which deals with the capability of understanding the mind to form a contract is also given. This Section also extents the status of mind during different situation like:

- (a) A person who is usually of unsound mind, but occasionally of sound mind, may make a contract during those intervals when he is sound mind.
- (b) A person who is usually of sound mind but occasionally of unsound mind is not considered as competent to make a contract when he is of unsound mind.

However the question of soundness of minor or unsoundness must be proved in the court of law. Whereas unsoundness of mind does not mean weakness of mind or loss of memory. It means lack of understating the effectiveness of contract as well as the terms of the contract. The following are persons who come under this category of incapability:

- (a) **Idiocy:** Generally he is considered as incapable of entering into contract. His mental status is such that even ordinary matters cannot be understood and judged by him, because of lack of development of his mind. The agreement with an idiot is void.
- (b) **Insanity or Lunacy:** Insanity or Lunacy appears in a person who is totally out of control. It is a disease which occur in the brain. Such persons cannot use his reasoning power due to some mental strain or disease. If his mind becomes sound due to the cure of his disease. In such cases he can enter into contract other wise he is totally incapable of making a contract.
- (c) **Drunkness:** Drunkness is another reason for incapability and it produces temporary incapability till a man is under the effect of intoxication creating impotence of mind. Drunkness is also treated as lunacy.

- (d) **Old person:** Many a time persons who are very old will lose the memory and become weak. Such person's mind and memory may decay due to his old age. Even such person are considered as incapable person for entering into a valid contract.

Persons disqualified from contracting by any other law:

Person who are not recognized as persons are dis-qualified in forming the valid contract. The following are the persons who are dis-qualified:

- (a) **A Married Women:** A woman as an individual is competent enough to enter into a contract. Law has not made any distinction regarding contractual capacity of men and women. Whether persons are married or unmarried, they enjoy the same contractual capacity. In respect of a property which belongs to woman, she holds absolute authority over it and she enters into a contract. But a married woman cannot enter into a contract in respect of her husband's property. However a married woman can bind her husband's property for necessities supplied to her in certain cases.
- (b) **Insolvents:** According to the law a person who is declared insolvent is not a person. All the property of such person ceased by his creditors or his property vests in the hands of the receiver or official assignee. Therefore such person who is declared as insolvent cannot possess the contractual capacity.
- (c) **Alien enemies:** Aliens are referred to the persons who are not belonging to country or citizen of any country. An Alien is a person who may be called as foreigner to the land. Such persons can be either an 'alien friend' or an 'alien enemy', and is created during peace or war of any country. Generally an alien is competent to contract with citizens of India living in India. The contractual capacity arises by such persons during peace of the country. But if the country declared war, in such cases the alien will be enemy and such persons cannot enter into a contract. Contracts before the declaration war stands void during the war and cannot be enforced.
- (d) **A Convict:** A convict is a man who is imprisoned. A convict while undergoing imprisonment is incapable of entering into a contract. But incapability stands cancelled when once period of sentence or imprisonment expires.
- (e) **Foreign Sovereigns and ambassadors:** Foreign sovereigns and accredited representatives of a foreign state or ambassadors enjoy special privilege, by which they cannot be sued in courts of law. Here these persons have right to contract but can claim the privilege of not being sued. However in India, under Section 86 of the Civil Procedure Code, previous sanction of Central Government is to be obtained, for suing the rulers of foreign state, ambassadors and envoys.
- (f) **Corporations:** A corporation is an artificial person created by the company and recognised by Law and exists only in the eyes of Law. In

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other words, joint stock companies and corporations are incorporated under an Act passed by Parliament or State Legislature, which referred to artificial persons. Such of the companies cannot enter into contract directly, as they cannot act beyond the powers of Memorandum of Association. These persons cannot enter directly including the contract of marriage. But these are competent to enter into a contract only through its agents or Board of Directors.

(g) **Professionals:** Professionals are person who have specialised knowledge, skill and qualification in their respective field. Professionals are not bared in entering into contracts. They have their right to be claimed after their service. But in England, there is a restriction that the barristers cannot sue their clients for their professional fees. In India, according to the Bar Council Act 1927, advocates of the High court can enter into a contract with his client and can also bring a suit against him for his fees.

Check Your Progress

3. Explain the concept of Offer and Acceptance.
4. Discuss about capacity parties to contract.

1.4 FREE CONSENT AND CONSIDERATION

1.4.1 Free Consent

Meaning and Definition of Free Consent

Free consent is very important and essential element of the valid contract. It is essential to the creation of a contract that the parties are “ad-idem”, i.e. they agree upon the same thing in the same sense at the same time and their consent is free and real. Under Sec 10 of the Contract Act provides that all the contracts are made with free consent. There is no misunderstanding between parties regarding the subject matter or any other essentials of the contract. It is not necessary only the consent of the parties to the contract, but there should be ‘free consent’. Both these terms are provided in the Contract Act.

According to Section. 13, **consent** is defined as, “Two or more persons are said to consent when they agree upon the same thing in the same sense.”

From the above section, consent means that the parties should have the identity of mind.

To-consolidate the Free consent as:

In presence of any one of the above mentioned elements, there is no free consent.

Under Section 14, Free consent is defined as ‘consent is said to be free when it is not caused by -

- (i) Coercion as defined in Section 15, or
- (ii) Undue influence, as defined in Section 16, or
- (iii) Fraud, as defined in Section 17, or
- (iv) Mis-representation as defined in Section 18 or
- (v) Mistake, subject to the provisions of Section 20, 21, and 22.

Consent is said to be caused when it would not have been given but for the existence of such coercion, undue-influence, fraud, mis-representation or mistake.

In absence of the above elements when a consent is given by the parties, then they are called Free consent. Thus consent and Free consent involves the identity of minds or “consensus-ad-idem”. This creates when two parties of a contract meet their mind at the same time and on the same thing. In absence of this and no common intention no contract can come into existence. Such of those contract maybe void or voidable.

The following are the elements which affects the free consent:

Coercion

Coercion refers making a person to do an act forcibly or compelling him to do so.

As per section 15 of the Act coercion is defined as; “Coercion is the committing or threatening to commit, any act forbidden by the Indian Penal Code, or the unlawful detaining, or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement.

From the above section the following are the analysis or elements for coercion:

- (a) The committing of any act forbidden by the IPC (Indian Penal Code) or
- (b) The threatening to commit any act forbidden by IPC, or
- (c) The unlawful detaining of any property, or
- (d) Threatening to detain a property wrongfully.

Thus, for an act to be forbidden by the IPC, there must not be merely a threat but the act should be such as to be punishable under the IPC. The agreement under coercion is voidable agreement

Undue-influence

Undue influence is another vitality element renders a contract voidable at the option of the party whose consent was procured by undue influence. The term ‘under influence’ means the unfair use of one’s authority or superior power in order to obtain the consent of a persons who is subordinates or in weaker position. According to Section 16 of the contract Act, undue influence is defined as,

“A contract is said to be induced by “undue influence” where the relation subsisting between the parties are such that one of the party is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.”

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From section 16, it is understood that sometimes the parties to an agreement are so related to each other that one party is in a position to dominate the will of the other. As a result of which other party is compelled to enter into an agreement against his will as a result of “undue influence”. Undue influence is moral coercion as opposed to physical coercion mentioned in section 15.

In continuation of section 16 under 16(2) the Act giving the exceptions to the persons who can dominate the will of other. The following are persons, exempted from undue influence:

As per section 16(2), “A person is deemed to be in a position to dominate the will of another:

- (a) Where he holds a real or apparent authority over the other.”

Example:

- (i) Relationship between master and servant
- (ii) Relationship between officer and accused
- (iii) Relationship between teacher and student.

- (b) “Where he stands in a fiduciary relation of mutual trust and confidence.”

Example:

- (i) Relationship between father and son.
- (ii) Relationship between doctor and patient.
- (iii) Relationship between trustee and beneficiary & so on.

- (c) “Where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness or mental or bodily distress etc.

Example:

- (i) Persons who are mentally weak, illiterates, very old-age and so on.
- (ii) A contract formed out of undue influence is not valid but voidable.

Fraud

Fraud refers to deceive or to cheat. The term fraud includes all acts committed by a person with an intention to deceive another person. Fraud is the willful representation made by a party to a contract with the intent to deceive other party or induce such party to enter into a contract.

According to the Indian Contract Act under Section 17, Fraud is defined as, “Fraud means and includes any of the following acts committed by a party to a contract or with his connivance (dis-regard) or by his agent, with intent to deceive another party there to or his agent or to induce him to enter into a contract.”

- (i) The suggestion as to a fact, of that which is not true by one who does not believe it to be true.
- (ii) The active concealment of a fact by one having knowledge or belief of the fact.
- (iii) A promise made without any intention of performing it.

(iv) Any other act fitted to deceive.

(v) Any such act or omission as the law specially declares to be fraudulent.

Mere silence will not amount to fraud but where the person is supposed to talk and does not speak, in such cases it amounts to fraud. Half truth revealed by a party also amounts to fraud.

Mis-representation

Mis-representation means false representation made innocently with an honest belief as to its truth by a party without any intention to deceive the other party.

As per section 18 of the Act, it is defined as, “mis-representation” means and includes:

- (i) The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true.
- (ii) Any breach of duty which without any intent to deceive, gains an advantage to the person committing it or anyone claiming under him, by misleading another to his prejudice or the prejudice of any one claiming under him.
- (iii) Causing however innocently a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement.

It also includes non-disclosure of material fact or facts where there's legal duty to disclose without any intention to deceive.

If a false statement is known to be false by the person making it, it is called fraudulent mis-representation or fraud; if it is honestly believed to be true, it is called an innocent mis-representation or just mis-representation. It is not every false or misleading statement amounts to mis-representation.

Mistake

A contract which is otherwise valid, may sometimes become vitiated owing to mistake which affects the consenting minds of the parties to it. Mistake may be defined as ‘an erroneous belief concerning something’. Mistake may also be an incorrect belief which leads one party to mis-understand the other. Mistake many times takes place where the parties to the contract are not fully aware of the terms of the agreement, and they take the terms in a different sense.

Section 20, 21 and 22 of the contract Act deal with the legal effect of mistake without defining the term;

Sec. 20 lays down that, “where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void.”

Sec. 21 lays down that, “A contract is not voidable because it was caused by a mistake as to any law in force in India. But mistake as to a law not in force in India has the same effect as a mistake of fact.

Sec. 22 states that, “A contract is not voidable merely because it was caused by one of the parties to it being under a mistake as to matter of fact.”

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The mistake may be -

- (i) Mistake of fact and
- (ii) Mistake of law.

Mistake of fact may be -

- (a) Bilateral mistake
- (b) Unilateral mistake.

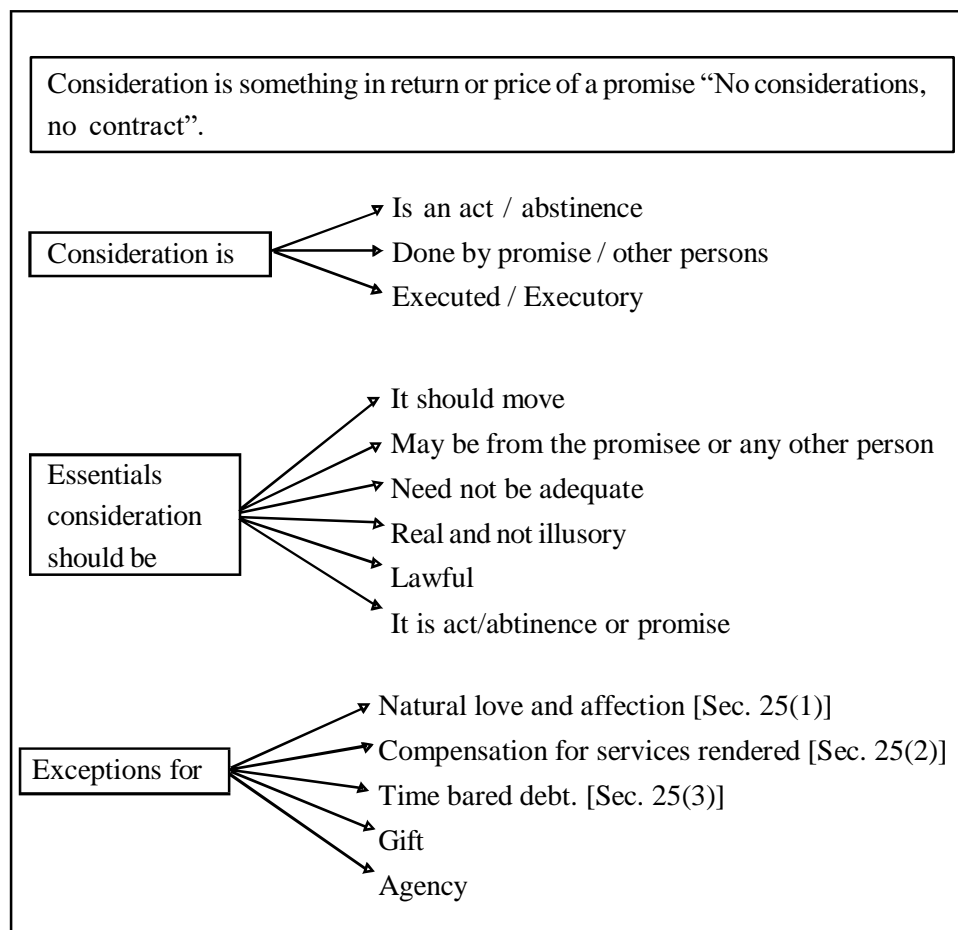


Figure 1.10: Free consent and Consideration

1.4.2 Consideration

Consideration is an important element of contract. Many a times it is considered as the foundation of the contract. The Contract Act enforces only those promises which are made for consideration. Where one party promises to do something it must get something in exchange. This “Something in return” is known as consideration. Subject to certain exception, an agreement made without consideration is “nudum pactum” i.e. is a nude or bare contract, and hence it is void.

According to the Section 10 of the contract Act which declares that an agreement becomes enforceable by law only if it is made for lawful consideration

and Section 25 of the Act lays down that an agreement made without consideration is void. Consideration is always referred as something which is made in cash or kind and it is also considered as life blood of every contract. Again, Section 23, 24 and 25 lays emphasis on the essential nature of lawful consideration and thus it plays a significant role in regulating the contractual relationship.

Meaning of Consideration

Consideration in the law of contracts is something of value given by one party in return for the promises of the other party to the contract.

Definition of Consideration

In the English case, Currie Vs Misa (1875) the word consideration was defined by Lush J as, “A valuable consideration in the sense of the law may consist either in some right, interest, profit or benefit accruing to one party, or some forbearance, detriment, loss or responsibility given, suffered or undertaken by the other”.

Justice Patterson defines as, “Consideration means something which is of some value in the eye of law. It may be some benefit to the plaintiff or some detriment to the defendant”

According to Calcutta High Court, “Consideration is a price of a promise or a return or quid-proquo (something in return), something of value received by the promisee as inducement of promise”.

Black Stone defines consideration as, the recompense (reward) given by the party contracting to the other. In other words, it is a price of the promise”.

Elements of Consideration

The essentials of a valid consideration are as under:

1. It must move at the desire of the promisor

In order to constitute legal consideration the act or abstinence forming the consideration for the promise must be done at the desire or request of the promisor.

Example: A saves B's house from the fire without being asked to do so. A cannot demand payment for his services because A performed this act voluntarily and not at the desire of B.

2. It may move from the Promisee or any other person

The second essential of a valid consideration is that consideration may move from the promisee or from a third person on his behalf. In other words the act which is to constitute consideration may be done by the promisee or any other person.

Example: A, an old lady, gifted her property to her daughter R on the condition that she should pay certain amount annually to A's brother C. On the same day R, entered into an agreement with her Uncle C to pay the amount. Afterwards she refused to fulfill her promise. C filed a suit. It was held that C was entitled to recover the amount as the consideration on his behalf had moved from her sister A.

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3. It may be past, present or future

It is clear from the definition of consideration that it may be past present or future. It means that the consideration is an act, which has already been done at the desire of the promisor or in progress or is promised to be done in future.

- (a) **Past Consideration:** When the consideration for a present promise was given before the date of the promise it is called a past consideration. It is not a valid consideration.

Example:

1. A has lost his purse and B a finder, delivers it to him. B cannot demand payment for his services because of past consideration.
2. A teaches the son of B at B's request in the month of January and in February B promises to pay A sum of ₹ 2,000 for his services. The services of A will be past consideration.

- (b) **Present Consideration:** When consideration is given simultaneously by one party to another at the time of contract, it is called Present Consideration. The act constituting the consideration is wholly or completely performed.

Example:

A sells a book to B and B pays its price immediately it is a case of present consideration.

- (c) **Future Consideration:** When the consideration on both sides is to be given at a future date, it is called future consideration or executory consideration. It consists of promises and each promise is a consideration for the other.

Example:

X promises to deliver certain goods to Y for ₹ 1500 after a week upon Y's promise to pay the agreed price at the time of delivery. The promise of X is supported by promise of Y and the consideration is executory on both sides.

4. It need not be Adequate

It is not necessary that consideration should be adequate to the value of the promise. The law only insists on the presence of consideration and not on its adequacy. It is for the parties to the contract to consider the adequacy of consideration and the courts are not concerned about it.

Example: A agrees to sell his car worth ₹ 200,000 for ₹ 50,000 only and his consent is free. The agreement is a valid contract.

5. It must be real

It is necessary that consideration must be real and competent. Where consideration is physically impossible, illegal, uncertain or unreal, it is not real and therefore shall not be a valid consideration.

- (a) **Physically Impossible:** A promise to do something which is physically impossible.

Example:

A, promise to put life in B's dead brother on B's promise to pay him ₹ 1 Lac.

(b) **Legally Impossible:** A promise to do something which is illegal.

Example:

A promise to pay ₹ 1 Lac to B on his promise to beat C.

(c) **Uncertain Consideration:** A promise to do something, which is too unclear and uncertain.

Example:

A employs B for a certain work and B promises to pay A.

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1.4.3 Types of Consideration

Consideration can be classified into:

1. Executory or Future Consideration

Executory or future consideration is one that takes the form of a promise to be performed in the future. It is the price promised by one party in return for the other party's promise. For instance, an engagement to marry someone, or a promise to deliver goods or to render services at a future date.

2. Executed or Present Consideration

Executed or present consideration is one which takes place simultaneously with the promise. The act constituting the consideration is wholly or completely performed. For instance, if A buys a book from a book-seller and pays the price and the book-seller delivers the book to A there and then, the consideration in this case is executed or present, since it is performed by both the parties simultaneously.

3. Past Consideration

Past consideration is one, which took place and is complete before the promise is made.

Rules of Consideration

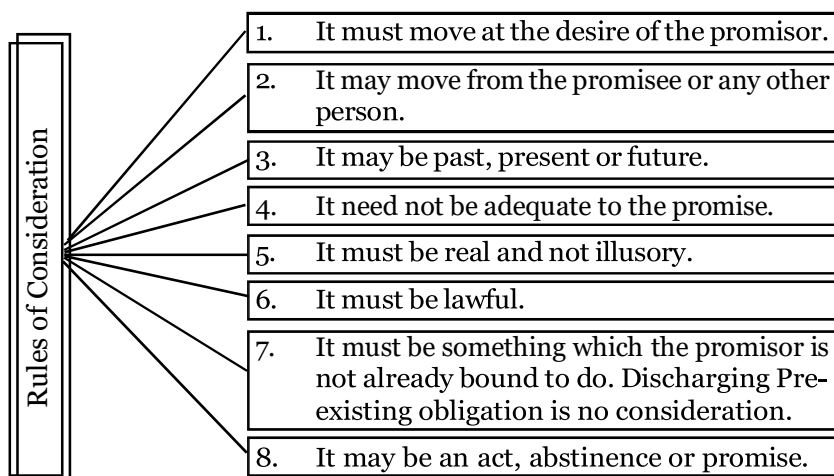


Figure 1.11: Rules of Consideration

From the definitions, the case laws, judgment and also the Act, the following are considered as essentials of a valid considerations:

A brief explanation of the above essentials are as follows:

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1. ***Consider must move at the desire of the promisor:*** The Indian Contract Act says that an act or abstinence, which forms consideration for the promise, must be done according to the desire of the promisor. It can also be done at the request of the promisor. Any Act performed at the desire or request of the third party cannot form a consideration. Thus an act done or services rendered voluntarily, or may also be at the desire of the third person will not amount to valid consideration so as to support a contract.

Example:

A saves B's goods from fire without being asked to do so. Here A cannot demand payment for his services.

According to the case, 'Durga Prasad Vs Baldeo' (1880).

The plaintiff constructed shops in a market at a request of the district collector. The defendants who occupied the shops promised to pay the plaintiff a commission on articles sold through shops, in consideration of the plaintiff having spent money on the construction of the shops. In a suit by the plaintiff for the recovery of commission, it was held that the promise was not supported by considerations. Held, the agreement was void being without consideration as plaintiff did not construct the shops at the desire of defendant, but at the desire of the district collector.

2. ***Consideration may move from the promisee or any other person:*** As per Section 2(d) of the Act, the consideration may be done either by the promisee or any other person. Here promisee is the person to whom the promise is made. It means a person can sue on contract, even if the consideration for the promise moved from a third party. While under the English Law consideration must be moved from the promisee only.

In the case of, 'Chinnayya Vs Ramayya (1881).

A, an old lady, by a deed of gift, made over certain property to her daughter R, with a direction that the daughter should pay an annuity to A's brother C, as has been done by A. Accordingly, on the same day, R, the daughter, executed a writing in favour of her maternal uncle C agreeing to pay the annuity. Afterwards she declined to fulfill her promise saying that no consideration had moved from her maternal uncle i.e. the promisee. It was held that, the word, "The promisee or any other person", in Section 2(d) clearly show that a stranger to the consideration may maintain a suit. Hence the maternal uncle, though a stranger to the consideration was entitled to maintain the suit.

3. ***Consideration may be past, present and future*** Under 2(d) states that consideration may be past, present and future, has done or abstained from doing (Past), or does or abstains from doing (Present) or promises to do or abstain from doing (Future) something". Hence, consideration may be:

- (a) **Past consideration:** A past consideration is something wholly done or suffered before making the agreement. Here the present promise is based on the consideration already taken place.

Example:

A found B's purse and gave it to him. B promised to give ₹ 100 as a reward. Here for B's promise, the act of A in finding B's purse is the past consideration.

- (b) **Present consideration:** Consideration which are executed in nature should move simultaneously with the promisee is called present consideration.

Example:

A receives ₹ 20,000 in cash from B, in return of an article, which he promises to deliver to B. It is present consideration for the promise to deliver the article.

- (c) **Future consideration:** It is also referred to executory in nature and here when the consideration from one party to the other is to pass subsequently in making of the contract, then it is known as future agreement.

Example:

A promises to sell and deliver a bag of rice of 50 kgs to B at ₹ 1,000 after a week, upon B's promise to pay the amount to A at the time of delivery. The promise of A is supported by promise of B and the consideration is executory on both the sides.

Thus, in case of future consideration, it is outstanding on both the sides where as in case of present consideration it is outstanding on one side only.

4. **Consideration need not be adequate to the promise:** The real meaning of consideration is something in return. This 'something in return', need not necessarily be equal in value to "something given". There is no mentioning of adequacy of consideration by Law. It is nowhere laid down that the consideration should be adequate to the promise. Adequacy is for the parties to decide at the time of making the agreement. No contract can be refused on the ground of inadequacy of the consideration. All that the law says, it has some value or something in return. Even a smallest consideration is sufficient provided it has some value. Under Explanation 2 to Section 25 of the Contract Act mentions that, "An agreement to which the consent of the promisor is freely given is not void merely because the consideration is inadequate, but the inadequacy of the consideration may be taken into account by the court in determining the question whether the consent of the promisor was freely given or not."

Example:

A agrees to sell his house worth ₹ 10 lakhs to B for ₹ 10 thousand. As consent to the agreement was freely given, the agreement is contract, notwithstanding the inadequacy of the consideration.

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- 5. Consideration must be real and not illusory:** Although the consideration can be past, present and future and also need not be adequate but it should be competent, real and valuable in the eyes of law. It should not be unreal or illusory. Consideration is illusory when a person promises to do something which he is already bound to do by law or by contract. Consideration must be something more than what a promise is already bound to do. Performance of a legal or public duty is no consideration for a promise. Similarly, performing or promising to perform a legal obligation imposed by a contract with the promisor cannot form consideration. But doing or agreeing to do more than a person's official duty will serve as consideration.

Example:

If A promises to put life in the dead body of B's son for ₹ 1,00,000, the agreement is void, because of the physical impossibility of the performance.

- 6. Consideration must be lawful:** Consideration must not be illegal, immoral or opposed to public policy. As per Section 23 of the Act, which is giving the consideration, which are unlawful and which are not unlawful. "The consideration or object of an agreement is lawful, unless:

"It is forbidden by law or is of such a nature that, if permitted, it would defeat the provisions of any law; or is fraudulent or involves or implies injury to the person or property of another; or the court regards it as immoral or opposed to public policy"

In each of the above cases, the consideration of an agreement is said to be unlawful. Every agreement of which consideration is unlawful is void.

Example:

A promise to obtain B an employment in the Government services and B promises to pay ₹ 50,000 to A. The agreement is void as the consideration for it is unlawful.

- 7. Consideration may be act, abstinence or promise:** According to Section 2(d), consideration may be an act, abstinence or promise. In other words consideration may consist of either a positive act or abstinence i.e. a negative act or a promise.

(a) An act which is a positive act.

Example:

A request B to sell and deliver certain goods on credit. B agrees to do so provided C guarantees the payment of the price. Here sale of goods by B to A is the consideration for C's promise to guarantee the payment.

(b) An abstinence refers to a negative act.

Example:

A the lender, entered into an agreement with borrower who is B, the loan becomes due. B fails to pay the loan. B promises to raise the rate of interest from 10% to 12% p.a. in consideration of a refraining from filing a suit against B for a year. Here A's abstinence is in consideration of B's promise.

(c) A return promise

In this consideration may be a promise by one party in return of a promise by the other party.

Example:

A agrees to sell his house to B for ₹ 10,00,000. Here B's promise to pay the sum of ₹ 10,00,000 is the consideration for A's promise to sell the house and A's promise to sell the house is the consideration for B's promise to pay ₹ 10,00,000.

8. *Dis-charging Pre-existing obligation is no consideration:*

Consideration must be something more than what the promise is already bound to do; either by general law or under an existing contract, is not a good consideration for a new promise. Performance of legal obligation is not a consideration for the promise. And there is no detriment to the promise or benefit to the promisor over and above their existing rights and obligation.

Example:

Under the case **Collins Vs Godfrey (1834)**.

A promise to pay money to a police officer to investigate into a crime. The agreement was held to be invalid because "the officer is already under the duty to do so by law".

However, where a person agrees to do more than his official duty, this will be a good consideration for the promise.

In the case, England Vs Davidson (1840)

"A police constable provided information leading to the conviction of a criminal. He sued for the reward offered for giving such information. It was held that he had rendered services outside the scope of his official duty and he was entitled to recover the reward".

Exceptions to rule of Lawful Consideration

As per the law it is clearly defined it as "No consideration and no contract" and all considerations must be lawful and unlawful consideration are considered as void. But there are few exception given by the law, where a contract can be enforceable even though there is no consideration. The following are exceptions.

1. **Natural Love and affection [Sec. 25(1)]:** As per this section, the agreement without consideration may be valid if it is in writing and registered and is made on account of natural love and affection between parties standing in a near relation to each other.

Example:

A for natural love and affection, promises to give his son B ₹ 10,000. A puts his promise to B into writing and registered it, Hence there is a contract.

2. **Compensation for services rendered [Sec. 25(2)]:** An agreement made without consideration may be valid if it is a promise to compensate wholly or in part, a person who has already voluntarily done something

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for the promisor or something which the promisor was legally compellable to do.

Example:

A finds B's purse and gives it to him B promises to give ₹ 200. Thus, there is a contract.

3. **Time-bared debt. [Sec. 25(3)]:** A promise to pay time barred debt is also a enforceable agreement. But promise must be in writing and be signed by the promisor or his agent authorized. An oral promise is not enforceable.
4. **Completed Gift:** The Act under Sec. 25 states that nothing in this section shall affect the validity, as between the donor and donee, of any gift actually made.
5. **Agency [Sec 185]:** There is no exception to the general rule. Under the above section it says no consideration is needed to create an agency.
6. **Guarantee [Sec. 127]:** A contract of guarantee are made without consideration.
7. **Remission [Sec. 63]:** No consideration is required for an agreement to receive less than what is due, which may be referred as remission in the law.

“No Consideration No Contract” and its exceptions

Consideration being one of the essential elements of a valid contract the general rule is that “an agreement made without consideration is void. But there are a few exceptions to the rule, where an agreement without consideration will be perfectly valid and binding. These exceptions are as follows:

1. Agreement made on account of natural love and affection [Sec. 25 (1)]

An agreement made without consideration is enforceable. If it is:

- (i) Expressed in writing.
- (ii) Registered under the law for the time being in force for the registration of documents.
- (iii) Is made on account of natural love and affection.
- (iv) Between parties standing in a near relation to each other.

Thus there are four essential requirements which must be complied with to enforce an agreement made without consideration, as per Section 25 (1).

Let us now study some illustrations in this behalf

- (a) A promises, for no consideration, to give to B ₹ 1,000. This is a void agreement
- (b) A for natural love and affection, promises to give his son B, ₹ 1,000. A puts his promise to B into writing and registers it This is a contract.

- (c) A registered agreement, whereby an elder brother, on account of natural love and affection, promised to pay the debts of his younger brother, was held to be valid and binding on the younger brother because the elder brother in the event of his not carrying out the agreement (Venkatasamy vs Rangasami)

It should, however, be noted that mere existence of a near relation between the parties does not necessarily import natural love and affection. Thus where a Hindu husband, after referring to quarrels and disagreement between him and his wife, executed a registered document in favour of his wife, agreeing to pay for separate residence and maintenance, it was held that the agreement was void for want of consideration because it was not merely out of natural love, and affection. (Rajlakhi Devi vs Bhootnath)

2. Agreement to compensate for past voluntary service (Sec.25 (2))

A promise made without consideration is also valid, if it is a promise to compensate, wholly or in part, a person who has already voluntarily done something for the promisor, or done something which the promisor was legally compelled to do.

Illustrations:

- (a) A finds B's purse and gives it to him. B promises to give A ₹ 50. This is a contract.
- (b) A supports B's infant son. B promises to pay A's expenses in so doing. This is a contract. (Note that B was legally bound to support his infant son).
- (c) A rescued B from drowning in the river, and B, appreciating the service that had been rendered, promises to pay ₹ 1,000 to A. There is a contract between A and B.

In order to attract this exception, the following points should be noted:

- (i) The service should have been rendered voluntarily for the promisor. If it is not voluntary but rendered at the desire of the promisor, then it is covered under 'past consideration' [as per Sec. 2(d) and not under this exception].
- (ii) The promisor must be in existence at the time the service was rendered. Thus where services were rendered by a promoter for a company not then in existence, a subsequent promise by the company to pay for them could not be brought within the exception. (Ahmedabad Jubilee Spinning Co. vs Chhotalal).
- (iii) The promise must be to compensate a person who has himself done something for the promisor and not to a person who has done nothing for the promisor. Thus, where B treated A during his illness but refused to accept payment from A; they being friends; and A in gratitude promises to pay ₹ 1,000 to B's son D, the agreement between A and D is void for want of consideration as it is not covered under the exception.

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(iv) The intention of the promisor ought to be to compensate the promisee. A promise given for any motive other than the desire to compensate the promisee would not fall within the exception. (Abdulla Khan vs Parshottam).

(v) The promisor to whom the service has been rendered needed competence to contract at the time the service was rendered. Thus a promise- made after attaining majority to pay for goods supplied voluntarily to the promisor during his minority has been held valid and the promisee could enforce it, (Karam Chand vs Basant Kaur).

The court in that case observed that they failed to see how an agreement made by a person of full age to compensate wholly or in part a promisee, who had already voluntarily done something for the promisor, even at a time when the promisor was a minor, did not fall within the purview of Sec. 25(2) of the Contract Act. The reasoning of the court is, that at the time the thing was done the minor was unable to contract, and therefore the person who did it for the minor must in law be taken to have done it voluntarily. In their opinion the 'provisions of Sec. 25(2) applied equally to a contract by a major, as well as by a minor, to pay for past services. In this connection it is important to note that this exception does 'not cover a promise by a person on attaining majority to repay the money borrowed during his minority because such a promise cannot be said to be a promise to compensate a person who has already voluntarily (without any promise of compensation) done something for the promisor. 'Advancing money as a loan' necessarily implies a promise to compensate (i.e., a promise to repay the loan) on the part of the borrower. Thus a promise made by a minor after attaining majority to repay money advanced during his minority has been held invalid and beyond the purview of Section 25(2) of the Contract Act (Indran Ramaswami vs Anthappa).

(vi) The service rendered must also be legal. Thus past cohabitation will not make a promise to pay for it enforceable under this exception (Sabava vs Yamanappa).

3. Agreement to pay a time-barred debt (Sec. 25 (3)]

Where there is an agreement, made in writing and signed by the debtor or by his authorised agent, to pay wholly or in part a debt barred by the law of limitation, the agreement is valid even though it is not supported by any consideration. A time barred debt cannot be recovered and therefore a promise to repay such a debt is without consideration, hence the importance of the present exception.

But before the exception can apply, it is necessary that:

- (i) The debt must be such of which the creditor might have enforced payment but for the law for the limitation of suits.
- (ii) The promisor himself must be liable for the debt. So a promissory note executed by a widow in her personal capacity in payment of time-

barred debt of her husband cannot be brought within the exception (Pestonji vs Maherbai²⁸);

- (iii) There must be an 'express promise to pay' a time barred debt as distinguished from a mere 'acknowledgement of a liability' in respect of a debt. Thus, a debtor's letter to his creditor, "I owe you ₹ 1,000 on account of my time-barred promissory note" is not a contract. There must be a distinct promise to pay; and
- (iv) The promise must be in writing and signed by the debtor or his agent. An oral promise to pay a time-barred debt is unenforceable.

The logic behind this exception is that by lapse of time the debt is not destroyed but only the remedy is lost. The remedy is revived by a new promise under the exception.

Illustration:

A owes B ₹ 1,000, but the debt is barred by the Limitation Act. A signs a written promise to pay B ₹ 500 on account of the debt. This is in contract (Appended to Sec. 25).

4. Completed gift

A gift (which is not an agreement) does not require consideration in order to be valid "As between the donor and the donee any gift actually made will be valid and binding even though without consideration" [Explanation 1, to Section 25]. In order to attract this exception there need not be natural love and affection or nearness of relationship between the donor and donee. The gift must, however, be complete.

5. Contract of agency

Section 185 of the Contract Act lays down that no consideration is necessary to create an agency.

6. Remission by the promisee, of performance of the promise (Sec. 63)

For compromising a due debt, i.e., agreeing to accept less than what is due, no consideration is necessary. In other words, a creditor can agree to give up a part of his claim and there need be no consideration for such an agreement. Similarly, an agreement to extend time for performances of a contract need not be supported by consideration (Sec. 63).

7. Contribution to charities

A promise to contribute to charity, though gratuitous, would be enforceable, if on the faith of the promised subscription, the promisee takes definite steps in furtherance of the object and undertakes a liability, to the extent of liability incurred, not exceeding the promised amount of subscription. In *Kedar Nath vs Ghorie Mohammad*, the defendant had agreed to subscribe ₹ 100 towards the construction of a Town Hall at Howrah. The plaintiff (secretary of the Town Hall) on the faith of the promise entrusted the work to a contractor and undertook liability to pay him. The defendant was held liable. But where the promisee had done nothing on the faith on the

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promise, a promised subscription is not legally recoverable. Accordingly, in Abdul Aziz vs Masum Ali, the defendant promised to subscribe ₹ 500 to a fund started for building, a Mosque but steps had been taken to carry out the repairs. The defendant was held not liable and the suit was dismissed.

Check Your Progress

5. Examine the concept of free consent.
6. Discuss about the concept of Consideration.

1.5 EXPRESSLY DECLARED VOID AGREEMENT, PERFORMANCE OF CONTRACTS

1.5.1 Expressly declared void agreement

Types of Agreement

There are many types of Agreement; on the grounds of enforceability agreement has two types which are as follows:

- A. Valid Agreement
- B. Void Agreement
- C. Voidable Agreement

A. Valid Agreement

Valid agreement is said to be valid if it can be enforceable in the Court of Law. Section 2(h) of the Indian Contract Act, 1872 says that, "an agreement enforceable by law is a contract"

B. Void Agreement

According to Section 2(g) of the Indian Contract Act, 1872 an agreement is not enforceable by law is said to be void.

Section 24 to 31 and 56 of the Indian Contract Act, 1872 lay down the provisions relating to the agreements which are declared void are as follows:

- (i) If consideration and objects are unlawful in part. (Section 24)
- (ii) Agreement without consideration (Section 25)
- (iii) Agreement in restraint of marriage (Section 26)
- (iv) Agreement in restraint of trade (Section 27)
- (v) Agreement in restraint of legal proceedings (Section 28)
- (vi) Uncertain Agreements (Section 29)
- (vii) Wagering Agreement (Section 30)
- (viii) Agreement contingent on impossible event (Section 31)

- (ix) Agreement to do impossible acts (Section 56)
- (x) Agreement to minor
- (xi) When both parties are under mistake of law.

C. Voidable Agreement

Voidable is a term typically used with respect to a contract that is valid and binding unless avoided or declared void by a party to the contract who is legitimately exercising a power to avoid the contractual obligations.

Voidable agreement is an agreement which is enforceable by law at the option of one or more of the parties thereto, but not at the option of other or others, is a voidable contract. However, the contract continues to be good and enforceable unless it is repudiated by the aggrieved party.

Void Agreement

As per Section 2(g) of The Indian Contract Act, 1872 “An agreement not enforceable by law is said to be void” and as per Section 2(j) of The Act “A Contract which ceases to be enforceable by law becomes void when it ceases to be enforceable”.

Types of Void Agreement

Void agreement can be of following two types:

- (i) **Void ab initio:** Void-ab-initio i.e. unenforceable from the very beginning.
- (ii) **Void due to the impossibility of its performance:** A contract can also be void due to the impossibility of its performance. *Example:* If a contract is formed between two parties A & B but during the performance of the contract the object of the contract becomes impossible to achieve (due to action by someone or something other than the contracting parties), then the contract cannot be enforced in the court of law and is thus void.

Void agreements as per the provisions of Indian Contract Act, 1872

1. **Any agreement with a bilateral mistake is void. (Section 20):** Where both the parties to an agreement are under a mistake as to matter of fact essential to agreement, the agreement is void, for example, A agrees to buy from B a certain horse. It turns out that the horse was dead at the time of the bargain, though neither party was aware of the fact. The agreement is void.

But a contract is not voidable merely because it was caused by one of the parties to it being under a mistake as to a matter of fact. (Section 22)
2. **Agreements which have unlawful consideration and objects are void. (Section 23 & 24):** The consideration or object of an agreement is unlawful if it is forbidden by law or of such a nature that if permitted, it would defeat the provisions of any law or is fraudulent or involves injury to the person or property of another or court regards it as immoral or opposed to public policy.

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If any part of a single consideration for one or more objects or any one or any part of any one of several considerations for a single object, is unlawful, the agreement is void. But where the legal part of an agreement is severable from the illegal, the former would be enforced.

3. *Agreements made without consideration is void. (Section 25):*
An agreement without the consideration is void unless:

- (i) It is made on account of natural love and affection and it is expressed in writing and registered under the law for the time being in force.
- (ii) It is a promise to compensate, a person who has already voluntarily done something for the promisor.
- (iii) It is a promise to pay a time barred debt.

4. *Agreement in restraint of marriage of any major person is void (Section 26):* Every agreement in restraint of the marriage of any person, other than a minor is void. It is the policy of the law to discourage agreements which restrains freedom of marriage. The restraint may be general or partial, that is to say, the party may be restrained from marrying at all or from marrying for a fixed time or from marrying a particular person or class of persons, the agreement is void.

5. *Agreement in restraint of trade is void. (Section 27):* Every agreement, by which anyone is restrained from exercising a lawful profession or trade or business of any kind, is to that extent void. There are two kinds of exception to the rule, those created by Statutes:

Sale of Goodwill: The only exception mentioned in the proviso to section 27 is that relating to sale of goodwill. It states that “One who sells the goodwill of the business may agree with the buyer to refrain from carrying on a similar business, within specified local limits, so long as the buyer or any person deriving the title to the goodwill from him, carries on a like business therein: Provided that such limits appear to the court reasonable, regard being had to the nature of the business. Partnership Act: There are four provisions in the Partnership Act which validate agreements in restraint of trade. Section 11 enables partners during the continuance of the firm to restrict their mutual liberty by agreeing that none of them shall carry on any business other than that of the firm. Section 36 enables them to restrain an outgoing partner from carrying on a similar business within a specified period or within specific local limits. A similar agreement may be made by partners upon or in anticipation of dissolution.

Exception to the rule as per Judicial Interpretation

Exclusive Dealing Agreements: Business practice in vogue is that a producer or manufacturer likes to market his goods through a sole agent or distributor and the latter agrees in turn not to deal with the goods of any other manufacturer. In the case of *Percept D. Mark (India) Pvt. Ltd. vs Zaheer Khan* it was observed by the Court that Negative Covenant in a contract that the covenantee would not sell a similar product of a competitor does not necessarily in restraint of trade, it could also be in furtherance of the trade.

Restraints upon Employee: An agreement of service often contains negative covenants preventing the employee from working elsewhere during the period covered by the agreement. Trade Secrets, name of customers etc. are also the property of master and servant is not supposed to disclose it to anyone else. An agreement of this class does not falls within Section 27.

Agreement in restraint of legal proceedings is void. (Section 28): An agreement purporting to oust the jurisdiction of the courts is illegal and void on grounds of public policy. Section 28 of the Act renders void two kinds of agreement, namely:

An agreement by which a party is restricted absolutely from enforcing his legal rights arising under a contract by the usual legal proceedings in the ordinary tribunals.

An agreement which limits the time within which the contract rights may be enforced.

However this is also not an absolute rule and it has two exceptions to it which is as follows:

This section shall not render illegal a contract, by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred.

Nor shall this section render illegal any contract in writing, by which two or more persons agree to arbitration any question between them which has already arisen or affect any provision of any law in force for the time being as to references to arbitration.

But right to Appeal does not come within the purview of this section. A party to a suit may agree not to appeal against the decision.

An agreement the terms of which are uncertain is void. (Section 29): Agreements, the meaning of which is not certain or capable of being made certain, are void. It is a necessary requirement that an agreement in order to be binding must be sufficiently definite to enable the court to give it a practical meaning. An agreement to agree in the future is void, for there is no certainty whether the parties will be able to agree.

Where only a part or a clause of the contract is uncertain, but the rest is capable of bearing a reasonably certain meaning, the contract will be regarded as binding. Similarly, if the agreement is totally silent as to price, it will be valid, for in that case, Section 9 of the Sale of Goods Act, 1930 will apply and reasonable price shall be payable.

An agreement by way of wager (betting/gambling) is void. (Section 30): Agreements by way of wager are void; and no suit shall be brought for recovering anything alleged to be won on any wager or entrusted to any person to abide by the result of any game or other uncertain event on which any wager is made. The section does not define “Wager”. But wager can be said as a promise to give money or money’s worth upon the determination or ascertainment of an uncertain event.

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This rule has two exceptions to it, which is as follows:

Horse Race: This section does not render void a subscription or contribution, or an agreement to subscribe or contribute, towards any plate, prize or sum of money of the value or amount of ₹ 500 or upwards to the winner or winners of any horse races.

Crossword Competitions & Lottery: If skill plays a substantial part in the result and prizes are awarded according to the merits of the solution, the competition is not a lottery. Otherwise it is. Thus, literary competitions which involve the application of skill and in which an effort is made to select the best and most skillful competitor, are not wagers.

An agreement contingent upon the happening of an impossible event is void. (Section 36): 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. Contingent agreements to do or not to do anything, if an impossible event happens, are void, whether the impossibility of the event is known or not to the parties to the agreement at the time when it is made. *For example:* A agrees to pay B ₹ 1,000 if two straight lines should enclose a space. The agreement is void.

Agreement to do impossible acts is void. (Section 56): An agreement to do an act impossible in itself is void. A contract to do an act which, after the contract is made, becomes impossible or by reason of some event which the promisor could not prevent, unlawful, becomes void when the act becomes impossible or unlawful.

Voidable Agreement

An agreement which is enforceable by law at the option of the one or more of the parties thereto, but not at the option of others or others, is a voidable contract. Voidable Contract are valid unless one of the parties has set it aside. Voidable Contract generally happens when one side of the party is tricked into entering a contract by other party.

1. Voidable Agreements as per provisions of Indian Contract Act, 1872

Voidability of agreements without free consent: When consent to an agreement is caused by coercion, fraud or misrepresentation the agreement is voidable at the option of the party whose consent was so caused. However, A party to a contract, whose consent was obtained by fraud or misrepresentation, may, if he thinks fit, insist that the contract shall be performed.

Power to set aside contract induced by Undue Influence: When consent to an agreement is caused by undue influence, the agreement is a contract voidable at the option of the party whose consent was so caused. A contract is said to be induced by undue influence where the relation subsisting between the contracting parties are such that one of the parties is in a position to dominate the will of the other.

In such a case the burden of proving that such a contract was not induced by undue influence shall lie upon the person who is in a position to dominate the will of other.

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Liability of a Party preventing event on which contract is to take effect: When a contract contains reciprocal promises and one party to contract prevents the other from performing his promise, the contract becomes voidable at the option of the party so prevented. Obvious principle is that a person cannot take advantage of his own wrong. *For example:* A and B contract that B shall execute certain work for A for a certain sum of money. B is ready and willing to execute the work accordingly, but A prevents him from doing so. The contract is voidable at the option of B.

Effect of failure to perform at fixed time, in a contract in which time is essential: When time is essence of contract and party fails to perform in time, it is voidable at the option of other party. A person who himself delayed the contract cannot avoid the contract on account of (his own) delay.

2. Consequences of rescission of Voidable Contract

When a person at whose option a contract is voidable rescinds it, the other party thereto need not perform any promise therein contained in which he is promisor. The party rescinding a voidable contract shall, if he has received any benefit there under from another party to such contract, restore such benefit, so far as may be, to the person from whom it was received.

3. Mode of Communicating or revoking rescission of voidable contract

The rescission of a voidable contract may be communicated or revoked in the same manner, and subject to the same rules, as apply to the communication or revocation of a proposal.

Section 19 in the Indian Contract Act, 1872

Voidability of agreements without free consent

When consent to an agreement is caused by coercion, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused. When consent to an agreement is caused by coercion, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused." A party to contract, whose consent was caused by fraud or misrepresentation, may, if he thinks fit, insist that the contract shall be performed, and that he shall be put in the position in which he would have been if the representations made had been true.

(Exception) If such consent was caused by misrepresentation or by silence, fraudulent within the meaning of section 17, the contract, nevertheless, is not voidable, if the party whose consent was so caused had the means of discovering the truth with ordinary diligence.

Explanation: A fraud or misrepresentation which did not cause the consent to a contract of the party on whom such fraud was practiced or to whom such misrepresentation was made, does not render a contract voidable.

Illustrations:

- (a) A, intending to deceive B, falsely represents that five hundred maunds of indigo are made annually at A's factory, and thereby induces B to buy

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the factory. The contract is voidable at the option of B. (a) A, intending to deceive B, falsely represents that five hundred maunds of indigo are made annually at A's factory, and thereby induces B to buy the factory. The contract is voidable at the option of B."

- (b) A, by a misrepresentation, leads B erroneously to believe that five hundred maunds of indigo are made annually at A's factory. B examines the accounts of the factory, which show that only four hundred maunds of indigo have been made. After this B buys the factory. The contract is not voidable on account of A's misrepresentation. (b) A, by a misrepresentation, leads B erroneously to believe that five hundred maunds of indigo are made annually at A's factory. B examines the accounts of the factory, which show that only four hundred maunds of indigo have been made. After this B buys the factory. The contract is not voidable on account of A's misrepresentation."
- (c) A fraudulently informs B that A's estate is free from incumbrance. B thereupon buys the estate. The estate is subject to a mortgage. B may either avoid the contract, or may insist on its being carried out and mortgage-debt redeemed. (c) A fraudulently informs B that A's estate is free from incumbrance. B thereupon buys the estate. The estate is subject to a mortgage. B may either avoid the contract, or may insist on its being carried out and mortgage-debt redeemed."
- (d) B, having discovered a vein of ore on the estate of A, adopts means to conceal, and does conceal the existence of the ore from A. Through A's ignorance B is enabled to buy the estate at an under-value. The contract is voidable at the option of A. (d) B, having discovered a vein of ore on the estate of A, adopts means to conceal, and does conceal the existence of the ore from A. Through A's ignorance B is enabled to buy the estate at an under-value. The contract is voidable at the option of A."

Difference between Void and Voidable Agreement

Void Agreement	Voidable Agreement
1. A void agreement is considered to be a legal contract that is invalid, even from the start of signing the contract.	1. Voidable agreement is also a legal contract which is declared invalid by one of the two parties, for certain legal reasons.
2. Section 2 (j) of the Indian Contract Act, 1872.	2. Section 2 (i) of the Indian Contract Act, 1872.
3. The agreement is valid, but subsequently becomes invalid due to some reasons.	3. The agreement is valid, until the party whose consent is not free, does not revoke it.
4. Subsequent illegality or impossibility of any act which is to be performed in the future.	4. If the consent of the parties is not independent.

5. While a void agreement is nonexistent and cannot be upheld by any law.

5. Voidable agreement is an existing contract and is binding to at least one party involved in the contract.

Indian Contract Act,
1872

1.5.2 Performance of Contracts

Performance of Contract

The term 'Performance of contract' means that both, the promisor, and the promisee have fulfilled their respective obligations, which the contract placed upon them. For instance, A visits a stationery shop to buy a calculator. The shopkeeper delivers the calculator and A pays the price. The contract is said to have been discharged by mutual performance.

Section 27 of Indian contract Act says that

The parties to a contract must either perform, or offer to perform, their respective promises, unless such performance is dispensed with or excused under the provisions of this Act, or any other law.

Promises bind the representatives of the promisor in case of the death of the latter before performance, unless a contrary intention appears in the contract.

According to the Section, there are two types of performance which are:

1. ***Actual performance:*** Actual performance of the contract means the actual discharge of the liability or obligation which a person has undertaken to perform and there remains no other task which he is obliged to discharge under the promise. He is said to have made the actual performance of the promise.

For example, P agrees to deliver 100 sacks of Mangoes to Q and Q promises to pay the price on delivery. P delivers the Mangoes on the due date and Q thereby makes the payment. This is called actual performance of contract.

2. ***Attempted performance:*** At times when the performance becomes due. The promisor is not able to discharge his obligation or perform his duty because he is prevented by the promisee in doing so. This situation where the promisor actually intended to perform his obligation or discharge his duty but is prevented from doing so by an intervening disability is known as the attempted performance of a promise.

If goods are tendered by the seller but refused by the buyer, the seller is discharged from further liability, given that the goods are in accordance with the contract as to quantity and quality, and he may sue the buyer for breach of contract if he so desires. The rationale being that when a person offers to perform, he is ready, willing and capable to perform. Therefore, a tender of performance is at par to actual performance, and it gives the promisor freedom from further performance of contract and moreover authorizes the promisor to bring action against the promisee for the breach.

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Requirement of Valid Tender

- (a) It must be unconditional.
- (b) It must be made at proper time and place.
- (c) A person to whom the tender is made must be given opportunity of inspection of goods or articles.
- (d) The tender must be whole and not of the part.
- (e) The tender must be in proper form tender of money in current coins.
- (f) The tender must be made to proper person.
- (g) Tender for the delivery of goods must be for the quantity and quality as stipulated in the contract.
- (h) A tender made to one of the several joint promisees has the same legal consequences as a tender to all of them.

Contract which need not to be Performed

A contract need not be performed –

1. When its performance becomes impossible. (Section 56)
2. When the parties to it agree to substitute a new contract for it or to rescind or alter it. (Section 62)
3. When the promisee dispenses with or remits, wholly or in part, the performance of the promise made to him or extends the time for such performance or accepts any satisfaction for it. (Section 63)
4. When the person at whose option it is voidable, rescinds it. (Section 64)
5. When the promisee neglects or refuses to afford the promisor reasonable facilities for the performance of his promise. (Section 67)
6. When it is illegal.

By whom Contract must be Performed

1. **Promisor Himself:** In the case of a contract involving personal skill, taste or diligence of the promisor, e.g., a contract to paint a picture, a contract of agency or service; the promisor must himself fulfill the contract. Section 40 states thus, "if it appears from the nature of the case that it was the intention of the parties to any contract that any promise contained in it should be fulfilled by the promisor himself, such promise must be performed by the promisor." (Section 40)

Illustration:

A promises to paint a picture for B. A must fulfill this promise personally.

2. **Agent:** When the contract is of impersonal nature i.e., personal consideration is not the foundation of a contract, a competent person can be employed to perform it. [Section 40(2)]

Illustration:

A promises to pay B a sum of money. A may fulfill this promise, either by personally paying the money to B or by causing it to be paid to B by another.

3. **Legal Representative:** In case of the death of the promisor before performance, the liability of performance falls on his legal representatives, unless a contrary intention appears from the contract [Section 37]. But, the contracts involving personal skill comes to an end on the death of the promisor on the basis of the rule of law : “ actio personalis moritur cum persona, i.e., a personal action dies with person”.

Illustrations:

- (a) A promises to paint a picture for B by a certain day at a certain price. A dies before the day. The contract cannot be enforced either by A's representatives or by B. (b) A promises to deliver goods to B on a certain day on payment of ₹ 1,000. A dies before that day. A's representatives are bound to deliver the goods to B, and B is bound to pay the ₹ 1,000 to A's representatives.
4. **Third Person:** If a promisee accepts performance of the promise from a third person, he cannot afterwards enforce it against the promisor.(Section 41).

Illustration:

A wanted to sell his property to B. So, A & B both entered into the contract for sale of property. A suddenly fall ill and therefore through power of attorney authorized his elder brother 'E' to perform the contract on A's behalf. 'B' thus afterward cannot enforce it against the promisor.

5. **Joint Promisors:** When two or more persons makes a joint promise to promisee, all joint promisors are bound to perform the contract.

Illustration:

A, B & C jointly enters into the contract with E for the sale of their jointly purchased property. Here, A, B & C are equally liable for the performance of contract.

Time and Place of Performance

1. **Performance of the promise within a reasonable time:** As per the Section 46 of Contract Act, where the time for performance is not specified in the contract and the promissory himself has to perform the promise without being asked for by the promisee, the contract must be performed within a reasonable time. The question of reasonable time, in each particular case, is a question of fact.
2. **Performance of promise where time is specified:** Section 47 says that when a promise is to be performed on a certain day and the promissory has undertaken to perform it without any demand by the promisee, the promisor may perform it at any time during the usual hours

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of business on such day and at the place at which the promise ought to be performed.

3. **Performance of promise on an application by the promisee:** 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 by the promisee. In such cases, the promisee must apply for performance at a proper place and within the usual hours of business.
4. **Performance of promise where no place is specified and also no application is to be made by promisee:** Section 49 of the contract act says that when promise is to be performed without application by the promisee and no place is fixed for the performance of it, it is the duty of the promisor to apply to the promisee to appoint a reasonable place for the performance of the promise and to perform it at such place.
5. **Performance of promise in the manner and time or sanctioned by promisee:** Sometimes the promisee himself prescribes the manner and the time of performance. In such cases, the promise must be performed in the manner and at the time prescribed by the promisee. The promisor shall be discharged from his liability if he performed the promise in the manner and time prescribed by the promisee.

Check Your Progress

7. Describe about expressly declared void agreement.
8. Explain the concept of Performance of contracts.

1.6 ANSWERS TO 'CHECK YOUR PROGRESS'

1. Discuss about Indian Contract Act, 1872.

The Indian Contract Act, 1872 prescribes the law relating to contracts in India and is the key act regulating Indian contract law. The Act is based on the principles of English Common Law. It is applicable to all the states of India. It determines the circumstances in which promises made by the parties to a contract shall be legally binding. Under Section 2(h), the Indian Contract Act defines a contract as an agreement which is enforceable by law. The Indian Contract Act, 1872 codifies the legal principles that govern 'contracts'. The Act basically identifies the ingredients of a legally enforceable valid contract in addition to dealing with certain special type of contractual relationships like indemnity, guarantee, bailment, pledge, quasi contracts, contingent contracts etc.

2. Explain the Nature of Contract.

As a result of increasing complexities of business environment, innumerable contracts are entered into by the parties in the usual course of carrying on

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their business. 'Contract' is the most usual method of defining the rights and duties in a business transaction. This branch of law is different from other branches of law in a very important respect. It does not prescribe so many rights and duties, which the law will protect or enforce; it contains a number of limiting principles subject to which the parties may create rights and duties for themselves. The Indian Contract Act, 1872 codifies the legal principles that govern 'contracts'. The Act basically identifies the ingredients of a legally enforceable valid contract in addition to dealing with certain special type of contractual relationships like indemnity, guarantee, bailment, pledge, quasi contracts, contingent contracts etc. All agreements are not studied under the Indian Contract Act, 1872, as some of those are not contracts. Only those agreements, which are enforceable by law, are contracts. This unit refers to the essentials of a legally enforceable agreement or contract. It sets out rules for the offer and acceptance and revocation thereof. It states the circumstances when an agreement is voidable or enforceable by one party only, and when the agreements are void, i.e. not enforceable at all.

3. Explain the concept of Offer and Acceptance.

An offer is a promise to act or refrain from acting, which is made in exchange for a return promise to do the same. Some offers anticipate not another promise being returned in exchange but the performance of an act or forbearance from taking action. For example, a painter's offer to paint someone's house for ₹ 1000 is probably conditioned on the homeowner's promise to pay upon completion, while a homeowner's offer to pay someone ₹ 1000 to have his or her house painted is probably conditioned upon the painter's successfully performing the job. In either case, an offeree's power of acceptance is created when the offeror conveys a present intent to enter a contract in certain and definite terms that are communicated to the offeree.

Acceptance occurs when an offeree agrees to be mutually bound to the terms of the contract by giving consideration, or something of value like money, to seal the deal. An accepted proposal is called a promise or an agreement. According to the Section 2(b) of the Indian Contract Act, acceptance is defined as, "when the person to whom the proposal is made signifies his assent thereto, the proposal is to be accepted. A proposal when accepted becomes a promise". Thus, acceptance is the assent or consent given to proposal. The offeree will become acceptor or promisee when he accepts the offer. Thus, acceptance is the manifestation by the offeree of his assent to the term. The acceptor should do something to signify his intention to accept. A common example of an act amounting to acceptance is the fall of the hammer in the case of an auction sale. No mental acceptance will form an acceptance, except where a proposal prescribes a particular mode of acceptance. The acceptance may be made in several different ways.

4. Discuss about capacity parties to contract.

The term capacity to a contract is defined clearly under Section 12 of the contract Act, under the heading as who are competent to contract as, "Every person is competent to contract who is in the age of majority avoiding to the

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law to which he is subject, and who is of sound mind and is not disqualified from contracting by any law to which he is subject.”

5. Examine the concept of free consent.

Free consent is very important and essential element of the valid contract. It is essential to the creation of a contract that the parties are “ad-idem”, i.e. they agree upon the same thing in the same sense at the same time and their consent is free and real. Under Sec 10 of the Contract Act provides that all the contracts are made with free consent. There is no misunderstanding between parties regarding the subject matter or any other essentials of the contract. It is not necessary only the consent of the parties to the contract, but there should be ‘free consent’. Both these terms are provided in the Contract Act.

6. Discuss about the concept of Consideration.

Consideration in the law of contracts is something of value given by one party in return for the promises of the other party to the contract. Consideration is an important element of contract. Many a times it is considered as the foundation of the contract. The Contract Act enforces only those promises which are made for consideration. Where one party promises to do something it must get something in exchange. This “Something in return” is known as consideration. Subject to certain exception, an agreement made without consideration is “nudum pactum” i.e. is a nude or bare contract, and hence it is void.

7. Describe about expressly declared void agreement.

According to Section 26 of the Indian Contract Act, all agreements in restraint of marriage except that of a minor are void. Romans were the first to delegitimize agreements that were in restraint of marriage. The basis of making agreements in restraint of marriage void is that marriage is a sacrament and nothing should interfere in the institution of marriage, not even contracts. The idea behind this provision is to not snatch away the personal right of every individual to marry someone of their own choice. It is important to note here that according to the section, agreements in restraint of marriage of a minor are not void.

8. Explain the concept of Performance of contracts.

The term ‘Performance of contract means that both, the promisor, and the promisee have fulfilled their respective obligations, which the contract placed upon them. For instance, A visits a stationery shop to buy a calculator. The shopkeeper delivers the calculator and A pays the price. The contract is said to have been discharged by mutual performance. The parties to a contract must either perform, or offer to perform, their respective promises, unless such performance is dispensed with or excused under the provisions of this Act, or any other law. Promises bind the representatives of the promisor in case of the death of the latter before performance, unless a contrary intention appears in the contract.

1.7 SUMMARY

*Indian Contract Act,
1872*

- Contract is a legally binding document between at least two parties that defines and governs the rights and duties of the parties to an agreement. A contract is legally enforceable because it meets the requirements and approval of the law.
- The Indian Contract Act, 1872 prescribes the law relating to contracts in India and is the key act regulating Indian contract law. The Act is based on the principles of English Common Law. It is applicable to all the states of India. It determines the circumstances in which promises made by the parties to a contract shall be legally binding.
- Under Section 2(h), the Indian Contract Act defines a contract as an agreement which is enforceable by law. The Indian Contract Act, 1872 codifies the legal principles that govern 'contracts'. The Act basically identifies the ingredients of a legally enforceable valid contract in addition to dealing with certain special type of contractual relationships like indemnity, guarantee, bailment, pledge, quasi contracts, contingent contracts etc.
- 'Contract' is the most usual method of defining the rights and duties in a business transaction. This branch of law is different from other branches of law in a very important respect. It does not prescribe so many rights and duties, which the law will protect or enforce; it contains a number of limiting principles subject to which the parties may create rights and duties for themselves.
- An offer is a promise to act or refrain from acting, which is made in exchange for a return promise to do the same. Some offers anticipate not another promise being returned in exchange but the performance of an act or forbearance from taking action.
- Acceptance occurs when an offeree agrees to be mutually bound to the terms of the contract by giving consideration, or something of value like money, to seal the deal. An accepted proposal is called a promise or an agreement. According to the Section 2(b) of the Indian Contract Act, acceptance is defined as, "when the person to whom the proposal is made signifies his assent thereto, the proposal is to be accepted. A proposal when accepted becomes a promise".
- The term capacity to a contract is defined clearly under Section 12 of the contract Act, under the heading as who are competent to contract as, "Every person is competent to contract who is in the age of majority avoiding to the law to which he is subject, and who is of sound mind and is not disqualified from contracting by any law to which he is subject."
- Free consent is very important and essential element of the valid contract. It is essential to the creation of a contract that the parties are "ad-idem", i.e. they agree upon the same thing in the same sense at the same time and their consent is free and real.

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- Consideration in the law of contracts is something of value given by one party in return for the promises of the other party to the contract. Consideration is an important element of contract. Many a times it is considered as the foundation of the contract. The Contract Act enforces only those promises which are made for consideration.
- According to Section 26 of the Indian Contract Act, all agreements in restraint of marriage except that of a minor are void. Romans were the first to delegitimize agreements that were in restraint of marriage. The basis of making agreements in restraint of marriage void is that marriage is a sacrament and nothing should interfere in the institution of marriage, not even contracts.
- The term 'Performance of contract means that both, the promisor, and the promisee have fulfilled their respective obligations, which the contract placed upon them.

1.8 KEY TERMS

- **Contract:** Contract is a legally binding document between at least two parties that defines and governs the rights and duties of the parties to an agreement. A contract is legally enforceable because it meets the requirements and approval of the law.
- **Contract Act 1872:** The Indian Contract Act, 1872 prescribes the law relating to contracts in India and is the key act regulating Indian contract law. The Act is based on the principles of English Common Law.
- **Offer:** An offer is a promise to act or refrain from acting, which is made in exchange for a return promise to do the same. Some offers anticipate not another promise being returned in exchange but the performance of an act or forbearance from taking action.
- **Acceptance:** Acceptance occurs when an offeree agrees to be mutually bound to the terms of the contract by giving consideration, or something of value like money, to seal the deal.
- **Capacity parties to contract:** The term capacity to a contract is defined clearly under Section 12 of the contract Act, under the heading as who are competent to contract as, "Every person is competent to contract who is in the age of majority according to the law to which he is subject, and who is of sound mind and is not disqualified from contracting by any law to which he is subject."
- **Free consent:** Free consent is provided under the Indian Contracts Act is Consent that is free from Coercion, Undue Influence, Fraud, Misrepresentation or Mistake.
- **Consideration:** Consideration in the law of contracts is something of value given by one party in return for the promises of the other party to the contract. Consideration is an important element of contract.

- **Void agreement:** Void agreement means the contract or agreement is no longer enforceable. While precise definitions vary by jurisdiction, void agreements are generally categorized as being void from the beginning and were never valid at any point.
- **Performance of contracts:** 'Performance of contract means that both, the promisor, and the promisee have fulfilled their respective obligations, which the contract placed upon them.

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1.9 SELF-ASSESSMENT QUESTIONS AND EXERCISES

Short Answer Questions

1. Define Indian Contract Act.
2. Define term of contract.
3. What are the essential requirements of a contract?
4. Define Agreement.
5. What do you mean Promise?
6. Give the meaning of Formal Contract.
7. What is Implied Contract?
8. Give the meaning of Quasi Contract.
9. What is Void Contract?
10. Give the meaning of Valid Contract.
11. What is Void Agreement?
12. What do you mean by Voidable Contract?
13. What is Unenforceable Contract?
14. Give the meaning of Legal Contract.
15. What is Executed Contract?
16. Give the meaning of Offer.
17. How an Offer is made?
18. What is Capacity parties to contract?
19. What is free consent?
20. Give the meaning of Consideration.
21. What is void agreement?
22. What is Performance of contract?

Long Answer Questions

1. Explain Nature of Indian Contract Act.
2. Discuss Importance of Indian Contract Act.

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3. Discuss the essential elements of a Valid Contract?
4. Define Contract? Bring out the various classes of contract.
5. What is Quasi Contract? Explain different types of Quasi Contract?
6. Explain essential of Valid Offer.
7. Discuss different types of Offer.
8. Explain Revocation of Offer.
9. Define consideration? Describe the characteristics features of a valid consideration?
10. Explain the rules protecting the Minor under the Indian Contract Act.
11. State the exception of the rule. "An agreement in restraint of trade is void".
12. Discuss about capacity parties to contract.
13. Explain about Free consent and Consideration.
14. Discuss about Expressly declared void agreement.
15. Explain in brief about performance of contracts.

1.10 FURTHER READING

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UNIT 2 BREACH OF CONTRACT

Structure

- 2.0 Introduction
- 2.1 Objectives
- 2.2 Breach of Contract, Remedies of Breach of Contract
 - 2.2.1 Breach of Contract
 - 2.2.2 Remedies of Breach of Contract
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2.0 INTRODUCTION

Breach of contract may occur when a party to a valid contract has failed to fulfill their side of the agreement. This can occur as either a partial or a complete breach. A court will also assess whether the breach was a substantial one or only a minor one. This will help the court determine what type of damages the breaching party should have to pay. Breach of contract is a legal cause of action and a type of civil wrong, in which a binding agreement or bargained-for exchange is not honored by one or more of the parties to the contract by non-performance or interference with the other party's performance. Breach occurs when a party to a contract fails to fulfill its obligation(s), whether partially or wholly, as described in the contract, or communicates intent to fail the obligation or otherwise appears not to be able to perform its obligation under the contract. Where there is breach of contract, the resulting damages will have to be paid by the party breaching the contract to the aggrieved party. It is important to bear in mind that contract law is not the same from country to country. Each country has its own independent, free standing law of contract. Therefore, it makes sense to examine the laws of the country to which the contract is governed before deciding how the law of contract (of that country) applies to any particular contractual relationship.

2.1 OBJECTIVES

After going through this unit, you will be able to:

- Explain the Breach of Contract and Remedies of Breach of Contract
- Describe the Indemnity and Guarantee Contracts

- Special Contracts and Bailment
- Examine the Pledge and Agency

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2.2 BREACH OF CONTRACT, REMEDIES OF BREACH OF CONTRACT

2.2.1 Breach of Contract

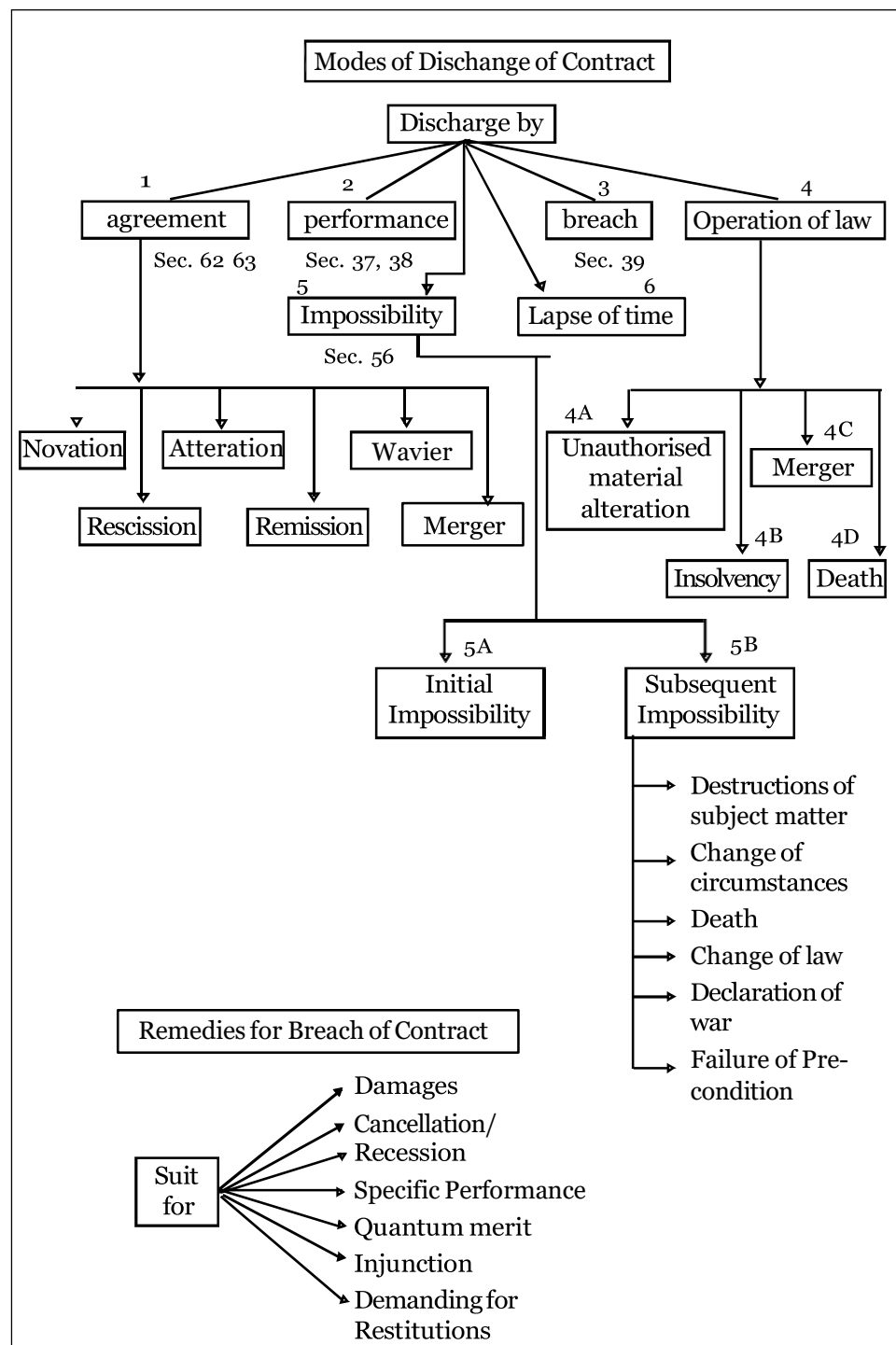


Figure 2.1: Breach of Contract

The Contract Act provides various rights and obligations between the parties to form a contract. When the contractual relationship subsisting between the parties come to an end the contract is said to be discharged. In other words, a contract is said to be discharged or terminated when the rights and obligations created by it are extinguished. Here the parties are no more liable under the contract, when once the discharge of the contract exist. Thus, discharge is an end of the contract and termination of the contractual relationship. The Act provides under different section the various modes of discharging of a contract, which are follow as under:

- (i) Discharge by agreement (Section 62, 63)
- (ii) Discharge by performance (Sec. 37, 38)
- (iii) Discharge by breach (Sec. 39)
- (iv) Discharge by operation of law.
- (v) Discharge by impossibility (Sec. 56)
- (vi) Discharge by lapse of time.

I. Discharge by Agreement

Since a contract is formed on the basis of an agreement, it follows that the contract can be discharged by mutual agreement. The rights and obligations created by an agreement can be discharged without their performance by means of another agreement between the parties which provides for the extinguishments of the earlier rights and obligations.

Section 62 provides: “If the parties to a contract agrees to substitute a new contract for it, or rescind or alter it, the original contract need not be performed.” From this section, it contemplates three distinct modes of discharge of contract by agreement. Novation, Alterations and Rescission are three different ways in which parties agree to terminate the existence of the contract.

As per section 63 of the Act, “Every person who accepts a proposal may dispense with or remit, wholly or in part, the performance of the promise made to him, or may extend the time for such performance or may accept instead of it any satisfaction which he thinks fit. This section also provides the modes of discharging the contract through Remission and Waiver.

Section 62 and 63 on the whole provides the ways in which the discharge of contract by mutual agreement is explained, which are discussed in brief below:

Novation

Novation refers to the substitution of a new contract for the existing one, either between the same parties or between different parties and the consideration for the new contract is the discharge of the old contract. It is a transaction by which, with the consent of all the parties concerned, the old contract is revoked and substituted by a new contract, unless there is extinguishments of all rights and

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obligations under the old contract, there is no novation. Thus, where the original debtors is given up the creditor and an other person undertakes the liability, then it is a case of novation. As the novation implies a fresh contract in place of original one, all the parties to the old contract must agree to it. The new contract should be valid and enforceable. The novation may be of following two types:

- (a) Novation involves change of parties. Here substituting a new debtor in place of an old one are with consent of the creditors.
- (b) Novation without change of parties. Here no parties will be changed but substitution of contract may be changed. Sometimes the concerned parties to a contract agree to substitute the existing contract for a new contract. In such case the original contract is discharged and need not be performed.

Rules regarding Novation

- (i) Novation must appear before the expiry of the time of performance of the original contract.
- (ii) It should have mutual consent of the parties and should not be made compulsory.
- (iii) The replaced contract for the old one should be legally enforceable.
- (iv) It must have been substituted to the present contract. An agreement to institute a contract in future will not be novation.
- (v) As a result of novation, the contract is totally discharged and law does not entertain any action based upon the terms of the old contract.

In novation, the new contract must also be valid and enforceable. If not, the parties remain bound by the original contract.

Example: A owes B ₹ 10,000 under a contract, B owes C ₹ 10,000. B orders A to credit C with ₹ 10,000 in his books, but C does not assent to the arrangement. B still owes C ₹ 10,000 and no new contract has been entered into.

Rescission

The word Rescission refers to cancellation. While novation results in a new contract in the place of the old one, rescission result in the cancellation of the original contract. Rescission results in the dissolution of the contract while novation results in replacement of the contract. An agreement of recession releases the parties from their obligations arising out of the contract. The example for the rescission follows:

Example:

A promises to sell a property to B on a certain day. Before the actual date of performance, A and B mutually agree that the contract will not be performed. Here the contract is rescinded.

The following are the modes of Rescission: Under to Sec. 64,

- (i) The parties to the contract must have mutual agreement to rescind the contract before it breaches.
- (ii) On breach of a contract by any one of the parties his aggrieved party can rescind the contract and claim for the compensation.
- (iii) The parties to the contract whose consent is not free, such of them are voidable contract, the parties whose consent is not free may rescind the contract.
- (iv) When the parties to the contract shows non-performance for a long time, and no other party has objected against it, the contract may be taken as rescinded.

Rescission may be total or partial. The total rescission appears where the discharge of the contract is full or whole. The partial is the variation of the original contract through;

- (a) Rescinding certain terms of the contract.
- (b) Substituting new terms for the one's which are rescinded.
- (c) Adding new terms without rescinding any of the terms of the original contract.

Alteration

Alteration refers to a change to one or more of the material terms of the contract. A contract may be discharged by alteration also. Alteration may be both material and immaterial. In case of the alteration, there is no change of parties to the contract but change of terms of the contract. Alteration made with the consent terms of the contract. Alteration made with the consent of all the parties results in the discharge of the original contract.

Example:

A enters into a contract with B for the supply of goods at his warehouse, on 1st July. Later both A and B agree to postpone the date of delivery to 30th Nov. This change, turns to alteration of the contract.

Remission

Under the Sec. 63 of the Contract Act Remission has been explained under the title as 'Promisee may dispense with or remit performance or promise' – which gives us every Promisee may dispense with or remit, wholly or in part, the performance of the promisee made to him, or may extend the time for such performance or may accept instead of it any satisfaction which he thinks fit." As per this section remission may be defined as the acceptance of a lesser sum than what was contracted for or a lesser fulfillment of the promise made.

Remission may be a unilateral act of the promisee discharging at his will and pleasure of the obligation of another. The situation is different in England, where a person cannot remit unless the fresh promise is supported by consideration. In

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India a promisee may remit or give up a part of his claim as full settlement with the assent of the promisor.

Example:

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A owes B ₹ 2,000. A pays to B who accepts in satisfaction of the whole debt ₹ 1,000 paid at the time and place at which the ₹ 2,000 were payable. The whole debt is discharged.

In case of Kapur Chand Godha Vs Mir Nawab Himayat Ali Khan (1963).

The defendant, the eldest son of the Nizam of Hyderabad, who had purchased jewellery for ₹ 27 lakhs from a Bombay merchant, executed a promissory note for a price. After the military occupation of Hyderabad, a debt settlement committee was set up by the military Governor. The committee paid ₹ 20 lakhs to the plaintiff, the jeweler, in the full settlement of 27 lakhs due to him, and he accepted in two installments. But after some days he said the defendant for the balance due. The Supreme Court held the case is covered by Sec.63 and he is not entitled to sue.

Waiver

Waiver refers to the abandonment of a right which a person entitled to. In other sense, Waiver means abandoning the right or waiving of a legal right. Normally everybody is at liberty to waive. A waiver is nothing unless it amounts to release. It signifies nothing. More than an intention not to insist upon the right. Thus when the promisee abandons his right of demanding performance, he is said to have waived this right. In such case, the promisor is released from his obligation to perform the promise undertaken. As per sec 63, to constitute a waiver neither an agreement nor consideration is necessary.

Example:

A agrees to repair the car of B. B later on forbids or refuse A to repair the car. A is no longer bound to perform the promise. Thus, the contract is terminated by Waiver.

Merger

Merger is combining two things. Merger takes place when an inferior right accruing to the contract merges into a superior rights. Again on this the inferior rights vanish and not required to be enforced.

Example:

A purchases a house, which he was having on lease. His right of a lessee is inferior to the right of an owner.

Accord and Satisfaction

The term 'accord' may be defined as the promise to accept less amount than what is due under the contract satisfaction refers to the payment or fulfillment of the lesser obligation. These two terms are used in English Law, who has no relevance

under the Indian Law. Under English Law, the old contract is discharged when the accord is followed by satisfaction.

II. Discharge by Performance

Performance of a contract is the usual mode of discharging a contract. The performance of a contract takes place, when the parties to the contract undertake the rights and obligation to do as per the terms of the agreement. When both the parties have performed their obligation, the contract is said to be discharged by performance.

According to Sec. 37 of the Contract Act, ‘The parties to a contract must either perform or offer to perform their respective promises, unless such performance is dispensed with or excused under the provisions of the Act, or of any other law. Promises bind the representatives of the promisors in case of the death of such provisions before performance unless a contrary intention appears from the contract.

According to the above section the contracting parties are bound to perform their respective promises or obligations unless the performance is dispensed with or excused under the provision of the Contract Act or any other law. If the promisors die before the performance, it is the obligation of the legal representatives to perform the promise, unless a contrary appears from the contract.

III. Discharge by Breach

It is also another mode of discharging the contract. Here, when a party to contract fails to perform his obligations, he is said to have committed breach of contract. A breach of a contract discharges the aggrieved party from performing his obligations. The breach of contract may either be

- (i) Actual Breach of contract
- (ii) Anticipatory Breach of contract Again,
- (i) **Actual Breach of Contract** may take place in two different situations i.e.

- (a) **At a time, when performance is actually due:** In this situation, if a party to a contract fails to perform his obligation at the specified time, he is liable for its breach.

Example: A agrees to deliver a furniture worth ₹ 10,000 to B on 31st March 2005, but fails to do so on that date, he is said to have committed a breach of the contract. Similarly, if A delivers furniture worth ₹ 10,000, on 31st March 2005, but B, for no valid reason, refuses to accept them, B becomes guilty of breach.

- (b) **Breach during the performance:** It occurs when one party fails or refuses to perform the obligation under the contract during the performance of the contract. Such a situation is likely to happen in case of contracts on installment of delivery of goods or constructions of a

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building and payments by installment and so on. Refusal of performance may be express or implied. Here the aggrieved party to repudiate the contract and sue the other party for damages due to breach of contract.

Example: Cort Vs Ambergate Railway Co. (1851): In this case, the plaintiff entered into contract to supply the defendant Co, 3900 tons of railway chairs at a certain price. After 1787 tons had been delivered to the company, the company requested him to deliver no more of Railway chairs. There upon, the plaintiff brought an action contending that he was always ready and willing to perform his part, but had been prevented from doing so by the action of the company. It was held that, since the contract has been renounced, he could maintain an action without manufacturing and tendering the rest of the goods. The measure of damages in such a case would ordinarily be the difference between the cost of production and delivery and the contract price.

- (ii) **Anticipating Breach of contract:** When a party to a contract has refused or repudiate, or renounces to perform his obligation, before the time fixed for performance is known as Anticipatory Breach of contract. Anticipatory breach is premature destruction of the contract rather than a failure to perform it.

Under Section 39 of the Indian contract Act lays down as “when a party to the contract,

- (a) has refused to perform or
- (b) disabled himself from performing the contract,
- (c) in its entirety, the promises may put an end to the contract,
- (d) unless he had signified by words or conduct, his acquiescence in its continuance.

When it put in a simple word, when the promisor, prior to the due date of performance, altogether refuses to perform his obligations under the contract or disables himself from doing so, then there occurs a breach of contract.

Example:

A singer enters into a contract with B, the manager of a theatre, to sing at his theatre two nights, every week during the next two months, and B engages to pay her ₹ 1000 per night. On the sixth night A, willfully absent herself. With the assent of B, Asings on the seventh night. B has signified his acquiescence in the continuance of the contract and cannot now put an end to it but he is entitled for compensation for the damages sustained by him though A’s failure to sing on the sixth night.

IV. Discharge by Operation of Law

Discharge by operation of law is another mode of discharge of the obligation of the contract: The following are the circumstances:

(a) Unauthorized Material alteration

If a party to a contract effects any material alterations in a written document or contract without the consent of the other party, then the contract has been done with unauthorized material alterations, which is void. In this case both the parties will be discharged from their respective obligations. A material alteration is one which changes, in a significant manner, the legal identity or character of the contract or the rights and liabilities of the parties to the contract. The effect of making such an alteration is exactly the same as that of canceling the contract. Both the parties will be discharged from their respective obligation.

(b) Insolvency

Under insolvency, the contract is discharged by the insolvency of one of the parties to it and when court passes an 'order of discharge'.

(c) Merger

It takes place when there is acceptance of a higher security in the place the lower. In other words when a contract with an inferior right give place to another contract with a superior right, the original contract gets discharged by its merger in the latter.

Example:

A was tenant of B's house. A purchases the house from B. The rights of A as the lessee of the house merge into his rights as the owner of the house. The tendency is discharged by merger.

(d) Death

Death of the promisor results in termination of the contract in case involving of personal skill and ability. Excepting the skills and ability of the contracting party's death, the other cases, the rights and liabilities of the deceased person pass on to the legal representatives.

V. Discharge by Impossibility (Sec. 56)

Impossibility is another situation for the discharging of the contract. A contract is discharged if its performance become impossible. Impossibility may arise on the face of two contract or may exist unknown to the parties at the time of making contract, or it may also arise subsequently after the contract is made.

Hence the impossibility of performance may be,

- (i) Initial impossibility
- (ii) Subsequent impossibility

(i) Initial impossibility

It is also referred as Pre-contractual impossibility. It is the impossibility which exists at the time of formation of contract. If an agreement contemplates doing something which is absolutely impossible the same becomes void-ab-intio [void at the very beginning]

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As per Sec. 56 of the Contract Act, under first paragraph it is said that “An agreement to do an act impossible in itself is void.” Here the word “impossible in itself” obviously means to something which is inherently impossible of performance.

If an agreement becomes void-ab-intio due to impossibility, the question of discharge of the contract does not arise since there is no contract to be discharged or terminated

Example:

A agrees with B to discover trasure by magic. Here the agreement is void-ab-intio, since it is impossible at the very beginning of the agreement.

The rule on void-ab-initio is based on the following maxims:

- (a) “Lex non Cogit ad impossibilla” est, i.e “the law does not recognize what is impossible” and
- (b) “Impossibillium nulla obligatio **est**”, i.e “what is impossible does not create an obligation.”

According to the above maxims, the parties discharged as a void agreement does not create any rights and obligations on the contracting parties. The impossibility reason may be known and unknown to the parties. In both the cases the agreement is void.

Even in this case of impossibility the Law provides compensation for loss through non-performance of act, under Sec. 56, where one person has promised to do some thing, which he knew or with reasonable diligence, might have known, and which the promisee did not know to be impossible or unlawful, such promisor must make compensation, to such promisee for any loss which such promise sustains through the non-performance of the promise.”

The above section will be understood with the example given below:

Example:

A contract to marry B, being already married to C, and being forbidden by the law to which he is subject to practice polygamy. Amust make compensation to B for the loss caused to her by the non-performance of his promise.

(ii) Subsequent impossibility

Subsequent impossibility is also referred as ‘Supervening’ impossibility.

A contracting parties who are capable of performing the contract at the time of entering into it, may tern to be incapable due to some reasons, which are beyond the control of the parties are known as **supervening** or subsequent impossibility. Here the contract may be valid at the time when it was entered into, but subsequently there may arise an impossibility, which may prevent its performance. In such cases the contracts become void and the parties to its are discharged from their obligations.

The same situation has been explained under Sec 56, in second paragraph of the Contract Act which provides it as, under the sub heading as ‘Contract to’

do act afterwards becoming impossible or unlawful” – “A contract to do an act which after the contract is made, becomes impossible, or, by reason of same event which the promisor could not prevent, unlawful becomes void when the act becomes impossible or unlawful.

Example:

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 war is declared.

Subsequent impossibility or **supervening** impossibility will hold good only when the following instances or circumstances takes place:

(a) Destruction of the Subject-matter

Subject matter is one of the essentials to form a valid contract. When the subject-matter of a contract, subsequent to its formation, is destroyed, without the fault of the promisor or promisee, then the contract gets discharged.

Example:

(1) Under the case **Tylor Vs Caldwell (1863)**, the dependent agreed to let a music hall for a series of concerts. Before the day of performance, the music hall was destroyed by fire. The plaintiff sued the dependent for damages for breach of contract. It was held that the contract had become void to the destruction of the hall and thus dependant was not liable.

Example:

(2) Case – **V. L Narasu Vs. P.S.V Iyer (1953)**

In this case, there was an agreement between the owner of a theater and a producer, to exhibit a picture. The Municipal authority issued an order to demolish the theatre because it was unsafe. The owner of the theatre has no knowledge of the defective and unsafe nature of the building. In this it was held that continued existence of the theatre was a fundamental basis of the contract and the demolition of the theatre discharged the contact because of supervencing impossibility.

(b) Unanticipated change of circumstances

It is another type of situation for subsequent impossibility, in case change of circumstances which has affected the performance of the contract to such an extent as to make it virtually impossible, the courts will not enforce the contract.

Example:

In case of Joseph Constantine steamship Line Ltd. Vs. Imperial Smelting Corporation Ltd. (1941), “A ship was chartered to load a cargo but on the day before she could have proceeded to her berth, an explosion occurred in the auxiliary boiler, which made it impossible for her to undertake the voyage at the schedule time. It was held by the House of Lords that frustration had occurred in the circumstances. As per Section 56, an abnormal rise or fall in price, a sudden depreciation of currency, an unexpected obstacle to execution or the like will not in itself make the contract impossible.

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NOTES**(c) Death or in Capacity of the Promisor**

A contract may be impossible when a promise made physically incapable of performance by reason of the death or incapacity of some person whose continued life and health are necessary for the performance of the contract. Such impossibility discharges the promisor liability.

Example:

A contracts to act at a theater for six months in consideration of a sum paid in advance by B. On several occasions A is too ill to act. The contract to act on those occasions becomes void.

(d) Change of Law

All agreements turn to contracts when they are lawful. Whereas contracts which are lawful when made but become unlawful later by reason of change in law, becomes impossible of performance. Impossibility created by law is a valid excuse for non performance.

Example:

A agreed to sell B 100 tonnes bag of sugar stocked in his godown. Before the delivery could be made, the godown was sealed by the Government and it requisitioned the whole of sugar under statutory powers. It was held that the contract is discharged as the delivery of the sugar becomes impossible.

(e) Declaration of war

When two parties entered in to a contract the contract is valid for performance, but the same contract gets discharged, if the war declared between two countries. However, such a contract may have the opportunity of reviving and maybe enforced at the end of the war, which is left to parties discretion. Whereas if the performance of the contract goes to help the enemy and enemy country, then such contracts become void.

Example:

A contract to take in cargo for B in a foreign port. A's Government declares war against the country in which the port is situated. Here the contract becomes void when the war is declared.

(f) Failure of pre-condition

This refer to where there non-existence or non-occurring of a particular state of things. In this situation when certain things necessary for performance cease to exist the contract for the reason of impossibility, then such contract becomes void. If a contract depends on the occurrence of an event, which does not in fact happen the contract is discharged.

Example:

In the case of Krell Vs Henry (1903)

A contract was to hire a flat for viewing the coronation procession of the king in 1902. The procession had to be cancelled on account of king's illness. A

suit was filed for the recovery of the rent for the flat. It was held that the hirer need not pay the rent as the existence of the procession was the basis of the contract and its cancellation stands discharge of the contract.

Example:

A and B entered in to contract to marry each other. Before the time fixed for marriage Agoes mad. In this case of impossibility arises there by the contract is void.

The impossibility of performance is not always the ground of discharge of the contract. But there are certain circumstances in which a contract is not discharged on the ground of subsequent or supervening impossibility. Such of them are referred to the exceptions. Then following are the exceptions referred to the impossibility or frustration

1. Self induced impossibility or frustration
2. Commercial impossibility
3. Difficulty of performance
4. Failure of a third party
5. Strikes, Lockouts and civil disturbances.
6. Failure of one of the objects.

The following are the effects of supervening impossibility.

1. Contract becomes void
2. Benefits to be restored
3. Compensation for non-performance

Doctrine of Frustration

The other concept of supervening impossibility is Doctrine of frustration. In England before 1863 it was the law that every one was absolutely bound to perform any obligation which he had undertaken to perform and could not claim to be excused on the ground that the performance subsequently became impossible. It comes under the purview of Sec 56 Contract Act. Even today in many cases, this is taken as reference & it is referred as, “When the party by his own contract creates a duty or change upon himself, he is bound to make it good, if he may, notwithstanding any accident by inevitable necessity, because he might have provided against it by his contract” [Paradise Vs Jane].

In case of *Satyabrata Ghose Vs. Mugneeram* (1954)

The Supreme Court observed as:

“Although various theories have been propounded by the judges and jurists in England regarding the Judicial basis of the doctrine of frustration, yet the essential idea upon which the doctrine is based, is that of impossibility of performance of the contract, in fact impossibility and frustration are often used interchangeably expressions.”

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The actual circumstances of the above said case was, an agreement was entered in to for the safe of land subject to the condition that the seller would do some development work on the land. Before the work could be completed the land was requisitioned by the Government for war purpose. Held, the contract was not frustrated.

VI. Discharge by Lapse of Time

The another mode of discharging the contract is by lapse of time

The Indian Limitations Act has prescribed period with in which the existing rights can be enforced in courts of law. The main object of this act is to guide and assist the vigilant on ones own act but not those who sleep over their rights. The Law fixes a specific period of performance and if no action is taken by the promisee in the court of Law with in the specific time, he is debarred from enforcing the contract. Many a times and in the case of simple contracts, the period of limitation is three years. If an aggrieved party does not enforce his rights with in the time prescribed by the Act, his remedy by way of a suit is barred, which in effect means, that the other party is discharged from his obligation. *For example*, the price of goods sold should be paid with in three years of the delivery of goods. In case of goods on credit, payment should be made after the expiry of a fixed period of credit, the price should be paid with in three years of the expiry of the period of credit. If the price is paid and the creditor does not file a suit against the buyer for the recovery of price within three years, the debt recovery of price within three years, the debt becomes time-barred and hence irrecoverable. Thus lapse of time terminates a contract.

Example:

‘A’ agrees to supply certain goods to ‘B’ at a certain price. Goods are to be delivered after a week and payment is to be made on delivery. ‘A’ supplies the goods as per the agreement. But, ‘B’ does not make the payment. ‘A’ must file the suit within three years after debt has become due. If he does not file, the suit against ‘B’ for the price of the goods, the debt become time barred.

Hence, Lapse of time terminates a contract.

2.2.2 Remedies of Breach of Contract**Remedies for Breach of Contract**

It is the duty of any lawful contracting parties to perform their respective promises. When the contract formed is valid, it is the commitment of both the parties to perform the contract. Where as when any one of the parties refuses to perform his promise, he is said to have committed a breach of the contract. The aggrieved party is given full right to file a case or bring an action for his damage. In some circumstance, the breach not only gives rise to a cause or bring an action for his damages. In some circumstances, the breach not only gives rise to a cause of action but also discharge the injured party from performance of his part of the

agreement. The Contract Act provides certain remedies for breach of contract under section 73 to 75. They are as follows:

- (i) Filing a suit for Damages.
- (ii) Suit for cancellation or Recession.
- (iii) Suit for specific performance.
- (iv) Suit upon Quantum Meruit.
- (v) Suit for Injunction
- (vi) Demanding for Restitutions

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A. Filing a suit for Damages

The aggrieved party, usually like to get back their money and pain in form of claiming the damages. Damages refer to compensation in terms of money to the aggrieved party for the loss or injury suffered by him. In the breach of contract, the other party earns certain rights including the right to claim damages or loss arising there from. The main aim of the 'damages' is Compensation not punishment. The damages are to be awarded for the loss which naturally arose from the breach (Sec 73). In this case the Contract Act does not seek to punish the guilty. Here the court will compel the party for breach of the contract to make good the loss by paying to the other party. The following are kinds of damages in order to protect the rights of the aggrieved parties.

(i) Ordinary or General or Compensatory Damages

Ordinary damages are also termed as general or compensatory damages. These are the damages which will be arising in the usual course of things from such breach. Those damages which are awarded to compensate the injured party for the actual amount of loss suffered by him consequent upon the breach are known as general damages. This sort of damages assessed on the basis of actual loss.

Example:

A contract to deliver 100 bags of oil seeds for ₹ 1,000 per bag on a future date. On the due date he refuses to deliver 100 bags of oil seeds. The price on that day was ₹ 1,100 per bag. The measure of damages is the difference between the market price on the date of breach and the contract price, $(1,000 \times 100)$ ₹ 1,00,000.

(ii) Special damages

Special damages arises in case of special circumstances. These damages cannot be recovered unless the special circumstances are brought to the knowledge of the other party. Special damages can be claimed by the aggrieved party along with the general damages, for the loss suffered under special circumstances. Special damages cannot be claimed as a matter of right.

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(iii) Vindictive or exemplary damages

Vindictive or exemplary damages are damages awarded to punish the wrong doing or defaulting parties. In this case of damages the main purpose is to punish the defaulting party and not make them only to pay the compensation. The vindictive damages are also known as punitive damages. Although the main contract is to compensate the injured party for the loss suffered and to punish him, there are two exceptions to the rule:

- (a) **Breach of a contract to marry:** In two case the amount of damages will depend upon the extend of injury to the party's feelings one may be ruined, other may not mind so much.
- (b) **Dishonour of a cheque** by a banker when there are sufficient funds to the credit of customer. In this case the rule of ascertainity damages is, 'the smaller the cheque, greater the damages'. The actual amount of damages will differ according to the status of the party.

(iv) Nominal damages

This type of damages are neither compensatory nor punishable. Nominal damages are warded only for the name sake. To maintain the decree of sight and when the aggrieved party has not suffered, then this sort of damages take place. These are usually awarded if the contract price and the market price are same at the time of breach of control and aggrieved party has thus suffered no loss. Awarding the nominal damages many a times in the discretion of the court.

B. Suit for cancellation or Recession

Rescission or cancellation means setting side the contract. The simple meaning of rescission means cancellation of the contract. When contract is broken by one party, then the other party may treat the contract as breach and refuse to perform his part of the contract, in other words putting an end to the contract. In the situation of rescission of the contract, the aggrieved or injured party is discharged from all the obligations under the contract.

Example: Apromises to sell his Lorry for 2 lakhs on certain date. B agreed to pay the price on the receipt of the lorry. Arefused to sell his Lorry to B. B need not pay the price.

The Contract Act under sec . 75 provides s "A person who rightly rescinds a contract is entitled to compensation for any damages which he has substituted through the non – fulfillment ofthe contract."

Again under section 66 of the Contract Act provides that such rescission may be communicated in the same manner as the communication of the revocation of a proposal. Aparty on rescinding contract is bound to restore the advantage a received under the contract.

The following circumstances where the court may grant the rescission:

- (i) Where the contract is voidable or terminated by the plaintiff.
- (ii) Where the contract is unlawful for causes apparent on its face and defendant is more to blame than the plaintiff.

The following are the circumstances, where the court may not grant rescission:

- (i) When the contract is ratified
- (ii) When the parties cannot be restored to their original position.
- (iii) When the third parties acquired the contract in good faith and use of value.

Check Your Progress

1. Discuss in brief about Breach of Contract.
2. State the remedies of Breach of Contract.

2.3 INDEMNITY AND GUARANTEE CONTRACTS, SPECIAL CONTRACTS

2.3.1 Contract of Indemnity

Under a contract of indemnity, liability of the promisor arises from loss caused to the promisee by the conduct of the promisor himself or by the conduct of other person. [Punjab National Bank v Vikram Cotton Mills].

Every contract of insurance, other than life insurance, is a contract of indemnity. The definition is restricted to cases where loss has been caused by some human agency. [Gajanan Moreshwar v Moreshwar Madan]

Section 124 deals with one particular kind of indemnity which arises from a promise made by an indemnifier to save the indemnified from the loss caused to him by the conduct of the indemnifier himself or by the conduct of any other person, but does not deal with those classes of cases where the indemnity arises from loss caused by events or accidents which do not depend upon the conduct of indemnifier or any other person. [Moreshwar v Moreshwar]

"Contract of indemnity" defined.-A contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person, is called a "contract of indemnity".

Definitions of Contract of Indemnity

The Contracts of Indemnity is defined as: "A Contract whereby one party promises to save the other from loss caused to him by the conduct of the promisor himself or by the conduct of any other person is called a contract of indemnity."

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The English law definition of a contract of indemnity is – “it is a promise to save a person harmless from the consequences of an act”. Thus it includes within its ambit losses caused not merely by human agency but also those caused by accident or fire or other natural calamities.

The definition of a contract of indemnity as laid down in Section 124 – “A contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person, is called a contract of indemnity.

The definition provided by the Indian Contract Act confines itself to the losses occasioned due to the act of the promisor or due to the act of any other person.

Illustration:

A contracts to indemnify B against the consequences of any proceedings which C may take against B in respect of a certain sum of 200 rupees. This is a contract of indemnity.

Nature of Contract of Indemnity

A contract of indemnity may be express or implied depending upon the circumstances of the case, though Section 124 of the Indian Contract Act does not seem to cover the case of implied indemnity.

A broker in possession of a government promissory note endorsed it to a bank with forged endorsement. The bank acting in good faith applied for and got a renewed promissory note from the Public Debt Office. Meanwhile the true owner sued the Secretary of State for conversion who in turn sued the bank on an implied indemnity. It was held that – it is general principle of law when an act is done by one person at the request of another which act is not in itself manifestly tortious to the knowledge of the person doing it, and such act turns to be injurious to the rights of a third person, the person doing it is entitled to an indemnity from him who requested that it should be done. [Secretary of State v Bank of India].

The Indian Contract Act also deals with special cases of implied indemnity:

1. U/s 69 if a person who is interested in payment of money which another is bound by law to pay and therefore pays it, he is entitled to be indemnified. For instance - if a tenant pays certain electricity bill to be paid by the owner, he is entitled to be indemnified by the owner.
2. Section 145 provides for right of a surety to claim indemnity from the principal debtor for all sums which he has rightfully paid towards the guarantee.
3. Section 222 provides for liability of the principal to indemnify the agent in respect of all amounts paid by him during the lawful exercise of his authority.

The plaintiff, an auctioneer, acting on the instruction of the defendant sold certain cattle which subsequently turned out to belong to someone else other than the defendant. When the true owner sued the auctioneer for conversion, the auctioneer in turn sued the defendant for indemnity. The Court held that the plaintiff having acted on the request of the defendant was entitled to assume that, if it would turned out to be wrongful, he would be indemnified by the defendant. [Adamson v Jarvis].

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Validity of Indemnity Agreement

A contract of indemnity is one of the species of contracts. The principles applicable to contracts in general are also applicable to such contracts so much so that the rules such as free consent, legality of object, etc., are equally applicable.

Where the consent to an agreement is caused by coercion, fraud, misrepresentation, the agreement is voidable at the option of the party whose consent was so caused. As per the requirement of the Contract Act, the object of the agreement must be lawful. An agreement, the object of which is opposed to the law or against the public policy, is either unlawful or void depending upon the provision of the law to which it is subject.

Contract of indemnity when enforceable

The question whether the liability of indemnifier commences only when the indemnified has actually suffered loss or when there is an apprehension that the indemnified by all chances is likely to suffer it.

The former view was held in cases like – Shankar Nimbaji v Laxman Sapdu /Chand Bibi v Santosh Kumar Pal.

The plaintiff filed a suit to recover ₹ 5,000 and interest from defendant by the sale of a mortgaged property and, in case of deficit, for a decree against the estate of defendant 2 which was in the hands of his sons, the defendant 2 died during the pendency of the suit. It was held that plaintiff cannot sue the defendant in anticipation that the proceeds realized by the sale of the mortgaged property would be insufficient and there would be some deficit. [Shankar Nimbaji v Laxman Sapdu]

The defendant's father while purchasing certain property covenanted to pay off mortgage debt incurred by the plaintiff and also promised to indemnify him if they were made liable for the mortgage debt. The defendant's father failed to pay off the mortgage debt and plaintiff filed an action to enforce the covenant. It was held as the plaintiff had not yet suffered any damage, the suit was premature so far as the cause of action on indemnity was concerned. [Chand Bibi v Santosh Kumar Pal]

A different point of view was held by the Courts in the following cases:

Plaintiff Company agreed to act as commission agent for the defendant firm for purchase and sale of "Hessian" and "Gunnies" and charge commission on all such

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purchases and the defendant firm agreed to indemnify the plaintiff against all losses in respect of such transactions. The plaintiff company purchased certain Hessian from one Maliram Ramjidas. The defendant firm failed to pay for or take delivery of the Hessian. Then Maliram Ramjidas resold it at lesser price and claimed the difference as damages from the plaintiff company. The plaintiff company went into liquidation and the liquidator filed a suit to recover the amount claimed by Maliram from the defendant firm under the indemnity. The defendant argued that in as much as the plaintiff had not yet paid any amount to Maliram in respect of their liability they were not entitled to maintain the suit under indemnity. It was held negative and decided in plaintiff's favour with a direction that the amount when recovered from the defendant firm should be paid to Maliram Ramjidas. [Osmal Jamal & Sons Ltd. v Gopal Purushotham]

After the landmark decision in the case of Gajanan Moreshwar v Moreshwar Madan Mantri it has been well established that the liability of the indemnifier commences as soon as the loss of the indemnified becomes absolute, certain or imminent. It is not necessary that the promisee should pay for the loss.

Right of the indemnity holder – (Section 125)

An indemnity holder (i.e. indemnified) acting within the scope of his authority is entitled to the following rights:

1. **Right to recover damages** – He is entitled to recover all damages which he might have been compelled to pay in any suit in respect of any matter covered by the contract.
2. **Right to recover costs** – He is entitled to recover all costs incidental to the institution and defending of the suit.
3. **Right to recover sums paid under compromise** – He is entitled to recover all amounts which he had paid under the terms of the compromise of such suit. However, the compensation must not be against the directions of the indemnifier. It must be prudent and authorized by the indemnifier.
4. **Right to sue for specific performance** – He is entitled to sue for specific performance if he has incurred absolute liability and the contract covers such liability. The promisee in a contract of indemnity, acting within the scope of his authority, is entitled to recover from the promisor-
 - (1) All damages which he may be compelled to pay in any suit in respect of any matter to which the promise to indemnify applies;
 - (2) All costs which he may be compelled to pay in any such suit if, in bringing or defending it, he did not contravene the orders of the promisor, and acted as it would have been prudent for him to act in the absence of any contract of indemnity, or if the promisor authorized him to bring or defend the suit;

- (3) All sums which he may have paid under the terms of any compromise of any such suit, if the compromise was not.

It is important to note here that the right to indemnity cannot be claimed of dishonesty, lack of good faith and contravention of the promisor's request. However, the right cannot be negated in case of oversight. [Yeung v HSBC]

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Right of Indemnifier

Section 125 of the Act only lays down the rights of the indemnified and is quite silent of the rights of indemnifier as if the indemnifier has no rights but only liability towards the indemnified.

In the logical state of things if we read Section 141 which deals with the rights of surety, we can easily conclude that the indemnifier's right would also be same as that of surety.

Where one person has agreed to indemnify the other, he will, on making good the indemnity, be entitled to succeed to all the ways and means by which the person indemnified might have protected himself against or reimbursed himself for the loss. [Simpson v Thomson].

Principle of Subrogation is applicable because it is an essential part of law of indemnity and is based on equity and the Contract Act contains no provision in contravention with [Maharaja Shri Jarvat Singhji v Secretary of State for India].

Contract of guarantee, surety, principal debtor and creditor:

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 gives the guarantee is called the "surety";

The person in respect of whose default the guarantee is given is called the "principal debtor", and the person to whom the guarantee is given is called the "creditor". A guarantee may be either oral or written.

Consideration for guarantee.-Anything done, or any promise made, for the benefit of the principal debtor, may be a sufficient consideration to the surety for giving the guarantee.

Illustrations:

- (a) B requests A to sell and deliver to him goods on credit. A agrees to do so, provided C will guarantee the payment of the price of the goods. C promises to guarantee the payment in consideration of as promise to deliver the goods. This is a sufficient consideration for C's promise.
- (b) A sells and delivers goods to B. C afterwards requests A to forbear to sue B for the debt for a year, and promises that, if he does so, C will pay for them in default of payment by B. A agrees to forbear as requested. This is a sufficient consideration for C's promise.
- (c) A sells and delivers goods to B. C afterwards, without consideration, agrees to pay for them in default of B. The agreement is void.

Surety Liability

The liability of the surety is coextensive with that of the principal debtor, unless it is otherwise provided by the contract.

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Illustration:

A guarantees to B the payment of a bill of exchange by C, the acceptor. The bill is dishonoured by 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.

Continuing Guarantee

A guarantee which extends to a series series of transactions is called a “continuing guarantee”.

Illustrations:

- (a) A, in consideration that B will employ C in collecting the rent of Bs zamindari, promises B to be responsible, to the amount of 5,000 rupees, for the due collection and payment by C of those rents.

This is a continuing guarantee.

- (b) A guarantees payment to B of the price of five sacks of flour to be delivered by 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, which C does not pay for. The guarantee given by A was not a continuing guarantee and accordingly he is not liable for the price of the four sacks.

Revocation of Continuing Guarantee

A continuing guarantee may at any time be revoked by the surety, as to future transactions, by notice to the creditor.

Illustrations:

- (a) A, in consideration of B's discounting, at A's request, bills of exchange for C, guarantees to B, for twelve months, the due payment of all such bills to the extent of 5,000 rupees. B discounts bills for C to the extent of 2,000 rupees. Afterwards, at the end of three months, A revokes the guarantee. This revocation discharges A from all liability to B for any subsequent discount. But

A is liable to B for the 2,000 rupees, on default of C.

Revocation of continuing guarantee by surety's death.-The death of the surety operates, in the absence of any contract to the contrary, as a revocation of a continuing guarantee, so far as regards future transactions.

Discharge of surety by variance in terms of contract

Any variance, made without the surety's consent, in the terms of the contract between the principal [debtor] and the creditor, discharges the surety as to transactions subsequent to the variance.

Illustrations:

- (a) 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 suretyship by the variance made without his consent, and is not liable to make good this loss.
- (b) A guarantees C against the misconduct of B in an office to which B is appointed by C, and of which the duties are defined by an Act of the Legislature. By a subsequent Act, the nature of the office is materially altered. Afterwards, B misconducts himself. A is discharged by the change from future liability under his guarantee, though the misconduct of B is in respect, of a duty not affected by the later Act.
- (c) C contracts to lend B 5,000 rupees on the 1st March. A guarantees repayment. C pays the 5,000 rupees to B on the 1st January. A is discharged from his liability, as the contract has been varied, inasmuch as C might sue B for the money before the 1st of March.

NOTES**Discharge of surety by release or discharge of principal debtor**

The surety is discharged by any contract between the creditor and the principal debtor, by which the principal debtor is released or by any act or omission of the creditor, the legal consequence of which is the discharge of the principal debtor.

Illustrations:

(a) A contracts with B to grow a crop of indigo on A's land and to deliver it to B at a fixed rate and C guarantees A's performance of this contract. B diverts a stream of water which is necessary for irrigation of A's land and thereby prevents him from raising the indigo. C is no longer liable on his guarantee.

Discharge of surety when creditor compounds with, gives time to, or agrees not to sue, principal debtor

A contract between the creditor and the principal debtor, by which the creditor makes a composition with or promises to give time to, or not to sue, the principal debtor, discharges the surety, unless the surety assents to such contract.

Surety not discharged when agreement made with third person to give time to principal debtor. Where a contract to give time to the principal debtor is made by the creditor with a third person and not with the principal debtor, the surety is not discharged.

Illustration:

(a) C, the holder of an overdue bill of exchange drawn by A as surety for B, and accepted by B, contracts with M to give time to B. A is not discharged.

NOTES**Release of one co-surety does not discharge others**

Where there are co-sureties, a release by the creditor of one of them does not discharge the others; neither does it free the surety so released from his responsibility to the other sureties. Discharge of surety by creditors act or omission impairing surety's eventual remedy.

Guarantee obtained by misrepresentation invalid.

Any guarantee which has been obtained by means of misrepresentation made by the creditor or with his knowledge and assent, concerning a material part of the transaction, is invalid.

Guarantee on contract that creditor shall not act on it until co-surety joins

Where a person gives 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.

Co-sureties liable to contribute equally

Where two or more persons are CO-sureties for the same debt or duty, either jointly or severally, and whether under the same or different contracts, and whether with or without the knowledge of each other, the co-sureties, in the absence of any contract to the contrary, are liable, as between themselves, to pay each an equal share of the whole debt, or of that part of it which remains unpaid by the principal debtor.

Illustrations:

- (a) A, B and C are sureties to D for the sum of 3,000 rupees lent to E. E makes default in payment. A, B and C are liable, as between themselves, to pay 1,000 rupees each.
- (b) A, B and C are sureties to D for the sum of 1,000 rupees lent to E, and there is a contract between A, B and C that A is to be responsible to the extent of one-quarter, B to the extent of one-quarter, and C to the extent of one-half. E makes default in payment. As between the sureties, A is liable to pay 250 rupees, B 250 rupees, and C 500 rupees.

Liability of co-sureties bound in different sums

Co-sureties who are bound in different sums are liable to pay equally as far as the limits of their respective obligations permit.

Illustrations:

- (a) A, B and C, as sureties for D, enter into three several bonds, each in a different penalty, namely, A in the penalty of 10,000 rupees, B in that of 20,000 rupees, C in that of 40,000 rupees, conditioned for D's duly accounting to E. D makes default to the extent of 30,000 rupees. A, B and C are liable to pay 10,000 rupees.

- (b) A, B and C, as sureties for D, enter into three several bonds, each in a different penalty, namely, A in the penalty of 10,000 rupees, B in that of 20,000 rupees, C in that of 40,000 rupees, conditioned for D's duly accounting to E. D makes default to the extent of 70,000 rupees. A, B and C have to pay each the full penalty of his bond.

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2.3.2 Guarantee Contracts

Section 126 of the Indian Contract Act, 1872 says that a Contract of Guarantee is a contract to perform the promise or discharge the liability of a third person in case of his default.

Illustration:

If A gives an undertaking stating that if ₹ 200 are lent to C by B and C does not pay, A will pay back the money, it will be a contract of guarantee. Here, A is the surety, B is the principal debtor and C is the creditor.

Surety is the person who gives the guarantee, the Principal Debtor is one for whom the guarantee is given and the creditor is the person to whom the guarantee is given. Contract Act uses the word 'surety' which is same as 'guarantor'. Prima facie, the surety is not undertaking to perform should the principal debtor fail; the surety is undertaking to see that the principal debtor does perform his part of the bargain. A contract of guarantee pre-supposes a principal debt or an obligation that the principal debtor has to discharge in favour of the creditor.

Anything done, or any promise made, for the benefit of the principal debtor, is deemed sufficient consideration to the surety for giving the guarantee. It is sufficient inducement that the person for whom the surety has given guarantee has received a benefit or the creditor has suffered an inconvenience. While Section 2 (d) of the ICA, 1872 says that past consideration is good consideration, illustration (c) of Section 127 of the ICA, 1872 seems to negate this point. Those who favor the validity of past consideration state that law is not supposed to be guided by illustrations. But there have been conflicting judgments about whether past consideration is good consideration.

Illustration:

B requests A to sell and deliver to him goods on credit. A agrees to do so, provided C will guarantee the payment of the price of the goods. C promises to guarantee the payment in consideration of A's promise to deliver the goods. This is deemed sufficient consideration for C's promise.

Illustration:

A sells and delivers goods to B. C afterwards requests A to forbear to sue B for the debt for a year, and promises that, if he does so, C will pay for them in default of payment by B. A agrees to forbear as requested. This is a sufficient consideration for C's promise.

Illustration:

A sells and delivers goods to B. C afterwards, without consideration, agrees to pay for them in default of B. The agreement is void.

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The most basic function of a contract of guarantee is to enable a person to get a job, a loan or some goods as the case may be. In case, a person is desirous of buying a car on a hire- purchase agreement by making monthly payments over a period of time but the car dealer asks for guarantee. Then someone would have to assure him that he will make the monthly payments in case of default by the person who is buying the car. Such an undertaking results in a contract of surety ship or guarantee. Guarantee is security in form of a right of action against a third party called the surety or the guarantor.

Essentials of Contract of Guarantee

Since Contract of Guarantee is a species of a contract, the general principles governing contracts are applicable here. There must be free consent, a legal objective to the contract, etc. Though all the parties must be capable of entering into a contract, the principal debtor may be a party incompetent to contract, i.e., a minor. This scenario is discussed later in this chapter.

A principal debt must pre-exist: A contract of guarantee seeks to secure payment of a debt, thus it is necessary there is a recoverable debt. There cannot be a contract to guarantee a time barred debt.

Consideration received by the principal debtor is sufficient for the surety. Anything done, or any promise made for the benefit of the principal debtor can be taken as sufficient consideration to the surety for giving guarantee.

Nature of Contract of Guarantee

The contract of guarantee has to be clear. A letter clearly stating the intention to guarantee a transaction will go on smoothly or one will behave appropriately conduct himself at work place will suffice. But a promise to pay extra attention or to take care of it does not constitute a guarantee.

In India, a contract of guarantee may be oral or written. It may even be inferred from the course of conduct of the parties concerned. Under English Law, a guarantee is defined as a promise made by one person to another to be collaterally answerable for the debt, default or miscarriage of the third persons and has to be in writing.

There are three parties in a contract of guarantee; the creditor, the principal debtor and the surety. In a contract of guarantee, there are two contracts; the Principal Contract between the principal debtor and the creditor as well as the Secondary Contract between the creditor and the surety. The contract of the surety is not contract collateral to the contract of the principal debtor but is an independent contract. Liability of surety is secondary and arises when principal debtor fails to fulfill his commitments. Even an acknowledgement of debt by the principal debtor will bind the surety.

It is not essential that the Principal Contract must be in place/existence at the time of the Contract of Guarantee being made. The original contract between the debtor and the creditor may be about to come into existence. Similarly, in certain situations, a surety may be called upon to pay though the principal debtor is not liable at all. For example, in cases where the principal debtor is a minor, the surety will be liable though the minor will not be personally liable.

A contract of guarantee is to be enforced according to the terms of the contract.

A guarantee is a contract of strictissima juris that means liability of surety is limited by law; a surety is offered protection by law and is treated as a favored debtor in the eyes of the law. A contract of guarantee is not a contract 'uberrimae fidei' (requiring utmost good faith). Still the suretyship relationship is one of trust and confidence and the validity of the contract depends upon the good faith of the creditor. However, it is not a part of the creditor's duty to inform the surety about all his previous dealings with the principal debtor.

In *WYTHES vs. LABON CHARE* 1858, Lord Chelmsford held that the creditor is not bound to inform the matters affecting the credit of the debtor or any circumstances unconnected with the transaction in which he is about to engage which will render his position more hazardous.

Since it is based on good faith, a contract of guarantee becomes invalid if the guarantee is obtained from the surety by misrepresentation or concealment as given in Sections 142 and 143 of the ICA, 1872.

Illustration:

If a clerk in an office occasionally fails to account for some of the receipts for money collected, he may be asked for surety. In case the person who steps up to be a surety for the clerk in the office is not informed of the occasional lapses on part of the clerk which lead to the requirement of a surety, any guarantee given by him is invalid as something of importance and directly affecting his decision to act as a surety was concealed from him.

Illustration:

A guarantees to C payment for iron to be supplied by him to B to the amount of 2,000 tons. B and C have privately agreed that B should pay ` five per ton beyond the market price, such excess to be applied in liquidation of an old debt. This agreement is concealed from A. A is not liable as a surety.

But where the surety ship is with regard to an advance to be made by a bank, the bank need not disclose past indebtedness to the surety unless it relates to the particular transaction.

Difference between Indemnity and Guarantee

1. In a contract of indemnity there are two parties i.e. indemnifier and indemnified. A contract of guarantee involves three parties i.e. creditor, principal debtor and surety.

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2. An indemnity is for reimbursement of a loss, while a guarantee is for security of the creditor.
3. In a contract of indemnity the liability of the indemnifier is primary and arises when the contingent event occurs. In case of contract of guarantee the liability of surety is secondary and arises when the principal debtor defaults.
4. The indemnifier after performing his part of the promise has no rights against the third party and he can sue the third party only if there is an assignment in his favour. Whereas in a contract of guarantee, the surety steps into the shoes of the creditor on discharge of his liability, and may sue the principal debtor.

Kinds of Guarantee

1. Specific Guarantee

It means guarantee which is given for a particular single transaction only. Under it the liability of the surety extends to a single transaction only.

Example: A guarantee payment to B for the price of 50 kgs of sugar to be delivered by B to C and to be paid in a month. B delivers to C. C pays for them. Afterwards B delivers 10 kg of sugar to C, which C does not pay. The guarantee given by A was only a specific guarantee and accordingly he is not liable for the price of the 10 kg sugar.

2. Continuing Guarantee

It means guarantee which extends to series of transaction. It is not circumscribed to a single transaction. Under this surety can fix the limit on the amount to be paid and when to be paid.

Example: overdraft.

Rights of Surety

Against the Principal Debtor:

- Right of subrogation
- Right of indemnity

Against the creditor:

- Right of Securities.
- Right to claim set off.

Against the co-sureties:

When the co-sureties have given guarantee for the same debt then they are liable to pay equally but according to the limit set by them.

Warranty

Warranty is an assurance given by the seller to the buyer that the product or service is of fine quality or what is promised to them. The warranty is drafted by the buyer.

The purposes of warranty are:

- (a) Allocation of risk between buyer and seller.
- (b) It encourages the seller to make all the necessary disclosure about the warranty.
- (c) Allows the buyer to set purchase price.
- (d) Enable the buyer to have protection through indemnities for known liabilities and in extreme circumstances can withdraw acquisition.

Breach of Warranty

If there is a breach of warranty then the buyer can seek for damages. The buyer is being compensated for the loss. They are put in the position in which they would have if the breach would not be done.

To claim for damages the buyer has to prove that:

- (a) The warranty is untrue and breach has been done.
- (b) Loss or damage is been suffered by the buyer.
- (c) The loss caused is because of breach of warranty.
- (d) The loss is not too remote i.e. it could have easily been foreseeable.
- (e) They have taken reasonable steps to mitigate loss.

2.3.3 Special Contracts

Specific Contracts

Specific contract is an equitable remedy in the law of contract, whereby a court issues an order requiring a party to perform a specific act, such to complete performance of the contract. Specific contract is commonly used in the form of injunctive relief concerning confidential information or real property.

Contingent Contracts

Section 31 of the Contract Act defines a contingent contract as follows: 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.

Illustration:

A contract to pay B ₹ 60,000 if B's house is burnt. This is a contingent contract. A contingent contract is a conditional contract in nature. When the performance of a contract becomes due only after the happening or non-happening of some uncertain event, such a contract is known as a contingent contract.

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Essentials of a contingent contract

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1. ***There must be a valid contract:*** The first requirement is that there must be a valid contract between the parties. It must fulfill all the essential requirements of a valid contract. The performance of such a contract must depend on happening or non-happening of some future event.
2. ***The event must be uncertain:*** The event upon which the performance of the contract depends must be an uncertain event.
3. ***The event must be collateral i.e., incidental contract:*** The event upon which the performance depends should not form part of reciprocal promises which constitute a contract. The event should be independent or ancillary to the contract.
4. ***The Contingent event must not be at the mere will and pleasure of the promisor:*** For instance, if A promise to pay B ₹ 20,000 if he so choose, it is not a contingent contract [In fact, it is not a contract at all].
5. ***Rules regarding Contingent Contracts (Sections 32-36):*** The rules regarding enforcement of contingent contracts.
6. ***Contingent contract dependent on the happening of a future uncertain event:*** Contingent contract to do or not to do anything, if an uncertain future event happens, cannot be enforced unless and until that event has happened. If the event becomes impossible, such contract becomes void. Examples: Amakes a contract with B to buy B's horse if A survives C. This contract cannot be enforced unless C dies in A's life time.
7. ***Contingent contract dependent on the non-happening of a future uncertain event:*** When a contract is dependent upon the non-happening of a future event, it can be enforced only when that event becomes impossible and not before. *Example:* A agrees to pay B a sum of money if a certain ship does not return. The ship is sunk. The contract can be enforced when the ship sinks.
8. ***Event linked with human conduct:*** If a contract is contingent as to how a person will act at an unspecified time, the event shall be considered, 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.
9. ***Contract contingent upon happening of a specified event within a fixed time:*** Contingent contract to do or not to do anything if a specified uncertain event happens within a fixed time, becomes void, if at the expiration of the time fixed, such event has not happened, or if before the time fixed, such event becomes impossible.
10. ***Contracts contingent upon the non-happening of a specified event within a fixed time:*** Contingent contracts to do or not to do anything if a specified uncertain event does not happen within a fixed time, may

be enforced by law when the time fixed has expired, and such event has not happened or before the time fixed has expired, if it becomes certain that it will not happen.

- 11. *Agreements contingent upon an impossible event:*** Contingent agreements to do or not to do anything if an impossible event happens, are void, whether the impossibility of the event is known or not known to the parties to the agreement when it is made.

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Quasi Contract

A quasi contract is a contract that is created by a court order, not by an agreement made by the parties to the contract. For example, quasi contracts are created by the court when no official agreement exists between the parties, in disputes over payments for goods or services. The goal in the court's creation of these contracts is to prevent unjust enrichment to any party. To explore this concept, consider the following quasicontract definition.

Consider the following example of a quasi-contract

Teresa's brother, Eric, tries to talk her into building a greenhouse in her large back yard. She declines, but Eric is convinced that, if she were surprised by a lovely greenhouse, she would love it. Knowing that Teresa makes good money, and could easily afford the greenhouse, Eric contacts greenhouse builder John, and arranges to have him erect the structure while his sister is at work one day.

Teresa is not happy by her brother's initiative, but the deed is done. Eric has directed John to bill his sister for the greenhouse, and that turns out to be the biggest surprise for her. She declines to pay and Eric tells John he cannot afford it. John is now out, not only payment for his many hours of hard work, but cash for the materials he used.

John has no choice but to file a civil lawsuit against Teresa, seeking payment. No contract exists between Teresa and John, however the court might allow John to recover the costs involved with building the greenhouse from Teresa, in order to prevent Teresa from being unjustly enriched. This is because, whether Teresa planned on it or not, she now has a brand new greenhouse.

The court is likely to create a quasi-contract, essentially contriving an agreement between John and Teresa, and holding Teresa responsible for the cost of John's materials. It is also possible the court might order her to pay for John's labor as well. Quasi contracts are always made to fit their specific situations.

A quasi contract, or an "implied-in-law" contract, may offer less recovery than an implied-in-fact contract. This is because an implied-in-fact contract lays out the terms of an agreement in its entirety, as the parties initially intended, even if only in a verbal agreement. As a result of an implied-in-fact contract, a party may be entitled to recover any and all expected profits, as well as the cost of any labor and materials he may have laid out to complete the project.

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A quasi contract will only afford as much recovery as necessary to prevent one party from being unjustly enriched. In the example above, it would be unfair for Teresa to benefit from the new greenhouse at John's expense, even though she never intended to enter into a contract with him.

Requirements for Quasi Contract

In order for a judge to make a ruling in this type of case, there are certain requirements for quasi contract. The first of the requirements for quasi contract is that the plaintiff must have provided a tangible good or service to the defendant, with the impression that the plaintiff would receive payment for that good or service. The second of the requirements for quasi contract is that the plaintiff must be able to express why it would be unjust for the defendant to receive the good or service without paying for it and would therefore be unjustly enriched.

Consider the above example of the greenhouse. John would have every right to demand payment from Teresa, who unexpectedly received a new greenhouse on her property. A quasi contract would be handed down by the court, requiring Teresa to pay restitution, or "quantum meruit," to John. Quantum meruit is only awarded to the extent that the defendant was unjustly enriched, and no more.

Quasi Contract Example Involving the Construction of Houses on Two Properties

An early example of a quasi-contract can be found in a case involving the construction of two homes on two lots that ultimately could not be completed. In February of 1981, Walter Salamon, a homebuilder, and Alfred E. Terra, Jr., a landowner, entered into two written agreements wherein Terra agreed to sell two properties to Salamon for \$9,000 each. From this \$9,000 amount, \$8,500 was to be paid on delivery of the deeds, which was to take place in August of that same year. The parties agreed that Salamon would take over ownership of the lots by April 15.

The parties also agreed that Salamon would, upon taking ownership of the lots, be responsible for paying the expenses related to the construction of houses on these properties, and that he would then sell the properties to third parties and pay Terra from the proceeds. Salamon was able to partially complete the construction of both houses, but he was unable to find the financing and purchasers necessary to complete the construction, due to the state of the economy at that time. The sales agreement was extended by several months, but Salamon was ultimately unable to pay for the lots.

Not only was Salamon unable to pay for the properties in full, he wanted Terra to reimburse him for the money he spent partially building the homes. Salamon sued Terra in district court, asking the court to create a quasi-contract so that he could recover for the costs associated with the two partially completed houses.

The court found that no promise had existed on Terra's part to pay Salamon for the value of the partially completed houses. However, the court found that Terra had been unjustly enriched, as he then had partially-built structures on his

properties. The court imposed a quasi-contract, awarding Salamon \$15,000 – the value of the benefits Terra had received – to compensate Salamon for his labor and materials.

Terra appealed the decision, and the Appellate Division reversed the lower court, holding that the lower court's finding of a quasi-contract was erroneous. According to the court, even if Terra was enriched and Salamon had suffered, there was no evidence to prove that either of these results was unjust.

The Appellate Division also stated that there was no basis for finding that Salamon had reasonably expected Terra to pay for partially completed houses if Salamon was unable to perform the contract. Therefore, the Appellate Division concluded that Salamon bore the risks involved with not completing or selling the houses, and must therefore also bear the losses suffered for not anticipating the effect of the economic downswing.

Salamon then appealed to the Commonwealth of Massachusetts, which affirmed the Appellate Court's decision. The court held that the evidence did not support the conclusion that either party should have expected Terra to pay for the value of the partially completed houses, or the expenses that Salamon had incurred. The court went on to say that the fact that Salamon built two houses on property Terra owned was merely part of the financing arrangement, and that Terra did not request, or even want the houses to be built. Terra, per the court, was only interested in receiving the balance of the purchase price of the lots.

Types of Quasi Contract

Important types of Quasi Contract that Sec. 68 to 72 of the Indian Contract Act 1872 deals with are given below:

(i) Claim for necessities supplied to person incapable of contracting (Sec 68)

If a person is incapable of entering into a contract, or anyone whom he is legally bound to support is provided by another person with necessities suited to his condition in life, the supplier is entitled to recover the price from the property of such incapable persons.

Example:

X supplies the wife and children of Y, a lunatic with necessities suitable to their conditions in life. X is entitled to be reimbursed from Y's property

(ii) Payment by an interested person (Sec 69)

A person who is interested in the payment of money which another is bound by law to pay, and who therefore pays it is entitled to be reimbursed by the other.

Example:

The consignee suffered loss due to fire in the wagon during transit. The insurer made good the loss. The claim was allowed as per Section 39.

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NOTES**(iii) Obligation to pay for non-gratuitous act (Sec 70)**

Where a person lawfully does anything for another person, or delivers anything to him, not intending to do so gratuitously and such other persons enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of or to restore the thing so done or delivered.

Example:

X, a tradesman, leaves goods at Y's house by mistake; Y treats the goods as his own. He is bound to pay X for them.

(iv) Responsibility of finder of goods (Sec 71)

Under Section 71 of the Act, a person who finds goods belonging to another and takes them into his custody is subject to the same responsibility as a bailee.

(v) Liability for money paid or things delivered by mistake or under coercion (Sec 72)

At fast Section 72 of the Indian Contract Act, 1872 provides that a person to whom money has been paid or anything delivered by mistake or under coercion must repay or return it.

Example:

A railway company refuses to deliver certain goods to the consignee, except upon the payment of illegal charge for carriage. The consignee pays the sum charged to obtain the goods to he is estimated recover so much of the charges as was illegal excessive.

Check Your Progress

3. Examine the concept Contract of Indemnity.
4. Discuss about Guarantee Contracts.
5. Explain about the concept of Special Contract.

2.4 BAILMENT, PLEDGE AND AGENCY

2.4.1 Bailment

Section 148 of the Contract Act defines bailment as the delivery of goods by one person to another person for some purpose, upon a contract that they will either return those goods or dispose of the goods according to the instructions of the person who delivered the goods when the purpose is accomplished. The person who hands over the goods is the bailor and the person who receives the goods is the bailee.

Illustration:

Ali stays at Hotel Babylon and leaves some luggage with the Hotel for safekeeping. The Hotel Babylon is a bailee in respect of the luggage and Ali is a bailor.

Kinds of Bailment

The various types of bailment are as follows:

I. On the basis of the benefit derived by the parties

1. **Bailment for the benefit of the bailor alone:** Where a person delivers his goods for safe custody with his relatives or friends without any reward. *For example*, A while going out of station, leaves his scooter with his friend, B, for safe custody.
2. **Bailment for the benefit of the bailee alone:** Where goods are lent for the use of friends and relatives. *For example*, A borrows B's books for a week.
3. **Bailment for the mutual benefit of both the bailor and the bailee:** Where goods are bailed for reward or some consideration then the bailment is for the benefit of both the parties.

Example:

- (i) A hires a taxi from B.
- (ii) A gives his radio for repair to a radio dealer.

II. On the basis of reward or consideration

1. **Gratuitous Bailment:** A bailment without any reward or consideration is called gratuitous bailment. *For example*, A while going out of station, leaves his cycle with his friend B. B is not to get any reward in this case.
2. **Non-gratuitous Bailment:** A bailment for reward or hire is a non-gratuitous bailment. *For example*, A gives his watch for repair.

Rights of the Bailee

1. **Rights to interplead (Sec. 165):** If a person, other than the bailor, claims the goods bailed, bailee may apply to the court to stop the delivery of the goods to the bailor and to decide the title to the goods.
2. **Rights against third person (Sec. 180):** If a third person wrongfully deprives the bailee of the use or possession of the goods bailed, or causes them any injury, the bailee is entitled to use such remedies as the owner might have used in a like case if no bailment has been made. Bailee can thus bring a suit against a third person for such deprivation or injury.
3. **Right of particular lien for payment for services (Sec. 170):** Where the bailee has
 - (a) in accordance with the purpose of bailment,
 - (b) rendered any service involving the exercise of labour of skill,

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- (c) in respect of the goods, he shall have
- (d) in the absence of a contract to the contrary, right to retain such goods, until he receives due remuneration for the services he has rendered in respect of them. Bailee has, however, only a right to retain the article and not to sell it. The service must have entirely been formed within the time agreed or a reasonable time and the remuneration must have become due.

This right of particular lien shall be available only against the property in respect of which skill and labour has been used.

Examples:

- (i) A delivers a rough diamond to jeweller, to be cut and polished, which is accordingly done. B is entitled to retain the stone till he is paid for the services he has rendered.
 - (ii) Agives cloth to B, a tailor, to make into a coat. B promises Ato deliver the coat as soon as it is finished, to give A three month's credit for the price. B is not entitled to retain the coat until he is paid.
4. **Right of general lien (Sec. 171):** Bankers, factors, wharfingers, attorneys of a High Court and policy brokers will be entitled to retain, as a security for a general balance of amount, any goods bailed to them in the absence of a contract to the contrary. By agreement other types of bailees excepting the above given five may also be given five may also be given this right of general lien.
 5. **Right to indemnity (Sec. 166):** Bailee is entitled to be indemnified by the bailor for any loss arising to him by reasons that the bailor was not entitled to make the bailment or to receive back the goods or to give a directions respecting them. If the bailor has not title to the goods, and the bailee in good faith, delivers them back to, or according to the directions of the bailor, the bailee shall not be responsible to the owner in respect of such delivery. Bailee can also claim all the necessary expenses incurred by him for the purpose of gratuitous bailment.
 6. **Right to claim compensation in case of faulty goods (Sec. 150):** A bailee is entitled to receive compensation from the bailor or any loss caused to him due to the failure of the bailor to disclose any faults in the goods known to him. If the bailment is for hire, the bailor will be liable to compensate even though he was not aware of the existence of such faults.
 7. **Right to claim extraordinary expenses (Sec. 158):** A bailee is expected to take reasonable care of the gods bailed. In case he is required to incur any extraordinary expenses, he can hold the bailor liable for such expenses.

8. **Right of delivery of goods to any one of the several joint bailor of goods.** Delivery of goods to any one of the several joint bailors of goods will amount to delivery of goods to all of them in the absence of any contract to the contrary.

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Duties of the Bailee

1. To take reasonable care (Sec. 151 & 152)

Bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the good bailed. It will not make any difference whether the bailment is gratuitous for reward. If any loss is caused to the goods, in spite of such reasonable care by the bailee, he shall not be liable for the loss. Bailee shall be held liable for losses arising due to his negligence.

Example:

- (i) A delivered to B certain gold ornaments for safe custody. B kept the ornaments in a locked safe and kept the key in the case box in the same room. The room was on the ground and was locked from outside, and therefore, was easily accessible to burglars. The ornaments were stolen. It was held that the bailee did not take reasonable care, and therefore, was liable for the loss (Rampal V. Gauri Shanker, 1952).
- (ii) A deposited his goods in B's godown. On account of unprecedented floods, a part of the goods were damaged. Held, B is not liable for the loss (Shanti Lal V. Takechand).

A bailee is liable to compensate the bailor for any damages done to the thing bailed by the negligence of his servants acting in the course of the employment.

2. To return the goods

Bailee must return or deliver the goods bailed according to the direction of the bailor, on the expiry of the time of bailment or on the accomplishment of the purpose of bailment (Sec. 160).

Bailee shall be responsible to the bailor for any loss, destruction or deterioration of the goods from the date of the expiry of the contract of bailment, if he fails to return deliver or tender the goods at the proper time (Sec. 161).

3. To return any increase or profit from the goods (Sec. 163)

Bailee is bound to deliver to the bailor any increase or profit which might have come from the goods bailed, provided the contract does not provide otherwise.

Example: A leaves a cow in the custody of B. The cow gives birth a calf. B is bound to deliver the calf as well as the cow to A.

4. To use goods according the conditions of bailment (Sec. 154)

Bailee must use the goods according to the conditions of the contract of bailment or the directions of the bailor. He shall be held liable for compensation to the bailor

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if any damage is caused to the goods because of his unauthorised use. Bailee must not do any act with regard to the goods bailed which is inconsistent with the terms of the bailment, otherwise the contract shall become voidable at the option of the bailor and bailee shall be held liable to compensate and damages caused to the goods.

Example:

A lends his horse to B for his own riding only. B allows C, a member of his family, to ride the horse. C, rides with care but the horse accidentally falls and is injured. What remedy has A against B?

A can claim damages from B for the injury caused to the horse from an unauthorised use. B in this case has failed to use the horse according to the conditions of bailment, and therefore, he shall be liable to pay compensation to the bailor for the damages caused to the horse because of his unauthorised use.

5. Must not mix up the goods with his own goods (Sec. 155 & 156-157)

Bailee is not entitled to mix up the goods bailed with his own goods except with the consent of the bailor. If he, with the consent of the bailor, mixes the goods bailed with his own goods, both the parties shall have an interest in proportion to their respective shares in the mixture thus produced (Sec. 155).

If the bailee, without the consent of the bailor, mixes the goods bailed with his own goods and the goods can be separated or divided, the property in the goods remains in the parties respectively bailee is bound to bear the expenses of separation and division and any damage arising from the mixture (Sec. 156).

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 to deliver them back, the bailor is entitled to compensation by the bailee for loss of the goods (Sec. 157).

Examples:

- (i) A bails two bales of cotton marked with a particular mark to B. B, without A's consent, mixes the 100 bales of his own, bearing a different mark. A is entitled to have his 100 bales returned and B is bound to bear all the expenses in the separation of the bales and any other incidental damages.
- (ii) A bails a barrel of cape flour worth ₹ 45 to B. B without A's consent, mixed the flour with country flour with country flour of his own, worth only ₹ 25 a barrel. B must compensate A for his flour.

6. Must not set up an adverse title

Bailee must not set up a title adverse to that of the bailor. He must hold the goods on behalf of and for the bailor. He cannot deny the title of the bailor.

Rights of Bailer

- (a) If bailee does not take care and destruction of goods takes place, bailer can claim compensation.
- (b) If bailee uses the goods for un-authorized purposes, bailer has the right to claim compensation.
- (c) Bailer has the right to claim return of goods.
- (d) Bailer has right to claim not only delivered goods but also accruals on goods if any.
- (e) In case where bailee has mixed the goods and they are of sufferable nature, bailer can claim cost of separation from bailee.
- (f) In case where the goods are of insufferable nature, bailer has right to claim compensation.
- (g) Bailer has right to repudiate the Contract of bailment whenever he wants but, by doing so, if bailee comes across any suffering, bailer has to compensate.

Duties of Bailer

- (a) **Duty to disclose faults:** Bailer should disclose faults present in goods at the time of making delivery. Faults are of two types namely; Known faults and Un-known faults. On the other hand bailments also are of two types namely Gratuitous bailment and Non-Gratuitous bailment. In case of gratuitous bailment, bailer is liable to compensate for bailee injuries arising out of known faults. In Gratuitous bailment, bailer is not answerable to un-known faults. In case of Non-Gratuitous bailment, bailer is answerable to both known faults and Un-known faults.
- (b) **Duty to contribute for expenses:** Bailer should Contribute for expenses incurred by bailee. In case of Gratuitous bailment, bailer need not contribute for ordinary expenses and extra ordinary expenses or to the contributed by bailer. In case of Non-Gratuitous bailment, bailer should contribute for both ordinary expenses and extra ordinary expenses.
- (c) **Duty with regard to defective title:** In case where bailer has delivered the goods with defective title, the bailee may come across suffering from the side of true owner due to bailers defective title. In such a case bailer with defective title should compensate bailee.
- (d) **Duty to Indemnify:** Principal of indemnity operates between bailer and bailee, where bailer becomes implied indemnifier and bailee becomes implied indemnity holder. So bailer has duty to indemnify bailee.
- (e) **Duty to take the Goods back:** After fulfillment of purpose bailee returns the goods to bailer. Then bailer should take them back. If bailer refuses to take the goods back, bailer has to compensate bailee.

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Termination of Bailment

Law relating to termination of bailment is discussed in Secs. 153 and 162. However, these sections are not exhaustive. Hence ordinary rules regarding discharge or termination of contracts will also apply in the following cases:

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1. ***When the period or purpose is over:*** In case the bailment is for a specific period or purpose, it is terminated on the expiry of that period or on the completion of the purpose.
2. ***When the bailee makes unauthorized use of the goods:*** In case the bailee makes unauthorized use of the goods bailed, the bailment is voidable at the option of the bailor.
3. ***When the subject-matter is destroyed or becomes illegal:*** In case the subject-matter is destroyed or becomes illegal, the bailment is terminated.
4. ***At the will of the bailor:*** Where the bailment is gratuitous, it can be terminated merely at the sweet will of the bailor. However, the termination should not cause loss to the bailee in excess of the benefit derived by him. In case the loss exceeds the benefit derived by the bailee, the bailor must compensate the bailee for such a loss (Sec. 159).
5. ***When the bailor or bailee dies:*** A gratuitous bailment is terminated by the death of the bailor or bailee.

2.4.2 Pledge and Agency

Pledge

According to Section 172 of the Contract Act, when goods are bailed as security for the payment of a debt or performance of a promise, the bailment is a pledge. If the pawnor (the bailor in a pledge) defaults payment or performance of their promise, the Pawnee (the bailee in a pledge) may either sue the pawnor or sell the goods pledged after giving reasonable notice to the pawnor. If the proceeds from the sale are less than the amount due to the Pawnee, the pawnor will still be liable to pay the remaining amount, but where the proceeds exceed the amount due; the Pawnee must return the surplus to the pawnor.

Illustration:

A, a Pawnee has only the special property in the goods pledged, that is, the right of retainer of the goods as security; in case of default, A must either bring a suit against B, the pawnor or sell the goods after giving reasonable notice.

Rights of Pawnor

Following are the rights of pawnor are:

1. ***Right of Redemption:*** A pawnor has a right of redemption after depositing the dues.

2. **Right of Suit:** If Pawnee makes unauthorized sale the pawnor has the right to file a suit against the Pawnee.
3. **Right of Proper Care:** The pawnor can enforce the Pawnee to do proper care and maintain the pledged goods.

Duties of the Pawnor

1. **Meet the Obligations:** Pawnor must meet the obligations regarding the contract with in specified time.
2. **Pay Extra Expenditure:** He should also pay the extra ordinary charges.

Rights of Pawnee

Following are the rights of Pawnee:

1. **Receipt of Payment:** Pawnee can retain the goods pledged until his dues are paid.
2. **Retain for Other Debts:** He has also right to retain the pledged goods for other debts taken.
3. **Recover Other Charges:** He has also right to recover the other charges like preservation of the pledged goods.
4. **Sell the Goods:** If pawnor fails to make payment then pawnee can sell the pledged goods after issuing the reasonable notice.

Duties of Pawnee

Following are the duties of Pawnee:

1. **Return of Goods:** On the receipt of his dues he should return the goods.
2. **Reasonable Care:** He must do the reasonable care of the pledges goods.
3. **Comply Terms:** He should abide by the terms.
4. **No Misuse:** He should not make unauthorized use the pledged goods.
5. **No Mixation:** He should not mix the pledged goods with his own goods beard by the pawnee.

Pledge by Non Owners

A pledge is a special type of bailment for the mutual benefit of bailor and bailee.

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

Example:

A borrows 200 rupees by depositing his watch with B as a security for repayment of the debt.

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It is a general rule that it is only the owner who can make a valid pledge. No one can convey a better title than what he had, is applicable to bailment and pledge. But, Sections 178 A, and 179 of the Contract Act provides certain circumstances in which the pledge made by a non-owner or a co-owner is also valid. In the following cases, a non-owner can make a valid pledge

1. Pledge by Mercantile Agent

According to Section 178, pledge by a mercantile agent, who is not-authorized by the owner of goods, will be valid, if the following conditions are fulfilled:

- (a) The mercantile agent is in possession of goods or document of title to the goods:
- (b) Such possession is with the consent of the owner.
- (c) He acts in the ordinary course of business while making the pledge.
- (d) The Pawnee acts in good faith, and
- (e) The Pawnee has no notice of the pawnor's defective title.

2. Pledge by Seller or Buyer in Possession after Sale

According to Section 30 of Sales of Goods Act, a seller left in possession of goods after sale and a buyer, who obtains possession of goods with the consent of the seller before sale, can create a valid pledge provided that the pawnee acts in good faith and has no notice of the previous sale of goods to the buyer or of the lien of the seller over the goods.

3. Pledge by a Person in Possession under a Voidable Contract

Where a person obtains possession of goods under a voidable contract, the pledge created by him will be valid, subject to the following conditions:

- (a) The contract has not been rescinded before the contract of pledge.
- (b) The Pawnee acts in good faith, and
- (c) The Pawnee has no notice of the pawnor's defect of title (Sec. 178 A).

4. Pledge by Person having Limited Interest (Sec. 179)

Where a person pledges the goods, in which he has only a limited interest, the pledge is valid to the extent of that interest.

5. Pledge by Co-owners in Possession

One of the several joint owners of the goods in possession thereof, with the consent of the other co-owners, may create a valid pledge of the goods.

Difference between Bailment and Pledge

Bailment

The act of delivering goods for a special purpose is termed as bailment. The person who is delivering the goods is called a bailor while the person who receives the goods is referred to as a bailee in the contract. The goods that are transferred

in this manner shall be returned to the owner upon completion of the purpose of the contract. The point to be remembered in this kind of transaction is that ownership of the goods does not get changed. In bailment, only goods are involved, and all movable items apart from property and money come under bailment. Thus it is clear that when you keep money in a bank account, it does not come under bailment.

Whereas, Pledge

Pledge is a thing that is given as security for the fulfillment of a contract or the payment of a debt and is liable to forfeiture in the event of failure. If a person keeps his gold or other valuable items in a bank locker or with a money lender in exchange for a loan, he is making a pledge to the money lender or the bank that he will return the money and get back his valuables. This is deemed as a kind of bailment and all conditions that are applicable on a bailment apply in such a case also. Bailment for security can be termed as a pledge. You are keeping your valuables with the money lender as a security against the loan and also making a pledge to pay back the money. To your pledge, the money lender agrees to keep the valuables as a security. In this special type of bailment where goods act as a security for payment of loan is called a pledge.

Check Your Progress

6. Describe about Bailment.
7. Explain about Pledge and Agency.

2.5 ANSWERS TO 'CHECK YOUR PROGRESS'

1. Discuss in brief about Breach of Contract.

Breach of contract is a legal cause of action and a type of civil wrong, in which a binding agreement or bargained-for exchange is not honored by one or more of the parties to the contract by non-performance or interference with the other party's performance. Breach occurs when a party to a contract fails to fulfill its obligation(s), whether partially or wholly, as described in the contract, or communicates intent to fail the obligation or otherwise appears not to be able to perform its obligation under the contract. Where there is breach of contract, the resulting damages will have to be paid by the party breaching the contract to the aggrieved party. If a contract is rescinded, parties are legally allowed to undo the work unless doing so would directly charge the other party at that exact time.

2. State the remedies of Breach of Contract.

- (i) Recession of Contract
- (ii) Sue for Damages

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(iii) Sue for Specific Performance

(iv) Injunction

(v) Quantum Meruit

NOTES**3. Examine the concept Contract of Indemnity.**

An indemnity contract is a legal arrangement between two parties in which one party agrees to pay another party for a loss or harm that meets certain requirements and conditions unless other circumstances are specified. It is a form of contingent contract which is characterized by all the essential elements of a valid contract. The mode of the compensation contract can be express or implied, i.e. if a person expressly agrees to save the other from damages, the mode of the contract will be stated, while if the contract is signified by the terms of the case, the mode of the contract will be implied.

4. Discuss about Guarantee Contracts.

Contract of Guarantee means a contract to perform the promises made or discharge the liabilities of the third person in case of his failure to discharge such liabilities. A contract of guarantee is governed by the Indian Contract Act, 1872 and includes 3 parties in which one of the parties acts as the surety in case the defaulting party fails to fulfill his obligations. Contracts of guarantee are mostly required in cases when a party requires a loan, goods or employment. The guarantor in such contracts assures the creditor that the person in need may be trusted and in case of any default, he shall undertake the responsibility to pay.

5. Explain about the concept of Special Contract.

Specific contract is an equitable remedy in the law of contract, whereby a court issues an order requiring a party to perform a specific act, such to complete performance of the contract. Specific contract is commonly used in the form of injunctive relief concerning confidential information or real property. Section 31 of the Contract Act defines a contingent contract as follows: 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.

6. Describe about Bailment.

Section 148 of the Contract Act defines bailment as the delivery of goods by one person to another person for some purpose, upon a contract that they will either return those goods or dispose of the goods according to the instructions of the person who delivered the goods when the purpose is accomplished. The person who hands over the goods is the bailor and the person who receives the goods is the bailee.

7. Explain about Pledge and Agency.

According to Section 172 of the Contract Act, when goods are bailed as security for the payment of a debt or performance of a promise, the bailment is a pledge. If the pawnor (the bailor in a pledge) defaults payment or

performance of their promise, the Pawnee (the bailee in a pledge) may either sue the pawnor or sell the goods pledged after giving reasonable notice to the pawnor. If the proceeds from the sale are less than the amount due to the Pawnee, the pawnor will still be liable to pay the remaining amount, but where the proceeds exceed the amount due; the Pawnee must return the surplus to the pawnor.

Agency can be defined as the relationship between two persons, wherein a person has the authority to act on behalf of another, bind him/her into a legal relationship with the third party. There are two parties in a contract of agency – principal and agent.

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2.6 SUMMARY

- Breach of contract is a legal cause of action and a type of civil wrong, in which a binding agreement or bargained-for exchange is not honored by one or more of the parties to the contract by non-performance or interference with the other party's performance. Breach occurs when a party to a contract fails to fulfill its obligation(s), whether partially or wholly, as described in the contract, or communicates intent to fail the obligation or otherwise appears not to be able to perform its obligation under the contract. Where there is breach of contract, the resulting damages will have to be paid by the party breaching the contract to the aggrieved party. If a contract is rescinded, parties are legally allowed to undo the work unless doing so would directly charge the other party at that exact time.
- An indemnity contract is a legal arrangement between two parties in which one party agrees to pay another party for a loss or harm that meets certain requirements and conditions unless other circumstances are specified. It is a form of contingent contract which is characterized by all the essential elements of a valid contract. The mode of the compensation contract can be express or implied, i.e. if a person expressly agrees to save the other from damages, the mode of the contract will be stated, while if the contract is signified by the terms of the case, the mode of the contract will be implied.
- Contract of Guarantee means a contract to perform the promises made or discharge the liabilities of the third person in case of his failure to discharge such liabilities. A contract of guarantee is governed by the Indian Contract Act, 1872 and includes 3 parties in which one of the parties acts as the surety in case the defaulting party fails to fulfill his obligations. Contracts of guarantee are mostly required in cases when a party requires a loan, goods or employment. The guarantor in such contracts assures the creditor that the person in need may be trusted and in case of any default, he shall undertake the responsibility to pay.
- Specific contract is an equitable remedy in the law of contract, whereby a court issues an order requiring a party to perform a specific act, such to

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complete performance of the contract. Specific contract is commonly used in the form of injunctive relief concerning confidential information or real property. Section 31 of the Contract Act defines a contingent contract as follows: 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 148 of the Contract Act defines bailment as the delivery of goods by one person to another person for some purpose, upon a contract that they will either return those goods or dispose of the goods according to the instructions of the person who delivered the goods when the purpose is accomplished. The person who hands over the goods is the bailor and the person who receives the goods is the bailee.
- According to Section 172 of the Contract Act, when goods are bailed as security for the payment of a debt or performance of a promise, the bailment is a pledge. If the pawnor (the bailor in a pledge) defaults payment or performance of their promise, the Pawnee (the bailee in a pledge) may either sue the pawnor or sell the goods pledged after giving reasonable notice to the pawnor. If the proceeds from the sale are less than the amount due to the Pawnee, the pawnor will still be liable to pay the remaining amount, but where the proceeds exceed the amount due; the Pawnee must return the surplus to the pawnor.
- Agency can be defined as the relationship between two persons, wherein a person has the authority to act on behalf of another, bind him/her into a legal relationship with the third party. There are two parties in a contract of agency – principal and agent.

2.7 KEY TERMS

- **Breach of Contract:** Breach of contract is a legal term that describes the violation of a contract or an agreement that occurs when one party fails to fulfill its promises according to the provisions of the agreement. Sometimes it involves interfering with the ability of another party to fulfill his duties. A contract can be breached in whole or in part.
- **Contract of Indemnity:** Contract of indemnity is a contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person, is called a contract of indemnity.
- **Right of Indemnifier:** Section 125 of the Act only lays down the rights of the indemnified and is quite silent of the rights of indemnifier as if the indemnifier has no rights but only liability towards the indemnified.
- **Guarantee:** Section 126 of the Indian Contract Act, 1872 says that a Contract of Guarantee is a contract to perform the promise or discharge the liability of a third person in case of his default. Surety is the person who gives the guarantee, the Principal Debtor is one for whom the guarantee is given

and the creditor is the person to whom the guarantee is given. Contract Act uses the word 'surety' which is same as 'guarantor' Prima facie, the surety is not undertaking to perform should the principal debtor fail; the surety is undertaking to see that the principal debtor does perform his part of the bargain. A contract of guarantee pre-supposes a principal debt or an obligation that the principal debtor has to discharge in favour of the creditor.

- **Specific Contracts:** Specific contract is an equitable remedy in the law of contract, whereby a court issues an order requiring a party to perform a specific act, such to complete performance of the contract. Specific contract is commonly used in the form of injunctive relief concerning confidential information or real property.
- **Contingent Contracts:** Section 31 of the Contract Act defines a contingent contract as follows: 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.
- **Quasi Contract:** A quasi contract is a contract that is created by a court order, not by an agreement made by the parties to the contract. For example, quasi contracts are created by the court when no official agreement exists between the parties, in disputes over payments for goods or services. The goal in the court's creation of these contracts is to prevent unjust enrichment to any party. To explore this concept, consider the following quasi contract definition.
- **Bailment:** Section 148 of the Contract Act defines bailment as the delivery of goods by one person to another person for some purpose, upon a contract that they will either return those goods or dispose of the goods according to the instructions of the person who delivered the goods when the purpose is accomplished. The person who hands over the goods is the bailor and the person who receives the goods is the bailee.
- **Pledge:** According to Section 172 of the Contract Act, when goods are bailed as security for the payment of a debt or performance of a promise, the bailment is a pledge. If the pawnor (the bailor in a pledge) defaults payment or performance of their promise, the Pawnee (the bailee in a pledge) may either sue the pawnor or sell the goods pledged after giving reasonable notice to the pawnor. If the proceeds from the sale are less than the amount due to the Pawnee, the pawnor will still be liable to pay the remaining amount, but where the proceeds exceed the amount due; the Pawnee must return the surplus to the pawnor.

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2.8 SELF-ASSESSMENT QUESTIONS AND EXERCISES

Short Answer Questions

1. What is Breach of Contract?
2. Give the meaning of Contract of Indemnity.

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3. What is Right of Indemnifier?
4. Define the term Guarantee.
5. What are the Specific Contracts?
6. What is Contingent Contract?
7. What is Quasi Contract?
8. Define the term Bailment.
9. What is Pledge?

Long Answer Questions

1. Explain the Breach of Contract.
2. What are the remedies of Breach of Contract? Explain.
3. Describe the Indemnity and Guarantee Contracts.
4. Explain various types of Guarantees.
5. Discuss various special Contracts.
6. Explain in brief about Bailment.
7. Discuss in details about Pledge and Agency.

2.9 FURTHER READING

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2. Anson, 1964, 22nd ed., "Law of Contract".
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5. Avtar Singh, 16th ed., 2009, "Company law".
6. Avtar Singh, 2007, 15th Ed., "Company Law".
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UNIT 3 **NEGOTIABLE INSTRUMENT ACT, 1881**

*Negotiable Instrument
Act, 1881*

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Structure

- 3.0 Introduction
- 3.1 Objectives
- 3.2 Negotiable Instrument Act, 1881 – Definition, Features
 - 3.2.1 Negotiable Instrument Act, 1881
 - 3.2.2 Meaning and Definitions of Negotiable Instruments
 - 3.2.3 Features of Negotiable Instrument Act
- 3.3 Promissory Note
 - 3.3.1 Meaning of Promissory Note
 - 3.3.2 Features of a Promissory Note
 - 3.3.3 Essentials of a Promissory Note
- 3.4 Bill of Exchange
 - 3.4.1 Meaning of Bill of Exchange
 - 3.4.2 Parties to a Bill of Exchange
 - 3.4.3 Characteristics of a Bill of Exchange
- 3.5 Cheques, Holder and Holder in Due Course
 - 3.5.1 Cheque
 - 3.5.2 Holder and Holder in Due Course
- 3.6 Crossing of Cheque, Types of crossing
 - 3.6.1 Crossing of Cheque
 - 3.6.2 Types of Crossing
- 3.7 Dishonor and Discharge of Negotiable Instruments
 - 3.7.1 Dishonor of Negotiable Instruments
 - 3.7.2 Discharge of Negotiable Instruments
- 3.8 Answers to ‘Check Your Progress’
- 3.9 Summary
- 3.10 Key Terms
- 3.11 Self-Assessment Questions and Exercises
- 3.12 Further Reading

3.0 INTRODUCTION

Negotiable Instruments Act, 1881 is an act in India dating from the British colonial rule that is still in force largely unchanged. A negotiable instrument is a piece of paper which entitles a person to a sum of money and which is transferable from one person to another by mere delivery or by endorsement and delivery. There were total 142 Sections in the Negotiable Instruments Act, 1881 when it came into force. The act was amended and amendment Act inserts five new sections from 143 to 147 touching various limbs of the parent Act and Cheque truncation through digitally were also included and the amendment Act has been recently brought into force on Feb. 6, 2003.

Every organization carries out numerous business transactions and there is always need for a mechanism which will assist them in discharging their commitments and obligations. This mechanism is the Negotiable Instrument which is a transferable

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document that can be passed on from one entity to another creating convenience and ease. Negotiable Instruments in India are governed under the Negotiable Instruments Act, 1881.

A negotiable instrument is a document guaranteeing the payment of a specific amount of money, either on demand, or at a set time. According to the Section 13 of the Negotiable Instruments Act, 1881 in India, a negotiable instrument means a promissory note, bill of exchange or cheque payable either to order or to bearer. So, there are just three types of negotiable instruments such as promissory note, bill of exchange and cheque. Cheque also includes Demand Draft.

An instrument can be negotiated any number of times. As per Section 118(e), endorsements appearing on the negotiable instrument are presumed to have been made in the order in which they appear on the instrument, unless contrary is proved. There is no mandatory provision to put date while signing, though advisable to do so. Section 118(d) provides that there is a presumption that the instrument was negotiated before its maturity, unless contrary is proved. As per section 60, Bill can be negotiated even after date of maturity by persons other than maker, drawee or acceptor after maturity. However, person getting such instrument is not 'holder in due course' and does not enjoy protections available to 'holder in due course'.

A negotiable instrument is one which entitles the holder to the receipt of money. It gives him the right to transfer the same by mere delivery or endorsement thereon. The negotiability of the instrument continues till its maturity. A negotiable instrument may be made payable to two or more payees jointly or it may be made payable in the alternative to one or two, or one or some of several payees.

3.1 OBJECTIVES

After going through this unit, you will be able to:

- Explain Concept Negotiable Instrument Act, 1881
- Describe the Promissory Note, Bill of Exchange and cheques
- Discuss the Holder and Holder in Due Course
- Examine Crossing of Cheque and Types of crossing
- Explain the Dishonor and Discharge of Negotiable Instruments

3.2 NEGOTIABLE INSTRUMENT ACT, 1881 – DEFINITION, FEATURES

3.2.1 Negotiable Instrument Act, 1881

Some important sections are listed below:

Section 4 of the Negotiable Instruments Act 1881 defines the promissory note, "A promissory note is an instrument in writing (note being a bank-note or a currency note) containing an unconditional undertaking, signed by the maker, to pay a certain

sum of money to or to the order of a certain person, or to the bearer of the instruments.”

Section 5 of the Act defines the bill of exchange, “A bill of exchange is an instrument in writing containing an unconditional order, signed by the maker, directing a certain person to pay a certain sum of money only to or to the order of a certain person or to the bearer of the instrument”.

Section 6 of the Act defines the cheque “A cheque is a bill of exchange drawn on a specified banker, and not expressed to be payable otherwise than on demand”.

All cheques are bill of exchange, but all bills are not cheque.

Section 6(a) defines ‘a cheque in the electronic form’.

Section 6(b) defines ‘a truncated cheque’.

Section 7 of the Act gives definition of ‘drawer’ and ‘drawee’. The maker of the bill of exchange or cheque is called “drawer” and the person thereby directed to pay is called the “drawee”.

Section 13 of the Act states that a negotiable instrument is a promissory note, bill of exchange or a cheque payable either to order or to bearer.

Section 18. Where amount is stated differently in figures and words: If the amount undertaken or ordered to be paid is stated differently in figures and in words, the amount stated in words shall be the amount undertaken or ordered to be paid.

Section 19. Instruments payable on demand: A promissory note or bill of exchange, in which no time for payment is specified, and a cheque, are payable on demand.

Section 22. “Maturity”. The maturity of a promissory note or bill of exchange is the date at which it falls due. The section also defines days of grace.

Section 25. When day of maturity is a holiday: When the day on which a promissory note or bill of exchange is at maturity is a public holiday, the instrument shall be deemed to be due on the next preceding business day.

Section 45. Holder’s right to duplicate of lost bill.

Section 58. A promissory note, bill of exchange or cheque payable to bearer is negotiable by endorsement and delivery thereof.

Section 78. To whom payment should be made: Payment of the amount due on a promissory note, bill of exchange or cheque must, in order to discharge the maker or acceptor, be made to the holder of the instrument.

3.2.2 Meaning and Definitions of Negotiable Instruments

Meaning of Negotiable Instrument

Negotiable Instrument is a transferable, signed document that promises to pay to a certain person or to the bearer of the instrument, a certain sum of money at a future date or on demand. Examples: Cheques, Bills of exchange and Promissory notes.

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Definitions of Negotiable Instrument

According to Section 13 (a) of the Negotiable Instruments Act 1881, “Negotiable instrument means a promissory note, bill of exchange or cheque payable either to order or to bearer, whether the word “order” or “ bearer” appear on the instrument or not.”

According to Justice, Willis, “A negotiable instrument is one, the property in which is acquired by anyone who takes it bonafide and for value notwithstanding any defects of the title in the person from whom he took it”.

3.2.3 Features of Negotiable Instrument Act

Features of Negotiable Instrument

A negotiable instrument has the following characteristics:

1. **Property:** The possessor of the instrument is the holder and owner thereof. A negotiable instrument does not merely give possession of the instrument, but right to property. Who sever gets possession of the instrument becomes its owner and is entitled to the summentioned therein as the holder. It passes by mere delivery where instrument is payable to ‘bearer.’
2. **Defects in Title:** The holder in good faith and for value called the ‘holder in due course’ gets the instrument free from all defects of any previous holder.
3. **Remedy:** The holder can sue upon the negotiable instrument in his own name. All prior parties are liable to him. A holder in due course can recover the full amount of the instrument.
4. **Right:** The holder in due course is not affected by certain defenses which might be available against previous holder, for example, fraud to which he is not a party.
5. **Payable to Order:** All three negotiable instruments are payable to order which is expressed to a particular person. An instrument which does not restrict its transferability expressly is negotiable whether the word ‘order’ is mentioned or not. The word ‘order’ or ‘bearer’ is no longer necessary to render an instrument negotiable.
6. **Payable to Bearer:** The negotiable instrument is expressed to be payable or on which the only or last endorsement is an endorsement in blank. It specifies that the person in possession of the bill is a bearer of the instrument which is so expressed payable to bearer.
7. **Payment:** A negotiable instrument may be made payable to two or more payees, or it may be payable in alternative to one or two payees.
8. **Consideration:** Consideration in the case of a negotiable instrument is presumed.
9. **Presumptions:** Certain presumptions apply to all negotiable instruments.

Presumptions to Negotiable Instruments

Negotiable Instrument
Act, 1881

For deciding cases in respect of rights of parties on the basis of a NI, the Court is entitled to make certain presumptions.

These are briefly stated as follow :

1. **Consideration:** That every negotiable instrument is made or drawn for a consideration. Thus, this need not necessarily be mentioned.
2. **Date:** That the negotiable instrument was drawn on the date shown on the face of it.
3. **Acceptance before maturity:** That the NI was accepted before its maturity, i.e., before it became overdue.
4. **Transfer before maturity:** That the negotiable instrument was transferred before its maturity.
5. **Order of Endorsements:** That the Endorsements appearing upon a negotiable instrument were made in the order in which they appear.
6. **Stamping of the instrument:** That an instrument which has been lost was properly stamped.
7. **Holder is Holder in due course:** That the holder of a negotiable instrument is the 'holder in due course', except where the instrument has been obtained from its lawful owner or its lawful custodian by means of offence or fraud.
8. **Proof of dishonour:** If a suit is filed upon an instrument which has been dishonoured, the Court shall, on proof of the protest, presume the fact of dishonour unless it is disproved.

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Check Your Progress

1. Describe about Negotiable Instrument Act, 1881.
2. State the features of Negotiable Instrument Act, 1881.

3.3 PROMISSORY NOTE

3.3.1 Meaning of Promissory Note

A “promissory note” is an instrument in writing containing an unconditional under-taking, signed by the maker, to pay a certain sum of money only to, or to the order of, a certain person, or to the bearer of the instrument.

3.3.2 Features of a Promissory Note

- (i) A promissory note must be in writing, duly signed by its maker and properly stamped as per Indian Stamp Act.
- (ii) It must contain an undertaking or promise to pay. Mere acknowledgement of indebtedness is not enough.
- (iii) The promise to pay must not be conditional.

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- (iv) It must contain a promise to pay money only.
- (v) The parties to a promissory note, i.e. the maker and the payee must be certain.
- (vi) A promissory note may be payable on demand or after a certain date.
- (vii) The sum payable mentioned must be certain or capable of being made certain. It means that the sum payable may be in figures or may be such that it can be calculated.

3.3.3 Essentials of a Promissory Note

1. The promissory note must be in writing.
2. The promissory note must contain an undertaking to pay.
3. The promise to pay must be unconditional.
4. It must be signed by the maker.
5. The maker must be a certain person.
6. The undertaking must be to pay a certain and definite sum of money only.
7. It must be payable on demand or at a fixed or determinable future time.
8. It should be payable on demand or at a fixed or determinable future time.
9. The payment must be in a legal money of the country and not in the form of food, grains etc.
10. Revenue stamps or requisite value under the stamp Act of the country should be affixed.
11. Other matters of form like number, date, place etc., are usually found given in notes, but they are not essentials in law.
12. A bank note or a currency note is not a promissory note within the meaning of this section.
13. A promissory note cannot be made payable to bearer on demand.

Check Your Progress

3. Discuss the concept of Promissory Note.
4. State the features of Promissory Note.

3.4 BILL OF EXCHANGE

3.4.1 Meaning of Bill of Exchange

A Bill of Exchange has been defined under Section 5 of the NI Act as “an instrument in writing containing an unconditional order, signed by the maker, directing a certain person to pay a certain sum of money only to, or to the order of certain persons or to the bearer of the instrument.”

A cheque is a special type of Bill of Exchange. It is drawn on banker and is required to be made payable on demand.

3.4.2 Parties to a Bill of Exchange

1. **The Drawer:** The person who draws a bill of exchange is called the drawer.
2. **The Drawee:** The party on whom such bill of exchange is drawn and who is directed to pay is called the drawee.
3. **The Acceptor:** The person who accepts the bill is known as the acceptor. Normally the drawee is the acceptor. But a stranger can also accept a bill on behalf of the drawee.
4. **The Payee:** The person to whom the amount of the bill is payable is called the payee.
5. **The Endorser:** When the holder transfers or endorses the instrument to any other person the holder becomes the Endorser.
6. **The Endorsee:** The person to whom the bill is endorsed is called the endorsee.
7. **The Holder:** Holder of bill of exchange means any person who is legally entitled to the possession of it and to receive or recover the amount due thereon from the parties. He is either the payee or the endorsee. The finder of a lost bill payable to bearer or a person in wrongful possession of such instrument is not a holder.

3.4.3 Characteristics of a Bill of Exchange

- (i) **It must be in writing:** The Bill of Exchange must be in writing.
- (ii) **Order to pay:** There must be an order to pay. It is of the essence of the bill that its drawer orders the drawee to pay money to the payee. The term 'order' does not mean command. Any request or direction or other words, which show an intention of the drawer to cause a payment being made by the drawee is sufficient. Politeness may be admissible but excessive politeness may prompt one to disregard it as an order.
- (iii) **Unconditional order:** This order must be unconditional, as the bill is payable at all events. It is absolutely necessary for the drawer's order to the drawee to be unconditional. The order must not make the payment of the bill dependent on a contingent event. A conditional Bill of Exchange is invalid.
- (iv) **Signature of the drawer:** The drawee must sign the instrument. The instrument without the proper signature will be inchoate (unclear or unformed or undeveloped) and hence ineffective. It is permissible to add the signature at any time after the issue of the bill.
- (v) **Drawee:** A bill, in order to be perfect, must indicate a drawee who should be called upon to accept or pay it.
- (vi) **Parties:** The drawer, the drawee (acceptor) and the payee- the parties to a bill are to be specified in the instrument with reasonable certainty.

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(vii) **Certainty of amount:** The sum must be certain.

(viii) **Payment in kind is not valid:** The medium of payment must be money and money only. The distinctive order to pay anything in kind will vitiate the bill.

(ix) **Stamping:** A Bill of Exchange, to be valid, must be duly stamped as per the Indian Stamp Act.

(x) **Cannot be made payable to bearer on demand:** A Bill of Exchange as originally drawn cannot be made payable to the bearer on demand.

Advantages of Bill of Exchange

1. Bill of exchange fixes the date of payment. The creditor knows when to expect his money and the debtor also knows when he will be required to make payment.
2. A bill of exchange is a negotiable instrument and can be used in settlement of debts.
3. It is a written and signed acknowledgement of debt and affords conclusive proof of indebtedness.
4. A debtor is free from worries and enjoys full period of credit, as he can never be called upon to pay the amount of the bill before the due date.
5. A creditor can convert the bill into cash by getting it discounted with the bank.

Cheques

A Cheque is an instrument in writing, containing an unconditional order, drawn on a specified banker, signed by the drawer, directing the banker, to pay, on demand, a certain sum of money only, to a certain person or to his order or to the bearer of the instrument.

A cheque is a document or instrument that orders a payment of money from a bank account. The person writing the cheque, the *drawer*, usually has a current account or checking account, where their money was previously deposited. The drawer writes the various details including the amount of money, date and a payee on the cheque, and signs it, ordering their bank, known as the *drawee*, to pay that person or company the amount of money stated.

Certificate of Deposit

Certificate of deposit is a negotiable financial instrument issued by a bank documenting a deposit; with principal and interest repayable to the bearer at a specified future date.

Importance of Certificate of Deposit

- (1) These are freely transferable for endorsement and delivery.
- (2) Issued at discount to face value.
- (3) These are document of title to time deposits.

- (4) Repayable on a fixed date without grace.
- (5) The most convenient instruments to depositors as they enable short term surpluses to earn higher returns.
- (6) CDs offer maximum liquidity as they are transferable by endorsement and delivery. The holder can resell his certificate to another person or party.
- (7) From the view of issuing bank, it is a means to raise resources in times of need and improve their lending capacity. The CDs are fixed term deposits which cannot be withdrawn until the redemption date.
- (8) It is an ideal instrument for banks with short term surplus funds to invest at an attractive rate.

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Commercial Paper

A Commercial Paper is an unsecured promissory note issued with a fixed maturity, short-term debt instrument issued by a corporation approved by RBI, typically for the financing of accounts receivable, inventories and meeting short-term liabilities. Maturities on commercial paper rarely range any longer than 270 days. The debt is usually issued at a discount, reflecting prevailing market interest rates. Commercial paper is not usually backed by any form of collateral, so only firms with high-quality debt ratings will easily find buyers without having to offer a substantial discount (higher cost) for the debt issue.

Features of Commercial Paper

- (1) Commercial Paper is a short term money market instrument comprising issuance of promissory note with a fixed maturity.
- (2) It is a certificate evidencing an unsecured corporate debt of short term maturity.
- (3) Commercial paper is issued at a discount to face value basis but it can also be issued in interest bearing form.
- (4) The issuer promises to pay the buyer some fixed amount on some future period but pledges no assets, only his liquidity and established earning power, to guarantee that promise.
- (5) Commercial paper can be issued directly by a company to investors or through banks/merchant bankers.

Treasury Bills

A treasury bill is a kind of finance bill or promissory note issued by the government of the country to raise short term funds. According to one categorisation, Treasury bills are ad hoc, tap and action bills. India has experimented with 91 days Treasury bills, 182 days Treasury bills, 364-day Treasury bills and two types of 14-day Treasury bills. The treasury bills are purchased by foreign banks in India, scheduled banks, National Co-operative Development organisations, financial institutions, joint stock companies, DFHI and others.

Characteristics of Treasury Bills

The important features of Treasury bills are:

1. High liquidity.
2. Absence of risk of default.
3. Ready availability on tap.
4. Assured yield.
5. Low transactions cost.
6. Eligibility for inclusion in statutory liquidity ratio (SLR) and
7. Negligible capital depreciation.

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Difference between Promissory Note and Bill of Exchange

Promissory Note	Bill of Exchange
i) It contains a promise to pay.	i) It contains an order to pay.
ii) The liability of the maker of a note is primary and absolute.	ii) The liability of the drawer of a bill is secondary and conditional.
iii) It is presented for payment without any previous acceptance by the maker.	iii) If a bill is payable some time after sight, it is required to be accepted either by the drawee himself.
iv) The maker of a promissory note stands in immediate relationship with the payee and is primarily liable to the payee or the holder.	iv) The maker or drawer of an accepted bill stands in immediate relationship with the accept or and the payee.
v) It cannot be made payable to the maker himself. The maker and the payee cannot be the same person.	v) The drawer and payee or the drawee and the payee may be the same person.
vi) In the case of a promissory note there are only two parties, viz., the maker (debtor) and the payee (creditor).	vi) There are three parties, viz, drawer, drawee and payee, and any two of these three capacities can be filled by one and the same person.
vii) A promissory note cannot be drawn in sets.	vii) The bills can be drawn in sets.

Check Your Progress

5. Discuss the concept Bill of Exchange.

3.5 CHEQUES, HOLDER AND HOLDER IN DUE COURSE

Negotiable Instrument
Act, 1881

3.5.1 Cheque

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Meaning of Cheque

A Cheque is an instrument in writing, containing an unconditional order, drawn on a specified banker, signed by the drawer, directing the banker, to pay, on demand, a certain sum of money only, to a certain person or to his order or to the bearer of the instrument.

History of Cheque

The cheque had its origins in the ancient banking system, in which bankers would issue orders at the request of their customers, to pay money to identified payees. Such an order was referred to as a bill of exchange. The use of bills of exchange facilitated trade by eliminating the need for merchants to carry large quantities of currency (e.g. gold) to purchase goods and services. A draft is a bill of exchange which is not payable on demand of the payee. The ancient Romans are believed to have used an early form of cheque known as pra-scriptiones in the first century BC. During the 3rd century AD, banks in Persia and other territories in the Persian Sassanid Empire issued letters of credit known as bakks.

Muslim traders are known to have used the cheque system since the time of Harun al-Rashid (9th century) of the Abbasid Caliphate. In the 9th century, a Muslim businessman could cash an early form of the cheque in China drawn on sources in Baghdad, a tradition that was significantly strengthened in the 13th and 14th centuries, during the Mongol Empire. Indeed, fragments found in the Cairo Geniza indicate that in the 12th century cheques remarkably similar to our own were in use, only smaller to save costs on the paper. They contain a sum to be paid and then the order "May so and so pay the bearer such and such an amount". The date and name of the issuer are also apparent. Between 1118 and 1307, it is believed the Knights Templar introduced a cheque system for pilgrims travelling to the Holy Land or across Europe. The pilgrims would deposit funds at one chapter house, then withdraw it from another chapter at their destination by showing a draft of their claim. These drafts would be written in a very complicated code only the Templars could decipher.

Parties to a Cheque

There are three parties involved in every cheque or payment order:

- (i) ***Drawer:*** The person who gives the order (writes out the cheque)
- (ii) ***Drawee:*** The financial institution upon whom the cheque is drawn
- (iii) ***Payee:*** The person or organisation named to receive payment.

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Characteristics of Cheque

The characteristics of cheque can be summarised as under:

1. A cheque is an unconditional order on a specified banker where the drawer has his account.
2. A cheque can be drawn for a certain sum of money.
3. Cheque is payable by the banker only on demand.
4. A cheque does not require acceptance by the banker as in the case of bill of exchange.
5. A cheque may be drawn up in three forms i.e.:
 - (i) *Bearer cheque*: It is made payable to the bearer i.e., it is payable to the person who present it to the bank for encashment.
 - (ii) *Order cheque*: It is one which is expressed to be so payable or which is expressed to be payable to a particular person without containing any prohibitory words against its transfer or indicating an intention that it shall not be transferable (Section 18); and
 - (iii) *Crossed cheque*: It is a cheque which can be collected only through a banker.
6. The cheque is a revocable mandate and the authority can be revoked by countermanding payment.
7. The cheque is determined by notice of death or insolvency of the drawer.
8. All cheques are bills of exchange but all bills of exchange are not cheques.

Types of Cheques

Cheques can be categorized into two, viz.:

1. Open Cheque
 - (a) Bearer Cheque
 - (b) Order Cheque
2. Crossed Cheque
 - (a) General Crossing
 - (b) Special Crossing
 - (c) Double Crossing

1. Open Cheque

An open cheque is a cheque which is payable at the counter of the drawee bank on presentation of the cheque.

- (a) *Bearer cheque*: A bearer cheque is the one which is issued without the name of the payee and the same can be encashed by any one. Bearer cheque is made payable to the bearer i.e. it is payable to the person who presents it to the bank for encashment.
- (b) *Order cheque*: A cheque which is paid to a named person with the words 'or order' after the payee's name, showing that he or she can endorse it and pass it to someone else if desired.

2. Crossed Cheque

A crossed cheque is a cheque which is payable only through a collecting banker and not directly at the counter of the bank. Crossing ensures security to the holder of the cheque as the collecting banker credits the proceeds to the account of the payee of the cheque.

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Differences between Cheque and Bill of Exchange

Cheque	Bill of Exchange
1. Cheque can be drawn only on a banker.	1. The drawee may be any person.
2. A cheque is payable on demand.	2. A bill may be drawn payable on demand or on expiry of certain period after date or sight.
3. Cheque is payable on demand and no grace period is allowed.	3. While calculating maturity three day's grace period is allowed.
4. Notice of dishonour is not necessary.	4. A notice of dishonour is required.
5. A cheque can be drawn to bearer and made payable on demand.	5. A bill cannot be made bearer if it is payable on demand. A bill drawn 'payable to bearer on demand' is void.
6. A cheque is not required to be presented for acceptance.	6. Bills sometimes, require presentment for acceptance.
7. No stamp duty is payable on cheques.	7. Affixation of proper stamps is necessary in case of Bills of Exchange.
8. A cheque may be crossed.	8. A bill of exchange cannot be crossed.
9. There is no system for noting and protesting in case of dishonour.	9. In case of dishonour of a bill proper noting and protesting is necessary.
10. The drawer does not get discharged from his liability because of delay in presenting the cheque to the bank for payment.	10. The drawer of the bill stands discharged from his liability if it is not duly presented for payment.

Liability of the Parties

1. **Drawer:** Undertakes that on due presentment, the cheque will be paid.
2. **Endorser:** Similar liabilities to the drawer unless the words sans recourse or 'without recourse' are added after the endorser's signature. A person who signs a cheque other than as payer or endorser can still be liable if it can be shown that at the time of signing that was their intention.
3. **Other people who have possession of the cheque at some time:**
 - (i) **Holder:**
 - Payee or endorser of a cheque who is in possession of it.
 - Bearer of a bearer cheque.

(ii) **Holder for value:** The person to whom the cheque has been negotiated after actual consideration has been introduced into the chain.

Essentials of a Valid Cheque

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The essential elements of a cheque are as under:

- (1) **It must have all essential of a bill of exchange:** The first requirement of a valid cheque is that it must have all the essential elements of a bill of exchange. The reason for the same is that the cheque is primarily a bill of exchange drawn upon a banker.
- (2) **It must be drawn on a specified banker:** The second requirement of a valid cheque is that it must be drawn on a specified banker. A cheque drawn on any person other than a banker is not valid.
- (3) **It must be payable on demand:** The last requirement of a valid cheque is that it must be payable on demand. As a matter of fact, a cheque is always payable on demand.

3.5.2 Holder and Holder in Due Course

Holder for Value

A collecting banker is holder for value if he gives the value of the cheque in any form to its customer before collecting the proceeds of the cheque deposited by the latter. He does not remain an agent of the customer, but becomes the owner of the cheque in his own right since he has paid value for it, and has acquired the ownership right in good faith. In such a situation, the banker is called holder for value and he is also the holder in due course.

When collecting banker becomes a holder for value?

According to Sir John Paget, a banker becomes a holder for value in the following ways:

- (a) By lending further on the strength of the cheque;
- (b) By paying the amount of the cheque or part of it in cash or in account before it is cleared;
- (c) By agreeing that the customer may draw before the cheque is cleared;
- (d) By accepting the cheque in avowed reduction of an existing overdraft;
- (e) By giving cash over the counter for the cheque at the time it is deposited in for collection.

In the above circumstances, the banker becomes the holder for value. Further, if he proves that he gave value for a cheque in good faith, he will be able to resist any claim by the true owner provided that

- (a) the cheque was not tainted with forgery,
- (b) he had no notice of any previous dishonour or of any defect in the title of his customer,
- (c) the cheque was not crossed 'not negotiable'

- (d) the cheque was not overdue for the purpose of negotiation, and
- (e) the cheque was regular on the face of it in all respects.

If the cheque is dishonoured, the collecting banker can use all the previous parties after giving them the notice of dishonour. The banker undertakes a risk also when he acts as a holder for value. He will be in a difficulty if last, but one endorsement proves to be a forged one. The banker will be liable to the true owner of the cheque. However, he can recover the amount from his customer.

Holder in Due Course

Holder in Due Course is one holding a cheque or promissory note, received for value, in good faith, and with no suspicion that it might be no good, claimed by another, overdue, or previously dishonoured. Such a holder is entitled to payment by the maker of the cheque or note. A Holder in Due Course (HDC) is a person who takes a negotiable instrument, such as a promissory note or cheque for value without knowledge of neither any apparent defect in the instrument nor any notice of dishonor. Status as a “holder in due course” is an affirmative defense against all legal claims the debtor may have against the original creditor. In other words, a “holder in due course” does not become responsible for the original creditor’s alleged misdeeds in the original credit transaction.

A person typically becomes a “holder in due course” through the following steps: (1) an original creditor loans money to a person in return for a promise to repay that money with interest; (2) The original creditor then sells the credit contract (the right to receive repayment of the loan) to a “new creditor” (such as a bank); and (3) the new creditor takes the debt without any knowledge of (a) a defect in the note, (b) any misrepresentations made by the original creditor to the debtor, or (c) any other act that would give the debtor a legal claim against the original creditor. For example, a consumer might purchase a car on the installment plan from a car dealer. The credit transaction would be secured by a promissory note and a chattel mortgage, deed of trust, or other security instrument. The retailer may then sell the note and related documents to a bank or other finance company. The latter would assert that it is an HDC and therefore not responsible for any defects in the car or for any misrepresentations about it that the retailer made to the consumer.

Example:

A gives B a promissory note in payment of a contract to be performed by B. B breaks the contract. B negotiates the note to C. To escape being subject to this defense C must have acquired the note under the circumstances that make him a holder in due course.

Example:

A borrows money from B and gives his promissory note thereof. B negotiates this note to C. As A has no defense against any one, it is useless to inquire whether or not C acquired as a holder in due course. All that interests A is whether C is really the legal owner. C may have acquired the paper by way of gift and may have taken long after maturity. This is immaterial.

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Sec. 70. Who Is Holder In Due Course:

In order to claim the peculiar advantages of the law merchant, the holder must be a holder in due course, that is, he must have acquired (1) paper complete and regular on its face; (2) for value; (3) in good faith and (4) before the paper was overdue. Manifestly one cannot be a holder in due course unless he acquires an instrument negotiable in form, and if it is incomplete or irregular when he obtains it, if in fact it does not lack negotiability, it at least imposes upon him the necessity of inquiry.

Collecting Banker as an Agent of the Customer

When a collecting banker acts as an agent of the customer, he credits the latter's account with the amount of the cheque after the proceeds of the cheque are actually collected from the drawee banker. The customer can draw the amount after his account is credited with the proceeds. In such a case, banker acts as an agent of his customer and does not get better title to the cheque than that of the customer. If the title of the customer is defective, the banker will run the risk of being liable to the true owner if it collects the cheque. If the cheque collected by the banker does not belong to his customer, the banker will be liable for 'conversion of money' or in other words, for illegally interfering with the rights of the true owner of the cheque.

As an agent of the customer, the collecting banker is a mere "conduit pipe to receive payment of the cheque from the bank on which it is drawn and holds the proceeds at the disposal of the customer." Like any other agent, the banker has to perform his duties diligently for the customer who has paid in his cheques. If he delays or does not exercise the normal skills expected, he will be liable to his customer. It has been held that the reasonable time would be presenting the cheque within one day after the receipt thereof where the cheque is drawn on a bank in the same place, or forwarding or presenting it on the day following the receipt thereof where the cheque is drawn on a bank in another place. After the expiry of reasonable time, the customer paying in the cheque for collection is entitled to presume that it has been collected and the proceeds thereof credited to his account.

Privileges of Holder in Due Course

Privileges granted to a 'holder in due course' under the Negotiable Instruments are given below:

1. He gets a better title than that of the transferor

One who is a 'holder' only gets no better title than that of his transferor but a holder in due course is in a privileged position in that he gets a better title than that of the transferor and the defenses on the part of a person liable that the instrument has been lost, or has been obtained by means of an offence or fraud or for an unlawful consideration cannot be pleaded against a holder in due course (Sec. 58).

For example, if P obtains an instrument payable to bearer by theft or fraud, or for an unlawful consideration, he cannot sue on it. But if P transfers the instrument (being a bearer one) to R under circumstances (for value in good faith) which make R a holder in due course, R can sue on the instrument.

The party liable to pay can take, as against P, the defence of theft or fraud, but as against R he will not be allowed to take such a defence.

Further, not only the holder in due course himself gets a good title free from all defects but also serves as a channel to protect all subsequent holders. Once an instrument passes through the hands of a holder in due course it is purged from all defects. Section 53 states that “a holder of a negotiable instrument who derives title from a holder in due course has the rights thereon of that holder in due course.”

Thus, anybody who takes a negotiable instrument from a holder in due course can recover the amount from all prior parties, although he had knowledge of the prior defects e.g., no consideration was paid by some of the prior parties or some one of them was a thief.

It is important to note that a forged instrument, even if it passes through the hands of a holder in due course, cannot be cured of its defect because there is no defect of title but there is complete absence of title.

2. Privilege in case of inchoate stamped instruments (Sec. 20)

In the case of inchoate stamped instrument, if the holder or original payee fills more amount than that was authorised, he cannot enforce the instrument for the whole amount (only actual authorised amount can be recovered).

If such an instrument is transferred to a holder in due course, he can claim the whole of the amount so entered provided that the amount is covered by the stamp affixed thereon. Thus, the defence that the amount filled by the holder was in excess of the authority given cannot be taken against a holder in due course.

3. Liability of prior parties

All prior parties to a negotiable instrument (i.e., its maker or drawer, acceptor and intervening indorsers) continue to remain liable to a holder in due course both jointly and severally (i.e., he can hold any or all prior parties liable) until the instrument is duly satisfied (Sec. 36). Whereas, only preceding party is liable to a succeeding party, if the succeeding party is only a holder.

4. Privilege in case of Fictitious bills (Sec. 42)

When a bill of exchange is drawn in a fictitious name and is made payable to the drawer's order (i.e., where both drawer and payee of a bill are fictitious persons), the bill is said to be a fictitious bill. Such a bill is not a good bill and cannot be enforced by law.

But the acceptor of such a bill is liable to a holder in due course provided the latter can show that the first endorsement on the bill and the signature of the supposed drawer are in the same handwriting.

5. Privilege when an instrument delivered conditionally is negotiated

When a negotiable instrument is endorsed or delivered conditionally or for a special purpose only, e.g., as collateral security or for safe custody and not with the idea of transferring absolute property therein, the property in the instrument does not pass to the indorsee and he is merely a bailee with limited title and power of negotiating it.

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This, however, does not affect the rights of a holder in due course, i.e., if such an instrument is negotiated to a holder in due course, the parties liable on the instrument cannot escape liability (Sections 46 and 47).

For example, if I give a cheque to a shopkeeper with the condition that he should not encash the cheque till he supplies me the goods, anybody encashing the cheque prior to fulfilling the condition is liable to return the money except the holder in due course.

6. Estoppel against denying original validity of instrument (Sec. 120)

The plea of original invalidity of the instrument; e.g., that no consideration actually passed between the maker and the payee of a promissory note; cannot be put forth against the holder in due course by the drawer of a bill of exchange or cheque or by the maker of a promissory note or by an acceptor of a bill for the honour of the drawer.

However, the aforesaid parties are not precluded from challenging the validity of the instrument on the ground that at the time of making the instrument he was a minor or his signature had been forged or the instrument is otherwise void ab-initio, e.g., where a promissory note is made 'payable to bearer' it is void and illegal as per the Reserve Bank of India Act.

7. Estoppel against denying the capacity of payee to indorse

"No maker of a note and no acceptor of a bill payable to order shall, in a suit thereon by a holder in due course, be permitted to deny the payee's capacity, at the date of the note or the bill to indorse the same" (Sec. 121).

Thus, a holder in due course can claim payment in his own name despite the payee's incapacity to indorse the instrument. As per Section 51, only a 'holder' or a person in lawful possession of the instrument is competent to endorse. Accordingly, a person who got the instrument for a gambling debt or for unlawful consideration cannot negotiate the same.

However, the holder in due course enjoys a privilege in this regard and he gets a good title even if he holds a negotiable instrument endorsed by a person who got the instrument for unlawful consideration because Section 121 provides that as against a holder in due course, no maker of a note and no acceptor of a bill payable to order shall be permitted to deny the payee's capacity to indorse the same.

Rights of a Holder in Due Course

Case: M/S. Sri Sai Mourya Estates vs The State of A.P. on 13 April, 2018

Heard counsel for the petitioners as well as the respondents. The present criminal petition is filed by the petitioners/ accused Nos.1 to 3 and 5, to quash the proceedings initiated against them in C.C.No.1374 of 2010 on the file of the Court of the II Additional Chief Metropolitan Magistrate at Nampally, Hyderabad, for the offences under Section 138 of the Negotiable Instruments Act, 1881 (for short, the Act).

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The brief facts of the case are that originally the 2nd respondent herein filed the above mentioned case i.e., C.C.No.1374 of 2010 against the petitioners and two others. The case of the 2nd respondent is that petitioner No.1 is a private limited company represented by petitioner Nos.2 to 4 and two others and petitioner Nos.2 to 4 approached his mother and requested her to give hand loan for the purpose of developing the lands in Magadha Venture situated at Kokapet Village, Ranga Reddy District. Believing the version of the petitioners, his mother paid a sum of ₹ 25 lakhs in cash as hand loan and in view thereof the petitioners executed a promissory note, dated 04.10.2007. In the said promissory note, Sri M. Chandra Shekar and Sri B. Venu Gopal Reddy acted as witnesses, since the amount was paid in their presence. It was also stated that the petitioners agreed to pay the above said amount with interest @24% per annum within a period of two years thereof. However, after receiving the amount, the petitioners changed their colour and started avoiding payment of the said amount. It is also specifically stated that the said amount was obtained by petitioner Nos.2 to 4 and two others for the purpose of investing in the real estate business of petitioner No.1 company. Petitioner No.1 was a private limited company, petitioner No.2 was the Managing Director and petitioner Nos.3, 4 and two others were the Directors of petitioner No.1 company. In fact, petitioner Nos. 2 to 4 and two other Directors are equally taking part in the business of the company and also looking after the financial aspects, such as, negotiating with the customers, issuing of cheques etc., and therefore all were equally responsible for the day to day affairs of the 1st petitioner company.

The 1st petitioner company represented by accused Nos.3 and 4, with the consent of accused Nos.2, 5 and 6, issued a cheque bearing No.332165, dated 16.09.2010, for a sum of ₹ 25 lakhs drawn on Andhra Bank, Banjara Hills, in favour of the mother of the 2nd respondent towards discharge of the debt. When the mother of the 2nd respondent deposited the above mentioned cheque for collection through her banker i.e., Bank of Baroda, Abids branch, Hyderabad, the same was returned unpaid with an endorsement funds insufficient and the same was intimated to her on 17.09.2010.

All the accused persons were jointly and severally liable for payment of the amount covered under the dishonoured cheque, but with a view to defeat the payment, all the accused had committed default in payment of legally enforceable debt to the mother of the 2nd respondent. In pursuance of the said dishonour of the cheque, the mother of the 2nd respondent got issued statutory notice, dated 07.10.2010, through her counsel calling upon all the accused including the petitioners herein, to pay the amount covered under the above said cheque within 15 days from the date of receipt of the notice. All the accused, including the petitioners herein, had received the notice on 11.10.2010 under the postal acknowledgement, dated 12.10.2010 and 13.10.2010 respectively, but have not chosen to give any reply and no amount was paid. However, after issuance of the legal notice, unfortunately the mother of the 2nd respondent died on 21.10.2010. That apart, she also filed a suit for recovery of the amount covered under the subject cheque before the Chief Judge, City Civil Court, Hyderabad vide O.S(SR).No.34508 of 2010. The original cheque as well as the cheque returned memo were filed before

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the civil Court and the same will be produced at the time of trial before the concerned Court. In those circumstances, the private complaint was filed vide C.C.No.1374 of 2010. Aggrieved by the filing of the complaint and initiation of proceedings against all the accused, including the petitioners herein, the present criminal petition was filed to quash off the same.

Counsel appearing for the petitioners contended that the subject cheque was issued in the name of the mother of the 2nd respondent, who filed a civil suit before the competent civil Court. Relying on Section 142 of the Act, he contended that the complaint had to be filed by the payee or the holder in due course of the cheque as the case may be. But, in the present case, the 2nd respondent was not the holder in due course and therefore he could not file a complaint against the petitioners and two others for the offence under Section 138 of the Act. As per Section 9 of the Act, holder in due course means a person who for consideration became the possessor of a cheque if payable to the bearer before the amount became payable and since the 2nd respondent is neither payee nor the holder in due course is not the possessor of the cheque for consideration amount, and as such the complaint filed by him is not maintainable. He also contended that unless a succession certificate, letter of administration and a probate of will is granted, the 2nd respondent, being the legal representative, cannot initiate the proceedings and the complaint filed by him is not maintainable. To support his contention the counsel had brought to the notice of the Court the provisions of Sections 53, 78 and 82(c) of the Act. The said provisions contemplated that the holder of a negotiable instrument, who deserved title from a holder in due course, had the right thereon of that holder in due course and subjected to provisions of Section 82(c), payment of the amount due on a promissory note, bill of exchange or cheque must have been in order to discharge a maker or acceptor, be made to the holder of the instrument. Section 82(c) of the Act reads as follows:

By payment:- to all parties thereto, if the instrument is payable to bearer or has been endorsed in blank, and such maker acceptor or endorser makes payment in due course of the amount due thereon.

Thus, the counsel contended that the 2nd respondent is neither the payee nor the holder in due course. To support his contention, counsel for the petitioners has relied on the judgment of the Bombay High Court in *Vishnupant Chaburao Khaire v. Kailash Balbhir Madan*.

The facts of the said case are that the accused/petitioner therein issued a cheque in favour of the father of the respondent/complainant on 28.08.2007. However, the father of the respondent/complainant died on 05.09.2007 in a vehicular accident. On 05.02.2008, the complainant presented the cheque for encashment, but the same was dishonoured and returned with an endorsement insufficient funds. The complainant issued a legal notice on 03.03.2008 and since the accused failed to pay the amount, filed a criminal case for the offences under Section 138 of the Act. Challenging the said initiation of the proceedings, the accused therein filed Crl.W.P.No.842 of 2009 before the Bombay High Court (Aurangabad Bench). The accused mainly contended that the complainant is neither a payee nor a holder in due course and he is not entitled to file the complaint for

the offence punishable under Section 138 of the Act. While dealing with the said issue, the Bombay High Court held that the complainant is not a payee or holder in due course within the meaning of law and he has no authority to demand money and lodge a complaint, since he can not give valid discharge for payment made to him. The said finding was arrived at by referring to Sections 211, 273 and 381 of the Succession Act by holding that unless the complainant is in a position to give full discharge and indemnity to the drawer of the cheque, he cannot lodge a complaint. The relevant paragraphs in the said judgment are as under:

The present Respondent-complainant is not the person named in the instrument nor he is a person to whom or to whose order money by the instrument is directed to be paid. Admittedly, there is no endorsement on the cheque by the deceased payee in favour of the Respondent-complainant. So, it is not that the amount under the instrument was directed to be paid to him. The holder in due course is defined as the person who for consideration is entitled to the possession of the bearer cheque or payee or endorsee thereof. It is submitted that as a legal representative of the deceased payee-father, the respondent-complainant, is entitled to possession of the valuable security/movable property left by his deceased father and also to receive or recover the amount thereunder. It is not disputed that the complainant could have filed a civil suit on the basis of the dishonoured cheque for recovery of the amount stated in the said cheque. The question is whether the respondent-complainant could file complaint in view of specific wording of Section 142(a). It is argued that the respondent complainant had not become possessor of the property for consideration, but it is because of death of his father-payee. He is also not endorsee.

(b) to Section 138 of the N.I. Act the payee or the holder in due course of the cheque, as the case may be, is to make a demand for the payment of the said amount of money by giving a notice in writing, to the drawer of the cheque, within [thirty] days of the receipt of information by him from the bank regarding the return of the cheque as unpaid. As per proviso (c), if the drawer of such cheque fails to make payment of the amount due under the cheque to the payee or to the holder in due course as the case may be within fifteen days of receipt of notice, then there would be an offence. It may be noted that this requires that the person demanding the amount must have right to demand the money and secondly, he must be in a position to discharge fully to the person who is to make the payment. If a person to whom payment is to be made is not in a position in law to discharge fully and indemnify for the payment made, non-payment to him cannot be an offence.

We may refer to certain provisions of the Succession Act in this respect. Section 211 speaks that the executor or administrator, as the case may be, of a deceased person is his legal representative for all purpose, and all the property of the deceased person vests in him as such. Section 273 of the Succession Act is regarding conclusiveness of probate or letters of administration. As per this section, probate or letters of administration shall have effect over all the property and estate, movable or immovable, of the deceased, throughout the [State] in which the same is or are granted, and shall be conclusive as to the representative title against all debtors of the deceased, and all persons holding property which belongs to him, and shall afford full indemnity to all debtors, paying their debts and all

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persons delivering up 03-12-2017 (Page 8 of 9) www.manupatra.com Hon'ble Sri Justice P. Keshava Rao such property to the person to whom such probate or letters of administration have been granted. Similarly, under Section 381, succession certificate with respect to debts and securities specified therein, is conclusive as against person owing such debts or liable on such securities and affords full indemnity to all persons as regards all payments made or dealings had, with the person to whom the certificate is granted. In other words, only in case the legatee or heir is armed with succession certificate or probate or letters of administration, he would be entitled to give full discharge and indemnity to the drawer of the cheque. Unless he can give such indemnity it cannot be said that he has authority to issue notice and non payment of amount mentioned in the notice within 15 days is an offence.

However, in the case on hand, it is the specific case of the 2nd respondent that after issuance of the cheque in question by all the accused including the petitioners herein, his deceased mother issued legal notice, dated 07.10.2010, calling upon all the accused to pay the amount covered under the cheque. However, before lodging the complaint unfortunately she died on 21.10.2010. In that regard, it is specifically mentioned in the complaint that after the demise of his mother, on an application, the Tahsildar, Nandyal, Kurnool District, issued family member certificate showing the name of the 2nd respondent as legal heir of his deceased mother. By virtue of the said certificate, the 2nd respondent stepped into the shoes of his deceased mother and is a payee or holder in due course of the subject instrument. Therefore, the above said judgment cited by the counsel for the petitioners is not applicable to the facts and circumstances of the case on hand.

Counsel for the 2nd respondent, advancing his arguments, contended that the 2nd respondent, being the legal representative, can initiate and continue the proceedings under the provisions of Sections 138 and 142 of the Act. The legal representatives will step into the shoes of the original payee or the holder in due course and can continue the proceedings. He also would contend that the disputed contentions can be raised only during the course of trial, but not at the threshold. He also emphasized on the aspect that as the payee or the holder in due course i.e., the deceased mother of the 2nd respondent has already issued a legal notice, dated 07.10.2010, the same proceedings can be continued by the 2nd respondent being the son and legal representative. He further contended that any person can initiate action against anybody to set the law into motion. That being the position the proceedings initiated by the 2nd respondent being the legal representative are maintainable. He also relied on the proposition that legal representative can be brought on record during the pendency of the criminal proceedings and he can initiate and continue the proceedings under the Act.

Counsel for the 2nd respondent brought to the notice of the Court the definition of Holder and Holder in due course as per Sections 8 and 9 of the Act and contended that the 2nd respondent would come within the definition of Holder as well as Holder in due course, since he is entitled to recover the amount due from the petitioners being the legal representative of his deceased mother. To support his contention that any person can initiate action against anybody to set the law into motion, he brought to the notice of the Court the definition of Complaint

in Section 2(d) of the Code of Criminal Procedure. He also brought to the notice of the Court Section 256 Cr. P.C., which contemplate non-appearance or death of the complainant i.e., if the summons have been issued on a complaint, Section 256(2) Cr.P.C. contemplates that the provisions of sub-section (1) shall, so far as may be, apply also to cases where the non-appearance of the complainant due to his death. Basing on the above provisions, he would contend that the proceedings as initiated by the 2nd respondent for the offence under Sections 138 and 142 of the Act against the petitioners are maintainable. To substantiate his contentions, he has relied upon the following judgments: Chandra Babu v. Ramani, Anup Jagdish Agarwal v. Nilkunj Lalit Shah and others, Smt. Bhagava v. Sri Kadasiddeshwara Trading Company and another, Maddipatta Govindaiah Naidu and others v. Yelakaluri Kamalamma and another, Tripuraneni Sai Prasad v. State of A.P. and another, Balasaheb K. Thackeray and another v. Venkat Alias Babru and another, Gadala Vasantha (died) by L. ₹ and another v. Cybermate Infotek Ltd., Secunderabad and another and Jimmy Jahangir Madan v. Bolly Cariyappa Hindley (died) by L. ₹ 10,000.

In Chandra Babu (2 supra), a Division Bench of the High Court of Kerala while considering a similar issue pleased to observe as under:

Another important statutory provision in this regard is Section 53 which is as follows:

Holder deriving title from holder in due course: Aholder of a negotiable instrument who derives title from a holder in due course has the rights thereon of that holder in due course."

Therefore, a holder deriving title from the holder in due course has all the rights of a holder in due course. Therefore, legal representative of a holder in due course has all the rights of the holder in due course. Here, in this case, if the original payee is a holder in due course, his representative has all his rights. Therefore, rights under Sections 138 and 142 are applicable to the legal representative also if he derives title from the holder in due course.

Next contention is that there maybe other legal heirs and, therefore, complaint by the one legal heir/representative is not maintainable. That is a matter for evidence. Further, they are all curable defects and that is not a matter to be considered for quashing a complaint at an initial stage (see M.M.T.C. Ltd., and Anr. V. Medchil Chemicals & Pharma (P) Ltd., & Anr. (2002 (1) SCC 234).

In Anup Jagdish Agarwal (3 supra), the High Court of Bombay observed as follows:

These views have my respectful concurrence. Moreover, nothing contrary was brought to my notice. In my view, in the light of this statutory scheme and the decisions referred above, it can be safely concluded that a complaint can be filed by the legal representatives of the payee and merely because it is so filed, it cannot be held that it is not maintainable. Once, the complaint can be held to be maintainable, then, any larger issue need not be gone into at this prima facie stage. Whether the presumption is applicable or whether burden has been discharged by

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the accused by leading evidence to the contrary are all matters which must be gone into and decided at the trial. Merely because in a petition challenging the issuance of process, all pleas of the afore referred nature are raised, does not mean that the presumption is not available to the complainants at this stage. The stage at which presumption can be held to be rebutted is not this prima facie stage of issuance of process. It is not as if the accused will have no opportunity to prove to the contrary. The complaint is yet to be tried. However, the order issuing process on the complaint cannot be faulted on the ground raised in this petition. The first contention, therefore, must fail.

In Smt. Bhagava (4 supra), the High Court of Karnataka held as follows:

Having regard to the factual aspects and the settled principles of law in this regard, in the opinion of this Court, on the death of the payee, his legal heirs steps into the shoes of the payee for all practical purposes and such a person can also file and prosecute the complaint after completing the legal formalities. It is also necessary to mention that it would be incumbent upon the complainant to prove that the complainant is the legal representative of the deceased payee, in the event of accused disputing the same. In the case on hand, the payee had died and the wife of the payee, as the legal heir, had presented the cheque in question and on the cheque being dishonoured, legal notice had also been issued and thereafter, the proceedings had been initiated under Section 138 of the NI Act.

In Maddipatta Govindaiah Naidu (5 supra), the Court observed as follows:

On an examination of all the relevant provisions of the criminal procedure code and the judicial precedents on the question, the proposition that criminal proceedings abate on the death of the complainant appears to be legally unfounded and unacceptable. Criminal proceedings legally instituted do not terminate or abate merely on the death of the complainant. The cause of action for civil action bears no analogy to complaints of crime.

In Tripuraneni Sri Prasad (6 supra), the Court observed as follows:

Thus, in view of the clear legal position, as stated above, the objection that the son of the deceased cannot come on record and continue the prosecution cannot be sustained. The point is answered accordingly holding that the proceedings in C.C.Nos.230 of 2004 and 264 of 2004 ipso facto do not come to an end and could be continued by the son of the deceased.

In Balasaheb K. Thackeray (7 supra), the Apex Court held as under:

At this juncture it is relevant to take note of what has been stated by this Court earlier on the principles applicable. In *Ashwin Nanubhai Vyas v. State of Maharashtra* (AIR 1967 SC 983) with reference to Section 495 of the Code of Criminal Procedure, 1898 (hereinafter referred to as the old Code) it was held that the Magistrate had the power to permit a relative to act as the complainant to continue the prosecution. In *Jimmy Jahangir Madan v. Bolly Cariyappa Hindley* ((2004) 12 SCC 509) after referring to *Ashwin* case (1 supra) it was held that heir

of the complainant can be allowed to file a petition under Section 302 of the Code to continue the prosecution.

In Gadale Vasantha (died) (8 supra), this Court observed as follows:

In view of the above pronouncement of the Supreme Court in Jimmy Jahangir Madans case (supra), decision of the Madras High Court in Thothans case (supra) no longer holds the field. The lie does not die with death of the complainant in criminal law. Any person, whether legal representatives of the deceased-complainant or any other interested person can continue the proceedings by coming on record in the place of the deceased-complainant with permission of the Court and can continue the prosecution either under Section 302 or under Section 495 Cr.P.C.

By considering the intendment of the provisions as stated supra and the findings given by the various High Courts, including the Apex Court, in the above referred judgments, it goes to show that the legal representative of a deceased can maintain proceedings for the offences under Sections 138 and 142 of the Act as a payee or a holder in due course against the drawer. As per Sections 138 and 142 of the Act, a payee or a holder in due course should make a demand for payment of such money by giving a notice in writing to the drawer of the cheque within the stipulated period of receiving the information regarding dishonour of the cheque and in the event of drawer of such cheque failed to make payment of such amount to the payee or the holder in due course of the cheque within that stipulated period, entail the payee or the holder in due course to file a complaint and initiate proceedings. Further, for the purpose of taking cognizance under Section 142 of the Act, a complaint should be filed in writing by the payee or the holder in due course. Section 7 of the Act defines Payee as follows:

The person named in the instrument, to whom or to whose order the money is by the instrument directed to be paid, is called the Payee.

The holder in due course, as defined under Section 9 of the Act, is as follows:

Holder in due course: Holder in due course means any person who for consideration became the possessor of a promissory note, bill of exchange or cheque if payable to bearer, or the payee or endorsee thereof, if payable to order, before the amount mentioned in it became payable and without having sufficient cause to believe that any defect existed to the title of the person from whom he derived his title.

The specific contention raised by the petitioners herein, who are the accused in C.C.No.1374 of 2010, is that admittedly the 2nd respondent is not a payee or a holder in due course. The complaint is filed as a legal representative. The legal representative of the payee is not a holder in due course, since the subject instrument/cheque came into possession of the 2nd respondent as a legal representative of the deceased and not by paying consideration by him or an endorsement on the cheque in his favour by the original payee. In this context, Section 75 of the Act contemplates presentment or to agent, representative of deceased or assignee of insolvent, which reads as follows:

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Presentment or to agent, representative of deceased or assignee of an insolvent: Presentment for acceptance or payment may be made to the duly authorized agent of the drawee, maker or acceptor, as the case may be or where the drawee, maker or acceptor has died, to his legal representative or where he has been declared an insolvent, to his assignee.

The above provision provides that if the maker of the cheque is dead, payment can be demanded from the legal representatives of the drawer, maker or acceptor. The heading of the Section is very clear and it shows presentment of the negotiable instrument can be made by the representative of the deceased also. Section 78 of the Act provides to whom payment should be made. Per contra, Section 138 of the Act says that if the amount is paid to the holder of the instrument, there should be sufficient discharge of liability. The Holder as defined under Section 8 of the Act is as follows:

Holder: The Holder of a promissory note, bill of exchange or cheque means any person entitled in his own name to the possession thereof and to receive or recover the amount due thereon from the parties thereto.

Where the note, bill or cheque is lost or destroyed, its holder is the person so entitled at the time of such loss or destruction.

Section 53 of the Act contemplates a holder of a negotiable instrument who derives title from a holder in due course has the right thereon of that of a holder in due course. Therefore, the holder deriving a title from the holder in due course has all the rights of the holder in due course. Therefore, the legal representative of a holder in due course has all the rights of the holder in due course.

In the case on hand, the deceased mother of the 2nd respondent was the holder in due course. Therefore, the 2nd respondent by virtue of being a legal representative is a holder in due course and he got all the rights to initiate proceedings under the provisions of Sections 138 and 142 of the Act against the petitioners herein. Hence, there was no dispute on the proposition that the legal representative could file/initiate proceedings for realizing the amount.

Section 78 of the Act deals with to whom payment should be made and the same is as follows:

To whom payment should be made: Subject to the provisions of Section 82, clause (c) payment of the amount due on a promissory note, bill of exchange or cheque must, in order to discharge the maker or acceptor, be made to the holder of the instrument.

From the above provision, it is clear that the 2nd respondent holds the cheque after the death of his mother being the payee and as a legal heir he is entitled to possess the same in his own name and in view of Section 53 he is the holder in due course and can get a full discharge. Thus, under Section 53 of the Act, a legal representative/heir of the payee or holder in due course can maintain a complaint under Section 138 of the Act.

The other contention raised by the counsel for the petitioners that there may be other legal representatives and therefore the complaint filed by one legal heir

i.e., the 2nd respondent is not maintainable. However, that is a matter of evidence and the same can be cured. Apart from that it is not a matter to be considered for quashing the complaint at the initial stage.

In the above circumstances, this Court was of the opinion that the complaint is maintainable. The 2nd respondent being the legal representative of his deceased mother i.e., payee or holder in due course could file a complaint under Section 138 read with Section 142 of the Act. As such, this Court holds that there are no merits in the criminal petition and the same is dismissed. Interim order, if any, stands vacated.

In the circumstances, the II Additional Chief Metropolitan Magistrate at Nampally, Hyderabad is directed to dispose of the matter as expeditiously as possible, preferably within a period of six months from the date of receipt of a copy of this order, after appreciating the rival contentions made by the parties, since the matter is of the year 2010.

Check Your Progress

6. Explain about Cheques.
7. Describe about Holder and Holder in Due Course.

3.6 CROSSING OF CHEQUE, TYPES OF CROSSING

3.6.1 Crossing of Cheque

A cheque may be a open cheque or a crossed cheque. An open cheque is one that can be paid by the paying banker across the counter while crossed cheque cannot be paid across the counter. Crossing of cheques is a universally adopted practice. Crossing on a cheque is a direction to the paying banker that the payment shall not be made across the counter. The payment on a crossed cheque can be collected only through a banker.

Cheques are usually crossed as a measure of safety. Crossing is made by drawing two parallel transverse lines across the face of the cheque with or without the addition of certain words. The usage of crossing distinguishes cheques from other bills of exchange.

In this regard Section 123 of the Negotiable Instruments Act states:

“Where a cheque bears across its face an addition of the words ‘and company’ or any abbreviation thereof, between two transverse lines, or of two parallel transverse lines simply, either with or without the words ‘not negotiable’ that addition shall be deemed a crossing, and the cheque shall be deemed to be crossed generally”.

Who may cross the cheque: Crossing of a cheque is an instance of an alteration which is authorized by the Act. Thus, the following parties may cross a cheque:

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1. **Drawer:** The drawer of the cheque may cross the cheque generally or specially.
2. **Holder:** Where the drawer does not cross the cheque, the holder may cross it generally or specially. Even if the cheque is already crossed the holder may add the words 'not negotiable'.
3. **Banker:** Where a cheque crossed specially the collecting banker may again cross it specially to another banker as its agent for collection. This is the only case where the Act allows a second special crossing by a banker and for the purpose of collection

3.6.2 Types of Crossing

Crossing can be classified into three categories:

- (i) General
- (ii) Special
- (iii) Double Crossing.

(i) General Crossing

Section 123 of the Act refers to general crossing as, "Where a cheque bears across its face two traverse lines with or without the words "and Co." or any abbreviation thereof or the words 'not negotiable, the cheque is said to have been crossed generally.

"Where a cheque is crossed generally, the banker on whom it is drawn shall not pay it otherwise than to the banker" (Section 126). The payee may get the cheque collected through a bank of his choice.

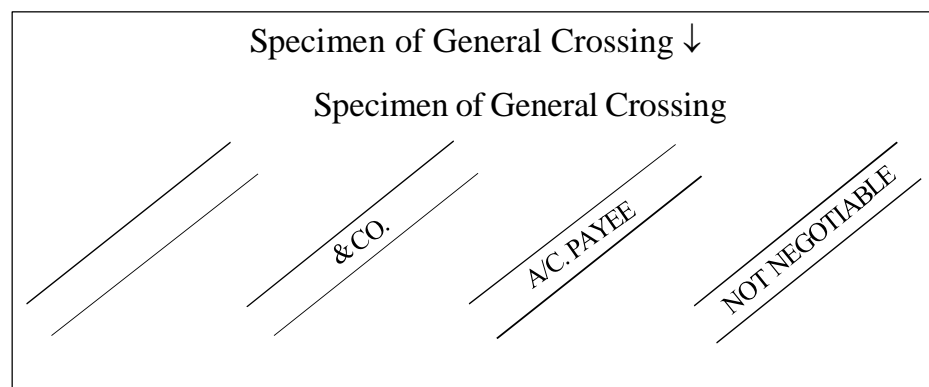


Figure 3.1: General Crossing

(ii) Special Crossing

Special crossing implies the specifications of the name of the banker on the face of the cheque. The object of special crossing is to direct the drawee banker to pay the cheque only if it is presented through the particular bank mentioned.

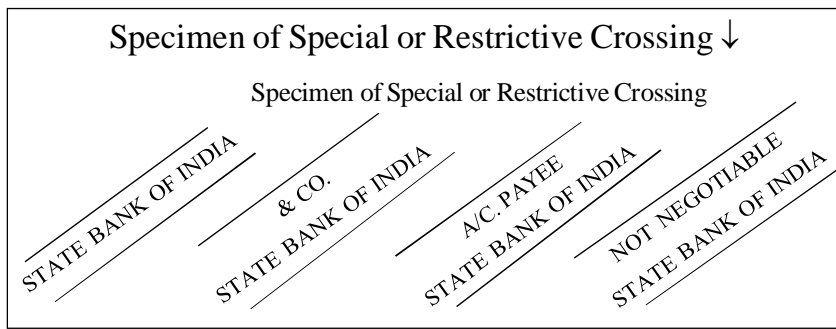


Figure 3.2: Special Crossing

In the case of special crossing the addition of two parallel transverse lines is not essential though generally the name of the bank to which the cheque is crossed specially is written between the two parallel transverse line (Section 124).

Section 126 of the Act provides that:

“Where a cheque is crossed specially, the banker on whom it is drawn shall not pay it otherwise than to the banker to whom it is crossed, or his agent for collection”.

Section 127 of the Act provides that:

“Where a cheque is crossed specially to more than one banker, except when crossed to an agent for the purpose of collection, the banker on whom it is drawn shall refuse payment thereof”.

Special crossing may take any of the following shapes:

- (i) “Account Payee” crossing or restrictive crossing
- (ii) This type of crossing acts as a warning to the collecting banker that the proceeds are to be credited into the account of the payee.
- (iii) These words are a mere direction to the receiving or collecting banker. These do not affect the paying banker who is under no duty to ascertain that the cheque in fact has been collected for the account of the person named as the payee.
- (iv) It has been held that crossing cheque with the words “Account Payee” and mentioning a bank is not a restrictive endorsement so as to invalidate further negotiation of the cheque by the endorsee.
- (v) It has been decided by the courts that an “account payee” crossing is a direction to the collecting banker as to how the proceeds are to be applied after receipt. The banker can disregard the direction only at his own risk and responsibility.

Cheque marked “Not Negotiable”

The general rule about the negotiability is that the holder in due course of a bill or promissory note or cheque takes the instrument free from any defect which might be existing in the title of the transferor. If the holder takes the instrument in good faith, before maturity and for valuable consideration, his claim is not defeated or affected by the defective title of the transferor. In case of any dispute, it is the

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transferor with the defective title who is liable. Addition of the words “not negotiable” to the crossing of a cheque, makes the position different.

Section 130 of the Negotiable Instruments Act provides that:

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“A person taking a cheque crossed generally or specially bearing in either case the words ‘not negotiable’ shall not have or shall not be able to give a better title to the cheque than the title of person from whom he took had”.

The effect of such a crossing is that the title of the transferee would be vitiated by the defect in the title of the transferor. The transferee of such a crossed cheque cannot get a better title than the transferor himself. The transferee cannot claim the right of a holder in due course by proving that he purchased the instrument in good faith for value.

(iii) Double Crossing

A cheque which is specially crossed has to be collected through the banker specified in the cheque. There is an exception to this for a special reason. If a banker, to whom a cheque is specially crossed, does not have a branch at the place of the paying banker, he may cross the cheque specially to another banker who acts as his agent for the purpose of collection of the cheque. It is very important to include the words “as agent for collection” under double crossing.

For instance,

Union Bank of India

to

State Bank of India

as agent for collection

Banker’s liability on payment of crossed cheque in due course

In respect of a crossed cheque it is presumed that the banker, on whom it is drawn, has made payment to the true owner of the cheque, though in fact, the amount of the cheque may not reach the true owner. In other words, the banker making payment in due course is protected, whether the money is or is not, in fact, received by the true owner of the cheque (Section 128). Banker’s liability on wrong payment of a crossed cheque section 126 of the Act states that:

- (a) In the case of generally crossed cheque the banker shall not pay it otherwise than to a banker, and
- (b) In the case of a specially crossed cheque it shall not be paid by the banker otherwise than to the banker to whom it is crossed or to his agent for collection.

Where the drawee banker pays a crossed cheque otherwise than in accordance with the provisions of Section 126 it shall be liable to the true owner of the cheque for any loss he may have sustained (section 129).

Protection of Banker in respect of uncrossed Cheques

Section 85(2) reads: When a banker makes payment on an uncrossed cheque in due course he is authorized to debit the account of his customer with the amount so paid irrespective of the genuineness of the endorsement thereon.

For example,

a cheque is drawn payable to N or order and it is stolen. Thereafter, the thief or someone else forges N's endorsement and presents the cheque to the bank for encashment. On paying the cheque, the banker would be able to debit the drawer's account with the amount of the cheque. The original character of the cheque issued as bearer, is not altered by subsequent endorsements, so far as the paying bank is concerned, provided that the payment is made in due course. Hence, the proposition that "once a bearer instrument always a bearer instrument".

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Protection in respect of crossed cheques

When a banker pays a cheque drawn by his customer in accordance with section 126 of the Act he can debit the drawer's account with the amount paid, even though the amount of the cheque does not reach the true owner.

Prerequisites for claiming protection

The protection in both the cases referred above can be availed only if the payment has been made in due course i.e.,

- (a) According to the apparent tenor of the instrument,
- (b) In good faith and without negligence.
- (c) To any person in possession thereof,
- (d) In circumstances that do not incite any suspicion that he is not entitled to receive payment of the cheque.

Endorsement

The word 'endorsement' in its literal sense means, a writing on the back of an instrument. But under the Negotiable Instruments Act it means, the writing of one's name on the back of the instrument or any paper attached to it with the intention of transferring the rights therein. Thus, endorsement is signing a negotiable instrument for the purpose of negotiation. The person who effects endorsements is called an 'endorser' and the person to whom negotiable instrument is transferred by endorsement is called the 'endorsee'.

An endorsement on a negotiable instrument, such as a cheque or a promissory note, has the effect of transferring all the rights represented by the instrument to another individual. The ordinary manner in which an individual endorses a cheque is by placing his or her signature on the back of it, but it is valid even if the signature is placed somewhere else, such as on a separate paper, known as Alonge, which provides space for signature.

Essentials of a Valid Endorsement

The following are the essentials of a valid endorsement:

1. It must be on the instrument. The endorsement may be on the back or face of the instrument and if no space is left on the instrument, it may be made on a separate paper attached to it called Alonge. It should usually be in ink.

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2. It must be made by the maker or holder of the instrument. A stranger cannot endorse it.
3. It must be signed by the endorser. Full name is not essential. Initials may suffice. Thumb-impression should be attested. Signature may be made on any part of the instrument.
4. It may be made either by the endorser merely signing his name on the instrument (it is a blank endorsement) or by any word showing an intention to endorse or transfer the instrument to a specified person (it is a full endorsement). No specific form of words are prescribed for an endorsement. But intention to transfer must be present.
5. It must be completed by delivery of the instrument. The delivery must be made by the endorser himself or by somebody on his behalf with the intention of passing property therein. Thus, where a person endorses an instrument to another and keeps it in his papers where it is found after his death and then delivered to the endorsee, the latter gets no right on the instrument.
6. It must be an endorsement of the entire bill. A partial endorsement i.e. which purports to transfer to the endorsee a part of the amount payable only does not operate as a valid endorsement.

Kinds of Endorsements

There are basically five types of endorsement. They are:

Endorsement means signing one's name on the back of negotiable instrument like bills of exchange a promissory note or a cheque with a view to transfer the Interest, right, property or title in the instrument to another person.

1. **Blank endorsement:** The endorsement in which the endorser merely signs his name on the back of the instrument without mentioning the name of the person to whom the instrument is endorsed. In the case of an endorsement in blank it means there will be no endorsee at all, only the endorser put his signature and then the cheque become payable to bearer. It is also known as general endorsement.
2. **Full endorsement:** It is an endorsement in which the endorser writes not only his name, but also the name of the person to whom the instrument is endorsed on the back of the instrument. The blank endorsement can be converted into endorsement of full. Under section 49 of the negotiable instrument act, a holder of a cheque endorsed in blank may convert the endorsement in blank into full, by writing above the endorser's signature with a direction to pay the instrument to another person or his order.
3. **Restrictive endorsement:** It is an endorsement in which the endorser restricts the further transferability in express words to some specified person only. It prohibits or restricts further negotiation of the instrument or which expresses that it is the only authority to deal with the instrument as directed. As an example if it is written on the instrument "pay X only or pay X for my use or pay the contents to Mr. X only".

4. **Conditional endorsement:** It is an endorsement which contains a condition made by the endorser. The endorsee can receive the amount only on the fulfillment of the condition or events. For instance, pay Mr. Z, if he returns to Bangalore.
5. **Sans recourse endorsement:** Under this endorsement, the endorser frees himself from any such liability arising from the dishonour of the instrument. For example, “pay Mr. X at his own risk”.
6. **Sans frais endorsement:** In this type of endorsement, the endorser makes it clear that no one should incur any expense on his account in respect of the negotiable instrument.
7. **Facultative endorsement:** In case of facultative endorsement, the endorser waives or surrenders his right to receive the notice of dishonour by writing the words “Notice of dishonour waived” after writing the name of the endorsee.

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Legal Provisions Regarding Endorsement

The legal provisions regarding endorsement are:

- (i) The endorsement may be cancelled before delivery.
- (ii) It shall be completed by delivery. It may be actual or constructive.
- (iii) The endorsement should be made for the full value of the instrument. If the value of the instrument is partially cleared the endorsement shall be made for the balance amount.
- (iv) It is implied that the endorsement is made in the order in which it is shown on the face or back of the instrument.
- (v) Endorsement may be made on the back of the cheque or on the face of the instrument or on a separate slip.
- (vi) It should be in writing and the endorser should sign the instrument.

Check Your Progress

8. Explain about Crossing of Cheque.

3.7 DISHONOR AND DISCHARGE OF NEGOTIABLE INSTRUMENTS

3.7.1 Dishonor of Negotiable Instruments

Dishonor of the negotiable instruments means that loss of honor or disrespect the tool on the part of the maker, drawer, or acceptor etc. which led to the consequence and that is non- realization of payment due on the instrument. To elaborate it means that when a bill of exchange is presented, and it is not accepted or it is not obtained by the acceptor it is called dishonor of cheque or any negotiable instruments.

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Types of Dishonour

Dishonour of cheque can be divided into two categories i.e.,:

- (a) ***Rightful Dishonour:*** Dishonour of cheque by the drawee banker for any of the reasons specified above or for any other rightful reason. In this case there is no remedy available against the banker but the holder in due course has remedy both civil and criminal against the drawer.
- (b) ***Wrongful Dishonour:*** Dishonour of cheque by the banker due to negligence or carelessness by its employees. The drawer may bring an action against the bank for losses suffered by him. The payee has no action against the banker in this case.

Dishonour of Cheque is an Offence

Section 138 of the Negotiable Instruments Act states that the return of a cheque by a banker because the money standing to the credit of the account holder is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from the account by an agreement made with the bank, is a criminal offence. The drawer shall be deemed to have committed an offence and such offence will be punishable with imprisonment for a term up to two years or with a fine twice the amount of the cheque or both.

Provisions of section 138 of the Act are applicable only if –

- (a) The cheque in question has been issued in discharge of a liability only. Unless contrary is proved, as per the provisions of section 139, a cheque is presumed to have been received by the holder in discharge of a debt or liability. A cheque given as gift will not fall in this category.
- (b) The cheque is presented to the bank for payment within three months or its specific validity period, whichever is earlier.
- (c) The payee or holder in due course has given notice demanding payment within thirty days of the receiving information of dishonour which should be for a reason other than insufficiency of funds.
- (d) The drawer does not make payment within 15 days of the receipt of the notice. The complaint can be made only by the payee/holder in due course, within one month.

Offences by companies: If the person committing an offence under section 138 is a company, every person who was in charge of the affairs of the company and was responsible for the business of the company at the time the offence was committed shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly. (Section 139) However, a person shall not be punishable under section 139 if it is proved that the offence has been committed without his knowledge or consent and that he had taken all due care to prevent commission of the offence.

Action to be taken: If a cheque is dishonoured for lack of funds, the drawer can be punished with imprisonment up to one year and/or within a fine up to double the amount of the cheque if:

- (i) The cheque has been presented to the bank within a year from the date on which it was drawn or within its validity.
- (ii) The payee or holder makes a demand for payment by giving notice in writing to the drawer within thirty days of the receipt of the information.
- (iii) The drawer of the cheque fails to make payment within fifteen days of receipt of the notice.

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Grounds of Dishonour of Cheques

Section 138 creates statutory offence in the matter of dishonour of cheques on the ground of insufficiency of funds in the account maintained by a person with the banker. Section 138 of the Act can be said to be falling either in the Acts which are not criminal in real sense, but are acts which in public interest are prohibited or those where although the proceeding may be in criminal form, they are really only a summary mode of enforcing a civil right. Normally in criminal law existence of guilty intent is an essential ingredient of a crime. However the Legislature can always create an offence of absolute liability or strict liability where 'mens rea' is not all necessary.

Creation of the strict liability is an effective measure by encouraging greater vigilance to prevent usual callous or otherwise attitude of drawers of cheques in discharge of debts or otherwise. The words as appearing in clause (b) of section 138 cannot be construed even to imply failure without reasonable cause in view of the explicit language in which the provisions is couched, the principle of strict liability incorporated in the main enacting clause.

The Supreme Court in the case of Electronics Trade and Technology Development Corporation (Supra(c)) struck a somewhat discordant note whilst going out of its way to observe that sec. 138 of the Negotiable Instruments Act is not attracted if the payee being put to notice not to deposit a cheque issued in his favour nonetheless presents such cheque for encashment and finds that it is dishonoured. It was really concerned with a situation where the drawer after issuing a cheque instructed the bank to stop payment and when the cheque was dishonoured contended that Sec. 138 was not attracted because it was not a case of dishonour for insufficiency of funds. This contention was rejected by the Supreme Court rightly holding that the provisions of Sec. 138 could not be whittled down by issuing a stop payment order to the drawer's bank after a cheque had been issued by the drawer in discharge of his liability" but it needlessly added that instructions to the payee not to deposit a cheque issued to him before he actually presented it would have the effect of avoiding the rigors of Sec. 138. The Supreme Court also held that the said section raised a presumption of dishonesty if a person draws a cheque on a bank without supporting funds in the account at that time.

Ingredients and requirements of the Penal Provisions

Section 138 creates an offence for which the mental elements are not necessary. It is enough if a cheque is drawn by the accused on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for discharge in whole or in part, of any debt or other liability due.

Therefore, whenever the cheques are on account of insufficiency of funds or reasons referable to the drawer's liability to provide for funds, the provisions of section 138 of the Act would be attracted, provided the following conditions are satisfied.

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(1) Existence of a Live account

Existence of a "live account" at the time of issue of cheque is a condition which is precedent for attracting penal liability for the offence under this section.

(2) Issue of a cheque in discharge of a debt or liability

The cheque issued and unpaid by the bank must have been issued in discharge of a debt or other liability wholly or in part. Where a cheque is issued not for the purposes of discharge of any debt or other liability, the maker of the cheque is not liable for prosecution under section 138 of the Act. A cheque given as a gift or for any other reasons and not for the satisfaction of any debt or other liability, partly or wholly even if it is returned unpaid will not meet penal consequences. If the above conditions are fulfilled, irrespective of the mental conditions of the drawer he shall be deemed to have committed an offence, provided the other three requisites are fulfilled.

- (a) ***Presentation of the cheque within three months or within the period of its validity:*** The cheque must have been presented to the bank within a period of three months from the date on which it is drawn or its period of validity, whichever is earlier. However if the period of validity of the cheque is not specified or prescribed the cheque is presented within three months from the date the cause of action can arise. The six months are taken from the date the cheque was drawn.
- (b) ***Return of the cheque unpaid for reason of insufficiency of funds:*** The cheque must be returned either because the money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the arrangement made to be paid from that account by an agreement with the bank. Even if the cheque is returned with the endorsement "account closed" section 138 is attracted.
- (c) ***Issue of the notice of dishonour demanding payment within thirty days of receipt of information as to dishonour of the cheque:*** The payee or the holder in due course of the cheque has to give a notice in writing making a demand for payment of the said amount of money to the drawer of the cheque. Such notice must be given within 30 days of information from the bank regarding the return of cheque as unpaid.
- (d) ***Failure of the drawer to make the payment within fifteen days of the receipt of the payment:*** After the receipt of the above notice the drawer of the cheque has to make payment of the said amount of money to the payee or to the holder in due course of the cheque within 15 days of the receipt of the notice. If the payment is not made after the receipt of the notice within stipulated time a cause of action for initiating criminal proceedings under this section will arise. It is distinctly possible that each of these ingredients may arise in a different locality and therefore the court in each of these localities may assume jurisdiction to try the

offence. This is the plain reading of section 177 of the Criminal Procedure Code. (K.Bhaskaran vs Sankaran Vaidhyan Balan reported in 1999 Criminal Law Journal 4606)

Negotiable Instrument
Act, 1881

Presumptions

Under Section 139, a court must presume that the holder of a cheque received it for the discharge, in whole or in part, of a legally enforceable debt or other liability. This presumption is rebuttable.

Consequences for dishonour of Cheques

A paying banker must refuse payment on cheques, issued by his customers, in the following circumstances:

1. **Insufficiency of funds:** When adequate funds are not available in the account of a customer, then the cheque can be dishonoured. If the banker pays a countermanded cheque, he will not only be required to reverse the entry but also be held liable to pay damages for dishonouring the cheques presented subsequently which would have been honoured otherwise.
2. **Notice of the Customer's Death:** The banker should not make payments on cheques presented after the death of the customer. He should return the cheque with the remark 'Drawer Deceased'.
3. **Notice of the Customer's Insolvency:** A banker should refuse payment on the cheques soon after the customer is adjudicated as insolvent.
4. **Receipt of the Garnishee Order:** Where Garnishee order is received attaching the whole amount, the banker should stop payment on cheques received after the receipt of such an order. But if the order is for a specific amount, leaving the specified amount, cheques should be honoured if the remaining amount is sufficient to meet them.
5. **Presentation of a post-dated cheque:** The banker may refuse the cheque when the cheque is presented before the valid date.
6. **Stale Cheques:** When the cheque is presented after a period of three months from the date it bears, the banker may refuse to make payment.
7. **Material Alterations:** When there is material alteration in the cheque, the banker may refuse payment.
8. **Drawer's Signature:** If the signature of the drawer on the cheque does not tally with the specimen signature, the banker may refuse to make payment.

Wrongful dishonor of Cheques

The various consequences for wrongful dishonour of cheques are as follows:

- (i) The damages that the banker has to pay will be more in case of wrongful dishonour of cheques of the trader-customer. *Example:* New Central Hall vs. United Commercial Bank Ltd.

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- (ii) The amount of damages claimed by the customer need not depend on the amount of the cheque. It means the smaller is the amount of the cheque dishonoured, the greater will be the amount of damages. This is because it is presumed that the dishonour of a cheque of a smaller amount will result in greater loss to the credit of the customer.
- (iii) The customer can declare substantial general damages without having any monetary loss.
- (iv) In case of trustee account, normally substantial general damages will be awarded for wrongful dishonour.
- (v) In case of non-trader customer, the damage will be nominal.
- (vi) The particular damages are awarded for the financial loss incurred by the customer as a consequence of wrongful dishonour, provided the loss must be proved by the customer.

Notice of Dishonour

Notice of dishonor means bringing either verbally or by writing, to the knowledge of the drawer or indorser of an instrument, the fact that a specified negotiable instrument, upon proper proceedings taken, had not been accepted or hasn't been paid, and that the party notified is expected to paid it.

Sec. 89. To whom notice of dishonor must be given. - Except as herein otherwise provided, when a negotiable instrument has been dishonored by non-acceptance or non-payment, notice of dishonor must be given to the drawer and to each indorser, and any drawer or indorser to whom such notice is not given is discharged.

Sec. 90. Given by whom. - The notice may be given by or on behalf of the holder, or by or on behalf of any party to the instrument who might be compelled to pay it to the holder, and who, upon taking it up, would have a right to reimbursement from the party to whom the notice is given.

Sec. 91. Notice given by agent. - Notice of dishonor may be given by any agent either in his own name or in the name of any party entitled to given notice, whether that party be his principal or not.

Sec. 92. Effect of notice on behalf of holder. - Where notice is given by or on behalf of the holder, it inures to the benefit of all subsequent holders and all prior parties who have a right of recourse against the party to whom it is given.

Sec. 93. Effect where notice is given by party entitled thereto. - Where notice is given by or on behalf of a party entitled to give notice, it inures to the benefit of the holder and all parties subsequent to the party to whom notice is given.

Sec. 94. When agent may give notice. - Where the instrument has been dishonored in the hands of an agent, he may either himself give notice to the parties liable thereon, or he may give notice to his principal. If he gives notice to his principal, he must do so within the same time as if he were the holder, and the principal, upon the receipt of such notice, has himself the same time for giving notice as if the agent had been an independent holder.

Sec. 95. When notice is sufficient. - A written notice need not be signed and an insufficient written notice may be supplemented and validated by verbal communication. A misdescription of the instrument does not vitiate the notice unless the party to whom the notice is given is in fact misled thereby.

Sec. 96. Form of notice. - The notice may be in writing or merely oral and may be given in any terms which sufficiently identify the instrument and indicate that it has been dishonored by non-acceptance or non-payment. It may in all cases be given by delivering it personally or through the mails.

Sec. 97. To whom notice may be given. - Notice of dishonor may be given either to the party himself or to his agent in that behalf.

Sec. 98. Notice where party is dead. - When any party is dead and his death is known to the party giving notice, the notice must be given to a personal representative, if there be one, and if with reasonable diligence, he can be found. If there be no personal representative, notice may be sent to the last residence or last place of business of the deceased.

Sec. 99. Notice to partners. - Where the parties to be notified are partners, notice to any one partner is notice to the firm, even though there has been a dissolution.

Sec. 100. Notice to persons jointly liable. - Notice to joint persons who are not partners must be given to each of them unless one of them has authority to receive such notice for the others.

Sec. 101. Notice to bankrupt. - Where a party has been adjudged a bankrupt or an insolvent, or has made an assignment for the benefit of creditors, notice may be given either to the party himself or to his trustee or assignee.

Sec. 102. Time within which notice must be given. - Notice may be given as soon as the instrument is dishonored and, unless delay is excused as hereinafter provided, must be given within the time fixed by this Act.

Sec. 103. Where parties reside in same place. - Where the person giving and the person to receive notice reside in the same place, notice must be given within the following times:

- (a) If given at the place of business of the person to receive notice, it must be given before the close of business hours on the following day.
- (b) If given at his residence, it must be given before the usual hours of rest of the day following.
- (c) If sent by post, it must be deposited in the post office in time to reach him in usual course on the following day.

Sec. 104. Where parties reside in different places. - Where the person giving and the person to receive notice reside in different places, the notice must be given within the following times:

- (a) If sent by post, it must be deposited in the post office in time to go by mail the following day from the day of dishonor or if there be no mail at a convenient hour on last day, by the next mail thereafter.

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- (b) If given otherwise than through the post office, then within the time that notice would have been received in due course of post, if it had been deposited in the post office within the time specified in the last subdivision.

Sec. 105. When sender is deemed to have given due notice. – Where notice of dishonor is duly addressed and deposited in the post office, the sender is deemed to have given due notice, notwithstanding any miscarriage in the mails.

Sec. 106. Deposit in post office; what constitutes. – Notice is deemed to have been deposited in the post-office when deposited in any branch post office or in any letter box under the control of the post-office department.

Sec. 107. Notice to subsequent party; time of. – Where a party receives notice of dishonor, he has, after the receipt of such notice, the same time for giving notice to antecedent parties that the holder has after the dishonor.

Sec. 108. Where notice must be sent. – Where a party has added an address to his signature, notice of dishonor must be sent to that address; but if he has not given such address, then the notice must be sent as follows:

- (a) Either to the post-office nearest to his place of residence or to the post-office where he is accustomed to receive his letters; or
- (b) If he lives in one place and has his place of business in another, notice may be sent to either place; or
- (c) If he is sojourning in another place, notice may be sent to the place where he is so sojourning.

But where the notice is actually received by the party within the time specified in this Act, it will be sufficient, though not sent in accordance with the requirement of this section.

Sec. 109. Waiver of notice. – Notice of dishonor may be waived either before the time of giving notice has arrived or after the omission to give due notice, and the waiver may be expressed or implied.

Sec. 110. Who is affected by waiver of notice. – Where the waiver is embodied in the instrument itself, it is binding upon all parties; but, where it is written above the signature of an indorser, it binds him only.

Sec. 111. Waiver of protest. – A waiver of protest, whether in the case of a foreign bill of exchange or other negotiable instrument, is deemed to be a waiver not only of a formal protest but also of presentment and notice of dishonor.

Sec. 112. When is notice dispensed with. – Notice of dishonor is dispensed with when, after the exercise of reasonable diligence, it cannot be given to or does not reach the parties sought to be charged.

Sec. 113. Delay in giving notice; how can excused it be? – Delay in giving notice of dishonor is excused when the delay is caused by circumstances beyond the control of the holder and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate, notice must be given with reasonable diligence.

Sec. 114. When notice need not be given to drawer. – Notice of dishonor is not required to be given to the drawer in either of the following cases:

- (a) Where the drawer and drawee are the same person;
- (b) When the drawee is fictitious person or a person not having capacity to contract;
- (c) When the drawer is the person to whom the instrument is presented for payment;
- (d) Where the drawer has no right to expect or require that the drawee or acceptor will honor the instrument;
- (e) Where the drawer has countermanded payment.

Sec. 115. When notice need not be given to indorser. Notice of dishonor is not required to be given to an indorser in either of the following cases:

- (a) When the drawee is a fictitious person or person not having capacity to contract, and the indorser was aware of that fact at the time he indorsed the instrument;
- (b) Where the indorser is the person to whom the instrument is presented for payment;
- (c) Where the instrument was made or accepted for his accommodation.

Sec. 116. Notice of non-payment where acceptance is refused. - Where due notice of dishonor by non-acceptance has been given, notice of a subsequent dishonor by non-payment is not necessary unless in the meantime the instrument has been accepted.

Sec. 117. Effect of omission to give notice of non-acceptance. - An omission to give notice of dishonor by non-acceptance does not prejudice the rights of a holder in due course subsequent to the omission.

Sec. 118. When protest need not be made; when must be made. - Where any negotiable instrument has been dishonored, it may be protested for non-acceptance or non-payment, as the case may be; but protest is not required except in the case of foreign bills of exchange.

3.7.2 Discharge of Negotiable Instruments

Discharge of Negotiable Instruments

Discharge of negotiable instrument means loss of honour or respect for the instrument in question on the part of the maker, drawee, or acceptor, as the case may be, which eventually results in non-realization of payment due on the instrument.

Modes of Negotiable Instruments

1. Dishonour by non-acceptance

Any type of negotiable instruments, i.e., bill of exchange, promissory note, or cheque may be dishonoured by non-payment by the drawee/acceptor thereof. But a bill may also be dishonoured by non-acceptance because bill of exchange is the only negotiable instrument which requires its presentment for acceptance and non-acceptance thereof, can amount to dishonour.

When is a bill said to be dishonoured by Non-Acceptance?

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A bill is said to be dishonoured by non-acceptance in the following circumstances.

When the drawee or one of the several drawees, not being partners, commit default in acceptance upon being duly required to accept the bill. In this regard Section 63 expressly provides that the holder must, if so required by the drawee of a bill of exchange presented to for acceptance, allow the drawee forty-eight hours (exclusive of public holidays) to consider whether he will accept it or not.

Where presentment is required and the bill remains unrepresented?

Where the drawee is incompetent to enter into a valid contract?

Where the bill is given a qualified acceptance?

If the drawee is a fictitious person?

If the drawee cannot be found even after reasonable search?

Where the drawee has either become insolvent or is dead and the holder does not present the bill to the assignee or legal representative of the insolvent or deceased drawee.

It is relevant to note that where a drawee-in-case-of-need is named in a bill of exchange or in any endorsement thereon, the bill is not dishonoured until it has been dishonoured by such drawee.

2. Dishonour of negotiable instrument by Non-payment

A promissory note, bill of exchange or cheque is said to be dishonoured by non-payment when the maker of the note, acceptor of the bill or drawee of the cheque commit default in payment upon being duly required to pay the same. Also the holder of a bill or pro-note may treat it as dishonoured, without placing for payment when presentment for payment is excused expressly by the maker of the pro-note or acceptor of the bill and the note or bill when overdue remains unpaid.

3. Dishonour by non-acceptance vs Dishonour by non-payment

If a bill is dishonoured either by non-acceptance or by non-payment, the drawer and all the endorers of the bill are liable to the holder, provided notice of such dishonour is given to them. The drawee, on the other hand, shall be liable to the holder only in the event of dishonour by non-payment.

4. Dishonour of Cheque for insufficiency of funds in the account

A cheque drawn by a person on an account maintained by him with a bank for payment of any amount of money to another person can be returned unpaid for lack of enough funds in the said account. This is called dishonour of cheques for insufficiency of funds (in the drawer's account). In such cases, the drawer is also criminally liable for this offense and may be punished with imprisonment for a term, which may extend to one year, or with fine that may extend to twice the amount of the cheque or with both.

5. Dishonour of cheque vs promissory note

A cheque being drawn on specified bank and not expressed to be payable otherwise than on demand is never presented to the drawee bank for acceptance and same

is the case of a promissory note. However, a promissory note made payable at a certain period after sight is required to be presented for sight, but it is never subject to presentment for acceptance.

How is a party to a negotiable instrument discharged?

A party to a negotiable instrument is discharged in the following ways:

- (a) By cancellation of the name of a party to the instruments.
- (b) By release of any party to the instruments.
- (c) By payments.
- (d) By allowing drawee more than 48 hours to accept.
- (e) By delay in presenting a cheque for payment.
- (f) By payment in due course of a cheque (payable to order).
- (g) By making qualified acceptance.
- (h) By non-presentment for acceptance of a bill of exchange.
- (i) By operation of law.
- (j) By material alteration.

Discharge of Negotiable Instruments

Discharging of a negotiable instrument means that all the rights of action under it are completely extinguished and it ceases to be negotiated anymore.

Modes of Discharge of Liability in Negotiable Instrument

Under following modes the maker, acceptor and endorser of a negotiable instrument is discharged from liability:

By Cancellation

Under this scheme, a holder who cancels acceptor's or endorser's name apparently or with intention to discharge him from the negotiable instrument, the latter is said to have discharged.

By release

A holder thereof who, by means other than cancellation, discharges maker, acceptor or endorser, and to all parties deriving title under such holder after notice of such discharge.

By Payment in the Due Course

When the payment on an instrument, at its maturity, is made by the party liable then all the parties stand discharged from the liability of negotiable instrument.

By Allowing Drawee

In this case, if a person holding the negotiable instrument allows the drawee for over 48 hours to consider whether he will accept the same then all the previous one's who didn't consent to the said allowance stand discharged.

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Material Alteration

In case a material alteration brought in the instrument, all the parties who do not consent to the said alteration stand discharged from the liability.

Notice of Dishonor

In case the holder of negotiable instrument fails to issue notice of dishonor to all the previous parties, they stand discharged.

By Operation of Law

Liability against the negotiable instrument also stand discharged in case of legal operations like;

- (a) Insolvency of debtor.
- (b) Loss of remedy on expiry of the limitation.
- (c) Merger of note into judgement debt.
- (d) Merger of lesser security into higher security.

Cases related to Negotiable Instrument

K. Ramalakshmi vs Swarnalatha on 4 November, 2013

It is brought to the notice of this Court that the learned Judicial Magistrates in some districts take the complaints filed under Section 138 of Negotiable Instruments Act as Calendar Cases while some others take them on file as Summary Trial Cases. In this context, Negotiable Instruments Amendment Act, 2002 has to be taken note of and followed in letter and spirit. Section 143 which has been inserted by the Amendment Act of 2002, and stipulates that notwithstanding anything contained in the Code of Criminal Procedure, all offences contained under Chapter XVII of Negotiable Instruments Act dealing with dishonour of cheques for insufficiency etc. of funds in the accounts, shall be tried by a Judicial Magistrate and the provisions of Sections 262 to 265 Cr.P.C, prescribing procedure for summary trials, shall apply to such trials and it shall be lawful for a Magistrate to pass sentence of imprisonment for a term not exceeding one year and an amount of fine exceeding ₹ 5,000 and it is further provided that in the course of a summary trial, if it appears to a Magistrate that the nature of the case requires passing of a sentence of imprisonment, exceeding one year, the Magistrate, after hearing the parties, record an order to that effect and thereafter recall any witness and proceed to hear or rehear the case in the manner provided in Criminal Procedure Code.

It is brought to the notice of this Court that the learned Judicial Magistrate in some districts take the complaints filed under Section 138 of Negotiable Instruments Act as Calendar Cases while some others take them on file as Summary Trial Cases. In this context, Negotiable Instruments Amendment Act 2002 has to be taken note of and followed in letter and spirit. Section 143 which has been inserted by the Amendment Act of 2002 stipulates that notwithstanding anything contained in the Code of Criminal procedure, all offences contained under Chapter XVII of Negotiable Instruments Act dealing with dishonour of cheques for insufficiency etc. of funds in the accounts, shall be tried by a Judicial Magistrate and the provisions of Sections 262 to 265, Cr.P.C. prescribing procedure for summary trials, shall

apply to such trials and it shall be lawful for a Magistrate to pass sentence of imprisonment for a term not exceeding one year and an amount of fine (not) exceeding ₹ 5,000 and it is further provided that in the course of a summary trial, if it appears to a Magistrate that the nature of the case requires passing of a sentence of imprisonment, exceeding one year, the Magistrate (may), after hearing the parties, record an order to that effect and thereafter recall any witness and proceed to hear or rehear the case in the manner provided in Criminal Procedure Code."

It is to be pointed out that as per Section 143 of the Negotiable Instruments Act, 2002 (with effect from 06.02.2003) the Judicial Magistrate First Class may pass sentence of fine exceeding ₹ 5,000. The limitation prescribed in Section 29(2) of Cr.PC., has been obviated as per the decision of Shaila P.Prabhu v. Nagendra K.Mallya reported in (1 (2007 B.C.377 (Karnt.)). Further, Section 143 of the Negotiable Instruments Act, 1881 provides for Summary Trial of Cases under the Negotiable Instruments Act with a view to speed up disposal of cases.

In the light of the aforesaid detailed discussions and in view of the fact that the Judicial Magistrate is required to follow the summary procedure in terms of Section 143 of the Negotiable Instruments Act, while trying an offence under Section 138 of Negotiable Instruments Act by applying the ingredients of Sections 262 to 265 of Cr.PC., and further in the course of trial if the nature of the case is one where sentence of imprisonment exceeding a year may have to be awarded or for any other reason it is untenable to try the case summary, then option is always available to the Judicial Magistrates to hear the parties and pass an order to that effect and later to recall any witnesses and to proceed either to hear or rehear the case, as per the procedure envisaged in Trial of Summary Cases viewed in that perspective. In the instant case on hand, the learned Judicial Magistrate No.1, Tirunelveli, while passing the impugned order on 10.01.2013 in C.C.No.9 of 2013 has not heard the parties (it is to be remembered that on behalf of the Petitioner / Accused Section 317 petition was filed and allowed and only Accused counsel was present) and as such it is pellucidly clear that the Learned Judicial Magistrate No.1, Tirunelveli while converting the case from STC into CC had not borne in mind the fact that the case relating to an offence under Section 138 of the Negotiable Instruments Act is to be tried as a summons case (under Section 143 of the Negotiable Instruments Act) and this has ultimately lead to miscarriage of justice. Further in as much as the impugned order, dated 10.01.2013, passed by the Learned Judicial Magistrate No.1, Tirunelveli while converting the case in Summary Trial Case in STC No.1154 of 2010 as Calendar Case in C.C.No.9 of 2013 is not in tune with the ingredients of the Negotiable Instruments Act (pertaining to the trial of offence under Section 138 of the Negotiable Instruments Act), as such, the said order suffers from impropriety and patent illegality in the eye of law and this Court necessarily interferes with the said order and sets aside the same in the interest of justice. Consequently, the Revision Petition succeed.

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Check Your Progress

9. Explain about Dishonour of Negotiable Instruments.

3.8 ANSWERS TO 'CHECK YOUR PROGRESS'

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1. Describe about Negotiable Instrument Act, 1881.

Negotiable Instruments Act, 1881 is an act in India dating from the British colonial rule that is still in force largely unchanged. A negotiable instrument is a piece of paper which entitles a person to a sum of money and which is transferable from one person to another by mere delivery or by endorsement and delivery. There were total 142 Sections in the Negotiable Instruments Act 1881 when it came into force. The act was amended and amendment Act inserts five new sections from 143 to 147 touching various limbs of the parent Act and Cheque truncation through digitally were also included and the amendment Act has been recently brought into force on Feb. 6, 2003.

2. State the features of Negotiable Instrument Act, 1881.

- (i) The possessor of the instrument is the holder and owner thereof. A negotiable instrument does not merely give possession of the instrument, but right to property.
- (ii) The holder in good faith and for value called the 'holder in due course' gets the instrument free from all defects of any previous holder.
- (iii) The holder can sue upon the negotiable instrument in his own name. All prior parties are liable to him. A holder in due course can recover the full amount of the instrument.
- (iv) The holder in due course is not affected by certain defenses which might be available against previous holder, for example, fraud to which he is not a party.

3. Discuss the concept of Promissory Note.

A "promissory note" is an instrument in writing containing an unconditional under-taking, signed by the maker, to pay a certain sum of money only to, or to the order of, a certain person, or to the bearer of the instrument.

4. State the features of Promissory Note.

- (i) A promissory note must be in writing, duly signed by its maker and properly stamped as per Indian Stamp Act.
- (ii) It must contain an undertaking or promise to pay. Mere acknowledgement of indebtedness is not enough.
- (iii) The promise to pay must not be conditional.
- (iv) It must contain a promise to pay money only.
- (v) The parties to a promissory note, i.e. the maker and the payee must be certain.
- (vi) A promissory note may be payable on demand or after a certain date.

5. Discuss the concept Bill of Exchange.

A Bill of Exchange has been defined under Section 5 of the NI Act as "an instrument in writing containing an unconditional order, signed by the maker,

directing a certain person to pay a certain sum of money only to, or to the order of certain persons or to the bearer of the instrument.” A cheque is a special type of Bill of Exchange. It is drawn on banker and is required to be made payable on demand.

6. Explain about Cheques.

A Cheque is an instrument in writing, containing an unconditional order, drawn on a specified banker, signed by the drawer, directing the banker, to pay, on demand, a certain sum of money only, to a certain person or to his order or to the bearer of the instrument. A cheque is a document or instrument that orders a payment of money from a bank account. The person writing the cheque, the drawer, usually has a current account or checking account, where their money was previously deposited. The drawer writes the various details including the amount of money, date and a payee on the cheque, and signs it, ordering their bank, known as the drawee, to pay that person or company the amount of money stated.

7. Describe about Holder and Holder in Due Course.

A collecting banker is holder for value if he gives the value of the cheque in any form to its customer before collecting the proceeds of the cheque deposited by the latter. He does not remain an agent of the customer, but becomes the owner of the cheque in his own right since he has paid value for it, and has acquired the ownership right in good faith. In such a situation, the banker is called holder for value and he is also the holder in due course.

Holder in Due Course is one holding a cheque or promissory note, received for value, in good faith, and with no suspicion that it might be no good, claimed by another, overdue, or previously dishonoured. Such a holder is entitled to payment by the maker of the cheque or note. A Holder in Due Course (HDC) is a person who takes a negotiable instrument, such as a promissory note or cheque for value without knowledge of neither any apparent defect in the instrument nor any notice of dishonor. Status as a “holder in due course” is an affirmative defense against all legal claims the debtor may have against the original creditor. In other words, a “holder in due course” does not become responsible for the original creditor’s alleged misdeeds in the original credit transaction.

8. Explain about Crossing of Cheque.

A cheque may be an open cheque or a crossed cheque. An open cheque is one that can be paid by the paying banker across the counter while a crossed cheque cannot be paid across the counter. Crossing of cheques is a universally adopted practice. Crossing on a cheque is a direction to the paying banker that the payment shall not be made across the counter. The payment on a crossed cheque can be collected only through a banker. Cheques are usually crossed as a measure of safety. Crossing is made by drawing two parallel transverse lines across the face of the cheque with or without the addition of certain words. The usage of crossing distinguishes cheques from other bills of exchange.

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9. Explain about Dishonour of Negotiable Instruments.

Dishonour of negotiable instrument means loss of honour or respect for the instrument in question on the part of the maker, drawee, or acceptor, as the case may be, which eventually results in non-realization of payment due on the instrument.

3.9 SUMMARY

- Negotiable instrument is one which entitles the holder to the receipt of money. It gives him the right to transfer the same by mere delivery or endorsement thereon. The negotiability of the instrument continues till its maturity. A negotiable instrument may be made payable to two or more payees jointly or it may be made payable in the alternative to one or two, or one or some of several payees.
- Section 4 of the Negotiable Instruments Act 1881 defines the promissory note, “A promissory note is an instrument in writing (note being a bank-note or a currency note) containing an unconditional undertaking, signed by the maker, to pay a certain sum of money to or to the order of a certain person, or to the bearer of the instruments.”
- Section 5 of the Act defines the bill of exchange, “A bill of exchange is an instrument in writing containing an unconditional order, signed by the maker, directing a certain person to pay a certain sum of money only to or to the order of a certain person or to the bearer of the instrument”.
- A Cheque is an instrument in writing, containing an unconditional order, drawn on a specified banker, signed by the drawer, directing the banker, to pay, on demand, a certain sum of money only, to a certain person or to his order or to the bearer of the instrument.
- A cheque is a document or instrument that orders a payment of money from a bank account. The person writing the
- cheque, the drawer, usually has a current account or checking account, where their money was previously deposited. The drawer writes the various details including the amount of money, date and a payee on the cheque, and signs it, ordering their bank, known as the drawee, to pay that person or company the amount of money stated.
- A Commercial Paper is an unsecured promissory note issued with a fixed maturity, short-term debt instrument issued by a corporation approved by RBI, typically for the financing of accounts receivable, inventories and meeting short-term liabilities. Maturities on commercial paper rarely range any longer than 270 days. The debt is usually issued at a discount, reflecting prevailing market interest rates. Commercial paper is not usually backed by any form of collateral, so only firms with high-quality debt ratings will easily find buyers without having to offer a substantial discount (higher cost) for the debt issue.
- A treasury bill is a kind of finance bill or promissory note issued by the government of the country to raise short term funds. According to one

categorisation, Treasury bills are ad hoc, tap and action bills. India has experimented with 91 days Treasury bills, 182 days Treasury bills, 364-day Treasury bills and two types of 14-day Treasury bills. The treasury bills are purchased by foreign banks in India, scheduled banks, National Co-operative Development organisations, financial institutions, joint stock companies, DFHI and others.

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- A collecting banker is holder for value if he gives the value of the cheque in any form to its customer before collecting the proceeds of the cheque deposited by the latter. He does not remain an agent of the customer, but becomes the owner of the cheque in his own right since he has paid value for it, and has acquired the ownership right in good faith. In such a situation, the banker is called holder for value and he is also the holder in due course.
- Holder in Due Course is one holding a cheque or promissory note, received for value, in good faith, and with no suspicion that it might be no good, claimed by another, overdue, or previously dishonoured. Such a holder is entitled to payment by the maker of the cheque or note. A Holder in Due Course (HDC) is a person who takes a negotiable instrument, such as a promissory note or cheque for value without knowledge of neither any apparent defect in the instrument nor any notice of dishonor. Status as a “holder in due course” is an affirmative defense against all legal claims the debtor may have against the original creditor. In other words, a “holder in due course” does not become responsible for the original creditor’s alleged misdeeds in the original credit transaction.
- Section 123 of the Act refers to general crossing as, “Where a cheque bears across its face two traverse lines with or without the words “and Co.” or any abbreviation thereof or the words ‘not negotiable, the cheque is said to have been crossed generally.
- “Where a cheque is crossed generally, the banker on whom it is drawn shall not pay it otherwise than to the banker” (Section 126). The payee may get the cheque collected through a bank of his choice.
- Special crossing implies the specifications of the name of the banker on the face of the cheque. The object of special crossing is to direct the drawee banker to pay the cheque only if it is presented through the particular bank mentioned.
- The word ‘endorsement’ in its literal sense means, a writing on the back of an instrument. But under the Negotiable Instruments Act it means, the writing of one’s name on the back of the instrument or any paper attached to it with the intention of transferring the rights therein. Thus, endorsement is signing a negotiable instrument for the purpose of negotiation. The person who effects endorsements is called an ‘endorser’ and the person to whom negotiable instrument is transferred by endorsement is called the ‘endorsee’.
- Dishonour of negotiable instrument means loss of honour or respect for the instrument in question on the part of the maker, drawee, or acceptor, as the case may be, which eventually results in non-realization of payment due on the instrument.

3.10 KEY TERMS

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- **Negotiable instrument:** Negotiable instrument is one which entitles the holder to the receipt of money. It gives him the right to transfer the same by mere delivery or endorsement thereon. The negotiability of the instrument continues till its maturity.
- **Promissory note:** A promissory note is an instrument in writing (note being a bank-note or a currency note) containing an unconditional undertaking, signed by the maker, to pay a certain sum of money to or to the order of a certain person, or to the bearer of the instruments.”
- **Bill of exchange:** A bill of exchange is an instrument in writing containing an unconditional order, signed by the maker, directing a certain person to pay a certain sum of money only to or to the order of a certain person or to the bearer of the instrument.
- **Cheque:** Cheque is an instrument in writing, containing an unconditional order, drawn on a specified banker, signed by the drawer, directing the banker, to pay, on demand, a certain sum of money only, to a certain person or to his order or to the bearer of the instrument.
- **Commercial Paper:** Commercial Paper is an unsecured promissory note issued with a fixed maturity, short-term debt instrument issued by a corporation approved by RBI, typically for the financing of accounts receivable, inventories and meeting short-term liabilities. Maturities on commercial paper rarely range any longer than 270 days.
- **Treasury bill:** Treasury bill is a kind of finance bill or promissory note issued by the government of the country to raise short term funds. According to one categorisation, Treasury bills are ad hoc, tap and action bills. India has experimented with 91 days Treasury bills, 182 days Treasury bills, 364-day Treasury bills and two types of 14-day Treasury bills. The treasury bills are purchased by foreign banks in India, scheduled banks, National Co-operative Development organisations, financial institutions, joint stock companies, DFHI and others.
- **Holder in Due Course:** Holder in Due Course is one holding a cheque or promissory note, received for value, in good faith, and with no suspicion that it might be no good, claimed by another, overdue, or previously dishonoured. Such a holder is entitled to payment by the maker of the cheque or note.
- **General Crossing of Cheque:** Section 123 of the Act refers to general crossing as, “Where a cheque bears across its face two traverse lines with or without the words “and Co.” or any abbreviation thereof or the words ‘not negotiable, the cheque is said to have been crossed generally.
- **Special crossing:** Special crossing implies the specifications of the name of the banker on the face of the cheque. The object of special crossing is to direct the drawee banker to pay the cheque only if it is presented through the particular bank mentioned.

- **Endorsement:** The word ‘endorsement’ in its literal sense means, a writing on the back of an instrument. Thus, endorsement is signing a negotiable instrument for the purpose of negotiation. The person who effects endorsements is called an ‘endorser’ and the person to whom negotiable instrument is transferred by endorsement is called the ‘endorsee’.
- **Dishonour of negotiable instrument:** Dishonour of negotiable instrument means loss of honour or respect for the instrument in question on the part of the maker, drawee, or acceptor, as the case may be, which eventually results in non-realization of payment due on the instrument.

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3.11 SELF-ASSESSMENT QUESTIONS AND EXERCISES

Short Answer Questions

1. Define Negotiable Instrument.
2. What is Negotiable Instrument?
3. Give the meaning of Bill of Exchange.
4. What is Accommodation bill?
5. What is Promissory note?
6. Define the term Cheque.
7. What is stale cheque?
8. What is Bearer cheque?
9. What is crossing of a cheque?
10. What is double crossing?
11. What is dishonour cheque?
12. What is meant by wrongful dishonour of cheque?
13. Define a holder.
14. What do you mean by “Holder for Value”?

Long Answer Questions

1. Explain Negotiable Instrument.
2. Explain the risk involved in honouring a postdated cheques.
3. What are the consequences of wrongful dishonour of cheques?
4. Distinguish between Cheque and Bills of Exchange.
5. Distinguish between a Cheque and a Draft.
6. What are the characteristics of Negotiable Instrument?
7. Explain various types of Negotiable Instrument.
8. What are the different methods of crossing of a cheque?
9. Explain the circumstances in which a Banker can dishonour a cheque.
10. Explain the Material Alteration of a cheque.

3.12 FURTHER READING

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UNIT 4 CONSUMER PROTECTION ACT, 1986

Consumer Protection Act,
1986

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Structure

- 4.0 Introduction
- 4.1 Objectives
- 4.2 Consumer Protection Act, 1986 – Main Provisions, Consumer Disputes, Consume Dispute Redressal Agencies
 - 4.2.1 Consumer Protection Act, 1986
 - 4.2.2 Main Provisions
 - 4.2.3 Consumer Disputes
 - 4.2.4 Consume Dispute Redressal Agencies
- 4.3 MRTP Act, 1969 – Meaning, Scope, Importance and Main Provisions
 - 4.3.1 MRTP Act, 1969
 - 4.3.2 Meaning of MRTP
 - 4.3.3 Scope of MRTP Act, 1969
 - 4.3.4 Importance of MRTP Act, 1969
 - 4.3.5 Main Provisions of MRTP Act, 1969
- 4.4 Answers to ‘Check Your Progress’
- 4.5 Summary
- 4.6 Key Terms
- 4.7 Self-Assessment Questions and Exercises
- 4.8 Further Reading

4.0 INTRODUCTION

Consumer Protection Act was enacted in the year 1986 to provide a better protection of the interests of consumers and encourage the consumer movements through consumer councils and other authorities for the settlement of consumer's disputes and for matters connected therewith. The Act gives full freedom to consumers in getting legal protection and free from fear, complexities and technicalities involved with the various legal procedure in the regular course of action like complaints and so on. Moreover there is no court fees or stamp duty to be affixed, no matter whatever may be the amount involved in the complaints. So the Act facilitates the consumers to get a better, inexpensive and speedy remedy. The Act shall be applicable to all goods and services unless otherwise, expressly provided by the Central Government by notification. The law shall see to the benefit of the general public, that is the consumers. The act applies in addition to the sale of all goods and services, in the private sector and the public sector as well as Government agencies. It provides for the establishment of Central Consumer Protection Council by the Central Government and likewise State Consumer Protection Council by the respective State Government.

The Act is considered as a revolutionary piece of legislation which can grow into an important tool for development. The objects and reasons behind the Act are based on inherent rights. The Act also seeks to provide for better protection of the interests of consumers. In addition to this it also makes provision for the

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establishment of consumer councils and other authorities for the settlement of consumer disputes.

There are six consumer rights recognised by the Act in the form of its objects, and are as follows:

- (a) The right to be protected against marketing of goods and services which are hazardous to life and property. So consumers should always sport an attitude of beware as, “Don’t sell me goods hazardous to my life and property”.
- (b) Secondly, ‘the right to be informed’ about the quality, quantity, potency, (marked or branded) purity, standards and price of goods and services to protect against unfair trade practices.
- (c) Then, ‘the right to be assured’, whenever possible, access to an authority of goods and services at competitive prices.
- (d) ‘The right to be heard’ and to be assured that the consumer’s interest will receive due consideration from appropriate forums.
- (e) The right to seek redressal against unfair trade practices or restrictive trade practice or unscrupulous exploitation and finally;
- (f) The right to consumer education.

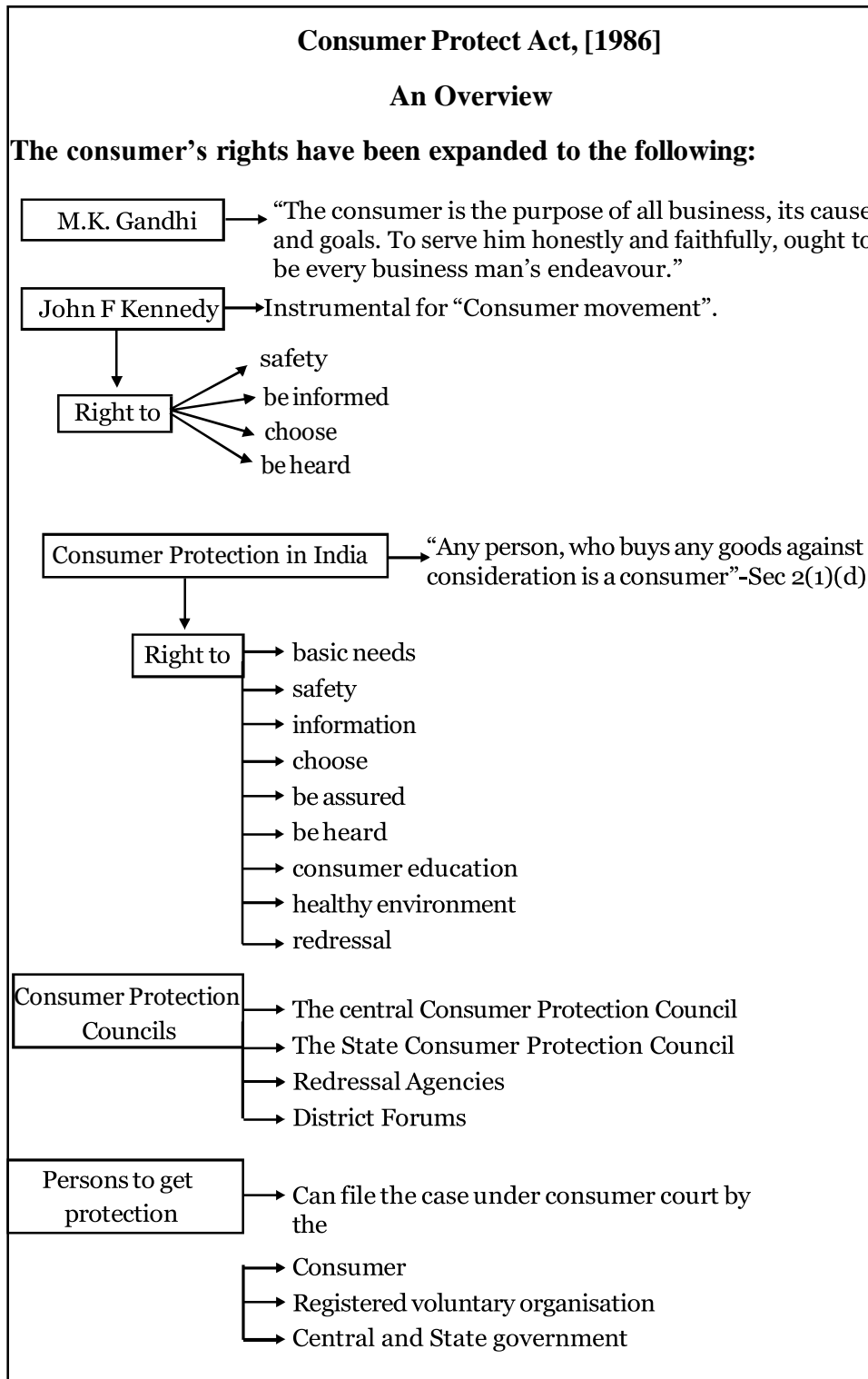
The Central and State Consumer Protection Councils are to protect and promote the above objects.

Actuated with above purpose a speedy, inexpensive and simple quasi – judicial machinery of redressal agencies to settle consumer disputes have been set up at the District, State and National level. These bodies are to decide disputes while observing the fundamental principles of natural justice and have power to grant certain specific reliefs. In some cases when it is appropriate, compensation or damages are also awarded. The system in this Act is simple on one hand and effective and authoritative on other hand.

4.1 OBJECTIVES

After going through this unit, you will be able to:

- Explain the Concept Consumer Protection Act, 1986
- Describe Main Provisions and Consumer Disputes
- Discuss Consume dispute redressal agencies
- Examine the Scope, Importance and Main Provisions of MRTP Act



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Figure 4.1: Consumer Protect Act, [1986]

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4.2 CONSUMER PROTECTION ACT, 1986 – MAIN PROVISIONS, CONSUMER DISPUTES, CONSUMER DISPUTE REDRESSAL AGENCIES

4.2.1 Consumer Protection Act, 1986

Who is a Consumer?

The consumer is the one who pays to consume the goods and services produced. Consumers play a vital role in the economic system of a nation. In the absence of their effective demand, the producers would lack a key motivation to produce goods which are to be sold to consumers.

Meaning of Consumer

Consumer is an individual who buys products or services for personal use and not for manufacture or resale. A consumer is someone who can make the decision whether or not to purchase an item at the store and someone who can be influenced by marketing and advertisements.

Definition of Consumer

According to Consumer Protection Act, 1986, “Consumer means any person who buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any user of such goods other than the person who buys such goods for consideration paid or promised or partly paid or partly promised, or under any system of deferred payment when such use is made with the approval of such person, but does not include a person who obtains such goods for resale or for any commercial purpose”.

According to Oxford Dictionary, “Consumer is a person who purchases goods and services for personal use”.

Concept of Consumerism

Consumerism is a movement or policies aimed at regulating the products or services, methods or standards of manufacturers, sellers and advertisers in the interest of buyers, such regulation may be institutional, statutory or embodied in a voluntary code occupied by a particular industry or it may result more indirectly from the influence of consumer’s organizations. The principle of ‘Caveat emptor’ relieved the seller of the obligation to make disclosure about the quality of the product. In addition, the personal relation between the buyer and seller was one of the major factors in their relations. But with the growth of trade and its globalization the rule no more holds true. It is now impossible for the buyer to examine the goods before hand and most of the transactions are concluded by correspondence. Further on account of complex structure of the modern goods, it is only the producer/seller who can assure the quality of goods. With manufacturing activity becoming more organized, the producers/sellers are becoming stronger and organized whereas the buyers are still weak and unorganized. In the age of revolutionized information

technology, Internet and with the emergence of e-commerce & m-commerce related innovations the consumers are further deprived to a great extent. As a result buyer is being misled, duped and deceived day in and day out.

*Consumer Protection Act,
1986*

Mahatma Gandhi, the father of the nation, very rightly held that “A Consumer is the most important visitor on our premises. He is not dependent on us we are dependent on him. He is not an interruption to our work; he is the purpose of it. We are not doing a favour to a consumer by giving him an opportunity. He is doing us a favour by giving an opportunity to serve him.” In spite of these views consumerism is still in its infancy in our country, thanks to the sellers market and the government monopoly in most services. Consumer awareness is low due to the apathy and lack of education among the masses. No one has told them about their rights- to be informed about product quality, price, protection against unsafe products, access to variety of goods at competitive prices, consumer education, etc. What consumers lack here are education and information resources, testing facilities, competent leadership, price control mechanism, and adequate quasi-judicial machinery. The providers of goods and services have been reluctant to give due consideration to consumer interest protection.

Some business in India have come together to adopt a code of conduct for regulating their own activities. Regulation of business through legislation is one of the important means of protecting the consumers. Consumerism has over the time developed into a sound force designed to aid and protect the consumer by exerting legal, moral and economic pressure on producers and providers in some of the developed countries. The success of consumerism lies in the realization of the business that there is no substitute for voluntary self-regulations. Little attention from the business will not only serve consumers interest but will also benefit them. The best possible solution is that the Consumers must be aware of their rights, join voluntary Consumer organizations, raise voice against exploitation and seek redress of their grievances in time.

Meaning of Consumerism

The word consumerism refers to the act of mobilizing consumers so as to ensure they have quality products and services. It involves protecting and informing consumers about their rights concerning goods and services. Consumerism results in honest packaging and improved product standards.

Consumerism in India

Consumer in India had started its journey with a need to raise its voice against the quality of goods as back as in 1969 through housewives. It took a shape of revolution at later stage and one day the parliament passed an act for the welfare of consumers in 1986. This Consumer Protection Act, 1986 had further undergone many challenges, criticism and even question on its legal validity was also put before the honorable Supreme Court of India After hearing all sort of accusation and constraints from the big business houses, our apex court held this welfare act very much valid , legal and within the framework of our constitution.

Since 1986 and after three important amendments to the act, scenario in the market has drastically changed and consumerism in India is diverted to more of

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lust than limited to needs. We are now easily confusing the things with what we need and what we want. It's true, if we work hard, we deserve nice things. But stuffing plenty of nice things which we really do not need deprive the other consumers from the things they require for their survival. Keeping four cars for four persons in the family is ultimately going to affect others and also more consumption of nation's resources like petrol, etc. Our sense of entitlement can muddy the waters when it comes to what you want and what you really need. The sizes of our houses are expanding as per our income and resources irrespective of the fact what we had in olden days. People were having more kids but still living in houses far smaller than we're willing to settle for today. Now we want a room for every child, plus a living room, family room, media room, and kids' playroom. And if we have to share a television, we are very uncomfortable with the idea.

This sense of entitlement is building commercial pressure on our children. Rates of depression, anxiety and other mental illnesses have risen in the past two decades in the children. A report submitted to the inquiry by the National Consumer Council found that children in deprived areas were more obsessed with money and shopping than youngsters from better-off homes. Poor children wanted a job with a high salary compared with children from affluent areas and they were the main victims of consumerism, as per the report conducted by the charity "The Children's Society"

The consumption patterns are so much a part of our lives that to change them would require a massive cultural overhaul. In consumer society of the day now, people replace their goods with newer ones, use them and throw them away. The question of repair does not arise. People have money to purchase goods in plenty. In case, they do not do so, it leads to recession massive unemployment. The success of a consumer society is measured with the rate of production, purchase and consumption. The society is considered to be progressing if all above elements are present there. The single most important measure of economic growth is the gross national product (GNP), the sum total of goods.

The effects of the Consumerism

Consumerism is appreciated in Western economies since a person's standard of living is valued by his or her material possessions. There are certain positive effects such as:

1. Positive Consumerism Effects

- (i) More industrial production.
- (ii) A higher growth rate economy.
- (iii) Available of more goods and services.
- (iv) More advertisement since goods manufactured have to be sold.
- (v) Increased production will result in more employment opportunities.
- (vi) A variety of choice for goods and services
- (vii) More comforts for a better living style.

2. Negative Consumerism Effects

Consumer Protection Act,
1986

- (i) The main cause of the current environmental crisis is human nature. More specifically, all we're doing is what all other creatures have ever done to survive, expanding into whatever territory is available and using up whatever resources are available and one day it may result into a death in their own waste.
- (ii) One is in a rat race to earn more and is forced to cope up with stress and other work related tensions.
- (iii) Material wealth is the deciding factor about whether a society is highly developed or not. Our ethical and spiritual values are left unimportant under the circumstances.
- (iv) Over-dependence on labor saving devices.
- (v) A car for each individual would mean gradual erosion of public transport.
- (vi) Crime rate also increases as wants to possess expensive gadgets increase. Thefts become common and daylight robberies take place.
- (vii) Personal relationships also get affected as people are busy trying to earn more to maintain their standard of living.
- (viii) Cheaper goods are today's consumption which also affect environmental resource.

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The Indian Consumer

When India opened its economy to the global marketplace in the early 1990s, many multinational corporations rushed in to pursue its middle-class consumers an estimated 200 million people only to confront low incomes, social and political conservatism, and resistance to change. It turned out that the Indian consumer was a tough one to figure out and win over.

Things are changing. Although attitudes remain complex, they have shifted substantially toward consumerism, particularly over the past decade. The country's recent economic performance is a factor, of course. For three years, GDP growth has been strong and sustained, at an average annual rate of around 8%. The population's demographic profile also plays a role: Indians constitute a fifth of the world's citizens below age 20. So a youthful, exuberant generation, weaned on success, is joining the ranks of Indian consumers.

To examine the changes in attitude, the Gallup Organization conducted two surveys of more than 2,000 respondents gauging the habits, hopes, plans, and evolution of the Indian consumer in the decade from 1996 to 2006. (For a similar look by Gallup at Chinese attitudes, see William McEwen et al., "Inside the Mind of the Chinese Consumer," HBR March 2006.) In collaboration with our colleagues Raksha Arora and Prasun Basu, we mined the data and emerged with three key insights.

Indians are often stereotyped as deeply spiritual people who reject materialistic values. Our research suggests that this stereotype no longer reflects reality. For instance, almost half of India's urban population had adopted a "work hard and get rich" ethos by 1996; another 9% had done so by 2006.

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Indians are more motivated than ever by personal ambition and a desire for material success, and they put in the hours it takes to achieve those goals. A recent Gallup poll of more than 30 countries showed that, with an average workweek of 50 hours, India ranks among the hardest working nations globally. (The average in the United States is 42 hours; major European nations such as Germany, France, and the UK have workweeks of fewer than 40 hours.)

An analysis of Indians' savings goals underscores the increase in materialism. Although long-term plans remain a high priority, life's pleasures in the here and now have gained importance over the past decade. Indians' desire to set money aside for electronics and durables has grown so dramatically that it has nearly caught up with their desire to save for their children's education. Travel and entertainment have also gained ground.

Interestingly, this trend does not apply only to the young; it holds true for people aged 15 to 55. And it is not merely a large-city phenomenon; people in smaller towns espouse these values as well.

Among durable goods, high-tech luxury items are increasingly in demand. The number of Indians who own or use mobile phones, for example, has grown 1,600% not surprising in a country that is adding more than 3 million subscribers a month. The number of people who own or use computers or laptops is up 100%, albeit from a very small base. Ownership of music systems and televisions is also on the rise.

Reasons for growth of consumerism in India

The term "consumerism" refers to the resistance of consumers to misleading advertising, sales techniques and products. The development of consumer power took place in the USA between 1889 and 1925 when consumers developed their strength and realized the need for resisting misleading and unrealistic advertising. Women's organizations developed to resist "black" sales. In India, consumer power developed during the Swadeshi Andolan in 1922, which continued till 1950. The second period of growth of consumerism was between 1926 and 1959 in the USA. Many books, articles and seminars were held on consumerism. Consumers' Union, Drug Control, etc., came into being during this period. In India, the growth of consumerism took place between 1951 and 1985. The third period, i.e. the surge of modern consumerism, started in India in 1986 when various organizations developed to protect the interests of the consumer. The consumers' Safety Act was enacted in 1989.

In India, many voluntary organizations were formed to protect the interests of consumers. The misleading activities of advertisers were brought to the notice of the public. The government was apprised of the widespread practice of adulteration. Consumerism in India developed rapidly. Women's organizations have become very active in India to educate people about misleading advertising and products. There has been a great pressure on the government to enact suitable legislation to protect the interests of consumers. Advertising is criticized vehemently. The present laws in India may not be very useful unless consumers are educated and motivated to protect their interests. Consumerism in India has to be developed

rapidly. The present state of consumerism in India is worse than it is in the USA. In America a tax was levied on advertising, to restrict the putting up of billboards along highways and to create a sense of purpose among consumers. The reasons for the growth of consumerism are technological development, water and air pollution, soaring prices, heavy taxes and other economic factors. Education and social consciousness have motivated people to safeguard their interests. In the Indian context, consumer protests have to be developed on a large scale.

Consumerism has a direct as well as indirect impact on advertising. If advertisers get the feedback that their presentation and announcements have been resisted by people, they would avoid misleading advertising. If they do not, their image would be tarnished. Advertisers have to evaluate the end results of their advertisements. Pre-assessment and evaluation will avoid unnecessary expenses on advertising. Therefore, advertisers should not feel that consumers are adversaries. They are, in fact, true guides for the success of advertising. Consumerism gives a boost to government control. The advertising research will not be required if consumer organizations provided adequate information and feedback on advertising. There-fore, consumers now receive the cooperation and assistance of many sound advertising agencies. Advertisers look upon their reactions as clues to the need for further development.

Indian Consumer Market

India is likely to be the world's largest consumer market by 2030, according to a report by global consultancy Deloitte. The country's retail market is projected to touch US\$ 1.3 trillion by 2020, as per Mr. KV Thomas, India's Consumer Affairs Minister. With the online medium of retail gaining more and more acceptance, there is a tremendous growth opportunity for companies (international and domestic) in the retail and fast-moving consumer goods (FMCG) segment.

The Indian consumer sector can be broadly categorized into urban and rural markets. The burgeoning sector is attracting global marketers like never before. The pace at which India's consumer market is changing can be put down to dramatic shifts in consumer behaviour, increasing urbanization, presence of a strong service sector, changing lifestyle, and most significantly, the expanding retail segment.

Businesses that can cater to the requirements of India's ambitious middle class, keep prices reasonable, build brand loyalty in new consumers, and adapt to a rapidly changing environment will find tremendous rewards in India's potential-filled consumer market.

Companies across the world are tuning their strategies and offerings to cater to Indian tastes and preferences. The following are some of the efforts, investments and developments in the sector:

Costume jewellery has clocked 20–30 per cent growth in the current fiscal market with women from well-to-do households increasingly preferring such jewellery for attending weddings and parties. While overseas demand for costume jewellery has witnessed a rise, demand from the rural market has also grown substantially over the years.

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HCL Infosystems plans to enter the European market with its range of computer tablets and phablets. The market is presently dominated by established high-end players and there is enough room for the value-for-money segment to grow, according to Mr Gautam Advani, Executive Vice President and Global Head (Mobility), HCL Infosystems.

Mars International India, importer and marketer of its chocolate brands in India, is seeking out manufacturing sites in India. The company, which hitherto has focused on growing its Snickers brand, launched its tablet chocolate brand Galaxy in India on November 7, 2013. Tablet chocolates constitute nearly 50 per cent of the estimated ₹ 5,000 crore (US\$ 803.37 million) chocolate market in India, which is growing at a compounded annual growth rate (CAGR) of 20 per cent, said Mr Raghav Rekhi, Marketing Director, Mars International India.

With present-day rural consumers seeking out better products and high-standard services, FMCG companies have intensified their efforts in the rural regions. Dabur India Ltd reported a 23 per cent rise in consolidated net profit during the quarter ended September, 2013 on the back of a sharp improvement in rural sales. The company was clearly seeing demand from rural India outpacing the urban markets, said Mr. Sunil Duggal, CEO, Dabur India.

US soft drinks giant PepsiCo plans to invest US\$ 5.5 billion by 2020 to expand its operations in India. It intends to double its manufacturing capacity and enhance its distribution network in rural areas.

Parle Agro has launched Cafe Cuba, India's first coffee-flavoured carbonated beverage. The company projects the new coffee drink to record sales of around ₹ 1,000 crore (US\$ 160.70 million) in the first 12–18 months of its launch.

Over the past 10 years economic growth has given rise to India's 'closet consumers', who are a major force behind the country's luxury market growth, stated a report titled 'The Changing Face of Luxury in India by Confederation of Indian Industry (CII) and IMRB International'.

India's urban population has contributed majorly to the growth of the online market in the country. Around 30–40 per cent of the total retail in India's top 75 cities is expected to be carried out online in the next 7–10 years, said Mr. Arvind Singhal, Chairman and Founder, Technopak Advisors. Amazon, the world's biggest internet retail company, has seen potential in the Indian market. In June 2013, India became the tenth market where Amazon has established a country-specific retail website.

With rural India getting increasingly empowered with all forms of technology, online portals are going to be vital for companies trying to access these markets. Of the total online market products, consumer durables account for 34 per cent, apparel and accessories 30 per cent, books 15 per cent, beauty and personal care 10 per cent and home and furnishing 6 per cent. Over 50 per cent of sales in these product categories take place in non-metro cities.

Some of the biggest deals in the online retail and retail space in the past three years materialised in the quarter ended September 2013. Flipkart.com raised US\$ 200 million from existing investors – private equity firms Tiger Global

Management LLC, Accel Partners and Iconiq Capital, and MIH (a part of South Africa's Naspers Group). This investment is the largest in online retail in the country.

Consumer Protection Act,
1986

Background of Consumer Protection

Consumer protection has always been sought to be maintained and enhanced from ancient times in different parts of the world. It is considered as an essential part towards the welfare of the population. People in the society in 320 B.C, Kautilya, have codified the rules of conduct of merchants, artisans, craftsmen and professionals. Manu in his Dharma Shashtra, has given a detailed description of unethical trade practices and the punishments to be met by the traders.

Even in Europe, during the middle age period, dishonest traders had their hands cut off and punished in other ways. Sale of adulterated food and drink was subjected to criminal penalties in the 14th century.

Even the American ex-president John F. Kennedy made a significant contribution to consumer movement by highlighting four rights of the consumers namely:

- (i) The right to safety
- (ii) The right to be informed
- (iii) The right to choose and
- (iv) The right to be heard

He also further went ahead by equating the consumer's interest with national interest. This was brought to the light of on implementation of Article 25, the Declaration of Human Rights, which says, "Everyone has right to a standard of living, adequate for health and well-being of himself and his family, including food, clothing, housing and medical care and necessary social services."

According to the principles of the "Consumers International" (formerly IOCU), "The right to satisfaction of basic needs; to have access to basic essential goods and services, adequate food, clothing, shelter, health care, education and sanitation."

Consumer Protection in India

A brief study of the movement towards consumer protection in different countries is given, highlighting the salient features of consumerism. It is touching upon the various topics like marketing, advertising, products safety, pricing and so on. The consumerism also enlightened through consumer education and the legislative action as the part of the Government. The Constitution of India, under Article 21, enshrines, "The right to life and liberty" and this has been expanded by the Supreme Court to include the right to live with human dignity, and all that necessarily follows it, such as the basic necessities of life with adequate nutrition, clothing and shelter.

The consumer's rights have been expanded to the following:

(a) Right to basic needs:	Food, shelter, clothing, health care and education.
(b) Right to safety:	Right to be protected against products, production processes and services which are hazardous to health and life.

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(c) Right to information:	Right to get access to all the facts necessary to make an informed and conscious choice. This right includes the right to protection against dishonest, deceitful and misleading advertisements.
(d) Right to Choice/Choose	Right to have access to a variety of product and services at competitive prices and in case of an existing monopoly the right to have assurance of satisfactory quality and service at a reasonable price, which is a right against exploitation?
(e) Right to be heard:	This is the right to be heard by any person, organization, business and government, the voice of the consumers. This right has been represented during the formulation and execution of economic policy.
(f) Right to redress:	It is for right to a fair settlement of just claims, and this includes right to receive compensation for mis-representation.
(g) Right to consumer education:	In this right to acquire knowledge and skill to become an enlightened consumer.
(h) Right to a healthy environment:	Right to have protection under mis-representation over which he as an individual has no control, but nevertheless falls as a victim.

Contributors for Consumer Protection and Consumer Organization

Mahatma Gandhi was the foremost important persons among Indians to focus on businessmen's outlook on the consumer. When he pointed out that; "The consumer is the purpose of all business, its cause and goals. To serve he honestly and faithfully, ought to be every business man's endeavour."

R. R. Dalwai (1949), a noted Gandhian and Raja Gopalachari (1950) were the persons who inspired the establishment of the first Consumer Protection Council in India. The leading industrialists like Ramakrishna Bajaj and J.R.D Tata are instrumental to form the Fair Trade Practice Association in Bombay in the year 1966. In the year 1974, B. M. Joshi started a consumer forum namely 'Akhil Bharatiya Grahak' in Pune. At present there are over 350 organizations in all states providing assistance to consumers in India. In 1978, the largest and the most prominent among all councils the Consumer Education and Research Centre (CERC) established in Ahmedabad. There is a separate consumer Unions comprising of 160 countries as members at the International level organization situated at Hague.

Objectives of Consumers Protection Act, 1986

The main objective of the Consumer Protection Act is to grant shield for and improved safeguard of consumers and their rights. Even though there is a prevailing Consumer Protection Act, it is still doubtful as to how far the objectives of the Act are achieved. Still we see that Rights of consumers are ignored but we hope the

government will surely take necessary actions in order to establish the proclaimed fundamental rights soon. Government must ensure consumers right to be conversant regarding the purity, standard, quality, quantity, potency, and value of goods, or services so as to shield the buyer against unfair trade practices.

Consumer Protection Act is to grant shield for the improved safeguard to consumers. Unlike prevailing laws, which are disciplinary or precautionary in nature, the provisions of this Act are compensatory in nature. The act is aimed to afford simple, quick and economical redressal to the consumers' grievances, and reliefs of a particular nature and award of damages wherever appropriate to the consumer.

Features of Consumers Protection Act, 1986

Salient features of consumer protection act are as follows:

1. Coverage of Items

This Act is applicable on all the products and services, until or unless any product or service is especially debarred out of the scope of this Act by the Central Government.

2. Coverage of Sectors

This Act is applicable to all the areas whether private, public or cooperative.

3. Compensatory Nature of Provisions

Many Acts have been passed for the help of consumers. Consumers enjoy the benefits of these Acts but if a consumer wishes the Consumer Protection Act can provide extra help. As a result the nature of provisions of this Act is compensating for the loss or providing extra help. Consumer is totally free to enjoy the benefits provided in the Act.

4. Group of Consumer's Rights

This Act provides many rights to consumers. These rights are related to safety, information, choice, representation, redressal, education etc.

5. Effective Safeguards

This Act provides safety to consumers regarding defective products, dissatisfactory services and unfair trade practices. So under the purview of this Act there is a provision to ban all those activities which can cause a risk for consumer.

6. Three-tier Grievances Redressal Machinery

Consumer courts have been established so that the consumers can enjoy their rights. This Act presents Three- tier Grievances Redressal Machinery:

- (i) At District Level-District Forum
- (ii) At State Level -State Commission
- (iii) At National Level – National Commission.

7. Time Bound Redressal

A main feature of the Act is that under this, the cases are decided in a limited period of time.

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8. Consumer Protection Council

To favour consumer protection and to encourage consumer's awareness there is a provision in this Act to establish Consumer Protection Councils.

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Importance of Consumers Protection Act, 1986

A. From Consumers point of view:

1. Consumers Ignorance

In the light of widespread ignorance of consumers about their rights and reliefs available to them, it becomes necessary to educate them about the same so as to achieve consumers' awareness.

2. Unorganized consumers

Consumers need to be organized in the form of consumer organization which would take care of their interests.

3. Widespread exploitation of consumers

Consumers are exploited by exploitative and unfair trade practices like unsafe and defective products, fake advertisements, less weights, etc. Consumers need protection against such practices.

B. From Business point of view:

1. Social Responsibility

Business is socially responsible to serve the interest of consumers. So it is the duty of producers and traders to provide right quality and quantity of goods at fair prices to the consumers.

2. Increasing Awareness

Consumers are becoming more conscious of their rights against the malpractices by the business as there are many consumer organizations and associations taking up their cases at various levels and helping them to enforce their rights.

3. Consumer Satisfaction

Consumer is the king of the market as consumers' satisfaction is the key to success of business. So, the businessmen should make the best efforts to serve the interests of consumers by providing them quality goods and services at reasonable price.

4. Social Justice

Exploitation of consumers is against the directive principles of state policy as laid down in the Constitution of India, thus manufacturers and traders as well as service providers should not act against the consumers' interest.

5. Trusteeship

According to Gandhian philosophy, manufactures and producers are not the real owners of the business but are merely the trustees of the resources supplied by the society. So, they should use such resources effectively for the benefit of the society, which includes the consumers.

6. Survival and Growth of Business

Consumer Protection Act,
1986

In today's global economy and increased competition, any business organization that indulges in malpractices shall find it difficult to continue. They must become aware of consumer protection in their own for long run interest.

4.2.2 Main Provisions

Complainant

Section 2(1)(b) in the Consumer Protection Act, 1986

“Complainant” means —

- (i) a consumer; or
- (ii) any voluntary consumer association registered under the Companies Act, 2013 or under any other law for the time being in force; or
- (iii) the Central Government or any State Government; or
- (iv) one or more consumers, where there are numerous consumers having the same interest;
- (v) in case of death of a consumer, his legal heir or representative; who or which makes a complaint;

Case: Jodhpur Development Authority vs. State Consumer Disp. Red. Forum on 11 October, 2011

Judgment dt: 11/10/2011 was no deficiency in service given by the respondent UIT, Jodhpur. It was also contended that the complainant was neither the ‘consumer’ nor the UIT, Jodhpur was a ‘service’ provider under the said Consumer Protection Act, 1986 and therefore, the complaint deserves to be rejected. The plea that the complainant was not a ‘consumer’ and UIT, Jodhpur was not a ‘service’ provider was, however, not raised in reply filed on behalf of the UIT, Jodhpur vide Ex.6. The District Consumer Disputes Redressal Forum vide its judgment dated 26/10/2009 held that the UIT, Jodhpur (now Jodhpur Development Authority) is guilty of providing defective service to the complainant and therefore, directed that physical and vacant possession of the plot of land in question should be handed over to the complainant and in case it is not possible due to any encroachment on the said plot of land, an alternative plot in the same locality of the same measurement may be allotted to the complainant and possession of the same may be handed over to him. Compensation of ₹ 53,000 was also awarded in favour of complainant and the Divisional Commissioner - respondent no. 3 was directed to hold inquiry against the responsible officers and employees of UIT, Jodhpur for deficiency in service and recover such S.B.CIVIL WRIT PETITION NO. 11316/2010 and 11 other connected writ petitions (See Schedule) Jodhpur Development Authority, Jodhpur vs. State Consumer Disputes Redressal Forum and Ors.

Judgment dt: 11/10/2011 damages from their salary.

The petitioner, Jodhpur Development Authority, filed an appeal under Section 15 of the Consumer Protection Act against the said judgment dated 26/10/2009 before the State Commission.

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In para no.9 of the said memo of appeal Ex.8, the JDA, Jodhpur also raised an objection that neither the complainant was a ‘consumer’ nor the petitioner UIT/JDA, Jodhpur was a ‘trader’ or ‘service’ provider as defined in the Consumer Protection Act and, therefore, the complaint deserves to be rejected as not maintainable.

Similarly, in Secretary, Bhubaneswar Development Authority vs. Susanta Kumar Misra - (2009) 4 SCC 684, the Hon'ble Apex Court held that any forum under the Consumer Protection Act, 1986 before granting any relief to a complainant, should be satisfied that the complaint relates to any of the matters specified in Section 2(1) (c) of the Act and that the complainant is alleged and S.B.CIVIL WRIT PETITION NO. 11316/2010 and 11 other connected writ petitions (See Schedule) Jodhpur Development Authority, Jodhpur vs. State Consumer Disputes Redressal Forum & Ors.

Judgment dt: 11/10/2011 cannot raise any grievance about not giving the possession within the time schedule. On the other hand, the petitioner JDA itself knew that there are encroachments on the land in question, still the lands were required to be surrendered by the title holders and 20-25% lesser land was allotted back to such applicants upon payment of price to be fixed by the UIT/JDA and a proper layout plan was to be prepared and possession of such land in question was required to be given to such allottees after removal of encroachments and demarcation of plots and allottees were further required to complete the construction within a period of five years from the date of demarcation of exact plot of land and giving of vacant possession. Therefore, this kind of development of land and allotment of plots clearly fell within the first category of cases as held by the Hon'ble Supreme Court in the case of UT Chandigarh Administration vs. Amarjeet Singh (supra) and, therefore, there is no shadow of doubt in the present case that JDA would be covered within the ambit and scope of Consumer Protection Act as a ‘service provider’ and the complainant would be a ‘consumer’ and, thus, applicability of the Consumer Protection Act in the present case is unequivocal and clear.

Complaint

When one makes any allegation in writing under Section [2 (1) (c)] and to remember in writing to invoke the provisions of this Act to obtain certain relief on account of any grievance occasioned by:

- (a) an unfair trade practice or restrictive trade practice adopted by any trader burdening a consumer with loss or damage;
- (b) defective goods bought or agreed to be bought;
- (c) deficiency in service availed or agreed to be availed;
- (d) price charged in excess of fixed or displayed price;
- (e) hazardous goods and services being offered for sale.

The compliant can be attached with receipt, invoice guarantee or warranty cards, correspondence and so on.

Again under section 12(1)B and section 12(1); A detail provision on, “who can file a complaint”? Which is given under in detail.

Who can file a Complaint [Sec. 2(1) (B) and Sec. 12(1)]

A complaint in relation to any goods sold or delivered or agreed to be sold or delivered or any service provided or agreed to be provided, may be filed, with a Consumer Forum, by -

- (a) A consumer; or
- (b) Any recognised consumer association, any voluntary consumer association registered under the Companies Act, 2013 or under any other law for the time being in force, whether the consumer is a member of such association or not; or
- (c) One or more consumers, where there are numerous consumers having the same interest, with the permission of the Consumer Forum, on behalf of, or for the benefit of all consumers so interested; or
- (d) The Central Government or the State Government, as the case may be, either in its individual capacity or as a representative of interests of the consumers in general; or
- (e) In case of death of a consumer, his legal heir or representative.

Further, the following are also considered as a consumer and hence they may file a complaint:

- (i) User of goods and beneficiary of services. It may be recalled that the definition of 'consumer' itself includes user of goods and beneficiary of services.
- (ii) Husband of the consumer. A husband can file a complaint on behalf of his wife (Punjab National Bank, Bombay vs K.B. Shetty).
- (iii) Insurance company. Where Insurance Company pays and settles the claim of the insured, it can file a complaint for the loss caused to the insured goods by negligence of goods/service provider. *For example*, when loss caused to such goods because of negligence of transport company, the insurance company can file a claim against the transport company (New India Assurance Company Ltd. vs Green Transport Co.)

Grounds on which a complaint can be made [Sec. 2(1)(C)]

The Consumer Protection Act has provided certain grounds on which complaint can be made. A complaint must contain any of the following allegations:

- (i) An 'unfair trade practice' or a 'restrictive trade practice' has been adopted by any trader or service provider;

Illustration: A sold a second-hand computer to B representing it to be a new one. Here B can make a complaint against A for adopting an unfair trade practice.

- (ii) The goods bought by him or agreed to be bought by him suffer from one or more defects;

Illustration: A bought a computer from B. It was not working properly since the first day. A can make a complaint against B for supplying him a defective computer.

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- (iii) The services hired or availed of or agreed to be hired or availed of by him suffer from deficiency in any respect;

Illustration: A booked a taxi at a taxi stand which should reach at his residence at 5.30 a.m. The taxi did not reach at the appointed hour. As a result A had to miss his train. A can make a complaint against the taxi stand for deficiency in services.

- (iv) A trade or service provider, as the case may be, has charged for the goods or for the services mentioned in the complaint, a price in excess of the price fixed by any law or displayed on the goods or any package containing such goods or displayed on the price list exhibited by him or agreed between the parties;

Illustration: A bought a maruti Car from an authorised dealer of the company who charged him ₹ 4,000 over and above the price displayed on the price list of the Maruti Company. A can file a complaint against the dealer.

- (v) Goods which will be hazardous to life and safety when used, are being offered for sale to the public in contravention of any standards relating to safety of such goods as required to be complied with by any law or if the trader could have known with due diligence that the goods so offered are unsafe to the public;

Under the Sale of Goods Act also there is an implied warranty on the part of the seller to disclose the dangerous nature of goods to the ignorant buyer. If there is breach of this warranty, the buyer is entitled to claim compensation for the injury caused to him.

Illustration: C purchases a tin of disinfectant powder from A. A knows that the lid of the tin is to be opened in a specific manner and if it is opened without special care it may be dangerous, but tells nothing to C. C opens the tin in the normal way where upon the disinfectant powder flies into her eyes and causes injury. C can make a complaint against A as he should have warned C of the probable danger.

- (vi) Services which are hazardous or likely to be hazardous to life and safety of the public when used are being offered by the service provider which such person could have known with due diligence to be injurious to life and safety.

Note: The terms ‘unfair trade practice’, ‘restrictive trade practice’, ‘defect’, ‘deficiency’, ‘trader’, etc. as defined under the Act have been discussed after the next heading.

The frame within which a complaint can be filed (Limitation Period).

Section 24A provides that a complaint can be filed before the Forums constituted under the Act (District forum, State Commission or National Commission) within two years from the date on which the cause of action has arisen.

There are no set rules to decide the point of time when cause of action arises. It depends on the facts and circumstances of each case.

4.2.3 Consumer Disputes

Consumer Protection Act,
1986

Consumer

Section 2(1)(d) in the Consumer Protection Act, 1986

“Consumer” means any person who, -

- (i) buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any user of such goods other than the person who buys such goods for consideration paid or promised or partly paid or partly promised, or under any system of deferred payment when such use is made with the approval of such person, but does not include a person who obtains such goods for resale or for any commercial purpose; or
- (ii) hires or avails of any services for a consideration which has been paid or promised or partly paid and partly promised or under any system of deferred payment and includes any beneficiary of such services other than the person who hires or avails of the services for consideration paid or promised or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the first mentioned person;

Explanation: For the purposes of sub-clause (i), “commercial purpose” does not include use by a consumer of goods bought and used by him exclusively for the purpose of earning his livelihood, by means of self-employment;

Consumer Dispute

According to Section 2(1)(e) of the Consumer Protection Act, ‘a Consumer Dispute’ means a dispute where a person against whom a complaint has been made, denies or disputes the allegations contained in the complaint. If the other party agrees to the complaint, dispute ceases.

Generally, laws in relation to product or service liability differ from nation to nation. The main objective of product or service liability is protection and safety of the consumer even if the consumer is himself responsible for his own loss. Product liability generally involves claims against companies and business organizations including retailers, marketers and manufacturers.

Often, we come across situations where a particular company make various promises in order to sell products but seldom fail to keep such promises. *For example*, purchases a mixer grinder from M/s Y & Co. operating in the same town. The grinder malfunctions within the warranty period of 1 year. Both the manufacturer and the seller failed to rectify mixer grinder.

To tackle such day to day problems which a consumer suffers, Consumer Rights were created to protect the rights of the consumers. The Consumer Protection Act, 1986 was enacted to ensure speedy redressal of consumer grievances.

In order to ensure protection and promotion of consumers, a three tier quasi-judicial machinery was enacted at the national, state and district level. The

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National Commission deals with complaints involving costs higher than ₹ 1 Crore. Similarly, the State Commission and the District Forum deals with complaints involving costs between ₹ 20 lakhs and ₹ 1 Crore and less than ₹ 20 lakhs, respectively. The consumers can file cases depending upon the cost along with the documents required for filing the complaint.

The Consumer Courts may seem to be a quasi-judicial body, however every order made by the District Forum, State Commission or National Commission is enforced like a decree of the Court. The order passed shall be binding on all the parties. If any such person fails to comply with the order passed by the District Forum, State Commission or National Commission, then he may be punished with:

- (i) Imprisonment from 1 month to 3 years;
- (ii) Fine ranging between ₹ 2,000 to ₹ 10,000;
- Or both.

Defect

Section 2(1)(f) in the Consumer Protection Act, 1986

“Defect” means any fault, imperfection or shortcoming in the quality, quantity, potency, purity or standard which is required to be maintained by or under any law for the time being in force or 15 [under any contract, express or implied or] as is claimed by the trader in any manner whatsoever in relation to any goods.

Product liability is the area of law in which manufacturers, distributors, suppliers and retailers are held responsible for any injuries products cause. Regardless of any contractual limitations of liability, if a product or any of its component parts are defective its manufacturer may be liable for damage under the Consumer Protection Act (CPA) or the common law of negligence.

An action under the CPA or for negligence can be brought for death, personal injury and damage caused to private property as the result of a product defect. Neither type of action can be used to compensate for pure economic or consequential loss.

This guide considers claims for a defective product under the Consumer Protection Act.

Liability under Part I of the CPA

The CPA introduced statutory liability for defective products. Liability under the CPA exists alongside liability in negligence, and in some cases a common law claim may succeed where a claim would not be available under the CPA.

The CPA applies to both products used by consumers and products used in a place of work. The CPA imposes strict liability on manufacturers of defective products for harm caused by those products. This means that people who are injured by defective products can sue for compensation without having to prove that the manufacturer was negligent. It is merely necessary to prove that the product was defective and that any injury or damage was most likely caused by the product.

Applicability

The CPA applies to all consumer products and products used at a place of work. The inclusion of 'products used at a place of work' extends the scope of the law to include sales of products between businesses rather than just sales to consumers if such products are used in a place of work.

A claim may be brought under the CPA by any person who is injured by a 'defective product', regardless of whether that person purchased the product. A claim may be brought for death, personal injury or damage to private property in excess of £275. However, no claim may be brought for damage to business property or for 'pure' economic losses. In particular, the CPA provides that a claim cannot be made for the loss of or damage to the defective product itself. Other than these restrictions, the CPA imposes no financial limit on the producer's total liability.

Who is Liable?

Under the CPA, the 'producer' of a product is liable for any defects. The producer is the manufacturer of the finished product or of a component of the finished product, or any person responsible for an industrial or other process to which any essential characteristic of the product is attributable. Liability may also be imposed on any party who holds itself out to be the producer through the use of a name or trade mark, and any person who imported the product into the Community.

As such, there may be more than one party liable under the CPA in respect of the same damage. Liability is joint and several, so the injured party may sue any or all of these people. Liability cannot be excluded or limited.

What is a Defective Product?

A 'product' can include goods, electricity and the component parts of any product. Where a component of or raw material incorporated into a finished product is defective both the manufacturer of the component and the manufacturer of the finished product are potentially liable.

A product is defective for the purposes of the CPA if its safety, including not only the risk of personal injury but also the risk of damage to property, is "not such as persons generally are entitled to expect". A product will not generally be considered defective just because a safer version is later put on the market.

In assessing the safety of the product the court will take into account all of the circumstances, specifically including:

- All aspects of the marketing of the product;
- The use of any mark in relation to the product;
- Instructions and warnings;

What might reasonably be expected to be done with the product at the time the product was supplied.

This last factor allows the court to take account of the 'state of the art' at the time of supply.

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Defences to a claim under the CPA

Although liability under the CPA is strict, the producer has a number of defences available if a claim is made. It is a defence to show:

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- (a) That the product is defective in order to comply with domestic or European law;
- (b) The party against whom the claim is being made did not supply the product;
- (c) That the product was not manufactured or supplied in the course of a business;
- (d) That the defect did not exist at the time the product was put into circulation;

If the party is being sued because it manufactured a component - that the defect is a defect within the finished product, and came about because of the way the finished product was designed or because of instructions given by the manufacturer of the finished product.

The CPA also includes a 'development risks' defence, which creates a defence if the "scientific and technical knowledge" at the time the product was manufactured was not such that the producer of a similar product might have been expected to discover the defect. This could be particularly important in relation to innovative and high-tech products. However it has been argued that the wording of the UK law is less strict than the wording of the law at European level, which deals with the state of scientific and technical knowledge generally rather than what a producer of similar products might be expected to discover.

How long are producers liable for?

The basic limitation period for claims under the CPA is three years from the date of damage or injury. However, since damage may not be immediately apparent, an alternative period of three years from the date when the producer knew - or could reasonably have known - of the claim, is provided. Since a product may remain in circulation for many years, a claim cannot be made more than ten years after the product was put into circulation.

Deficiency

"Deficiency" means any fault, imperfection, shortcoming or inadequacy in the quality, nature and manner of performance which is required to be maintained by or under any law for time being in force or has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service.

Case: Wing Cdr. Jaspal Singh vs Df Homes Panchkula on 3 March, 2017

Alleging deficiency, in rendering service, and indulgence into unfair trade practice, on the part of the Opposite Parties, the complainants filed the instant complaint under Section 17 of the Consumer Protection Act, 1986 (in short 1986 Act) seeking directions to the Opposite Parties, to hand over the physical possession of unit, in question, complete in all respects, after obtaining requisite permissions/

approvals like completion and occupation certificates, etc., and execute and register the sale deed in respect of the allotted floor in time bound manner; restrain the Opposite Parties from cancelling, alienating, altering, changing or creating third party interest in the unit, in question, pay delay compensation interest @18% p.a. from expiry of three years from the date of allotment of the independent floor till date of handing over of physical possession; bear all payments towards increase in service tax levied after 12.01.2013; award ₹ 10,00,000 as compensation for deficiency in service, unfair trade practice, mental harassment, loss and injury suffered by the complainants due to negligence of the Opposite Parties; furnish complete accounts as also intimate the balance payments to be made on possession; award ₹ 55,000 towards litigation expenses and pass such further orders/directions, as may be necessitated in the matter and deemed appropriate under the circumstances of the case.

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In the preliminary objections, it was stated that the parties were bound by the terms and conditions mentioned in the Independent Floor Buyer's Agreement; that the complainants have made baseless allegations of unfair trade practice, deficiency in service, etc. with an ulterior motive to amend/modify/rewrite the concluded Agreement duly executed between parties, purely to invoke jurisdiction of this Commission; that this Commission cannot adjudicate upon the matter where the prima facie prayers are for modification of clauses of the Agreement; that the complainants are not consumers as the floor, in question, was booked by them for investment purposes and earning profits and that when given the option to exit vide letter dated 05.06.2013 (Annexure R-4), the complainants agreed to continue with allotment and delay and, as such, they (complainants) voluntarily waived off their right to raise any grievance. Another objection raised in the written statement is that as per Clause 55 in the Agreement, all disputes arising out of the Agreement are to be settled amicably, failing which, they shall be referred to the Arbitration. It was further stated that the Opposite Parties could not be made liable for delay caused due to force majeure conditions, which was on account of stay by Hon'ble Punjab & Haryana High Court and Hon'ble Supreme Court of India from 19.04.2012 to 12.12.2012 and delay in grant of approvals in layout plans and service plans. In Sub Para (g) of Para 8, it was further stated that approval regarding revision in layout plan and service plans sought on 11.3.2013 and 20.05.2013, was received on 06.09.2013 and 14.08.2014 respectively. Apart from above objections, in Paras 18-19 of the written statement, on merits, though the Opposite Parties admitted that the office of the Opposite Parties is situated in Chandigarh and the Agreement was also executed between the parties at Chandigarh, however, the territorial jurisdiction of this Commission to entertain and try the complaint has been challenged on the ground that the project, in dispute, is situated in Panchkula, which comes within the jurisdiction of Panchkula District. It was further stated that only Courts at Panchkula and Punjab and Haryana High Court have the territorial jurisdiction to entertain and try the instant complaint.

The Opposite Parties, in preliminary submissions, have prayed to allow them 31% cost escalation of construction as well as 47% of the land holding cost, totaling 76% of the sale price. There is a clear and specific stipulation in Clause 1.2 of the Agreement that price of the unit is escalation free. The Opposite Parties

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failed to complete construction and deliver possession within stipulated period and extended one year period. The Opposite Parties are themselves responsible for delay and deficiency in service and their prayer for allowing them escalation cost amounts to seeking amendment of the terms and conditions of the Agreement. The plea, being devoid of merit, must fail, and the same stands rejected.

To pay compensation by way of interest @12% p.a. on the deposited amounts to the complainant w.e.f. 01. 04 .201 7, onwards (per month), till possession is delivered, by the 10th of the following month, failing which, the same shall also carry penal interest @15% p.a., instead of 12% p.a., from the date of default, till payment is made.

Pay compensation in the sum of ₹ 1,25,000 on account of mental agony, physical harassment and deficiency in service and ₹ 35,000 as litigation costs, to the complainant, within 45 days from the date of receipt of a certified copy of the order, failing which, the said amounts shall carry interest @12% p.a., from the date of filing the complaint till realization.

Deficiency in Services

Under Section - 2 (1) (0) of this Act, a very comprehensive definition has been incorporated for service. It says “Service of any description which is made available to potential users”. The word “Potential user’s are consumers who enjoy the facilities given through services by banking, financing, insurance, transport, supply of electrical and other energy, boarding or lodging or both, house construction, entertainment, amusement and so on. Rendering of free services or personal service are exempted under this Act. The services rendered by the doctors are covered under the provision of this Act. In case of Tilak Raj Vs Haryana School Education Board, Bhiwani – I (1992) C P J 76, Education is also a service within the purview of the Act. Services include hiring of marriage hall, marriage consultancy, tax consultancy and so on are included in the word ‘services’. But the services rendered by a lawyer against payment of professional fee is a contract of personal services.

Consumer Dispute: Section 2 (1) (e), It refers to a dispute where the person against whom a complaint has been made, denies or disputes the allegations contained in the complaint. Thus it is clear that if a person against whom complaint is made agrees to the complaint, there is on ‘Consumer dispute’.

Restrictive Trade Practice: Sec. 2 (1) (nn) – Under this section Restrict Trade Practice has been defined as any trade practice which requires a consumer to buy, hire or avail of any goods or, as the case may be, services as a condition precedent for buying, hiring or availing of any other goods or services.

Unfair Trade Practice: ‘Unfair Trade Practice’ means a trade practice which, for the purpose of promoting the sale, use or supply of any goods or for the provision of any service, adopts any unfair method or unfair or deceptive practice including any of the following practices namely:

- (i) False representation of goods and services.
- (ii) False representation of re-built, second-hand, renovated goods as new goods.

- (iii) Representation of goods or services for sponsorship, approval, performance and so on, in absence of such goods and services.
- (iv) False or misleading representation of goods and services. (like misleading advertisement)
- (v) Giving the warranty or guarantee of the performance, efficiency or length of life of a product to the public without any base or adequate test.

Appropriate Laboratories: There is provision for laboratory test of sample goods also for which parties has to pay a prescribed fee in such a situation. These tests are conducted by the appropriate laboratories. For the purpose of the Act, the term appropriate laboratory under Sec. 2 (1) (a) means:

- (a) A laboratory or organisation recognised by the Central Government.
- (b) Recognised by a State Government, subject to such guidelines as may be prescribed by the Central Government in this behalf.
- (c) Any such laboratory, or organisation established by or under any law for the time being in-force which is maintained, financed or aided by the Central Government or a State Government for carrying out analysis or test of any goods with a view to determine whether such goods suffer from any defect.

It also include, laboratories established under the Prevention of Food & Adulteration Act.

District Forum

Under Section 2(1)(h) “District Forum” means a Consumer Disputes Redressal Forum established under clause (a) of section 9.

The Consumer Protection Act has laid down in detail the qualifications for the President and members of the District Forum. The jurisdiction of the District Forum is within the local limits of the district. The complaint can be filed to the Forum by the consumer to whom such goods are sold or delivered or agreed to be sold or delivered or such services provided or agreed to be provided.

The complaint can also be filed by central or state government or by a group of consumers. Thus, it is not necessary that complaint is filed by effected person but matter can be taken by others also as defined in Section 12.

Procedure of complaint has also been laid down in detail. The District Forums have been given powers of civil courts for summoning and enforcing the attendance and evidence on affidavit, discovery and production of any documents, issuing of any commission for the examination of any witness. The proceedings before the Forum “shall be deemed to be a judicial proceedings within the meaning of various sections of the Indian Penal Code”.

The District Forums have been given powers to pass verdict which are binding subject to appeal. After the proceedings conducted if District Forum is satisfied that the goods complained against suffer from any of the defects specified in the complaint or that any of allegations contained in the complaint about the services are proved, it shall issue an order to the opposite party directing him to do one or more of the following things, namely;

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- (a) To remove the defect pointed out by the appropriate laboratory from the goods in question;
- (b) To replace the goods with new goods of similar description which shall be free from any defect;
- (c) To return to the person who complaint, the price or as the case may be, the charges paid by the him;
- (d) To pay such amount as may be awarded by it as compensation to the consumer for any loss or injury suffered by the consumer, due to the negligence of the opposite party;
- (e) To remove the defects or deficiencies in the services in question;
- (f) To discontinue the unfair trade practice or the restrictive trade practice or not to repeat them;
- (g) Not to offer the hazardous goods for sale;
- (h) To withdraw the hazardous goods from being offered for sale;
- (i) To provide adequate costs to parties.

It may be observed from the above that the purpose of the verdict is not only to compensate a particular consumer but to stop such dealings in the future to protect other consumers.

Person

Under Section 2(1)(m) “person” includes —

- (i) a firm whether registered or not;
- (ii) a Hindu undivided family;
- (iii) a co-operative society;
- (iv) every other association of persons whether registered under the Societies Registration Act, 1860 (21 of 1860) or not;

Unfair Trade Practices

The Constitution of India, in its essay in building up a just society, has mandated the State to direct its policy towards securing that end. Articles 38 and 39 of the Constitution of India, which are part of the Directive Principles of State Policy, mandate the state to direct its policy towards securing: that the ownership and control of material resources of the community are so distributed as to best sub serve the common good; and that the operation of the economic system does not result in concentration of wealth and means of production to the common detriment.

Accordingly, after independence, the Indian Government assumed increased responsibility for the overall development of the country. Government policies were framed with the aim of achieving a socialistic pattern of society that promoted equitable distribution of wealth and economic power. However, even as the economy grew over the years after independence, there was little evidence of the intended trickle-down. Concerned with this, the Government appointed a Committee on Distribution of Income and Levels of Living (Mahalanobis Committee) in October 1960. The Committee noted that big business houses

were emerging because of the “planned economy” model practised by the Government and recommended looking at industrial structure, and whether there was concentration. Subsequently, the Government appointed the Monopolies Inquiry Commission (MIC) in April 1964, which reported that there was high concentration of economic power in over 85 percent of industrial items in India.

The MIC observed that big businesses were at an advantage in securing industrial licences to open or expand undertakings. This intensified concentration, especially as the Government did not have adequate mechanisms to check it. Subsequently, the Planning Commission of India, in July 1966, appointed the Hazari Committee to review the operation of the industrial licensing system. The report echoed previous concerns regarding skewed benefits of the licensing system. Following this, the Government, in July 1967, appointed the Industrial Licensing Policy Inquiry Committee, which felt that licensing was unable to check concentration, and suggested that the Monopolies and Restrictive Trade Practices (MRTP) Bill (as proposed by the MIC) be passed, to set up an effective legislative regime.

With this backdrop, competition law, was enacted in India check concentration of economic power, control the growth of monopolies and prevent various trade practices detrimental to public interest.

Definition of Unfair Trade Practice

UTPs encompass a broad array of torts, all of which involve economic injury brought on by deceptive or wrongful conduct. The legal theories that can be asserted include claims such as trade secret misappropriation, unfair competition, false advertising, palming-off, dilution and disparagement. UTPs can arise in any line of business and frequently appear in connection with the more traditional intellectual property claims of patent, trademark and copyright infringement. Specific types of UTPs prohibited in domestic law depend on the law of a particular country. The World Bank (WB) and the Organisation for Economic Cooperation and Development (OECD) Model Law, for example, lists the following trade practices to be unfair:

- (i) Distribution of false or misleading information that is capable of harming the business interests of another firm;
- (ii) Distribution of false or misleading information to consumers, including the distribution of information lacking a reasonable basis, related to the price, character, method or place of production, properties, and suitability for use or quality of goods; false or misleading comparison of goods in the process of advertising;
- (iii) Fraudulent use of another’s trade mark, firm name, or product labelling or packaging;
- (iv) Unauthorized receipt, use or dissemination of confidential scientific, technical, production, business or trade information.

The dictionary meaning of ‘unfair trade practice’ is a trade practice which, for the purpose of promoting the sale, use or supply of any goods or for the provision of any service, adopts any unfair method or unfair or deceptive.

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Definition of Unfair Trade Practice Under Consumer Protection Act, 1986

Section 2(1) (r) of Consumer Protection Act, 1986 also defines the term ‘unfair trade practice’. It reads:

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“unfair trade practice” means a trade practice which, for the purpose of promoting the sale, use or supply of any goods or for the provision of any service, adopts any unfair method or unfair or deceptive practice including any of the following practices, namely; —

- (1) The practice of making any statement, whether orally or in writing or by visible representation which, —
 - (i) falsely represents that the goods are of a particular standard, quality, quantity, grade, composition, style or model;
 - (ii) falsely represents that the services are of a particular standard, quality or grade;
 - (iii) falsely represents any re-built, second-hand, renovated, reconditioned or old goods as new goods;
 - (iv) represents that the goods or services have sponsorship, approval, performance, characteristics, accessories, uses or benefits which such goods or services do not have;
 - (v) represents that the seller or the supplier has a sponsorship or approval or affiliation which such seller or supplier does not have;
 - (vi) makes a false or misleading representation concerning the need for, or the usefulness of, any goods or services;
 - (vii) gives to the public any warranty or guarantee of the performance, efficacy or length of life of a product or of any goods that is not based on an adequate or proper test thereof;

Provided that where a defence is raised to the effect that such warranty or guarantee is based on adequate or proper test, the burden of proof of such defence shall lie on the person raising such defence;

- (viii) makes to the public a representation in a form that purports to be —
 - (i) a warranty or guarantee of a product or of any goods or services; or
 - (ii) a promise to replace, maintain or repair an article or any part thereof or to repeat or continue a service until it has achieved a specified result, if such purported warranty or guarantee or promise is materially misleading or if there is no reasonable prospect that such warranty, guarantee or promise will be carried out;
- (ix) materially misleading the public concerning the price at which a product or like products or goods or services, have been or are, ordinarily sold or provided, and, for this purpose, a representation as to price shall be deemed to refer to the price at which the product or goods or services has or have been sold by sellers or provided by suppliers generally in the relevant market unless it is clearly specified to be the price at which

the product has been sold or services have been provided by the person by whom or on whose behalf the representation is made;

- (x) gives false or misleading facts disparaging the goods, services or trade of another person.

Explanation: For the purposes of clause (1), a statement that is —

- (a) Expressed on an article offered or displayed for sale or on its wrapper or container; or
- (b) Expressed on anything attached to, inserted in or accompanying, an article offered or displayed for sale, or on anything on which the article is mounted for display or sale; or
- (c) Contained in or on anything that is sold, sent, delivered, transmitted or in any other manner whatsoever made available to a member of the public, shall be deemed to be a statement made to the public by, and only by, the person who had caused the statement to be so expressed, made or contained;

- (2) Permits the publication of any advertisement whether in any news-paper or otherwise, for the sale or supply at a bargain price, of goods or services that are not intended to be offered for sale or supply at the bargain price, or for a period that is, and in quantities that are, reasonable, having regard to the nature of the market in which the business is carried on, the nature and size of business, and the nature of the advertisement.

Explanation: For the purpose of clause (2), “bargaining price” means -

- (a) A price that is stated in any advertisement to be a bargain price, by reference to an ordinary price or otherwise, or
- (b) A price that a person who reads, hears or sees the advertisement, would reasonably understand to be a bargain price having regard to the prices at which the product is advertised or like products are ordinarily sold;

- (3) Permits -

- (a) The offering of gifts, prizes or other items with the intention of not providing them as offered or creating impression that something is being given or offered free of charge when it is fully or partly covered by the amount charged in the transaction as a whole;
- (b) The conduct of any contest, lottery, game of chance or skill, for the purpose of promoting, directly or indirectly, the sale, use or supply of any product or any business interest;

- (3A) Withholding from the participants of any scheme offering gifts, prizes or other items free of charge, on its closure the information about final results of the scheme.

Explanation: For the purposes of this sub-clause, the participants of a scheme shall be deemed to have been informed of the final results of the scheme where such results are within a reasonable time, published, prominently in the same newspapers in which the scheme was originally advertised;

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- (4) Permits the sale or supply of goods intended to be used, or are of a kind likely to be used, by consumers, knowing or having reason to believe that the goods do not comply with the standards prescribed by competent authority relating to performance, composition, contents, design, constructions, finishing or packaging as are necessary to prevent or reduce the risk of injury to the person using the goods;
- (5) Permits the hoarding or destruction of goods, or refuses to sell the goods or to make them available for sale or to provide any service, if such hoarding or destruction or refusal raises or tends to raise or is intended to raise, the cost of those or other similar goods or services.
- (6) Manufacture of spurious goods or offering such goods for sale or adopts deceptive practices in the provision of services.

(2) Any reference in this Act to any other Act or provision thereof which is not in force in any area to which this Act applies shall be construed to have a reference to the corresponding Act or provision thereof in force in such area.

Borrowings from Monopolies and Restrictive Trade Practices Act, 1969

Originally MRTP Act, contained no provision for protection of consumers against false and misleading advertisements or other similar trade practices. This Act was directed, inter alia, against restrictive and monopolistic trade practices. It proceeded on the assumption that the competitive market would provide fair deal to the consumers. But that was only partly true. There is now a greater recognition that consumers need to be protected not only from the effects of restrictive trade practices but also from the practices which are resorted to by the trade and industry to mislead and dupe the customers. The effect is to shift the emphasis on detection and eradication of frauds against the consumers. If a consumer is thus falsely induced to enter into buying goods which do not possess quality and do not have the cure for the ailment advertised, it is apparent that consumer is being made to pay for the quality of things on false representation. This has created a situation of very safe haven for the suppliers and positions of frustration and the uncertainty for the consumers. Obviously, such a situation cannot be accepted. The consumer protection must have a positive and active role to play. The Sachar Committee, therefore, recommended that the unfair trade practices like misleading advertisements and false representations, bargain sales, bait and switch selling, offering of gifts and prizes with intention of not providing them, conducting promotional contests, supplying goods that do not comply with safety standards and hoarding and destruction of goods should be prohibited.

The MRTP Act, 1969, was enacted to prevent monopolies and restrictive trade practices in the economy. In 1984, it was amended to add chapter V introducing the concept of unfair trade practices on the basis of high powered Sachar Committee. It also created a body called the Director General of Investigation and Registration (DGIR). On a complaint, or on its own, the DGIR could investigate into a claim of a restrictive or an unfair trade practice. The MRTP created a judicial body called the MRTP Commission and the DGIR was to take cases before the benches of the Commission. The Commission, on judging a

practice to be an unfair trade practice, could order the offending party to cease and desist the practice.

To understand the working of the law on unfair trade practices, one would need to examine specific provisions of the MRTP Act. Section 36 A of the Act lists unfair trade practices. This is the substantive ground on which the DGIR could start investigations and bring the matter before the MRTP Commission. The Commission could discontinue an unfair trade practice, under Section 36 D, if the practice is 'prejudicial to the public interest or to the interest of any consumer or consumers generally.' Section 36 A has five parts or sub-sections covering different themes.

36 A (1): False representation of products or services, including false description, guarantee, warranty or performance of a product or service.

36 A (2): Advertisement of false bargain price.

36 A (3): Contest, lotteries, game of chance or skill for promotion of sale.

36 A (4): Sale of goods not in conformity with safety standards provided by the law.

36 A (5): Hoarding or destruction of goods or refusal to sell goods.

In MRTP, Act 1969, the greatest advantage was that it has fixed categories of unfair trade practices. This was helpful in predicting law and advance knowledge of what kind of conduct would amount to violations of provision. But the definition of MRTP Act, 1969 had a major shortcoming. It was too specific and it can be denied that human mind can invent new forms of unfair trade practices with the advancement of new technologies. Therefore, MRTP Act was insufficient to curb and regulate these practices.

Therefore, there was a requirement for a general definition which can curb unexpected and unspecified categories of unfair practices. This will make the definition more living and less static, which can take care of future developments in the field of unfair trade practices.

Cases on unfair trade practices under MRTP Act

In re Lakhanpal National Ltd. v. MRTP Commission, it was alleged before the Commission that:

1. The appellant company was manufacturing NOVINO (dry cell) batteries in collaboration with M/s. Mitsushita Electric Industrial Company of Japan, and not with National Panasonic of Japan using their techniques, as advertised by it: and
2. The representation that NOVINO batteries are manufactured in joint venture or in collaboration with National Panasonic is false and misleading.

The MRTP commission held it to be misleading but the Supreme Court reversed the order by saying:

There is no other company with the name 'national' or 'panasonic' and there is no scope for any confusion on that score. Where the reference is being made to the standard of the quality, it is not material whether manufacturing company

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is indicated by its accurately correct name or by its description with reference to its products. We, therefore, hold that the erroneous description of the manufacturing company in its advertisements in question does not attract sec 36A of the Act, although we would hasten to add that it would be more proper for the appellant company to give the full facts by referring to Mitsushita Ltd. by its correct name and further stating that its products are known by the names 'national' and 'panasonic'.

In re Glaxo Ltd and Capsulation Services Ltd., the allegation was that Glaxo marketed a drug 'phexin', manufactured by capsulation, showing logo of Glaxo prominently on the packing strip and name of Capsulation written in small print, thereby giving the impression that Phexin is being manufactured by Glaxo. In the course of the inquiry it was found:

1. The said drug was manufactured and packed by Capsulation on the basis of technical know-how supplied by Glaxo and under its supervision as per its quality control standard and therefore, the said product was not an inferior product.
2. The price of this drug compared well with similar products manufactured by other leading pharmaceutical manufacturers.

The commission held that the ingredient of loss or injury being absent, even though the impugned practice may fall under one or more clauses of Section 36 A of the Act, it is not an unfair trade practice.

In re Bombay Tyres International Limited, the respondent company was supplying tyres to TELCO under the brand name 'modistones' which, however, were not manufactured by it, but by Modi Rubber Limited at Modipuram. It was alleged that it was an unfair trade practice attracting clause (i) of Section 36 A(1). The commission holding that no UTP was involved closed the enquiry with the following observations:

"As regards unfair trade practices, U/S 36A(1)(i) it would be objectionable only if for the purpose of promoting sale, use or supply of goods the respondent company falsely represents that the goods are of a particular standard, quality, grade, composition, styles or model. Section 36 A of the Act does not inhibit procuring of particular goods from another manufacturer so long as the quality or the standard which the said goods represented to possess are not allowed to Deteriorate in any way.

Changes made in the MRTP Act, 1991

Section 36 A as initially framed, inter alia, envisaged to necessary ingredients of an unfair trade practice:

1. The trade practice should fall within the ambit of one or more of the categories enumerated in clauses (1) to (5) of section 36 A
2. The trade practice should cause loss or injury to the consumers of goods or services.

Thus, it was necessary to allege an establish loss or injury to the consumers of goods or services before a trade practice could be branded as unfair, within the

meaning of the MRTP Act. Also if any trade practice, even if undesirable or deceptive, was not covered by the categories specified in the section, it fell outside the provisions of the Act. In the opening part of the Section the words, “adopts one or more of the following practices and thereby causes loss or injury to the consumers or such goods or services, whether by eliminating or restricting competition or otherwise” have now been substituted by the words “adopts any unfair method or unfair or deceptive practice including any of the following practices”.

In *Society for Civic Rights v. Colgate Palmolive (India) Ltd.* in a full bench of commission, the majority view held that the Key Phrase “and thereby causes loss or injury to the consumers of such goods and services” does not require the causing of actual loss or injury to the consumers. Rather the key phrase is a part of the definition which implies in every trade practice which adopts one or the other trade practice mentions in the subsequent paragraphs of Section 36A, loss or injury is implied.

The definition of unfair trade practice has, thus, been amplified on the lines of the provisions contained in the U.S. Anti-Trust Law. Even if the trade practice is not of the nature stated in clauses (1) to (5) of this section, it would nonetheless be regarded as unfair trade practice, if it is otherwise unfair or deceptive. By another amendment, the scope of clause (1) (i) has been expanded by the inclusion of the words “quantity”. Thus, if there is a false representation about the quantity, it would amount to unfair trade practice. It is now not necessary to establish loss or injury to consumers.

Borrowings from Federal Trade Commission Act, 1914

Section 5 of the Federal Trade Commission Act, 15 U.S.C. § 45 grants the FTC power to investigate and prevent deceptive trade practices. The statute declares that “unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful. Unfairness and deception towards consumers represent two distinct areas of FTC enforcement and authority. The FTC also has authority over unfair methods of competition between businesses.

But the motto behind enacting this Act was not the protection of interest of consumers. It was rather enacted to protect the interest of the competitors. In *FTC v. Raladam Co.* it was held that FTC has no jurisdiction if it is deceptive of public. It has jurisdiction only if it is injurious to the interest of competitors.

Although 1938 Amendment gave jurisdiction to FTC in cases of deception to public as well.

By the enforcement of Sec. 5 of FTCA, different orders were passed by the FTC. Authors wrote many books giving different headings. Indian law is inspired by that, and therefore other 5 categories have been taken from FTC orders.

By 1964 enough cases had been decided to enable the Commission to identify three factors that it considered when applying the prohibition against consumer unfairness. These were:

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- (1) Whether the practice injures consumers;
- (2) Whether it violates established public policy;
- (3) Whether it is unethical or unscrupulous. These factors were later quoted with apparent approval by the Supreme Court in the 1972 case of *Sperry & Hutchinson*. (Cigarette test rule) Since then the Commission has continued to refine the standard of unfairness in its cases and rules, and it has now reached a more detailed sense of both the definition and the limits of these criteria.¹⁰

Consumer Injury

Unjustified consumer injury is the primary focus of the FTC Act, and the most important of the three S&H criteria. By itself it can be sufficient to warrant a finding of unfairness. The Commission's ability to rely on an independent criterion of consumer injury is consistent with the intent of the statute, which was to "[make] the consumer who may be injured by an unfair trade practice of equal concern before the law with the merchant injured by the unfair methods of a dishonest competitor."

The independent nature of the consumer injury criterion does not mean that every consumer injury is legally "unfair", however, to justify a finding of unfairness the injury must satisfy three tests. It must be substantial; it must not be outweighed by any countervailing benefits to consumers or competition that the practice produces; and it must be an injury that consumers themselves could not reasonably have avoided.

First of all, the injury must be substantial. The Commission is not concerned with trivial or merely speculative harms. In most cases a substantial injury involves monetary harm, as when sellers coerce consumers into purchasing unwanted goods or services or when consumers buy defective goods or services on credit but are unable to assert against the creditor claims or defences arising from the transaction. Unwarranted health and safety risks may also support a finding of unfairness. Emotional impact and other more subjective types of harm, on the other hand, will not ordinarily make a practice unfair. Thus, for example, the Commission will not seek to ban an advertisement merely because it offends the tastes or social beliefs of some viewers, as has been suggested in some of the comments.

Second, the injury must not be outweighed by any offsetting consumer or competitive benefits that the sales practice also produces. Most business practices entail a mixture of economic and other costs and benefits for purchasers. A seller's failure to present complex technical data on his product may lessen a consumer's ability to choose, for example, but may also reduce the initial price he must pay for the article. The Commission is aware of these tradeoffs and will not find that a practice unfairly injures consumers unless it is injurious in its net effects. The Commission also takes account of the various costs that a remedy would entail. These include not only the costs to the parties directly before the agency, but also the burdens on society in general in the form of increased paperwork, increased regulatory burdens on the flow of information, reduced incentives to innovation, capital formation and similar matters.

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Finally, the injury must be one which consumers could not reasonably have avoided. Normally, we expect the marketplace to be self-correcting, and we rely on consumer choice i.e., the ability of individual consumers to make their own private purchasing decisions without regulatory intervention - to govern the market. We anticipate that consumers will survey the available alternatives, choose those that are most desirable, and avoid those that are inadequate or unsatisfactory. However, it has long been recognized that certain types of sales techniques may prevent consumers from effectively making their own decisions, and that corrective action may then become necessary. Most of the Commission's unfairness matters are brought under these circumstances. They are brought, not to second-guess the wisdom of particular consumer decisions, but rather to halt some form of seller behaviour that unreasonably creates or takes advantage of an obstacle to the free exercise of consumer decision making.

Sellers may adopt a number of practices that unjustifiably hinder such free market decisions. Some may withhold or fail to generate critical price or performance data, for example, leaving buyers with insufficient information for informed comparisons. Some may engage in over coercion, as by dismantling a home appliance for "inspection" and refusing to reassemble it until a service contract is signed. And some may exercise undue influence over highly susceptible classes of purchasers, as by promoting fraudulent "cures" to seriously ill cancer patients. Each of these practices undermines an essential precondition to a free and informed consumer transaction, and, in turn, to a well-functioning market. Each of them is therefore properly banned as an unfair practice under the FTC Act.

Analysis of Section 2(1) (R) of Consumer Protection Act, 1986

Clause (1) the practice of making any statement, whether orally or in writing or by visible representation which, -

- (i) Falsely represent that the goods are of a particular standard, quality, quantity, grade, composition, style or model;

In Masterphone Industries Private Ltd., the respondent company, engaged in the manufacture of T.V. Sets, gave an advertisement '100% imported with matsushita technology and sankyo; the best entertainer, claiming foreign collaboration for manufacturing T.V. sets. These assertion being false, it was held to be an unfair trade practice.

- (ii) Falsely represent that the services are of a particular standard, quality or grade;

In Institute of Personnel Management and Industrial Relations, the use of the word 'recognised' after its name constitute unfair trade practice, as it gave a false impression that all its courses are recognised by the Punjab Government, whereas, in fact, only one course was recognised by the State Government.

- (iii) Falsely represent any re-built, second-hand, renovated, reconditioned or old goods as new goods;

In Bennett Coleman & Co. Ltd., the respondent in its publication series 'Indrajal Comics' bought out two comics, which were virtually copies

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of two comics published earlier under different titles. It was alleged that in doing so, the respondent has falsely given the impression to the readers that two new comics have been published, whereas the so called new comics were mere repetition of the old ones. The commission, while holding that it was an unfair trade practice, disposed off the case on the basis of the following undertaking given by the respondent:

“We Bennett Coleman & Co. Ltd., the publishers of indrajai comics hereby undertake that whenever repeated editions of a particular comic which was published earlier is again brought out, it will be printed in the cover page that the edition is a repeated version of the story published on an earlier date under a particular name, specifying the date and particular name of the earlier publication”.

- (iv) Represents that the goods or services have sponsorship, approval, performance, characteristics, accessories, uses or benefits which such goods or services do not have;

In Katihar Medical College, the Principal issued an advertisement that the college was authorised to impart medical education, whereas actually the college was neither recognised by the Medical Council of India nor affiliated to any university and there was no hospital facility available to the students. The respondent came up with an application U/S 36 D (2) of the Act and an undertaking was given by the respondent not to indulge in such unfair trade practice in future.

- (v) Represents that the seller or the supplier has a sponsorship or approval or affiliation which such seller or supplier does not have;

In Purshottam Thakurdas, the respondent, who is engaged in the business of marketing watches, misrepresented that he is the authorised dealer of HMT, by so mentioning in the cash memos issued by him to his customers. He was also charging more than the fixed retail prices of HMT watches. On the assumption that the impugned trade practice is unfair and on the undertaking furnished by the respondent that he will refrain from indulging therein, the Commission disposed of the enquiry U/S 36D (2) of the Act.

- (vi) Makes a false or misleading representation concerning the need for, or the usefulness of, any goods or services;

In Boots Company Limited, the respondent engaged in the manufacture of pharmaceutical products, in its advertisement on the T.V. network failed to state the warning that Coldarin should not be used by children below 12 yrs of age, except under medical advice as per the requirements laid down by the Director General of Health Services. Holding it to be an unfair trade practice, the Commission disposed of the case U/S 36D (2) on the basis of the undertaking given by the respondent.

- (vii) Gives to the public any warranty or guarantee of the performance, efficacy or length of life of a product or of any goods that is not based on an adequate or proper test thereof;

Provided that where a defence is raised to the effect that such warranty or guarantee is based on adequate or proper test, the burden of proof of such defence shall lie on the person raising such defence;

In *re Gem India*, the Commission held that making false claim regarding the quality of refrigerator as being free from manufacturing defects and further is not providing satisfactory service by timely replacement in terms of the warranty is a breach of clause (vii). Also that subsequent replacement of the machine after the complaint has been filed with the Commission was too late and did not wipe out the unfair trade practice indulged in by the respondent, as it deprived the consumer of the use of the refrigerator for a long period. A “cease and desist” order was passed requiring the respondent to refrain from indulging in such unfair trade practice amounting to breach of warranty on his part.

The proviso of this sub-clause envisages the onus of proof on the person raising the defence that the warranty or guarantee is based on adequate or proper tests.

(viii) Makes to the public a representation in a form that purports to be—

- (i) a warranty or guarantee of a product or of any goods or services; or
- (ii) a promise to replace, maintain or repair an article or any part thereof or to repeat or continue a service until it has achieved a specified result, if such purported warranty or guarantee or promise is materially misleading or if there is no reasonable prospect that such warranty, guarantee or promise will be carried out;

In *Chloride India Ltd.*, the respondent is the manufacturer of batteries, which was fitted on *Rajdoot Motor Cycles*, which carries 12 months warranty. The battery supplied to the complainant developed trouble during the warranty period. The defective battery was however, not repaired or replaced within reasonable time. The respondent was held to have indulged in unfair trade practice.

- (ix) Materially misleads the public concerning the price at which a product or like products or goods or services, have been or are, ordinarily sold or provided, and, for this purpose, a representation as to price shall be deemed to refer to the price at which the product or goods or services has or have been sold by sellers or provided by suppliers generally in the relevant market unless it is clearly specified to be the price at which the product has been sold or services have been provided by the person by whom or on whose behalf the representation is made;

In *Hiralal Bros.*, an advertisement, representing a sale discount of 50% or more on various textile items, was issued. It did not indicate the original sale price of the said items. On investigation it was found that on 5 items the discount exceeded 50 % but on the remaining 7 items the discount was less than 50%. As a matter of fact, the range of discount varied from 21 – 61% which gives an average of 40% and not even 50%. It was held that the advertisement would be covered by the provision of sub-clause (ix).

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- (x) Gives false or misleading facts disparaging the goods, services or trade of another person.

This sub-clause is intended to prohibit the practice of making any statement which gives false or misleading facts disparaging the goods, services or trade of another person. It may be direct statement or it may indirectly or inferentially disparage the trade or business of another. 'Disparagement' generally involves casting aspersions on the quality or characteristics of goods or services of another, whereas other types of false advertising usually comprise assertions of superior attribute for the advertiser's own goods and services.

In Tainwala Chemicals & Plastics India Ltd., the respondent, who is a manufacturer of mosquito repellant mats under the names of 'casper', issued an advertisement to promote the sale of its product, falsely disparaging its well-known competing brand 'GOOD KNIGHT', stating that it is not at all efficacious. A 'cease and desist' order was passed by the commission.

Explanation: For the purposes of clause (1), a statement that is -

- (a) Expressed on an article offered or displayed for sale or on its wrapper or container; or
- (b) Expressed on anything attached to, inserted in, or accompanying, an article offered or displayed for sale, or on anything on which the article is mounted for display or sale; or
- (c) & contained in or on anything that is sold, sent, delivered, transmitted or in any other manner whatsoever made available to a member of the public,

shall be deemed to be a statement made to the public by, and only by, the person who had caused the statement to be so expressed, made or contained;

Exception to clause (1) of 2(1)(r)

It is noted that section 2(1)(r) does not provide any exception to clause (1). Although some exceptions were recommended by the Sachar Committee, but it is not clear as to why they have not been incorporated in the Act. It is submitted that following exceptions should be incorporated:

1. The aforesaid provision shall not apply if a person establishes-
 - (a) That the act or omission giving rise to the offence was a result of a bonafide error.
 - (b) That he took reasonable precaution and exercised due diligence to prevent the occurrence of such error and that he took reasonable measures forthwith, after the representation was made, to bring the error to the attention of the class of persons likely to have been reached by the representation.
2. In a proceeding for contravention of any of the aforesaid provisions committed by the publication of an advertisement, it would be a defence for a person who establishes that he is a person whose business it is to publish or arrange for the publication of advertisement and that he

received the advertisement for publication in the ordinary course of business and did not know and had no reason to suspect that its publication would amount to contravention of any such provision.

(2) permits the publication of any advertisement whether in any news-paper or otherwise, for the sale or supply at a bargain price, of goods or services that are not intended to be offered for sale or supply at the bargain price, or for a period that is, and in quantities that are, reasonable, having regard to the nature of the market in which the business is carried on, the nature and size of business, and the nature of the advertisement.

Explanation: For the purpose of clause (2), “bargaining price” means

- (a) A price that is stated in any advertisement to be a bargain price, by reference to an ordinary price or otherwise, or
- (b) A price that a person who reads, hears or sees the advertisement, would reasonably understand to be a bargain price having regard to the prices at which the product advertised or like products are ordinarily sold;

Under this clause it is an offence to advertise a product at a bargain price if the supplier does not or cannot supply the product in reasonable quantities. This is also known as bait and switch selling. Usually, this practice is aimed at advertising a product in limited supply at low prices solely for the purpose of attracting customers to a retail location when there is little prospectus that the customer can purchase the product advertised. This clause would be applicable in cases where there is no intention to offer for sale the goods or services at the price or for a period that is and quantities that are reasonable having regard to the nature of the market in which the business is carried on, the nature and size of the business and the nature of the advertisement.

The explanation to the section defines what bargain price would mean for this purpose. Where the advertisement does not state but any person who sees, reads or hears the advertisement would reasonably understand the price having regard to the prices at which the product advertised of like products are sold, to be the bargain price.

Bait advertisement is an alluring but insincere offer to sell a product of services which the advertiser in truth does not intend or want to sell. Its purpose is to switch consumers from buying the advertised merchandise, in order to sell something else, usually at a higher price or on a basis more advantageous to the advertiser. The primary aim of the bait advertisement is to obtain leads as to persons interested in buying merchandise of the type so advertised. Advertisement includes any form of public notice however disseminated or utilized.

Exception to clause (2) of Section 2(1)(r)

It is to be noted that no exception has been provided in the section but Sachar Committee recommended some of the exceptions that can be adopted. These are:

- (i) He took reasonable steps to obtain an adequate time and a quantity of the product that would have been reasonable having regard to the nature of the advertisement, but was unable to obtain such quantity by reason

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of events beyond his control that he could not reasonably have anticipated;

- (ii) He obtained a quantity of the product that was reasonable having regard to the nature of the advertisement, but was unable to meet the demand thereof, because that demand surpassed his reasonable expectation;
- (iii) After he was unable to supply the product in accordance with the advertisement, he undertook to supply the same product or an equivalent product of equal or better quality at the bargain price applied and that he fulfilled the undertaking.

In Dayal Novelties, the respondent issued an advertisement about organizing exhibition-cum-sale, without mentioning the period of sale and quality of goods offered for discount sale. The sale was actually organized for the purpose of clearing old stocks. While accepting the undertaking and directing the respondents to abide by the undertaking, the Commission directed that the period of sale should be 'reasonable having regard to the nature of market in which the business is carried out, the nature and size of business, and the nature of the advertisement' as set out in section 36A (2).

(3) Permits -

(a) the offering of gifts, prizes or other items with the intention of not providing them as offered or creating impression that something is being given or offered free of charge when it is fully or partly covered by the amount charged in the transaction as a whole;

It covers cases where gifts, prizes or other items are offered with an intention of not providing them or creating an impression that something is being offered free of charge when it is fully or partly covered by the amount charged in the transaction as a whole.

In *Re Nirma chemicals Works Ltd.*, the scheme involving prizes worth ₹ 71 lakhs launched by the respondent for promoting sale, use or supply of its washing powder was held to fall U/S 36A (3)(a) because that created an impression among consumers that something was being given or offered free of charge when it was fully or partly covered by the amount charged in the transaction as a whole. The D.G. (I&R) had argued that the respondent increased the price of their detergent powder just prior to the launching of scheme and that it has the intention to recover the value of the prizes from the consumers by having raised the prices of its products.

(b) the conduct of any contest, lottery, game of chance or skill, for the purpose of promoting, directly or indirectly, the sale, use or supply of any product or any business interest;

This provision reveals that even if conducting any contest, lottery, etc. is without any reference to promoting sale, use or supply of any product, it may be to promote some business interest which may ultimately result in promotion of sale, etc.

In *Avon Cycle Pvt. Ltd.*, the company advertised a scheme offering 42 prizes on the basis of a lucky draw. The company attempted to justify the scheme on the basis that it was financed out of the profits of the company and not by

increasing the prize. The scheme was held to be an unfair trade practice prejudicial to public interest for several reasons:

- (i) The conduct of lotteries, contests, etc. tends to induce consumers to buy products on consideration other than quality and price. When the essential consideration of quality and prices are lost sight of, consumer and public interest suffers.
- (ii) The award of prizes, benefits only a miniscule number of consumers. Discriminatory benefits of this kind to a select few without any corresponding benefit to or, as often happens at the expense of the bulk of the consumers is obviously not in the overall interest of the consumers. On the other hand, the same amount, if utilized for the purpose of reducing prices or providing better services to the consumers, in general will enhance consumer satisfaction.
- (iii) The practice of offering prizes by lottery tends to encourage the gambling instinct leading to unnecessary, avoidable and excessive purchases by consumers for the purpose of gaining entry into the lottery. Such available and excessive purchases are the real loss to the consumers. Instead of protecting consumer's interest, lotteries and contests therefore, clearly act in a prejudicial manner in regard to consumer and public interest.
- (iv) It has deleterious impact on competition in as much as extraneous considerations other than quality and price tend to determine consumer preferences and purchases and thereby distorting competition. A better product tends to be obscured and inferior products gain preferences in consumer choice merely because the opportunity the latter provides to enter a contest. Interfering with healthy competition, contests and lotteries ultimately result in loss to the consumer.

Sachar Committee recommended the following exceptions:

- (i) There is adequate and fair disclosure of the number and approximate value of the prizes, of the area or areas to which they relate and of any fact within the knowledge of the advertiser that affects materially the chances of winning.
- (ii) Distribution of the prizes is not unduly delayed.
- (iii) Selection of participants or distribution of prizes is made on the basis of scale or on random basis in any area to which prizes have been allocated.

(3A) withholding from the participants of any scheme offering gifts, prizes or other items free of charge, on its closure the information about final results of the scheme.

Explanation: For the purposes of this sub-clause, the participants of a scheme shall be deemed to have been informed of the final results of the scheme where such results are within a reasonable time, published, prominently in the same newspapers in which the scheme was originally advertised;

The above provision was added by 2002 amendment and makes it mandatory to inform about the final results of any scheme offering prizes, gifts or

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other items free of charge. The result of such schemes may be published within a reasonable time in the newspapers in which the scheme was originally advertised. Withholding of the information about the final results of the scheme will amount to an unfair trade practice within the ambit of the Consumer Protection Act.

(4) permits the sale or supply of goods intended to be used, or are of a kind likely to be used, by consumers, knowing or having reason to believe that the goods do not comply with the standards prescribed by competent authority relating to performance, composition, contents, design, constructions, finishing or packaging as are necessary to prevent or reduce the risk of injury to the person using the goods;

One of the most important right available to the consumers is to assure that the goods purchased will be reasonably safe in use. There is an urgent need for effective action in the field of consumer product safety. Increasing affluence and the increasing range of complex nature of product have led to the prevalent situation in which unsafe products may cause death or serious injury. Sometimes the danger arises from defective design, or sub-standard material or poor workmanship. This clause also attracts cases where certain goods are knowingly being sold as complying with standards prescribed by a competent authority. Even where a person does not know, it is sufficient if he has reasons to know that sales are being so made. For instance, unauthorized use of I.S.I. mark on the goods or any other mark not permitted by State Government would be hit by this clause.

In Vijay International Products the respondents were manufacturing and marketing stoves under the brand name 'nutan', designed by Indian Oil Corporation without competent authority's inspection and clearance. The stoves actually marketed were sub-standard without conforming to the approved specifications. The respondent gave an undertaking not to manufacture or sell the stoves designed by IOC without their permission.

(5) Permits the hoarding or destruction of goods, or refuses to sell the goods or to make them available for sale or to provide any service, if such hoarding or destruction or refusal raises or tends to raise or is intended to raise, the cost of those or other similar goods or services.

The practice of hoarding or destruction of goods with a view to create artificial scarcity and thus to force up prices are quite common in our country. To control such practices, clause (5) of section 2(1)(r) prohibits hoarding or destruction of goods, or refusal to sell the goods or to make them available for sale, or to provide any service, if such hoarding, destruction or refusal raises or tends to raise or is intended to raise, the cost of those or other similar goods or services.

(6) Manufacture of spurious goods or offering such goods for sale or adopts deceptive practices in the provision of services.

The Amendment Act, 2002 inserted a new sub-clause (6) in section 2(1)(r) of the Act to further enlarge the scope of the definition of 'unfair trade practice' to include manufacture of spurious goods or sales of spurious goods or adoption of deceptive practices in the provision of services. According to this provision, manufacture of spurious goods or offering such goods for sale or adopting deceptive practices in the provision of services will amount to an unfair trade practice.

Clause (oo) of Section 2 (1) of the Act defines spurious goods and services to mean such goods and services which are claimed to be genuine but they are not actually so.

*Consumer Protection Act,
1986*

Consumer Protection Council (Central, State and District – their constitutions and objectives)

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Central Consumer Protection Council

Section 4 of the Act provides that

- (1) The Central Government may, by notification, establish with effect from such date as it may specify in such notification, a council to be known as the 'Central Consumer Protection Council'.
- (2) The Central Council shall consist of the following members namely;
 - (a) The minister incharge of the 'Consumer Affairs' in the Central Government, who shall be its chairman, and
 - (b) Such number of other official or non - official members representing such interests as may be prescribed.

Note: The word "Consumer affairs" has been substituted by the "Consumer Protection" and the same is known as The Consumer Protection (Amendment) Act, 1993 with effect from 18th June, 1993.

The Consumer Protection Rules were formulated in the year 1987. It provides that the Central Council shall consist of the following 150 members namely:-

- (i) The minister incharge of Consumer Affairs in the Central Government who shall be Chairman of the Central Council.
- (ii) The minister of State or Deputy minister incharge of Consumer Affairs in the Central Government, who shall be the Vice-Chairman of the Central Council.
- (iii) The minister of Food and Civil Supplies or minister incharge of Consumer Affairs in the State.
- (iv) Eight members of the Parliament:- Five from Lok Sabha and three from Rajya Sabha.
- (v) The Secretary of the National Commission for Scheduled Castes and Scheduled Tribes.
- (vi) Representatives of the Central Governmental Departments and autonomous organisations concerned with consumer interests not exceeding twenty.
- (vii) Representatives of women not less than ten.
- (ix) Representatives of farmers, trade and industries not exceeding twenty.
- (x) Persons capable of representing consumer interest not specified above, not exceeding fifteen.
- (xi) The secretary in the Department of Civil supplies shall be the member secretary of the Central Council.

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Meeting of The Central Council: The procedure for meeting of the Central Council is provided under Section 5 of the Act. According to this;

- (i) The Central Council shall meet as and when necessary, but at least one meeting of the Council shall be held every year.
- (ii) The Central Council shall meet at such time and place as the Chairman may think fit and shall observe such procedure in regard to the transaction of its business as may be prescribed.

Objects of The Central Council: The main objects of the Central Council is explained under Sec. 6 of the Act. Which is basically to promote and protect the rights of the consumers. They are as follows:

(Sec. 6). Infact the objects of the central council are the various rights of consumers recognised under the Act which are to be promoted and protected by the council. Thus, the Act (under Section 6) has enumerated some rights of consumers which need to be protected by the council. These rights of consumers are:

(i) Right to Safety

This right has been recognised by Sec. 6(a) as, “the right to be protected against the marketing of goods and services which are hazardous to life and property”. The rationale behind this provision is to ensure physical safety of the consumers. The law seeks to ensure that those responsible for bringing goods to the market, in particular, manufacturers, distributors, retailers and the like should ensure that the goods are safe for the users. In case of dangerous or risky goods, consumer should be informed of the risk involved in improper use of goods. Vital safety information should be conveyed to consumers.

Illustration: M bought an insecticide from N. N did not inform M that touching this insecticide with bare hands can create skin problem. M, while using the insecticide came in contact with it and suffered from skin problem consequently. Here can be held liable under the Act.

(ii) Right to Information

under Section 6(b) this right has been recognised as, “the right to be informed about the quality, quantity, potency, purity, standard and price of goods or services, as the case may be, so as to protect the consumer against unfair trade practices.” Adequate information is very important in order to make a right choice of goods to be purchased. This right ensures that the consumer should be made aware of the quality, weight, content and price of the product at the very pre-purchase stage. The fixing of I.S.I mark and agmark enables the consumer to know about its quality. Under some other legislations it is mandatory for the manufactures and packers to provide information on the package to the consumers about the contents, weight, purity and potency of the product being sold. Consumers suffer much on the price front as the prices often printed or tagged in the product are misleading and no price control is there expect with respect to essential commodities. Advertisements also often mislead the consumers.

(iii) Right to Choose

This right has been recognised by Section 6(c) as, “the right to be assured, wherever possible, access to a variety of goods and services at competitive prices.” Fair and effective competition must be encouraged so as to provide consumers with maximum information about the wide variety of competing goods available in the market. Shoppers or buyers guide should be made available to the consumers by the Government or Business organisations to protect this right of consumers.

(iv) Right to be Heard

This right is ensured by Section 6(d) as, “the right to be heard and to be assured that consumers interests will receive due consideration at appropriate forums.” The Consumer Protection Act, 1986 has well taken care of this right by providing three stages redressal machinery to the consumers, namely, District Forum, State Commission and National Commission. Every consumer has a right to file complaint and be heard in that context. Further, with a view to providing better protection of this right various public and private sector undertakings have provided Consumer Ombudsman (Complaint cells) to provide redressal to consumer complaints outside the courts.

(v) Right against exploitation

This right is guaranteed under Section 6(e) of the Act as, “the right to seek redressal against unfair trade practices or restrictive trade practices or unscrupulous exploitation to consumers.” Consumers are the most helpless lot in our country due to very many factors. When consumers are exploited, adequate remedy must be made available. The Act has thus ensured to prevent exploitation of consumers by invoking the jurisdiction of consumer Forums in cases involving unfair trade practices and restrictive trade practices.

(vi) Right to Education

This right has been recognised under Section 6(f) of the Act as, “the right to consumer education.” The right to consumer education is a right which ensures the remedies available to them. Unless the consumers are aware of their rights and remedies, protection of their interest shall remain a myth. In this connection the role of Consumer protection Councils is very vital. The Central Council must ensure to educate the consumers about their rights and remedies under the Act throughout the country and the State Councils and the District Councils must ensure to educate about these rights to consumers within their territories. For spreading this education, media, school curriculum and cultural activities etc. may be used as a medium.

State Consumer Protection Councils

Section 7 of the Act provides a separate Council,

- (i) The State Government may, by notification, establish with effect from such date as it may specify in such notification a council to be known as the Consumer Protection Council for (E.g. Karnataka), there in after referred to as the State Council.

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- (ii) The State Council consist of the following members, namely –
 - (a) The minister incharge of consumer affairs in the State Government who shall be its chairman.
 - (b) Such number of other official or non-official members representing such interests as may be prescribed by the State Government.
- (iii) The State Council shall meet as and when necessary but not less than two meetings shall be held every year.
- (iv) The State Council shall meet at such time and place as the chairman may think fit and shall observe such procedure in regard to the transaction of the business as may be prescribed by the State Government.

Object of the State Council

Act provides under Section 8, the objects of the State Council, to promote and to protect, the rights of the consumers within the state laid down in clauses (a) to (f) of Section-6.

Consumer Redressal Agencies

The Consumer Protection Act under Chapter III explains about the Consumer Disputes Redressal Agencies. Section 9 of the Act gives the provision for establishment of Consumer Disputes Redressal Agencies. In this the provision is to create a “three-tier remedial machinery” for inexpensive and expeditious redressal of consumer grievances by way of an alternative to the ordinary process of instituting actions before a Civil Court with all its heavy court fees, cost and enormous delay.

Section 9, provides that the following agencies are required to be established for the purpose of the Act:

- (i) The Consumer Disputes Redressal Forum to be known as the ‘District Forum’. The District Forum is to be established by the State Government in each state by notification. The State Government, if it deems fit, establish more than one District Forum.
- (ii) A Consumer Disputes Redressal Commission to be known as State Commission. ‘This is also to be established by the State Government by means of notification.
- (iii) A National Consumer Disputes Redressal Commission to be established. This is to be established by the Central Government by means of a notification.

The forum exercises quasi-judicial powers for redressal of consumer dispute. The authorities here should record reasons, how so ever brief, for their conclusions. (Charan Singh Vs Healing Touch Hospital (2000)).

District Forums

The formation of District Forums and other relevance given in the Sec 10 of the Consumer Protection Act. According to this,

- (1) Each District Forum shall consist of:

- (a) A person who is, or has been, or is qualified to be a District Judge, who shall be its president.
- (b) Two other members shall be persons of ability, integrity and standing, and have adequate knowledge or experience, or have shown capacity in dealing with, problems relating to economics, law, commerce, accountancy, industry, public affairs or administration, and one of whom shall be a woman.

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Appointment:

Every appointment under Section 10 & sub-section (1) shall be made by the State Government as the recommendation of a selection committee consisting of the following, namely;

- (i) The president of the State Commission – Chairman.
 - (ii) Secretary, Law Department of the State – Member
 - (iii) Secretary in-charge of the department dealing with consumer affairs in the State as Member
- (i) **Term of office:** Under Sec. 10 and sub-section (2), every member of the District Forum shall hold office for a term of five years or up to the age of 65 years, whichever is earlier, and shall not be eligible for re-appointment.

Resignation: The same Section provides that a member may resign his office in writing, addressed to the State Government and on such resignation being accepted, his office shall become vacant and may be filled by the appointment of a person possessing any of the qualification mentioned in Sub-section (i) in relation to the category of the member who has resigned.

- (ii) **Salary and honorarium:** The salary or honorarium and other allowances payable to, and the other terms and conditions of service of the members of the District Forum shall be such as may be prescribed by the State Government.
- (iii) **No effect of Vacancy:** According to Section 29 (A), no act or proceeding of the District Forum, the State Commission or the National Commission shall be invalid by reason only of the existence of any vacancy amongst its members or any defect in the constitution thereof.

4.2.4 Consume dispute redressal agencies

Composition and Jurisdiction of District Forum

Section 11 (1) Provides that District Forum shall have jurisdiction to entertain complaints where the value of goods or services are the compensation if any, claimed which does not exceed five lakhs.

(2) A complaint shall be instituted in a District Forum within the local limits of whose jurisdiction.

- (a) The opposite party or each of the opposite parties, where there are more than one, at the time of the institution of the complaint, actually and

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voluntarily resides or carries on business or has a branch office or personally works for gain, or

- (b) Any of the opposite parties, where there are more than one, at the time of the institution of the complaint, actually and voluntarily resides, or carries on business or has a branch office, or personally works for gain, provided that in such case either the permission of the District Forum is given, or the opposite parties who do not reside, or carry on business or have a branch office, or personally work for gain, as the case may be, acquiesce in such institution; or
- (c) The cause of action, wholly or in part, arises.

Composition of the State Commission

According to Section 16;

- (1) Each State Commission shall consist of:
 - (a) A person who is or has been a Judge of a High Court, appointed by the State Government, who shall be its President:
 - (b) Two other members, who shall be persons of ability, integrity and standing and have adequate knowledge or experience of, or have shown capacity in dealing with, problems relating to economics, law, commerce, accountancy, industry, public affairs or administration, one of whom shall be a woman:
 - (i) President of the State Commission as Chairman.
 - (ii) Secretary of the Law Department of the State as Member.
 - (iii) Secretary, incharge of Department dealing with consumer affairs in the State as Member.
- (2) The salary or honorarium and other allowances payable to, and the other terms and conditions of service the members of the State Commission shall be such as may be prescribed by the State Government.

Every member of the State Commission shall hold Office for a term of five years or upto the age of sixty-seven years, whichever is earlier and shall not be eligible for re-appointment.

- (4) Notwithstanding anything contained in sub-section (3), a person appointed as a President or a member before the commencement of the Consumer Protection (Amendment) Ordinance, 1993, shall continue to hold such office as President or member, as the case may be, till the completion of his term.

Jurisdiction of the State Commission: According to Section 17; subject to the other provisions of this Act, the State Commission shall have jurisdiction—

- (a) To entertain:
 - (i) Complaints where the value of the goods or services and compensation, if any, claimed exceeds rupees five lakhs but does not exceed rupees twenty lakhs; and

(ii) Appeals against the orders of any District Forum within the State; and

- (b) To call for the records and pass appropriate orders in any consumer dispute which is pending before or has been decided by any District Forum within the State, where it appears to the State Commission that such District Forum has exercised a jurisdiction not vested in it by law, or has failed to exercise a jurisdiction so vested or has acted in exercise of its jurisdiction illegally or with material irregularity.

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Procedure applicable to State Commissions: According to Section 18, the provisions of Section 12, 13 and 14 and the rules made there under for the disposal of complaints by the District Forum shall, with such modifications as may be necessary, be applicable to the disposal of disputes by the State Commission.

Vacancy in the office of the President: Section 18A provides that when the office of the President of the District Forum or of the State Commission, as the case may be, is vacant or when any such President is, by reason of absence or otherwise, unable to perform the duties of his office, the duties of the office shall be performed by such person, who is qualified to be appointed as President of the District Forum, as the case may be, of the State Commission, as the State Government may appoint for the purpose.

Appeals: According to Section 19, any person aggrieved by an order made by the State Commission in exercise of its powers conferred by sub-clause (i) of clause (a) of Section 17 may prefer an appeal against such order to the National Commission within a period of thirty days from the date of the order in such form and manner as may be prescribed:

Provided that the National Commission may entertain an appeal after the expiry of the said period of thirty days if it is satisfied that there was sufficient cause for not filing it within that period.

Composition of the National Commission

Section 20

(1) The National Commission shall consist of:

- (a) A person who is or has been a Judge of the Supreme Court, to be appointed by the Central Government, who shall be its President;
- (b) Four other members who shall be persons of ability, integrity and standing and have adequate knowledge or experience of, or have shown capacity in dealing with, problems relating to economics, law, commerce, accountancy, industry, public affairs administration, one of whom shall be a woman:

Provided that every appointment under this clause shall be made by the Central Government on the recommendation of a selection committee consisting of the following namely:

- (a) A person who is a Judge of the Supreme Court, to be nominated by the Chief Justice of India—Chairman.

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(b) The Secretary in the Department of Legal Affairs in the Government of India—Member.

(c) Secretary of the Department dealing with consumer affairs in the Government of India—Member.

- (2) The salary or honorarium and other allowances payable to and the other terms and conditions of service of the Members of the National Commission shall be such as may be prescribed by the Central Government.

Every member of the National Commission shall hold office for a term of five years or upto the age of seventy years, whichever is earlier and shall not be eligible for re-appointment.

- (3) Notwithstanding anything contained in Sub-section (3), a person appointed as a President or a Member before the commencement of the Consumer Protection (Amendment) Ordinance, 1993, shall continue to hold such office as President or Member, as the case may be, till the completion of his term.

Jurisdiction of the National Commission – Section 2, says, Subject to the other provisions of this Act, the National Commission shall have jurisdiction—

(a) To entertain:

(i) Complaints where the value of the goods or services and compensation, if any, claimed exceeds rupees twenty lakhs and

(ii) Appeals against the orders of any State Commission; and

(b) To call for records and pass appropriate orders in any consumer dispute which is pending before or has been decided by any State Commission where it appears to the National Commission that such State Commission has exercised a jurisdiction not vested in it by law, or has failed to exercise a jurisdiction so vested, or has acted in the exercise of its jurisdiction illegally or with material irregularity.

Power of and procedure applicable to the National Commission:

The National Commission shall, in the disposal of any complaints or any proceedings before it, have –

(a) The powers of a Civil Court as specified in Sub-sections (4), (5) and (6) of Section 13;

(b) The power to issue an order to the opposite party directing him to do any one or more of the things referred to in clauses (a) to (i) of Sub-section (1) of Section 14, and follow such procedure as may be prescribed by the Central Government.

Appeal – According to Section 23, any person, aggrieved by an order made by the National Commission in exercise of its powers conferred by Sub-clause (i) of clause (a) of Section 21, may prefer an appeal

against such order to the Supreme Court within a period of thirty days from the date of the order:

Provided that the Supreme Court may entertain an appeal after the expiry of the said period of thirty days if it is satisfied that there was sufficient cause for not filing it within that period.

Finality of orders – According to Section 24, every order of a District Forum, the State Commission or the National Commission shall, if no appeal has been preferred against such order under the provisions of this Act, be final.

Limitation period – According to Section 24(A),

- (1) The District Forum, the State Commission or the National Commission shall not admit a complaint unless it is filed within two years from the date on which the cause of action has arisen.
- (2) Notwithstanding anything contained in Sub-section (1), a complaint may be entertained after the period specified in Sub-section (1), if the complainant satisfies the District Forum, the State Commission or the National Commission, as the case may be, that he had sufficient cause for not filing the complaint within such period:

Provided that no such complaint shall be entertained unless the District Forum, the State Commission or the National Commission, as the case may be, records its reasons for condoning such delay.

Administrative control – According to Section 24B,

- (1) The National Commission shall have administrative control over all the State Commissions in the following matters, namely:
 - (i) Calling for periodical return regarding the institution, disposal pendency of cases;
 - (ii) Issuance of instructions regarding adoption of uniform procedure in the hearing of matters, prior service of copies of documents produced by one party to the opposite parties, furnishing of English translation of judgments written in any language, speedy grant of copies of documents;
 - (iii) Generally overseeing the functioning of the State Commissions or the District Forum to ensure that the objects and purposes of the Act are best served without in any way interfering with their quasi-judicial freedom.
- (2) The State Commission shall have administrative control over all the District Fora within its jurisdiction in all matters referred to in Sub-section (1).

Enforcement of orders by the Forum, the State Commission or the National Commission – According to Section 25, every order made by the District Forum, the State Commission or the National Commission may be enforced by the District Forum, the State Commission or the National Commission, as the case may be, in the same manner as if it were decree or order made by a court in

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a suit pending therein and it shall be lawful for the District Forum, the State Commission or the National Commission to send, in the event of its inability to execute it, such order to the court within the local limits of whose jurisdiction:

- (a) In the case of an order against a company, the registered office of the company is situated, or
- (b) In the case of an order against any other person, the place where the person concerned voluntarily resides or carries on business or personally works for gain, is situated and thereupon, the court to which the order is so sent, shall execute the order as if it were a decree or order sent to it for execution.

Dismissal of frivolous or vexatious compliants – According to Section 26, where a complaint instituted before the District Forum the State Commission or the National Commission, as the case may be, is found to be frivolous or vexatious, it shall, for reasons to be recorded in writing dismiss the compliant and make an order that the complainant shall pay to the opposite party such cost, not exceeding ten thousand rupees, as may be specified in the order.

Penalties – According to Section 27, where a trader or a person against whom a compliant is made or the complainant fails or omits to comply with any order made by the District Forum, the State Commission or the National Commission, as the case may be, such trader or person or complainant shall be punishable with imprisonment for a term which shall not be less than one month but which may extend to three years, or with fine which shall not be less than two thousands rupees but which may extend to ten thousand rupees, or with both:

Provide that the District Forum, the State Commission or the National Commission, as the case may be, may, if it is satisfied that the circumstances of any case so require, impose a sentence of imprisonment or fine, or both, for a term less than the minimum term and the amount lesser than the minimum amount, specified in this section.

Case Related to Consumer Protection Act, 1986

1. Subodh Chandel And Another vs The President Distt. Consumers on 28 May, 2013

This is submitted that the storage of the potatoes by the farmers in cold storage is for commercial purpose for which a claim petition cannot be filed in the Consumer Forum. The services offered by the cold storage in such case will fall in the exception under Section 2 (1) (d) (ii) of the Consumer Protection Act, which excludes the consumers of commercial purpose from the definition of consumers, for invoking remedies under the Act. In the present case the farmers had kept their agriculture produce in the cold storage for hire. They were required to pay the price for protection of the potatoes, and thus they were consumers for commercial purpose.

Shri D.K. Pandey has relied on a judgment of Supreme Court in General Manager, Telecom vs. M. Krishnan & another, Civil Appeal No.7687 of 2004 decided on 1.9.2009, in which the Supreme Court, in view of the special remedies provided under Section 7-B of the Indian Telegraph Act regarding disputes in

respect of telephone bills, held that in such case the remedy under the Consumer Protection Act is by implication barred. The Supreme Court held that special law overrides the old law and hence the High Court was not correct in its approach. The Supreme Court referred upon a decision in *Chairman, Thiruvalluvar Transport Corporation vs. Consumer Protection Council* (1995) 2 SCC 479 in which it was held that the National Commission has no jurisdiction to adjudicate upon claims for compensation arising out of motor vehicles accidents. Reliance has also been placed on some interim orders granted by this Court in such matters.

Puspalata Purohit vs State of Odisha and Others on 2 December, 2016

Learned counsel for the petitioner also drew attention to the reported decision of *National Seeds Corporation Limited v. M. Madhusudhan Reddy* and another, reported in (2012) 2 SCC 506 where Their Lordships were considering a case under the Consumer Protection Act which is quoted below:

It can thus be said that in the context of farmers/growers and other consumer of seeds, the Seeds Act is a special legislation insofar as the provisions contained therein ensure that those engaged in agriculture and horticulture get quality seeds and any person who violates the provisions of the Act and/or the Rules is brought before the law and punished. However, there is no provision in that Act and the Rules framed thereunder for compensating the farmers etc. who may suffer adversely due to loss of crop or deficient yield on account of defective seeds supplied by a person authorised to sell the seeds. That apart, there is nothing in the Seeds Act and the Rules which may give an indication that the provisions of the Consumer Protection Act are not available to the farmers who are otherwise covered by the wide definition of 'consumer' under Section 2(1)(d) of the Consumer Protection Act. As a matter of fact, any attempt to exclude the farmers from the ambit of the Consumer Protection Act by implication will make that Act vulnerable to an attack of unconstitutionality on the ground of discrimination and there is no reason why the provisions of the Consumer Protection Act should be so interpreted".

However, with due regard, it is found from the above decision that in the nature of grievance as discussed therein the compensation can be claimed before a Consumer Forum or State Commission, as the case may be, under the Consumer Protection Act because under the Seeds Act the seeds were distributed following the provisions of the Seeds Act and Rules. But in the instant case there is no statute or rule produced to show that the opposite parties have violated the norms. The fact of above case is also different from the fact of the case in hand. So, the said decision also does not extend help to petitioner.

Check Your Progress

1. Describe about Consumer Protection Act, 1986.
2. State the Provisions of Consumer Protection Act, 1986.
3. Explain the concept of Consumer Disputes.

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4.3 MRTP ACT, 1969 – MEANING, SCOPE, IMPORTANCE AND MAIN PROVISIONS

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4.3.1 MRTP Act, 1969

The MRTP Act, 1969 has its genesis in the Directive Principles of State Policy embodied in the Constitution of India. Clauses (b) and (c) of Article 39 of the Constitution lay down that the State shall direct its policy towards ensuring (i) that the ownership and control of material resources of the community are so distributed as best to sub-serve the common good; and (ii) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment.

The Monopolies and Restrictive Trade Practices Act, 1969 had its genesis in the Directive Principles of State Policy embodied in the Constitution of India. It received the assent of the President of India on 27 December, 1969. It received the assent of the President of India on 27 December, 1969. The Monopolies and Restrictive Trade Practices Act was intended to curb the rise of concentration of wealth in a few hands and of monopolistic practices. It was repealed on September 2009. The Act has been succeeded by The Competition Act, 2002. It was established under the Monopolies and Restrictive Practices (Inquiry and Control) Act 1948. It was reconstituted as the Monopolies Commission on 31 October 1956 by the Restrictive Trade Practices Act 1955, which also set up a Restrictive Practices Court and a registrar of restrictive trading agreements. The history of competition law in India dates back to the 1960s when the first competition law, namely the Monopolies and Restrictive Trade Practices Act (MRTP) was enacted in 1969. But after the economic reforms in 1991, this legislation was found to be obsolete in many aspects and as a result, a new competition law in the form of the Competition Act, 2002 was enacted in 2003. The Monopolies and Restrictive Trade Practices (MRTP) Act, 1969, aims at preventing concentration of economic power in the hands of few business houses. The Act provides for control of monopolies, prohibition of monopolistic, restrictive and unfair trade practice and protection of consumer interests.

4.3.2 Meaning of MRTP

The MRTP Act defines the Monopolistic Trade Practice as “Such practice indicates misuse of one’s power to abuse the market in terms of production and sales of goods and services. Firms involved in monopolistic trade practice try to eliminate competition from the market. Then they take advantage of their monopoly and charge unreasonably high prices. They also deteriorate the product quality, limit technical development, prevent competition and adopt unfair trade practices”.

4.3.3 Scope of MRTP Act, 1969

It is important to first understand the scope that governs the MRTP Act in order to truly understand their applicability and the practical difficulties that arose in their implementation. The scope of MRTP Act, 1969 can be summarized as follows:

1. Command and Control Approach

The Act made it mandatory for enterprises having assets exceeding ₹ 20 crores to take approval of the Central Government before any kind of corporate restructuring or takeover. The criterion for identifying the dominant undertakings was also fixed. Enterprises having assets of more than ₹ 1 crore were automatically considered as dominant.

2. Monopolistic Trade Practices

MTPs as covered under the Chapter IV of the MRTP Act are the activities undertaken by Big Business Houses by abusing their market position that hamper or eliminate healthy competition in the market. Such practices are anti-consumer-welfare.

3. Restrictive Trade Practices

RTPs are activities that block the flow of capital or profits in the market. Some firms tend to control the supply of goods or products in the market either by restricting production or controlling the delivery. MRTPA discourages and prevents the firms from indulging in RTPs.

4. Unfair Trade Practices

UTP is basically an act of false, deceptive, misleading or distorted representation of facts pertaining to goods and services by the firms. Section 36-A of the MRTPA prohibits firms from indulging in Unfair Trade Practices (UTPs). This provision was inserted by the landmark 1984 Amendment to the MRTPA.

4.3.4 Importance of MRTP Act, 1969

Importance of MRTP Act 1969 can be summarized as follows:

1. The Monopolistic and Restrictive Trade Practices Act, 1969, was enacted to ensure that the Provisions Relating to Monopolistic, Restrictive and Unfair Trade Practices.
2. Section 10 of the MRTP Act, 1969 empowers the MRTP Commission to ensure that the operation of the economic system does not result in the concentration of economic power in hands of few, and to provide for the control of monopolies.
3. This Act may be called the Monopolies and Restrictive Trade Practices Act, 1969 and extends to the Whole of India except the State of Jammu and Kashmir.
4. It shall come into force on such date as the Central Government may, [by notification] appoint.
5. The monopolies and restrictive trade practices act, 1969, was enacted to ensure that the operation of the economic system does not result in the concentration of economic power in the hands of few.
6. Provide for the control of monopolies. Provide monopolistic and restrictive trade practices.

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7. It is designed to ensure that the operation of the economic system does not result in concentration of the economic power to the common detriment.
8. The Government adopted the Monopolies and Restrictive Trade Practices (MRTP) Act in 1969 and accordingly the MRTP Commission was set up in 1970.
9. The Commission was set up to investigate the effects of such practices, case by case, on the public interest and to recommend suitable corrective measures.
10. The MRTP Act established to ensure the operation of the economic system does not result in the concentration of economic power in hands of few.

4.3.5 Main Provisions of MRTP Act, 1969

1. Section 10 of the MRTP Act, 1969 empowers the MRTP Commission to enquire into monopolistic or restrictive trade practices upon a reference from the Central Government or upon its own knowledge or on information. The MRTP Act, 1969 also provides for appointment of a Director General of Investigation and Registration for making investigations for the purpose of enquiries by the MRTP Commission and for maintenance of register of agreements relating to restrictive trade practices.
2. The MRTP Commission receives complaints both from registered consumer and trade associations and also from individuals either directly or through various Government Departments. Complaints regarding Restrictive Trade Practices or Unfair Trade Practices from an association are required to be referred to the Director General of Investigation and Registration for conducting preliminary investigation in terms of Sections 11 and 36C of the MRTP Act, 1969 and Regulation 119 of the MRTP Commission Regulations, 1974. The Commission can also order a preliminary investigation by the Director General of Investigation and Registration when a reference on a restrictive trade practice is received from the Central/ State Government, or when Commission's own knowledge warrants a preliminary investigation. Enquiries are instituted by the Commission under relevant Sections of the MRTP Act, 1969 after the Director General of Investigation and Registration has completed the preliminary investigation and as a result of the findings, submits an application to the Commission for an enquiry.
3. Seven enquiries under Section 10(b) were pending with the MRTP Commission at the beginning of the year 2004, while no fresh inquiry was instituted during the period April, 2004- December, 2004. Two enquiries were disposed of during the period and 5 enquiries were pending as on 31.12.2004. 4. 289 enquiries, including 268 brought forward from the previous year, were considered during January 2004-December 2004. 19 enquiries were disposed of during the said period and the

remaining 270 enquiries were pending with the Commission as on 31st December 2004.

5. Neither any enquiry was not brought forward from the previous year nor was any enquiry instituted under this Section during the year.
6. 42 enquiries carried forward from the previous year were taken up by the Commission during January 2004 to December 2004. Ten enquiries were disposed of during the period and the remaining 32 were pending with the Commission as on 31st December 2004.
7. 65 enquiries were brought forward from the previous year and 2 fresh enquiry were instituted by the Commission during the year from January 2004 to December 2004. Two enquiries were disposed of during the said period and 65 enquiries were pending with the Commission as on 31st December 2004.
8. Provisions relating to Unfair Trade Practices were incorporated in the MRTP Act, 1969 in 1984. Unfair Trade Practices have been defined in Section 36A as trade practices which for the purpose of promoting the sale, use or supply of any goods or for provision of any services, adopt one or more of the practices mentioned therein and thereby cause loss or injury to the consumers of such goods or services, whether by eliminating or restricting competition or otherwise.

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Check Your Progress

4. Discuss the concept of MRTP Act, 1969.
5. Explain about Importance of MRTP Act.
6. State the main Provisions of MRTP Act.

4.4 ANSWERS TO 'CHECK YOUR PROGRESS'

1. Describe about Consumer Protection Act, 1986.

Consumer Protection Act was enacted in the year 1986 to provide a better protection of the interests of consumers and encourage the consumer movements through consumer councils and other authorities for the settlement of consumer's disputes and for matters connected therewith. The Act gives full freedom to consumers in getting legal protection and free from fear, complexities and technicalities involved with the various legal procedure in the regular course of action like complaints and so on. Moreover there is no court fees or stamp duty to be affixed, no matter whatever maybe the amount involved in the complaints. So the Act facilitates the consumers to get a better, inexpensive and speedy remedy. The Act shall be applicable to all goods and services unless otherwise, expressly provided by the Central Government by notification. The law shall see to the benefit of the general public, that is the consumers. The act applies in addition to the sale of all goods and services, in the private sector and the public sector as well as Government agencies. It provides for the establishment of Central Consumer Protection Council by the Central

Government and likewise State Consumer Protection Council by the respective State Government.

2. State the Provisions of Consumer Protection Act, 1986.

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- (a) The goods or services must have been purchased or hired or availed of for a consideration which has been paid in full or in part or under a system of deferred payment, i.e., in respect of hire-purchase transactions;
- (b) The goods purchased should not be meant for resale or for a commercial purpose. Goods purchased by a dealer in the ordinary course of his business and those which are in the course of his business to supply would be deemed to be for re-sale;
- (c) In addition to the purchaser(s) of goods, or hirer(s) or user(s) of services, any beneficiary of such services, a user of goods/services with the approval of the purchaser or hirer or user would also be deemed to be a “consumer” under the Act.
- (d) The interests of consumers are sought to be protected and promoted under the Act inter alia by establishment of Consumer Protection Councils at the District, State and National levels.
- (e) The Act provides for a three-tier quasi-judicial redressal mechanism at the District, State and National levels for redressal of consumer disputes and grievances, namely:
- (f) It has jurisdiction to entertain complaints where the value of goods/services complained against and the compensation, if any claimed, exceeds ₹10,000,000 (Indian Rupees 10 Million).
- (g) It has jurisdiction to entertain complaints where the value of goods/services complained against and the compensation, if any claimed, exceeds ₹ 2,000,000 (Indian Rupees 2 Million) but less than ₹ 10,000,000 (Indian Rupees 10 Million).

3. Explain the concept of Consumer Disputes.

According to Section 2(1)(e) of the Consumer Protection Act, ‘a Consumer Dispute’ means a dispute where a person against whom a complaint has been made, denies or disputes the allegations contained in the complaint. If the other party agrees to the complaint, dispute ceases.

Generally, laws in relation to product or service liability differ from nation to nation. The main objective of product or service liability is protection and safety of the consumer even if the consumer is himself responsible for his own loss. Product liability generally involves claims against companies and business organizations including retailers, marketers and manufacturers.

4. Discuss the concept of MRTP Act, 1969.

The MRTP Act, 1969 has its genesis in the Directive Principles of State Policy embodied in the Constitution of India. Clauses (b) and (c) of Article 39 of the Constitution lay down that the State shall direct its policy towards ensuring (i) that the ownership and control of material resources of the community are so distributed as best to sub-serve the

common good; and (ii) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment.

*Consumer Protection Act,
1986*

5. Explain about Importance of MRTP Act.

- (a) The Monopolistic and Restrictive Trade Practices Act, 1969, was enacted to ensure that the Provisions Relating to Monopolistic, Restrictive and Unfair Trade Practices.
- (b) Section 10 of the MRTP Act, 1969 empowers the MRTP Commission to ensure that the operation of the economic system does not result in the concentration of economic power in hands of few, and to provide for the control of monopolies.
- (c) This Act may be called the Monopolies and Restrictive Trade Practices Act, 1969 and extends to the Whole of India except the State of Jammu and Kashmir.
- (d) It shall come into force on such date 1 as the Central Government may, [by notification] appoint.
- (e) The monopolies and restrictive trade practices act, 1969, was enacted to ensure that the operation of the economic system does not result in the concentration of economic power in the hands of few.

6. State the main Provisions of MRTP Act.

- (a) Section 10 of the MRTP Act, 1969 empowers the MRTP Commission to enquire into monopolistic or restrictive trade practices upon a reference from the Central Government or upon its own knowledge or on information
- (b) The MRTP Commission receives complaints both from registered consumer and trade associations and also from individuals either directly or through various Government Departments. Complaints regarding Restrictive Trade Practices or Unfair Trade Practices from an association are required to be referred to the Director General of Investigation and Registration for conducting preliminary investigation in terms of Sections 11 and 36C of the MRTP Act, 1969 and Regulation 119 of the MRTP Commission Regulations, 1974.

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4.5 SUMMARY

- The consumer is the one who pays to consume the goods and services produced. Consumers play a vital role in the economic system of a nation. In the absence of their effective demand, the producers would lack a key motivation to produce goods which are to be sold to consumers.
- Consumer Protection Act was enacted in the year 1986 to provide a better protection of the interests of consumers and encourage the consumer movements through consumer councils and other authorities for the settlement of consumer's disputes and for matters connected therewith. The Act gives full freedom to consumers in getting legal protection and free

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from fear, complexities and technicalities involved with the various legal procedure in the regular course of action like complaints and so on.

- The act applies in addition to the sale of all goods and services, in the private sector and the public sector as well as Government agencies. It provides for the establishment of Central Consumer Protection Council by the Central Government and likewise State Consumer Protection Council by the respective State Government.
- Consumer Dispute' means a dispute where a person against whom a complaint has been made, denies or disputes the allegations contained in the complaint. If the other party agrees to the complaint, dispute ceases. Generally, laws in relation to product or service liability differ from nation to nation. The main objective of product or service liability is protection and safety of the consumer even if the consumer is himself responsible for his own loss. Product liability generally involves claims against companies and business organizations including retailers, marketers and manufacturers.
- The MRTP Act defines the Monopolistic Trade Practice as "Such practice indicates misuse of one's power to abuse the market in terms of production and sales of goods and services Firms involved in monopolistic trade practice tries to eliminate competition from the market. Then they take advantage of their monopoly and charge unreasonably high prices. They also deteriorate the product quality, limit technical development, prevent competition and adopt unfair trade practices".
- The MRTP Act, 1969 has its genesis in the Directive Principles of State Policy embodied in the Constitution of India. Clauses (b) and (c) of Article 39 of the Constitution lay down that the State shall direct its policy towards ensuring (i) that the ownership and control of material resources of the community are so distributed as best to sub-serve the common good; and (ii) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment.
- The MRTP Commission receives complaints both from registered consumer and trade associations and also from individuals either directly or through various Government Departments. Complaints regarding Restrictive Trade Practices or Unfair Trade Practices from an association are required to be referred to the Director General of Investigation and Registration for conducting preliminary investigation in terms of Sections 11 and 36C of the MRTP Act, 1969 and Regulation 119 of the MRTP Commission Regulations, 1974.

4.6 KEY TERMS

- **Consumer:** The consumer is the one who pays to consume the goods and services produced. Consumers play a vital role in the economic system of a nation. In the absence of their effective demand, the producers would lack a key motivation to produce goods which are to be sold to consumers.
- **Consumer Protection Act 1986:** Consumer Protection Act was enacted in the year 1986 to provide a better protection of the interests of consumers

and encourage the consumer movements through consumer councils and other authorities for the settlement of consumer's disputes and for matters connected therewith.

*Consumer Protection Act,
1986*

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- **Consumer Disputes:** According to Section 2(1)(e) of the Consumer Protection Act, 'a Consumer Dispute' means a dispute where a person against whom a complaint has been made, denies or disputes the allegations contained in the complaint. If the other party agrees to the complaint, dispute ceases.
- **Monopolistic and Restrictive Trade Practice:** Monopolistic and Restrictive Trade Practice as such practice indicates misuse of one's power to abuse the market in terms of production and sales of goods and services. Firms involved in monopolistic trade practice tries to eliminate competition from the market. Then they take advantage of their monopoly and charge unreasonably high prices. They also deteriorate the product quality, limit technical development, prevent competition and adopt unfair trade practices.
- **Monopolistic Trade Practices:** MTPs as covered under the Chapter IV of the MRTP Act are the activities undertaken by Big Business Houses by abusing their market position that hamper or eliminate healthy competition in the market. Such practices are anti-consumer-welfare.
- **Restrictive Trade Practices:** RTPs are activities that block the flow of capital or profits in the market. Some firms tend to control the supply of goods or products in the market either by restricting production or controlling the delivery. MRTP discourages and prevents the firms from indulging in RTPs.
- **Unfair Trade Practices:** UTP is basically an act of false, deceptive, misleading or distorted representation of facts pertaining to goods and services by the firms. Section 36-A of the MRTPA prohibits firms from indulging in Unfair Trade Practices (UTPs). This provision was inserted by the landmark 1984 Amendment to the MRTPA.
- **MRTP Act 1969:** The MRTP Act, 1969 has its genesis in the Directive Principles of State Policy embodied in the Constitution of India. Clauses (b) and (c) of Article 39 of the Constitution lay down that the State shall direct its policy towards ensuring (i) that the ownership and control of material resources of the community are so distributed as best to sub-serve the common good; and (ii) that the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment.

4.7 SELF-ASSESSMENT QUESTIONS AND EXERCISES

Short Answer Questions

1. Define Consumer.
2. What do you mean by Consumer dispute?
3. What is the meaning of service as per Consumer Protection Act?
4. Define complaint.

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5. What is defect under COPRA?
6. What is deficiency?
7. Define deficiency service.

Long Answer Questions

1. What are the objects of the Central Consumer Protection Council?
2. What is the need for the COPRA Act, 1986?
3. What are the objects of COPRA Act, 1986?
4. What are the rights of a consumer?
5. Write a note on a consumer redressal agency?
6. How is protection of action taken in good faith? What are the powers to remove difficulties?
7. Explain power to make rules and laying of rules.
8. Briefly state the constitution, composition and objects of consumer protection councils.

4.8 FURTHER READING

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2. Anson Law of Contract 22nd Edition 1964.
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9. Charles De Houghton on The Company, Ed. 1970.
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12. D.J. Hewitt Control of Delegated legislation being a Study of Ultra Vires 1953.
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14. D.S.R. Krishnamurti, TAXMANN'S Company Law 2006.

UNIT 5 FOREIGN EXCHANGE MANAGEMENT ACT, 2000 (FEMA)

*Foreign Exchange
Management Act, 2000
(FEMA)*

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Structure

- 5.0 Introduction
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- 5.6 Key Terms
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- 5.8 Further Reading

5.0 INTRODUCTION

Development of a country depends upon the development of various sections of the economy, especially the various sectors. Industrialisation depends upon the investments made in the economy for starting various project, the project requires capital investment, material, technical know – how and so on. International Trade also plays an important role in the development of a country. Even before independence then Government passed several ordinances regulatory Foreign Exchange Transactions. In 1947, FERA(Foreign Exchange Regulation Act) was passed by the Government of India for a period of ten years. It was made permanent in 1957. In the years 1973, the Act was modified and the same year it was passed. With global economy opening up due to the liberation of economic policies since 1992, the 1973, Act was relaxed in 1993 and several amendments were enacted on part of the on – going process of economic liberalisation relating to foreign investment and foreign trade.

Significant developments have taken place since 1993 due to the liberalisation and globalisation. Some of the major developments were:

- (i) Substantial increase in foreign Exchange Reserve
- (ii) Growth in foreign trade
- (iii) Rationalisation of tariffs.

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- (iv) Current account convertability.
- (v) Liberalisation of Indian Investment abroad.
- (vi) Increased access to Indian corporate for external commercial borrowings.
- (vii) Participation of foreign institutional Investors in stock market in India.

Considering these developments, the Central Government decided to introduce Foreign Exchange Management Bill and repeal the FERA, 1973. The provision of the Bill aims at consolidating and amending the law received the 29th December 1999. It came in to existence on 1st day of June, 2000 as The Foreign Exchange Management act, 1999.

5.1 OBJECTIVES

After going through this unit, you will be able to:

- Explain the Foreign Exchange Management Act 2000 (FEMA)
- Describe Objectives and Main provisions
- Discuss the Introduction to Intellectual Property Right Act
- Examine Copyright, Patent and Trademark

5.2 FOREIGN EXCHANGE MANAGEMENT ACT, 2000 (FEMA) – OBJECTIVES AND MAIN PROVISIONS

5.2.1 Foreign Exchange Management Act, 2000 (FEMA)

- (i) It extends to whole of India.
- (ii) It shall also apply to all branches, offices and also to any contravention there under committed out side India by any persons to whom this Act applies.

FEMA, 1999 seeks to establish to more liberal and orderly regulatory frame work conducive to economic growth by limiting its boundary to:

1. Current Account transactions such as:
 - (a) Payment due in connection with foreign trade.
 - (b) Other current business, services and short-term banking and credit facilities in the ordinary business.
 - (c) Payments due an internet on loans, and as net income from investment, remittances for living expenses of parents, spouse and children residing abroad and expenses in connection with foreign travel, education and medical care of parents, spouse and children.

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2. Capital account transactions such as:

- (a) transactions which alters the assets or liabilities, including contingent liabilities outside India, of persons resident in India or assets or liabilities in India of persons resident outside India and include transfer or issue of an foreign securities by a person resident in / out side India.
- (b) Any borrowing or lending in foreign exchange / Indian rupees between a person resident in/ out side India.
- (c) Deposits between persons resident in / out side India.
- (d) Export, import or holding of currency or currency notes.
- (e) Transfer for immovable property in / out side India, other than a lease not exceeding 5 years by a person resident in / out side India.

3. Export of Goods and Services.

4. Realisation and repatriation of foreign exchange.

5. Exemption from realisation and repatriation in certain cases.

5.2.2 Objectives of Foreign Exchange Management Act, 2000

Objective of FEMA

The Act aims “to consolidate and amend the law relating to foreign exchange with objective of facilitating external trade and payments and for promoting the orderly development and maintenance of foreign exchange market in India;

In order words, the objectives are:

- (i) To facilitate external trade and payment.
- (ii) To promote the orderly development and maintenance of the foreign exchange market in India.
- (iii) To restrict current account transactions by the centre in consultation with the RBI.
- (iv) On the capital account, to allow foreign exchange and flow only for transactions that are permitted.

Definitions

Section 2 of the foreign Exchange Management Act provides list of 31 terms which have been defined in the Act. Some of the important ‘definitions’ are explained below :

Sec. 2(a) “Security” means shares, stocks, bonds and debentures, Govt. securities as defined in the Public debt Act, 1944, Savings certificate Act, 1959 applies, deposit receipts in respect of deposits or securities and units of the Unit Trust of India established under the Unit Trust of India Act, 1963 or of any mutual fund and includes certificates of title to securities but does not include Bills of Exchange or Promissory notes or any other instruments which may be notified by the Reserve Bank as security for the purposes of this Act.

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Sec. 2(b) “Service” means service of any description which is made available to potential users and includes the provision of facilities in connection with banking, financing, insurance, medical assistance, legal assistance, chit fund, real estate, transport, processing supply of electrical or other energy, boarding or lodging or both entertainment, amusement or the purveying of news or other information, but does not include the rendering of any service free of charge or under a contract of personal service.

Sec. 2(c) Authorised Person mean an authorised dealer, money changer, off share banking unit or any other person for the time being authorised under sub-section (1) of section (10) to deal in foreign exchanged or foreign section securities;

Sec. 2(d) “Current account transaction” means a transaction other than a capital account transaction and without prejudice to the generality of the foregoing such transactions includes;

- (i) Payments due in connection with foreign trade, other current business services, and short – term banking and credit facilities in the ordinary course of business,
- (ii) Payments due as interests on loans and as net income from investment,
- (iii) Remittances for living expenses of parents, spouse and children residing abroad, and
- (iv) Expenses in connection with foreign travel, education and medical care of parents, spouse and children;

Sec. 2(e) “Capital account transaction” means a transaction which alters the assets or liabilities, including contingent liabilities, in India of persons resident outside India of persons resident in India of assets or liabilities in India of persons resident outside India, and includes transactions referred to in sub-section (3) of section 6;

Sec. 2(h) “currency” includes all currency notes, postalnotes, postal orders, money orders, cheques, draft, travellers cheques, letters of credit, bills of exchange and promissory notes, credit cards or such other similar instruments, as may be notified by the Reserve Bank;

Sec. 2(l) “export” with its grammatical variations and cognate expression, means :

- (i) The taking out of India any goods;
- (ii) Provision of services from India to any person outside India;

Sec. 2(m) “foreign currency” means any currency other than Indian currency;

- (i) Deposits, credits and balances payable in any foreign currency,
- (ii) Drafts, travelers cheques, letters of credit or bills of exchange, expressed or drawn in Indian currency but payable in any foreign currency,

Sec. 2(n) drafts travelers cheques, letters of credit or bills of exchange, expressed or drawn by banks, institutions or persons outside India, but payable in Indian currency;

Sec. 2(o) “foreign security” means any security, in the form of shares, stocks bonds, debentures or any other instrument denominated or expressed in foreign currency and includes securities expressed in foreign currency, but where redemption or any form of return such as interest or dividends is payable in Indian currency;

“Person” includes:

- (i) An individual
- (ii) A Hindu undivided family
- (iii) A company,
- (iv) A firm,
- (v) An association of persons or a body of individuals, whether incorporated or not,
- (vi) Every artificial judicial person, not falling within any of the preceeding sub-clauses and
- (vii) Any agency, office or branch owned or controlled by such person

Sec. 2(v) ‘Person resident in India’ means:

- (i) Person residing in India for more than 180 days during the course of the preceeding financial year balance does not include:
 - 1. A person who has gone out of India or who stays outside India, in either case-
 - (a) For or on taking up employment outside India or
 - (b) For Carrying on outside India a business or vocation outside India or
 - (c) For any other purpose, in such circumstances as would indicate his intention to stay outside India for an uncertain Period:
 - 2. A person who had come to or stays in India, in either case, otherwise than:
 - (a) For or on taking up employment in India a business or vocation in India or
 - (b) For carrying on in India a business or vocation in India or
 - (c) For any other purpose, in such circumstances as would indicator his intention to stay in India for an uncertain period.
 - (i) Any person or body corporate registered or incorporated in India.
 - (ii) An office, branch or agency in India owned or controlled by as person resident outside India.
 - (iii) An office, branch, or agency outside India owned or controlled by a person resident in India

Sec. 2(w) Person resident outside India” – means a person who is not resident in India.

“Repatriate to India” means bringing into India the realised foreign exchange and

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- (i) The selling of such foreign exchange to an authorised person in India in exchange for rupees or
- (ii) The holding or realised amount in an account with an authorised person in India to the extent notified by the Reserve Bank and includes use of the realised amount for discharge of a debt or liability denominated in foreign exchange and the expression “repatriation” shall be constructed.

5.2.3 Main Provisions of Foreign Exchange Management Act, 2000

Dealing in Foreign Exchange (Section 3)

Same as otherwise provided in this Act, rule, or regulations made there under, or with the general or special permission of the Reserve Bank, no person shall –

- (a) Deal in or transfer any foreign exchange or foreign security to any person not being authorized person.
- (b) Make any payment to or for the credit of any person resident outside India in any manner.
- (c) Receive otherwise through an authorised person, any payment by order or on behalf of any person resident out side India in any manner.
- (d) Enter into any financial transactions in India as consideration for or in association with acquisition or creation or transfer of a right to acquire, any asset outside India by any person.

Restriction on Holding of Foreign Exchange [Section – 4]

No person resident – in India shall acquire, hold, own, posses or transfer any foreign exchange, foreign security or any immovable property situated out side India .

Current Account transactions [Section – 5]

Any person my sell or draw foreign exchange to or from an authorised person if such sale or drawal of a Current a/c transaction.

Provided that the Central Government may, in public interest and in consultation with the Reserve Bank, impose such reasonable restrictions for Current a/c transactions as may be prescribed.

According to section 2(J) “Current Account Transaction” means a transaction other than a capital account transaction. It include following:

- Payment due in connection with foreign trade, other current business services and short term banking and credit facilities in the ordinary course of business.
- Payments due as interest on loans and as net income from investments
- Remittances for living expenses of parents, spouse and children residing abroad
- Expenses in connection with foreign travel, education and medical care of parents, spouse and children.

Besides above, any expenditure which is not a 'capital account transaction' will be current account transaction.

In certain cases, prior approval of Reserve Bank of India is necessary for current account transaction. These have been provided in Foreign Exchange Management (Current Account Transactions) Rules 2000.

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Capital account transactions [Section 6]

- (1) Subject to the provisions of sub-section (2), any person may sell or draw foreign exchange to or from an authorised person for a capital account transaction.
- (2) The Reserve Bank may, in consultation with the Central Government, specify-
 - (a) Any class or classes of capital account transactions which are permissible;
 - (b) The limit up to which foreign exchange shall be admissible for such transaction:

Provided that the Reserve Bank shall not impose any restriction on the drawal of foreign exchange for payments due on account of **amortization** of loans or for depreciation of direct investments in the ordinary course of business.

- (3) Without prejudice to the generally of the provisions of sub-section (2), the Reserve Bank may, by regulations, prohibit, restrict or regulate the following-
 - (a) Transfer or issue of any foreign security by a person resident in India;
 - (b) Transfer or issue of any security by a person resident outside India;
 - (c) Transfer for issue of any security or foreign security by any branch, office or agency in India of a person resident outside India;
 - (d) Any borrowing or lending in foreign exchange in whatever form or by whatever name called;
 - (e) Any borrowing or lending in rupees in whatever form or whatever name called between a person resident in India and a person resident outside India;
 - (f) Deposits between persons resident in India and persons resident outside India;
 - (g) Export, import or holding of currency or currency notes;
 - (h) Transfer of immovable property outside India, other than a lease not exceeding five years, by a person resident in India;
 - (i) Acquisition or transfer of immovable property in India, other than a lease not exceeding five years, by a person resident outside India;
 - (j) Giving of a guarantee or surety in respect of any debt, obligation or other liability incurred-
 - (i) By a person resident in India and owed to a person resident outside India;
 - (ii) By a person resident outside India

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Note: This provision enables the Reserve Bank, to prohibit, restrict or regulate the specific transactions by making regulations.

- (4) A person resident in India may hold, own, transfer or invest in foreign currency, foreign security or any immovable property situated outside India if such currency, security or property was acquired, held or owned by such person when he was resident outside India or inherited from a person who was resident outside.
- (5) A person resident outside India may hold, own, transfer or invest in Indian currency, security or any immovable property situated in India if such currency, security or property was acquired, held or owned by such person when he was resident in India or inherited from a person who was resident, in India.
- (6) Without prejudice to the provisions of this section, the Reserve Bank may, by regulation, prohibit, restrict or regulate establishment in India of a branch, office or other place of business by a person resident outside India, for carrying on any activity relating to such branch, office or other place of business.

Note: Sub clauses (4) and (5) incorporate the existing policy regarding person resident in India acquiring assets outside India and a non-resident acquiring assets in India while he was resident in India. Last clause empowers the Reserve Bank to regulate and setting up of branches or offices in India by foreign firms.

Realisation and repatriation of foreign exchange [Sec – 8]

Same as otherwise provided in this act, where any amount of foreign exchange is due or has accrued to any person resident in India, such person shall take all reasonable steps to realise and repatriate to India such foreign exchange within such period and in such manner as may be specified by the Reserve Bank.

Exemption from realisation and repatriation

Section (9) provides exemption from provisions of section 4 & 8 in the following cases:

- (a) Possession of foreign currency or foreign coins by any person up to such limit as the Reserve Bank may specify.
- (b) Foreign currency account held or operated by such person or class of persons and the limit up to which the Reserve Bank may specify.
- (c) Foreign exchange acquired or received before the 8th day of July 1947 or any income arising or accruing thereon which is held out side India by any person in pursuance of a general or special permission granted by the Reserve Bank.
- (d) Foreign exchange held by a person resident in India upto such limit as the Reserve Bank may specify, if such foreign exchange was acquired by way of gift or inheritance from a person referred to in clause (e) including any income arising there from;

- (e) Foreign exchange acquired from employment, business, trade, vocation, services, honorarium, gifts, inheritance or any other legitimate means up to such limit as the Reserve Bank may specify; and
- (f) Such other receipts in foreign exchange as the Reserve Bank may specify.

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Authorised Person (Section – 10)

Section-10 empowers the RBI to authorise persons to deal in foreign exchange & foreign security. It may specify conditions while granting authorisation. It may revoke authorisation in public interest in case there is contravention or failure to comply with prescribed conditions:

- Only a person appointed by RBI can deal in foreign exchange or in foreign securities as an authorised dealer.
- No payment can be made to a person resident outside India, without the permission of RBI.
- No one can receive any payment from a person resident outside India without the permission of Reserve Bank.

Contravention & Penalties [Section – 13]

Section 13 deals with the contraventions as civil offences as distinguished from criminal offences under FEMA 1973.

The adjudicating officers are empowered to impose following penalties:

1. If any person contravenes any provisions of FEMA – he be liable to a penalty up to “Thrice” the sum involved in such contravention where such amount is quantifiable.
2. Up to two lakhs where the amount is not quantifiable.
3. If contravention continues everyday further penalty which may extend to ₹ 5,000/- for every day after the first day during which contravention continues on him within a period of 90 days, he shall be liable to civil imprisonment.

Power to Make Rules (Section - 46)

- (1) The Central Government may, by notification, make rules to carry out the provisions of this Act.
- (2) Such rules may provide for:
 - (a) The imposition of reasonable restrictions on current account transactions,
 - (b) The manner in which the contravention may be compounded under section 15;
 - (c) The manner of holding an inquiry by the Adjudicating Authority;
 - (d) The form of appeal and fee for filing such appeal under sections 17 and 19;
 - (e) The salary and allowances payable to and the other terms and conditions of service of the Chairperson and other Members of the Appellate Tribunal and the Special Director (Appeals),

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- (f) The salaries and allowances and other conditions of service of the officers and employees of the Appellate Tribunal and the office of the Special Director (Appeals),
- (g) The additional matters in respect of which the Appellate Tribunal and the Special Director (Appeals) may exercise the powers of a civil court under clause (i) of sub-section (2) of section 28;
- (h) The authority or person and the manner in which any document may be authenticated under clause (ii) of section 39; and
- (i) Any other matter.

Check Your Progress

1. Discuss about Foreign Exchange Management Act, 2000.
2. State the objectives of Foreign Exchange Management Act.
3. Explain the main provisions of Foreign Exchange Management Act, 2000.

5.3 INTRODUCTION TO INTELLECTUAL PROPERTY RIGHT ACT – COPYRIGHT, PATENT AND TRADEMARK

5.3.1 Introduction to Intellectual Property Right Act

Intellectual property rights (IPR) refers to the legal rights given to the inventor or creator to protect his invention or creation for a certain period of time. These legal rights confer an exclusive right to the inventor/creator or his assignee to fully utilize his invention/creation for a given period of time. It is very well settled that IP play a vital role in the modern economy. It has also been conclusively established that the intellectual labor associated with the innovation should be given due importance so that public good emanates from it.

Intellectual property (IP) is a category of property that includes intangible creations of the human intellect. There are many types of intellectual property, and some countries recognize more than others. The most well-known types are copyrights, patents, trademarks, and trade secrets. The modern concept of intellectual property developed in England in the 17th and 18th centuries. The term “intellectual property” began to be used in the 19th century, though it was not until the late 20th century that intellectual property became commonplace in the majority of the world's legal systems.

The main purpose of intellectual property law is to encourage the creation of a wide variety of intellectual goods. To achieve this, the law gives people and businesses property rights to the information and intellectual goods they create, usually for a limited period of time. This gives economic incentive for their creation, because it allows people to profit from the information and intellectual goods they

create. These economic incentives are expected to stimulate innovation and contribute to the technological progress of countries, which depends on the extent of protection granted to innovators.

The intangible nature of intellectual property presents difficulties when compared with traditional property like land or goods. Unlike traditional property, intellectual property is “indivisible”, since an unlimited number of people can “consume” an intellectual good without it being depleted. Additionally, investments in intellectual goods suffer from problems of appropriation: a landowner can surround their land with a robust fence and hire armed guards to protect it, but a producer of information or literature can usually do very little to stop their first buyer from replicating it and selling it at a lower price. Balancing rights so that they are strong enough to encourage the creation of intellectual goods but not so strong that they prevent the goods' wide use is the primary focus of modern intellectual property law.

The legal rights granted with the aim to protect the creations of the intellect. These rights include Industrial Property Rights (e.g. patents, industrial designs and trademarks) and Copyright (right of the author or creator) and Related Rights (rights of the performers, producers and broadcasting organizations) refers to “Intellectual Property Rights”.

In today's globalized scenario of expanding multilateral trade and commerce, it has become inevitable for any country to protect its intellectual property by providing statutory rights to the creators and inventors and thus help them fetch adequate commercial value for their efforts in the world market. This innovative and creative capacity is protected under the intellectual property system of WTO. Recognizing this fact, India as a founder member of WTO has ratified the Agreement on Trade Related Intellectual Property Rights (TRIPS). As per the agreement, all member countries including India are to abide by the mutually negotiated norms and standards within the stipulated timeframe. Accordingly, India has set up an Intellectual Property Right (IPR) regime, which is WTO compatible and is well established at all levels whether statutory, administrative or judicial. The Government has taken a comprehensive set of initiatives to streamline the intellectual property administration in the country in view of its strategic significance. In the Ministry of Commerce and Industry, the office of the 'Controller General of Patents, Designs and Trade Marks (CGPDTM) has been set up under the Department of Industrial Policy and Promotion. It administers all matters relating to patents, designs, trademarks and geographical indications and also directs and supervises the functioning of the following:

- (a) The Patent Office (including Designs Wing).
- (b) The Patent Information System (PIS).
- (c) The Trade Marks Registry (TMR) and
- (d) The Geographical Indications Registry (GIR).

Besides, a ‘Copyright Office’ has been set up in the Department of Education of the Ministry of Human Resource Development, to provide all facilities including registration of copyrights and its neighboring rights. As far as issues relating to

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layout design of integrated circuits are concerned, 'Department of Information Technology' in the Ministry of Information Technology is the nodal organization. While, 'Protection of Plant Varieties and Farmers Rights Authority' in Ministry of Agriculture administers all measures and policies relating to plant varieties. For complementing the administrative set up, several legislative initiatives have been taken. It includes, the Trade Marks Act, 1999; the Geographical Indications of Goods (Registration and Protection) Act, 1999; the Designs Act, 2000; the Patents Act, 1970 and its subsequent amendments in 2002 and 2005; Indian Copyright Act, 1957 and its amendment Copyright (Amendment) Act, 1999; Semiconductor Integrated Circuit Layout Design Act, 2000; as well as the Protection of Plant varieties and Farmer's Rights Act, 2001.

Types of Intellectual Property Rights (IPR)

Various types of Intellectual Property Rights (IPR) are as follows:

1. Patents

A patent is a form of right granted by the government to an inventor or their successor-in-title, giving the owner the right to exclude others from making, using, selling, offering to sell, and importing an invention for a limited period of time, in exchange for the public disclosure of the invention. An invention is a solution to a specific technological problem, which may be a product or a process and generally has to fulfill three main requirements: it has to be new, not obvious and there needs to be an industrial applicability. To enrich the body of knowledge and stimulate innovation, it is an obligation for patent owners to disclose valuable information about their inventions to the public.

2. Copyright

A copyright gives the creator of original work exclusive rights to it, usually for a limited time. Copyright may apply to a wide range of creative, intellectual, or artistic forms, or "works". Copyright does not cover ideas and information themselves, only the form or manner in which they are expressed.

3. Industrial design rights

An industrial design right (sometimes called "design right" or design patent) protects the visual design of objects that are not purely utilitarian. An industrial design consists of the creation of a shape, configuration or composition of pattern or color, or combination of pattern and color in three-dimensional form containing aesthetic value. An industrial design can be a two- or three-dimensional pattern used to produce a product, industrial commodity or handicraft. Generally speaking, it is what makes a product look appealing, and as such, it increases the commercial value of goods.

4. Plant varieties

Plant breeders' rights or plant variety rights are the rights to commercially use a new variety of a plant. The variety must amongst others be novel and distinct and for registration the evaluation of propagating material of the variety is considered.

5. Trademarks

A trademark is a recognizable sign, design or expression which distinguishes products or services of a particular trader from similar products or services of other traders.

6. Trade dress

Trade dress is a legal term of art that generally refers to characteristics of the visual and aesthetic appearance of a product or its packaging (or even the design of a building) that signify the source of the product to consumers.

7. Trade secrets

A trade secret is a formula, practice, process, design, instrument, pattern, or compilation of information which is not generally known or reasonably ascertainable, by which a business can obtain an economic advantage over competitors and customers. There is no formal government protection granted; each business must take measures to guard its own trade secrets (e.g., Formula of its soft drinks is a trade secret for Coca-Cola.)

5.3.2 Copyright

Copyright is a collection of rights that automatically vest to someone who creates an original work of authorship like a literary work, song, movie or software. These rights include the right to reproduce the work, to prepare derivative works, to distribute copies, and to perform and display the work publicly. To understand how these rights can be used or licensed, it's helpful to analogize them to a bundle of sticks, where each stick represents a one of these rights. The copyright owner has the right to keep each "stick" for themselves, to transfer them individually to one or more people, or to transfer them collectively to one or more people. In short, copyright allows the owner to choose the ways his/her copyrighted works are made available to the public.

The primary objective of copyright is to induce and reward authors, through the provision of property rights, to create new works and to make those works available to the public to enjoy. The theory is that, by granting certain exclusive rights to creators, which allow them to protect their creative works against theft, they receive the benefit of economic rewards and the public receives the benefit of the creative works that might not otherwise be created or disseminated.

Meaning of Copyright

Copyright (or author's right) is a legal term used to describe the rights that creators have over their literary and artistic works. Works covered by copyright range from books, music, paintings, sculpture, and films, to computer programs, databases, advertisements, maps, and technical drawings.

Characteristics of Copyright

Copyright is not a single right rather it is collection of rights. Following are the characteristic features of copyright.

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1. Creation of a statute

Copyright is formation of a particular statute under the present law. This law is applicable only on work which is as per the provision of this act i.e. any work cannot qualify for copyright.

2. Form of intellectual property

A copyright is a form of intellectual property because it protects the product of a human mind.

3. Monopoly right

Copyright is monopolistic in nature. It restricts others from using the rights of a copyright owner.

4. Negative right

Copyright is a negative right it stops others from copying the work protected under copyright.

5. Object of copyright

The basic aim of copyright law is to motivate authors, composers and artists to create original works by giving them exclusive right for a specified period of time.

6. Multiple rights

Copyright is not a single right. It consists of a collection of different rights in the same work. For example, a literary work copyright includes the right issuing copies of work, translation of work etc.

7. Neighbouring rights

Copyright Act explains broadcasters' and performers' rights, they are known as "neighbouring rights". They were created for performing artists, producers of phonogrammes, and people involved in broadcasting (radio or television).

Objectives of Indian Copyright Act, 1957

The Indian Copyright Act, 1957 is enacted with the following two main objectives:

1. Encouragement to the Original Work

The main objective of the Copyright Act is to encourage authors, composers, artists, and designers to create original works by rewarding them with the exclusive right for a limited period (usually for the life of the originator plus 50 years) to exploit the work for monetary gain.

The economic exploitation is done by licensing such exclusive rights to the entrepreneurs like publishers, film producers and record manufacturers for a monetary consideration. In reality, people who economically exploit the copyright are the greater beneficiaries of the copyright law than the creators of works of copyright. The publishers and authors of books are such examples.

2. Protection to the Originator

The objective of copyright law is also, in essence, to protect the author or the creator of the original work from the unauthorized reproduction or exploitation of his/her materials. The right also extends to prevent others from exercising without authority any other form of right attached to copyright, for example, in case of literary work, the right of translation, adaptation or abridgement. In the recent times, with the rapid advance of technology, copyright infringement in the form of 'piracy' has become a serious problem of international in character. This is because the technological progress has made reproduction of copyright material easy and cheap.

As a consequence, cassettes sales of pirate recordings in 1997 were estimated at 174 million units with a value of some 83 million dollars, making India the World's third largest piracy market in volume and sixth in value. Sales through piracy in India account for nearly 30% of total unit sales which was as high as 80% during the eighties. Piracy of compact discs is also becoming a serious problem in India.

Owing to the international character of copyright, various countries have joined to form conventions for the protection of copyrights owned by its nationals in other countries. The Berne Convention for the Protection of Literary and Artistic Works is the result of such joint effort. India is a member of two of such conventions. Accordingly, the Indian copyright owners can protect their copyright in almost in any country in the world. The appropriate actions taken under the Copyright Act 1957 can stop infringement of copyright. Infringement of copyright is also an offence punishable with imprisonment and fine.

5.3.3 Patent

The history of Patent law in India starts from 1911 when the Indian Patents and Designs Act, 1911 was enacted. The present Patents Act, 1970 came into force in the year 1972, amending and consolidating the existing law relating to Patents in India. The Patents Act, 1970 was again amended by the Patents (Amendment) Act, 2005, wherein product patent was extended to all fields of technology including food, drugs, chemicals and microorganisms. After the amendment, the provisions relating to Exclusive Marketing Rights (EMRs) have been repealed, and a provision for enabling grant of compulsory license has been introduced. The provisions relating to pre-grant and post-grant opposition have been also introduced. An invention relating to a product or a process that is new, involving inventive step and capable of industrial application can be patented in India. However, it must not fall into the category of inventions that are non-patentable as provided under Section 3 and 4 of the (Indian) Patents Act, 1970. The first legislation in India relating to patents was the Act VI of 1856. The objective of this legislation was to encourage inventions of new and useful manufactures. It helps to induce inventors to disclose secret of their inventions. The Act was subsequently repealed by Act IX of 1857 since it had been enacted without the approval of the British Crown. Fresh legislation for granting exclusive privileges was introduced. It was an Act XV of 1859. In 1872, the Act of 1859 was consolidated to provide protection relating to designs. It was

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renamed as “The Patterns and Designs Protection Act” under Act XIII of 1872. The Act of 1872 was further amended in 1883 (XVI of 1883) to introduce a provision to protect novelty of the invention. The Indian Patents and Designs Act, 1911, (Act II of 1911) replaced all the previous Acts. This Act brought patent administration under the management of Controller of Patents for the first time. This Act was further amended in 1920 to enter into reciprocal arrangements with UK and other countries for securing priority. After Independence, it was felt that the Indian Patents & Designs Act, 1911 was not fulfilling its objective. It was found desirable to enact comprehensive patent law owing to substantial changes in political and economic conditions in the country.

Meaning of Patent

Patent is the granting of a property right by a sovereign authority to an inventor. This grant provides the inventor exclusive rights to the patented process, design, or invention for a designated period in exchange for a comprehensive disclosure of the invention. They are a form of incorporeal right. Patents provide an incentive for companies or individuals to continue developing innovative products or services without the fear of infringement. For example, large pharmaceutical companies can spend billions of dollars on research and development. Without patents, their drugs and medicines could be duplicated and sold by companies that didn't research or invest the needed capital for R&D.

Patent Rules in India

The TRIPS Agreement, which came into effect on 1 January 1995, is to date the most comprehensive multilateral agreement on intellectual property. The areas of intellectual property that it covers are:

1. Copyright and related rights.
2. Trademarks including service marks.
3. Geographical indications including appellations of origin.
4. Industrial designs.
5. Patents including the protection of new varieties of plants.
6. The layout-designs of integrated circuits; and undisclosed information including trade secrets and test data.

The main features of the agreement are as follows:

1. Standards

In respect of each of the main areas of intellectual property covered by the TRIPS Agreement, the Agreement sets out the minimum standards of protection to be provided by each Member. Each of the main elements of protection is defined, namely the subject-matter to be protected, the rights to be conferred and permissible exceptions to those rights, and the minimum duration of protection. The Agreement sets these standards by requiring, first, that the substantive obligations of the main conventions of the WIPO, the Paris Convention for the Protection of Industrial Property (Paris Convention) and the Berne Convention for the Protection of Literary and Artistic Works (Berne Convention) in their most recent versions must

be complied with. With the exception of the provisions of the Berne Convention on moral rights, all the main substantive provisions of these conventions are incorporated by reference and thus become obligations under the TRIPS Agreement between TRIPS Member countries. The relevant provisions are to be found in Articles 2.1 and 9.1 of the TRIPS Agreement, which relate, respectively, to the Paris Convention and to the Berne Convention. Secondly, the TRIPS Agreement adds a substantial number of additional obligations on matters where the pre-existing conventions are silent or were seen as being inadequate. The TRIPS Agreement is thus sometimes referred to as a Berne and Paris-plus agreement.

2. Enforcement

The second main set of provisions deals with domestic procedures and remedies for the enforcement of intellectual property rights. The Agreement lays down certain general principles applicable to all IPR enforcement procedures. In addition, it contains provisions on civil and administrative procedures and remedies, provisional measures, special requirements related to border measures and criminal procedures, which specify, in a certain amount of detail, the procedures and remedies that must be available so that right holders can effectively enforce their rights.

3. Dispute settlement

The Agreement makes disputes between WTO Members about the respect of the TRIPS obligations subject to the WTO's dispute settlement procedures.

In addition the Agreement provides for certain basic principles, such as national and most-favored-nation treatment, and some general rules to ensure that procedural difficulties in acquiring or maintaining IPRs do not nullify the substantive benefits that should flow from the Agreement. Special transition arrangements operate in the situation where a developing country does not presently provide product patent protection in the area of pharmaceuticals. The TRIPS Agreement is a minimum standards agreement, which allows Members to provide more extensive protection of intellectual property if they so wish. Members are left free to determine the appropriate method of implementing the provisions of the Agreement within their own legal system and practice.

Procedure to get Patent

In India, a patent application can be filed, either alone or jointly, by true and first inventor or his assignee. After filing the application for the grant of patent, a request for examination is required to be made for examination of the application by the Indian Patent Office. After the First Examination Report is issued, the Applicant is given an opportunity to meet the objections raised in the report. The Applicant has to comply with the requirements within 12 months from the issuance of the First Examination Report. If the requirements of the first examination report are not complied with within the prescribed period of 12 months, then the application is treated to have been abandoned by the applicant. After the removal of objections and compliance of requirements, the patent is granted and notified in the Patent Office Journal.

Filing of Application for Grant of Patent in India by Foreigners

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India being a signatory to the Paris Convention for the Protection of Industrial Property, 1883 and the Patent Cooperation Treaty (PCT), 1970, a foreign entity can adopt any of the aforesaid routes for filing of application for grant of patent in India. Where an application for grant of patent in respect of an invention in a Convention Country has been filed, then similar application can also be filed in India for grant of patent by such applicant or the legal representative or assignee of such person within twelve months from the date on which the basic application was made in the Convention Country i.e. the home country. The priority date in such a case is considered as the date of making of the basic application.

1. Form 1 – Application for Grant of Patent

It is an application for grant of patent in India. In this form, you will have to furnish information, such as, name and address of the inventor(s), name and address of the applicant(s), information corresponding to prior patent applications relating to the current invention, which you or any authorized entity has filed and some declarations, among other information.

2. Form 2 – Provisional/Complete Specification

It is used to furnish your patent specification. The patent specification can be provisional or a complete patent specification depending of the type of patent application (provisional or complete) you are filing. You might find our article on “What are the different patent filing options?” useful.

3. Form 3 – Statement and Undertaking Under Section 8

It is used to furnish information/actions relating to patent applications filed in other countries for the current invention. Additionally, any information relating to the rights corresponding to the present patent application has to be furnished. It is used to undertake that you will be keeping the patent office informed in writing the details regarding corresponding applications for patents filed outside India.

4. Form 5 – Declaration by Inventor

It is used to declare the inventors of the subject matter sought to be protected using the current patent application.

5. Form 9 – Request for Publication

If this form is not filed, then the patent specification will be published by the patent office after 18 months from the priority date (filing of the first patent application for the current subject matter). On the other hand, by filing this form, you can generally have your patent specification published within 1 month from filing this form. Note that the patent rights start from the date of publication of the patent application (enforceable after grant of patent).

6. Form 18 – Request for Examination of Application for Patent

This form can be filed within 48 months from the priority date. The patent office will not consider your patent application for examination unless this form is filed.

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Pre-Grant Opposition

A representation for pre-grant opposition can be filed by any person under Section 11A of the Patents Act, 1970 within six months from the date of publication of the application, as amended (the “Patents Act”) or before the grant of patent. The grounds on which the representation can be filed are provided under Section 25(1) of the Patents Act.

Post-Grant Opposition

Any interested person can file post-grant opposition within twelve months from the date of publication of the grant of patent in the official journal of the patent office.

Grounds for Opposition

Some of the grounds for filing pre-and post-grant opposition are as under:

1. Patent wrongfully obtained.
2. Prior publication.
3. The invention was publicly known or publicly used in India before the priority date of that claim.
4. The invention is obvious and does not involve any inventive step.
5. That the subject of any claim is not an invention within the meaning of this Act, or is not patentable under this Act.
6. Insufficient disclosure of the invention or the method by which it is to be performed.
7. That in the case of a patent granted on convention application, the application for patent was not made within twelve months from the date of the first application for protection for the invention made in a convention country or in India.
8. That the complete specification does not disclose or wrongly mentions the source and geographical origin of biological material used for the invention.
9. That the invention was anticipated having regard to the knowledge, oral or otherwise, available within any local or indigenous community in India or elsewhere.

Restoration and Surrender of Lapsed Patent

Applications for restorations of lapsed patents

1. Where a patent has ceased to have effect by reason of failure to pay any renewal fee within the period prescribed under section 53 or within such period as may be allowed under sub-section (4) of section 142, the patentee or his legal representative, and the patent was held by two or more persons jointly, then, with the leave of the Controller, one or more of them without joining the others, may, within eighteen months from the date on which the patent ceased to have effect, make an application for the restoration of the patent.

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2. Omitted by the Patents (Amendment) Act, 2002
3. An application under this section shall contain a statement, verified in the prescribed manner, fully setting out the circumstances which led to the failure to pay the prescribed fee and the Controller may require from the applicant such further evidence as he may think necessary.

Procedure for disposal of applications for restoration of lapsed patents

1. If, after hearing the applicant in cases where the Applicant so desires or the Controller thinks fit, the Controller is prima facie satisfied that the failure to pay the renewal fee was unintentional and that there has been no undue delay in the making of the application, he shall publish the application in the prescribed manner and within the prescribed period any person interested may give notice to the Controller of opposition thereto on either or both of the following grounds, that is to say,
 - (a) That the failure to pay the renewal fee was not unintentional or
 - (b) That there has been undue delay in the making of the application.
2. If notice of opposition is given within the period aforesaid, the Controller shall notify the applicant and shall give to him and to the opponent an opportunity to be heard before he decides the case.
3. If no notice of opposition is given within the period aforesaid or if in the case of opposition, the decision of the Controller is in favor of the applicant, the Controller shall, upon payment of any unpaid renewal fee and such additional fee as may be prescribed, restore the patent and any patent of addition specified in the application which has ceased to have effect on the cesser of that patent.
4. The Controller may, if he thinks fit as a condition of restoring the patent, require that an entry shall be made in the register of any document or matter which, under the provisions of this Act, has to be entered in the register but which has not been so entered.

Rights of patentees of lapsed patents which have been restored

1. Where a patent is restored, the rights of the patentee shall be subject to such provisions as may be prescribed and to such other provisions as the Controller thinks fit to impose for the protection or compensation of persons who may have begun to avail themselves of or have taken definite steps by contract or otherwise to avail themselves of, the patented invention between the date when the patent ceased to have effect and the date of publication of the application for restoration of the patent under this Chapter.
2. No suit or other proceeding shall be commenced or prosecuted in respect of an infringement of a patent committed between the date on which the patent ceased to have effect and the date of the publication of the application for restoration of the patent.

Surrender of Patents

Foreign Exchange
Management Act, 2000
(FEMA)

The surrender of patents includes the following:

1. A patentee may, at any time by giving notice in the prescribed manner to the Controller, offer to surrender his patent.
2. Where such an offer is made, the Controller shall publish the offer in the prescribed manner, and also notify every person other than the patentee whose name appears in the register as having an interest in the patent.
3. Any person interested may, within the prescribed period after such publication, give notice to the Controller of opposition to the surrender, and where any such notice is given the Controller shall notify the patentee.
4. If the Controller is satisfied after hearing the patentee and any opponent, if desirous of being heard, that the patent may properly be surrendered, he may accept the offer and by order, revoke the patent.

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Infringement of Patent

Patent infringement occurs when a party makes, uses, offers to sell, sells or imports products covered by the patent without the patent owner's permission. To determine whether a particular product is covered by a patent, you must review the numbered paragraphs or claims, at the end of the patent. If the product includes every element set forth in at least one of the claims, it is covered and said to "infringe" the patent (and the claim is said to "read on" the product). If the product omits even one element included in the claim, it does not infringe.

Scope of Infringement

According to the provisions of the Indian Patents Act 1970, what constitutes infringement is not defined in the act. Therefore, any violations of the rights conferred on the patentee under the act may result in an infringement of patent. It is to be noted that Indian Limitations Act governs the period of limitation for bringing a suit for infringement of patent, which is three years from the date of infringement.

A suit for patent infringement is required to be filed in a district court having jurisdiction to try the suit, the jurisdiction is governed by the Civil Procedure Code (C.P.C.) the cause of action must have arisen in a place within the jurisdiction of the court where the suit is to be filed. However, where the defendant counter claims revocation of the patent the suit along with the counter claim will be transferred to the High Court. Patent infringement proceedings can only be initiated after grant of patent in India but may include a claim retrospectively from the date of publication of the application for grant of the patent.

Infringement of a patent consists of the unauthorized making, importing, using, offering for sale or selling any patented invention within the India. Under the (Indian) Patents Act, 1970 only a civil action can be initiated in a Court of Law. Further, a suit for infringement can be defended on various grounds including the grounds on which a patent cannot be granted in India and based on such defense; revocation of Patent can also be claimed.

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5.3.4 Trademark

A trademark is a visually perceptible sign used in relation to goods services. The primary purpose of a trademark is to identify commercial or trade origins of the goods or service such a trademark distinguishes a particular product form another product. It offers an assurance to the consumer that when he is buying a particular item with a trademark he is purchasing the same item which he has been assured of its quality, composition etc. So a trademark reflects the goodwill or reputation of a particular product. It is statutorily not compulsory for somebody to register a trademark. If a trade mark is register by someone in that case he has a built in right to the safety of that particular mark. The registration of a trademark does not confer any new right on the holder of the trade mark. It only supplements a right which already exists. Therefore, a trade mark registration is a cumulative and not alternative to the protection of the mark by the common law.

Trademarks not only help distinguish products within the legal and business systems—but just as significantly with consumers. They are used to identify and protect words and design elements that identify the source, owner, or developer of a product or service. They can be corporate logos, slogans, bands, or the brand name of a product. Similar to a trademark, a service mark identifies and distinguishes the source of a service rather than a product, and the term trademark is often used to refer to both trademarks and service marks.

Using a trademark prevents others from using a company or individual's products or services without their permission. They also prohibit any marks that have a likelihood of confusion with an existing one. This means that a business cannot use a symbol or brand name if it looks or sounds similar, or has a similar meaning to one that's already on the books especially if the products or services are related. For instance, a soft drink company can't legally use a symbol that looks like that of Coca-Cola and it can't use a name that sounds like Coke.

Meaning of Trademark

Trademark refers to a recognizable insignia, phrase, word, or symbol that denotes a specific product and legally differentiates it from all other products of its kind. A trademark exclusively identifies a product as belonging to a specific company and recognizes the company's ownership of the brand. Trademarks are generally considered a form of intellectual property and may or may not be registered.

Functions of a Trademark

A trademark serves the purpose of identifying the source or the origin of goods. Trademark performs the following four functions.

1. It identifies the product and its origin.
2. It proposes to guarantee its quality.
3. It advertises the product. The trademark represents the product.
4. It creates an image of the product in the minds of the public particularly the consumers or the prospective consumers of such goods.

Types of Trademark in India

The Trademarks Act, 1999, allows the registration of various types of trademarks such as word marks, service marks, collective marks, certification marks, series marks logos/symbols and many others.

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1. Word Marks

Word Marks are the most common types of trademarks that are registered in India. These refer to any marks that are used to identify the products and services of a trading company or service-providing company. If the name of your product or service is text-based (contains text only) it will be registered under Word Marks.

For Example -

The word Nestle® is a registered as a Word-Mark.

2. Service Marks

Service Marks represent the service which a company or business deals in. They distinguish different services available in the market and is filed under trademark classes 35-45.

For example -

FedEx is a registered courier delivery service provider.

3. Logos and Symbols

A logo is a printed/painted figure/design/character and do not consist of any letters/words/numerals. For word marks that are also used as a logo, the trademark needs to be registered both as a word mark and a device marks. In India, the registration for both these aspects can be made in a single application.

For example -

Apple has a registered logo which is used on each of their products.

4. Shape of Goods

The shape of goods is categorized in Trade Dress (appearance of a product) wherein, other than a logo or label a product can also be distinguished based on its packaging.

For example -

The bottle of Coca-Cola is distinguished from other brands on the basis of its bottle's shape.

5. Series Marks

Service marks are trademarks which have a common syllable, prefix or suffix, thus denoting as a family of marks sharing a 'common name.' They should differ only as to matters of non-distinctive characters (goods, price, quality or size).

For example -

McDonald's have a series of 'Mc' registered as word mark which represents their different product range such as Mc Chicken, Mc Veggie etc.

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6. Collective Trademarks

These marks are linked with a group of people and not one single product or service. These trademarks are primarily owned by an organization, institutes or any association. They can be used by members of the organization to represent them as one the part. They are “Badges of origin” which indicates the specific source of the individual, his/her products and services.

For Example -

A chartered accountant can use the “CA” device as he is a registered member of the Institute of Chartered Accountants.

7. Certification Mark

The certification mark is created to show a specific quality standard that the company has met. This means that the public will be aware that the trader's goods or services are certified as it has met a particular standard, as defined by the certifying body that owns the certification mark. Certification marks are used to define “Standard” of goods and services.

For Example -

FSSAI - Certification for the quality of packaged food products.

8. Geographical Indicators

A geographical indication is used on products to show the unique nature, reputation and quality the products possess based on the place of origin.

The Geographical Indicators are awarded by the GI Registry and is granted to natural, agricultural, manufactured and handicraft products that come from a specific geographical origin.

For Example -

Darjeeling Tea is a GI under the Intellectual Property Rights.

Check Your Progress

4. Discuss the concept of Intellectual property rights.
5. Explain the concept of Copyright.
6. Examine in brief about Patent.
7. Discuss the concept of Trademark.

5.4 ANSWERS TO ‘CHECK YOUR PROGRESS’

1. Discuss about Foreign Exchange Management Act, 2000.

The Foreign Exchange Management Act, (1999) or in short FEMA has been introduced as a replacement for earlier Foreign Exchange Regulation Act (FERA). FEMA became an act on the 1st day of June, 2000. FEMA was introduced because the FERA didn't fit in with post-

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liberalisation policies. A significant change that the FEMA brought with it, was that it made all offenses regarding foreign exchange civil offenses, as opposed to criminal offenses as dictated by FERA. The main objective behind the Foreign Exchange Management Act, (1999) is to consolidate and amend the law relating to foreign exchange with the objective of facilitating external trade and payments. It was also formulated to promote the orderly development and maintenance of foreign exchange market in India. FEMA is applicable to all parts of India. The act is also applicable to all branches, offices and agencies outside India owned or controlled by a person who is a resident of India.

2. State the objectives of Foreign Exchange Management Act.
 - (i) To facilitate external trade and payment.
 - (ii) To promote the orderly development and maintenance of the foreign exchange market in India.
 - (iii) To restrict current account transactions by the centre in consultation with the RBI.
 - (iv) On the capital account, to allow foreign exchange and flow only for transactions that are permitted.

3. Explain the main provisions of Foreign Exchange Management Act, 2000.

The major provisions of FEMA, 2000 relate to following matters:

- (a) Dealing in foreign exchange, etc.
 - (b) Holding of foreign exchange, etc.
 - (c) Current account transactions
 - (d) Capital account transactions
 - (e) Export of goods and services
 - (f) Realization and repatriation of foreign exchange
 - (g) Exemption from realization and repatriation in certain cases.
 - (h) Provisions relating to authorised persons. i.e. authorised by RBI to deal with foreign exchange or in foreign securities
 - (i) Power of RBI to inspect authorized person
 - (j) Contravention and penalties
 - (k) Adjudication and appeal
 - (l) Directorate of enforcement
 - (m) Miscellaneous provisions
4. Discuss the concept of Intellectual property rights.

Intellectual property rights (IPR) refers to the legal rights given to the inventor or creator to protect his invention or creation for a certain period of time. These legal rights confer an exclusive right to the inventor/creator or his assignee to fully utilize his invention/creation for a given period of time. It is very well settled that IP plays a vital role in the modern economy.

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It has also been conclusively established that the intellectual labor associated with the innovation should be given due importance so that public good emanates from it.

5. Explain the concept of Copyright.

Copyright is a collection of rights that automatically vest to someone who creates an original work of authorship like a literary work, song, movie or software. These rights include the right to reproduce the work, to prepare derivative works, to distribute copies, and to perform and display the work publicly. To understand how these rights can be used or licensed, it's helpful to analogize them to a bundle of sticks, where each stick represents a one of these rights. The copyright owner has the right to keep each "stick" for themselves, to transfer them individually to one or more people, or to transfer them collectively to one or more people. In short, copyright allows the owner to choose the ways his/her copyrighted works are made available to the public.

6. Examine in brief about Patent.

Patent is the granting of a property right by a sovereign authority to an inventor. This grant provides the inventor exclusive rights to the patented process, design, or invention for a designated period in exchange for a comprehensive disclosure of the invention. They are a form of incorporeal right. Patents provide an incentive for companies or individuals to continue developing innovative products or services without the fear of infringement. For example, large pharmaceutical companies can spend billions of dollars on research and development. Without patents, their drugs and medicines could be duplicated and sold by companies that didn't research or invest the needed capital for R&D.

7. Discuss the concept of Trademark.

Trademark is a visually perceptible sign used in relation to goods services. The primary purpose of a trademark is to identify commercial or trade origins of the goods or service such a trademark distinguishes a particular product from another product. It offers an assurance to the consumer that when he is buying a particular item with a trademark he is purchasing the same item which he has been assured of its quality, composition etc. So a trademark reflects the goodwill or reputation of a particular product. It is statutorily not compulsory for somebody to register a trademark. If a trade mark is register by someone in that case he has a built in right to the safety of that particular mark. The registration of a trademark does not confer any new right on the holder of the trade mark. It only supplements a right which already exists. Therefore, a trade mark registration is a cumulative and not alternative to the protection of the mark by the common law.

5.5 SUMMARY

*Foreign Exchange
Management Act, 2000
(FEMA)*

- The Foreign Exchange Management Act, (1999) or in short FEMA has been introduced as a replacement for earlier Foreign Exchange Regulation Act (FERA). FEMA became an act on the 1st day of June, 2000. FEMA was introduced because the FERA didn't fit in with post-liberalisation policies. A significant change that the FEMA brought with it, was that it made all offenses regarding foreign exchange civil offenses, as opposed to criminal offenses as dictated by FERA.
- The main objective behind the Foreign Exchange Management Act, (1999) is to consolidate and amend the law relating to foreign exchange with the objective of facilitating external trade and payments. It was also formulated to promote the orderly development and maintenance of foreign exchange market in India. FEMA is applicable to all parts of India. The act is also applicable to all branches, offices and agencies outside India owned or controlled by a person who is a resident of India.
- Intellectual property rights (IPR) refers to the legal rights given to the inventor or creator to protect his invention or creation for a certain period of time. These legal rights confer an exclusive right to the inventor/creator or his assignee to fully utilize his invention/creation for a given period of time. It is very well settled that IP play a vital role in the modern economy. It has also been conclusively established that the intellectual labor associated with the innovation should be given due importance so that public good emanates from it.
- Copyright is a collection of rights that automatically vest to someone who creates an original work of authorship like a literary work, song, movie or software. These rights include the right to reproduce the work, to prepare derivative works, to distribute copies, and to perform and display the work publicly. To understand how these rights can be used or licensed, it's helpful to analogize them to a bundle of sticks, where each stick represents a one of these rights. The copyright owner has the right to keep each "stick" for themselves, to transfer them individually to one or more people, or to transfer them collectively to one or more people. In short, copyright allows the owner to choose the ways his/her copyrighted works are made available to the public.
- Patent is the granting of a property right by a sovereign authority to an inventor. This grant provides the inventor exclusive rights to the patented process, design, or invention for a designated period in exchange for a comprehensive disclosure of the invention. They are a form of incorporeal right. Patents provide an incentive for companies or individuals to continue developing innovative products or services without the fear of infringement. For example, large pharmaceutical companies can spend billions of dollars on research and development. Without patents, their drugs and medicines could be duplicated and sold by companies that didn't research or invest the needed capital for R&D.

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- Trademark is a visually perceptible sign used in relation to goods services. The primary purpose of a trademark is to identify commercial or trade origins of the goods or service such a trademark distinguishes a particular product form another product. It offers an assurance to the consumer that when he is buying a particular item with a trademark he is purchasing the same item which he has been assured of its quality, composition etc.
- So a trademark reflects the goodwill or reputation of a particular product. It is statutorily not compulsory for somebody to register a trademark. If a trade mark is register by someone in that case he has a built in right to the safety of that particular mark. The registration of a trademark does not confer any new right on the holder of the trade mark. It only supplements a right which already exists. Therefore, a trade mark registration is a cumulative and not alternative to the protection of the mark by the common law.

5.6 KEY TERMS

- **Foreign Exchange Management Act, 2000:** The Foreign Exchange Management Act, (1999) or in short FEMA has been introduced as a replacement for earlier Foreign Exchange Regulation Act (FERA). FEMA became an act on the 1st day of June, 2000. FEMA was introduced because the FERA didn't fit in with post-liberalization policies.
- **Intellectual property rights:** Intellectual property rights (IPR) refers to the legal rights given to the inventor or creator to protect his invention or creation for a certain period of time. These legal rights confer an exclusive right to the inventor/creator or his assignee to fully utilize his invention/creation for a given period of time. It is very well settled that IP play a vital role in the modern economy. It has also been conclusively established that the intellectual labor associated with the innovation should be given due importance so that public good emanates from it.
- **Copyright:** Copyright is a collection of rights that automatically vest to someone who creates an original work of authorship like a literary work, song, movie or software. These rights include the right to reproduce the work, to prepare derivative works, to distribute copies, and to perform and display the work publicly.
- **Patent:** Patent is the granting of a property right by a sovereign authority to an inventor. This grant provides the inventor exclusive rights to the patented process, design, or invention for a designated period in exchange for a comprehensive disclosure of the invention. They are a form of incorporeal right.
- **Trademark:** Trademark is a visually perceptible sign used in relation to goods services. The primary purpose of a trademark is to identify commercial or trade origins of the goods or service such a trademark distinguishes a particular product form another product. It offers an assurance to the consumer that when he is buying a particular item with a trademark he is purchasing the same item which he has been assured of its quality,

composition etc. So a trademark reflects the goodwill or reputation of a particular product.

- **Word Marks:** Word Marks are the most common types of trademarks that are registered in India. These refer to any marks that are used to identify the products and services of a trading company or service-providing company. If the name of your product or service is text-based (contains text only) it will be registered under Word Marks.
- **Logos and Symbols:** A logo is a printed/painted figure/design/character and does not consist of any letters/words/numerals. For word marks that are also used as a logo, the trademark needs to be registered both as a word mark and a device mark. In India, the registration for both these aspects can be made in a single application.

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5.7 SELF-ASSESSMENT QUESTIONS AND EXERCISES

Short Answer Questions

1. What is Foreign Exchange Management Act?
2. What is foreign exchange?
3. Who is an authorized person?
4. What is Currency?
5. What is Indian Currency?
6. What are currency notes?
7. What is current account transaction?
8. What is foreign security?
9. Give the meaning of Intellectual property rights.
10. What is Copyright?
11. Define the term Patent.
12. What is Trademark?

Long Answer Questions

1. State the objectives of the FEMA.
2. What is the need for FEMA?
3. What are the main provisions of FEMA?
4. Briefly write the scope of FEMA.
5. Discuss the concept of Intellectual property rights.
6. Write note on: Copyright.
7. Explain various types of Patent.
8. Discuss in brief about Trademark.

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5.8 FURTHER READING

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