3RD SEMESTER BTTM
CALICUT UNIVERSITY

INTRODUCTION TO ACCOUNTANY AND BUSINESS LAW II

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Objectives:

1. To provide Students with Basic Legal Concepts and the Indian Legal Environment in which Business is carried on.
2. To identify the emerging legal issues in a digital networked environment.

Module I

Law – Definition Characteristics– Need Classification– Sources of law Nature of business law The Indian Contract Act,1872 – Contract Nature and classification of contracts offer and acceptance consideration capacities of parties free consent coercion undue influence – misrepresentation fraud mistake void agreements discharge of contract breach of contract and remedies contingent contracts quasi contracts

Module II

Special contracts contract of indemnity meaning– nature right of indemnity holder and indemnifier – contract of guarantee meaning – nature and features surety and cosurety –rights and liabilities discharge of surety from his liability – contract of bailment and pledge rights and duties of bailer and bailee , pledge and pledge pledge by non owners agency creation of agency – duties and liabilities of agent and principal termination of agency .

Module III

Sale of Goods Act, 1930contract for sale of goods Meaning – essentials of a contract of sale – conditions and warranties caveat emptor sale by non owners rules as to delivery of goods auction sale rights of unpaid seller.

Module IV

The Negotiable Instruments Act,1881Negotiable instruments – meaning – characteristics – types – cheques – promissory note and bill of exchange – crossing of cheques holder and holder in due course negotiation and types of endorsement – dishonor of negotiable instrument & provisions of section 138 – noting and protest .

Module V

The Consumer Protection Act,1986 – Definition – of consumer – complainant – goods – service – complaint – unfair trade practices – restrictive trade practices – rights and remedies for consumers consumer protection council – consumer disputes redressal agencies.

Module VI

The Information Technology Act, 2000 – Digital signature – digital signature certificate – electronic records and governance certifying authorities – cyber crimes – offences and penalties underIT Act,2000.

Reference books:

1. Business Laws – Balchandani
2. Business Laws – S.D.Geet and M.S. Patil
3. Business LawsS.S. Gulshan
4. Business & Industrial Law B.S.Moshal

CPA COLLEGE OF GLOBAL STUDIES

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MODULE 1

DEFINITION

According to S R Davar, business law "means that branch of law which is applicable to or concerned with trade and commerce in connection with various mercantile or business transactions".

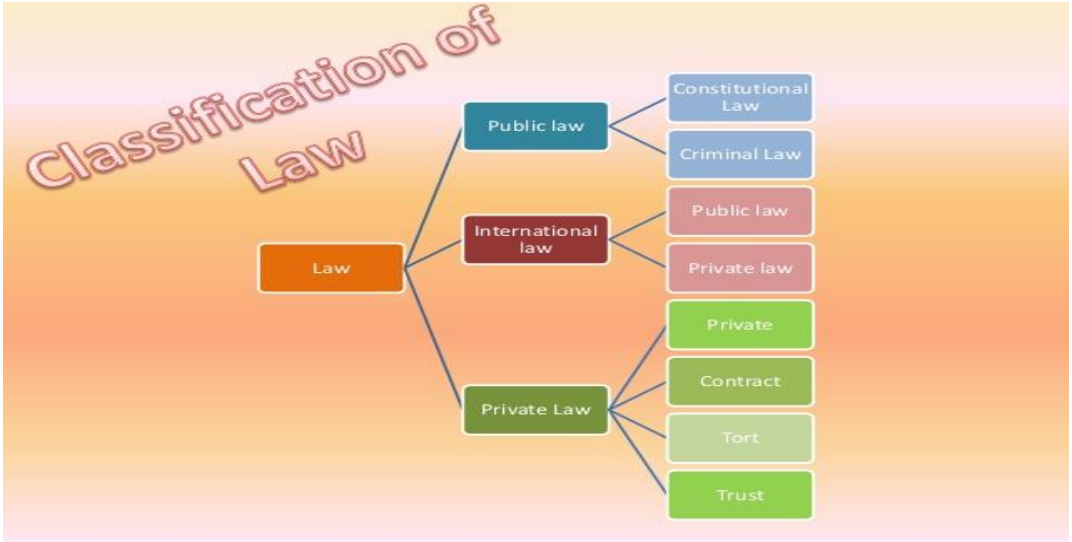
Sources of Business Law

a) The English Mercantile Law
b) Statutes of the Indian Legislature
c) Judicial Decisions & Precedents
d) Customs and Usage.

Characteristics and nature of law

- Permanent
- Universal
- Uniform

Classification of law



Needs of law

Law protect our general safety and ensure our rights as citizens against abuses by other people, organisations etc

The Indian contract act 1872

It comprise of two parts

- Part 1 :deals with general principals of contract (sec 1-75)
- Part 2 :Deals with special types of contract (sec 124- 238)

CONTRACT

Sec 2(h) which states it is an agreement which is enforceable by law

Essential elements of a valid contract

1. **Agreement** (offer + acceptance)
2. **Enforceable by law** (it is an intension to create legal relationship btw parties)
3. **Identity of mind** (both the parties in the contract should think about subject matter in same sense)
4. **Capacity of parties** (legal ability to get in to the contract major person, sound mind ,people who are qualified by law)
5. **Consideration** (something in return in a contract it is a benefit one gets)
6. **Free consent** (the parties to the contract should be willing and freely agree to the terms and conditions)
7. **Not decleared to be void** (if the law of the nation has decleared any contract to be void (invalid) such contracts should not be carried out and won't supported by court of law)
8. **Certainty and possibility of contract** (contract shoud be certain and possible are only be carried out)
9. **Legal formalities** (such as registration, signing contracts ,using stamp paper, stamp duty etc important depending upon the nature of the contract)

"All contracts are agreements
but all agreements are not contracts''

CLASSIFICATION OF CONTRACT

1. On the basis of Enforceability

a) Valid Contract: A contract which satisfies all the legal requirements laid down in Section 10 of the Act, is a valid contract

b) Void contract: lacking some essential contract

c) voiable contract: *valid at one part invalid at other part*

d) illegal contract*: criminal in nature or immoral*

e) Unenforceable Contract**:** An unenforceable contract is that which is valid and enforceable,but for certain technical defects such as want of proof, expiry of the period within whichenforceable,

2. On the basis of performance

a) Unilateral Contract: one sided contract in which only one party has his performance and otherparties performance is outstanding

b) Bilateral Contract: both the parties performance are outstanding

c) Executed Contract: both parties have carried out respective obligations

d) Executory Contract: one or both the parties to the contract have still to perform their obligations in future

3.on the basis of formality

a) express contract : both the parties in the contract agree to the terms either oraly or in a written form

b)implied contract : An implied contract is one which arises out of acts or conduct of the parties or out of the dealings between them.

For example: *A takes a seat in a bus. There is an implied contract that he will pay the prescribed fare for taking him to his destination.*

*c)***Quasi Contract:** contract that is created by court order, not by an agreement made by the parties to the contract

OFFER AND ACCEPTANCE

It is an established principle that an agreement arises only when an offer is made by one person and is accepted by the other person, to whom it is made. Thus, an offer and its acceptance is the starting point in the making of an agreement

ESSENTIAL ELEMENTS OF OFFER

- Clear and certain
- Communicated
- Intension to create legal relationship
- All special terms must be communicated
- It may be conditional
- Made with an intension to obtain the acceptance
- An invitation to an offer is not an offer
- An offer can be made to an individual or to the public at large
- The person who make the offer is **offeror**
- The person to whom the offer is made is the **offeree**

CONSIDERATION

The consideration is one of the essential elements of a valid contract. The term 'consideration' may be defined as the price of the promise.

Definition

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

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

ESSENTIALS OF CONSIDERATION

1. Consideration must move at the desire of the promisor: The act or abstinence of the promisee or any other person must be done at the desire or request of the third party or voluntary acts would not constitute a valid consideration. The desire of the promisor may be express or implied from the conduct of the parties.

2. Consideration may move from the promisee or any other person: It is not necessary that the consideration should proceed only from the promisee. Consideration furnished by a third party will also be valid if it has been done at the desire of the promisor. This is termed as 'Doctrine of Constructive Consideration".

3. Consideration may be past, present or future: The words, has done or abstained from doing, does or abstains from doing, or promises to do or to abstain from doing; indicate that the consideration may be past, present or future.

a) Past consideration: When the present promise is based on the consideration already taken place (i.e., before the date of the promise), it is termed as consideration.

b) Present consideration: When the promisor receives consideration simultaneously with his promise, it is termed as present consideration.

c) Future consideration: When the consideration for a promise is rendered in future it is termed as future or executory consideration.

4. Consideration need not be adequate: The consideration need not be adequate to the promise but it must be of some value in the eye of the law. According to explanation 2 to Section 25, 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.

5. Consideration must be real and not illusory: Consideration must be real and be of some

value in the eyes of law. Consideration of the following type are not real:
(a) Physical impossibility: For instance As promising to put life into B's dead wife should B pay him Rs. 500, is void for lack of physical possibility.
(b) Legal impossibility: If consideration consists of something illegal, the agreement will be void.
(c) Uncertain consideration: An uncertain or vague consideration will make the agreement void.
(d) Illusory consideration: It consists of a promise to do something which a person is already bound to do by law or contract. It must be something more than what a promisee is already bound to do.
6. Consideration must be lawful: Section 23 of the Act which says that "every agreement of which the consideration is unlawful, is void". It means that an agreement must be supported by lawful consideration.
7. Consideration must not be illegal, immoral or opposed to public policy: The consideration
of an agreement is unlawful if:
a) it is forbidden by law; or
b) it is of such a nature that if permitted it would defeat the provisions of any law; or
c) it is fraudulent; or
d) it involves or implies injury to the person or property of another; or
e) the court regard it as immoral

PRIVITY OF CONSIDERATION OR STRANGER TO CONSIDERATION

The term 'privity of consideration' means stranger to the consideration, or consideration given by any other person other than the promise

PRIVITY OF CONTRACT OR STRANGER TO CONTRACT

The term 'privity of contract' means stranger to a contract. privity of contract, a person, who is not a party to the contract, cannot sue for carrying out the promise made by the parties to the contract.

"No Consideration, No Contract"

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

When an agreement is expressed in writing and registered under law and made an account of natural love and affection (eshtadanam)

- **compensation for voluntary services [Sec. 25 (2)]**

giving back the lost purse consideration not needed

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

When a debtor makes a written and registered promise, under signature of his own or that of his agent, to pay a time-barred debt, no fresh consideration is needed.

- **Gift**

gift needs no consideration

- **Agency**

No consideration is necessary to create an agency

CAPACITY OF PARTIES OR CAPACITY OF CONTRACT

The 'capacity to contract' means the competence (i.e., capability) of the parties to enter into a valid contract. The legal ability of a person to get into a contract should be a major, (according to Indian majority act a person who attains the age of 18 is said to be major) a person of sound mind and not disqualified by law of the country

PERSONS NOT COMPETENT TO CONTRACT (They are incapable of entering into a valid contract)

(i) Minors;

(ii) Persons of unsound mind; and

(iii) Persons disqualified for contracting by any other law

MINOR

According to Section 3 of the Indian Majority Act, 1875, a person who has not completed his age of 18 years (majority), is considered to be a minor.

Rules Regarding Minor's Agreements

- A minor cannot get into a contract, agreement with the minor is invalid and inoperative
- A minor can be a promise or beneficiary who enjoys the benefit
- A minor can't ratify his act even after attaing the majority
- A minor can always plead for minority
- A minor cant get into a partnership
- A minor cant be declared insolvent by the court
- A minor can be an agent
- A minor is liable for civil wrongs

PERSONS OF UNSOUND MIND

. The following persons are considered to be the persons of unsoundmind.

1. **Idiot:** An idiot is a person who has completely lost his mental faculties of thinking for rational judgement. All agreements, other than those for necessities of life, with idiots are absolutely void.

2. Lunatics: A lunatic is a person who is mentally deranged (disordered) due to some mental strain or other personal experience but who has some lucid intervals of sound mind.

3. Drunken or intoxicated person: A drunken or intoxicated person is a sane person who is delirious from fever or who is so drunk that he cannot understand the terms of a contract or form a rational judgement as to its effect on his interest

PERSONS WHO ARE DISQUALIFIED BY LAW TO CONTRACT

Alien enemy: "Alien" means a person who is not a citizen of India. During the continuance of war with the country to which an alien belongs, he becomes an alien enemy.

Insolvent person: can't get into a contract

Foreign Sovereigns, their Diplomatic Staff and Accredited representatives of Foreign States:

Such persons can enter into valid contracts and can enforce them in Indian courts. However,a suit cannot be filed again them, in the Indian courts, without the prior sanction of the central government.

Joint Stock Company and Corporations incorporated under Special Acts: A corporation or company, being an artificial person, and having a separate legal entity, can hold property; can purchase or sell property; and can sue or be sued in the Courts of Law. But it cannot enter into contracts which are strictly of personal nature.

Convicts: A convict cannot enter into a contract while he is undergoing imprisonment. This inability comes to an end on the expiration of the period of imprisonment

FREE CONSENT

"two or more persons are said to consent when they agree upon the same thing in the same

sense". there should be an identity of mind and consent should be real and free

"Consent is said to be free when it is not caused by

1. Coercion*, as defined in Section 15*

2. Undue influence *as defined in Section 16*

3. Fraud, *as defined in Section 17*

4. Misrepresentation*, as defined in Section 18*

5. Mistake*, subject to the provisions of Sections 20, 21 and 22.*

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

Coercion

When a person obtains the consent of the other party by force or under fear caused to him or by threatening or cause violence or causing harm

Undue influence

"where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other, and uses that position to obtain an unfair advantage over the other".

fraud

"fraud means and includes any of the following acts committed by a party to a contract or with his connivance or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract

Misrepresentation

The term 'Misrepresentation' means a false representation of fact made innocently or nondisclosure of a material fact without any intention to deceive the other party. A false representation made by a person may be either:

1. Innocent or unintentional, i.e., without any intention of deceiving the party.

2. Intentional or wilful or deliberate

Essentials of Misrepresentation

1. There must be a representation or breach of duty.

2. The representation must be of facts material to the contract.

3. The representation must be untrue.

4. The representation must be made with a view to inducing the other party to enter into contract.

5. The other party must have acted on the faith of the representation.

6. The person making the representation honestly believes it to be true

Mistake

A mistake is said to have occurred where the parties intending to do one thing by error do something else. Mistake is an erroneous belief concerning something

Example: *X engages Y as a teacher for his son appearing for IAS Preliminary. Y agrees to come daily 7. X think 7 a.m. but Y means 7 p.m. This is a bilateral mistake of fact but not essential and can be rectified. Therefore the agreement is valid.*

(1) Bilateral mistake; and

(2) Unilateral mistake.

(1) Bilateral mistake: Where both the parties to an agreement are under a mistake as to matter of fact essential to the agreement, the agreement is void. An agreement shall be void if the following conditions are satisfied:

Both the parties must be under a mistake: This means the mistake must be mutual or common.

(2) Unilateral mistake

. The term unilateral mistake means where only one party to the agreement is under a

mistake. 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.

MISTAKE OF LAW

a) Mistake of law of the country: It does not render the agreement void. This is based on the well established rule of law namely, ignorantia juris non excusat (i.e., ignorance of law is no excuse).Section 21 lays down that "a contract is not voidable because it was caused by a mistake as to any law in force in India".

b) Mistake of foreign law: The mistake of the foreign law has the same effect as a mistake of fact. Therefore, it renders the agreement void. Section 21 lays down that "a mistake as to a law not in force in India has the same effect as a mistake of fact".

LEGALITY OF CONSIDERATION AND OBJECT

For a valid contract it is essential that the object or consideration of the agreement must be lawful.

According to Sec. 23 of the Indian Contract Act, the objects and the consideration of an agreement shall be unlawful in the following cases:

1. Where it is forbidden(not allowed or banned) by law: As a matter of fact, an act is forbidden by law, when it is punishable by criminal law of the country, or when it is prohibited by special legislation or by the regulations made by a competent authority under power derived from the legislature.

2. Where it defeats the provision(supply) of any law: It is of such nature that, if permitted, it would defeat the provisions of law, e.g., purchase of land being sold for arrears of land revenue by the defaulter, or an agreement by a debtor not to raise the plea of limitation in a suit by the creditor.

3. Where it is fraudulent: If the two parties agree to practice a fraud on third party, then the agreement between the parties is unlawful and void.

4. Where it is injurious either to the person or his property: It involves or implies injury to the person or property of another, e.g., an agreement to indemnify a person against the consequences of publication of a libel.

5. Where it is regarded as immoral: The term 'immoral' depends upon the standard of 'morality'prevailing at a particular place and time. If the consideration for the agreement is an act of sexual immorality, for example, illicit co-habitation and prostitution, the agreement is illegal.

6. Where it is opposed to public policy: The agreements that are injurious to the public or which are against the public good or public welfare are void.

AGREEMENTS OPPOSED TO PUBLIC POLICY

Public policy is that principle of law which holds that no citizen can lawfully do that which has atendency to be injurious to the public. An agreement is said to be opposed to public policy when itis injurious to the welfare of the society or it tends to prejudice the welfare of the society.

Following agreements have been declared by the Courts as opposed to public policy and they are as follows:

1. Trading with an alien enemy: All agreements made with an alien enemy are illegal on the ground of public policy.

2. Agreement for stifling prosecution: An agreement which seeks to absolve an offender of criminal liability or excuse him from prosecution or to withdraw a criminal case pending againsthim is known as an agreement stifling prosecution.

3. Maintenance and Champerty: Any agreement which improperly promotes litigation is opposed to public policy. Such agreements may be either maintenance or Champerty.

4. Agreement for sale of public offices and titles: The agreements for the sale or trafficking inpublic offices or to obtain public title like Padma Shree etc., are illegal on the ground of

being opposed to public policy.

5. Marriage brokerage agreements: Agreements to procure marriages for reward, or agreement to pay money to the parent or guardian of a minor in consideration of his consenting to give the child in marriage, are void.

6. Agreement in restraint of personal liberty: An agreement which unduly restricts the personal liberty of any person is void on the ground of being opposed to public policy.

7. Agreement in restraint of parental rights: An agreement which is inconsistent with the duties arising out of such guardianship is void as being opposed to public policy.

8. Agreements tending to create interest opposed to duty: An agreement with a public servant
which obliges him to do something which is inconsistent with his official duty, shall be void as being opposed to public policy.

9. Agreements interfering with marital duties: Any agreement which interferes with the performance of marital duties, it is void. For example, an agreement that the husband shall always live at the wife's house was held to be void.

10. Agreements to vary the period of limitation: Agreements, the object of which is to curtail or extend the period of limitation prescribed by the law of limitation, are void.

11. Agreements to defraud creditors or revenue authorities: The agreements, the object of which is to defraud the creditors or revenue authorities are void as being opposed to public policy.

12. Agreement tending to create monopoly: An agreement, the object of which is to create monopoly is illegal and void as being opposed to public policy.

13. Agreement to commit a crime: An agreement to indemnify a person against consequences of his criminal act is void as opposed to public policy. These act may be grouped under the
following heads:

a) Agreements in restraint of marriage [Section 26].

b) Agreements in restraint of trade [Section 27].

c) Agreements in restraint of legal proceedings [Section 28].

All these agreements will be discussed in detail in the next chapter on "Void Agreement".

VOID AGREEMENTS

According to Section 2 (g) of the Indian Contract Act, 1872, a void agreement is an agreement which is not enforceable by law. A void agreement does not create any legal rights and obligations all the essential elements of a valid contract laid down in Section 10, must not have been expressly declares as void by any law in force in any country.

The following agreements have been expressly declared as void by the Indian Contract Act:

1. Agreements by incompetent persons [Section 11].
2. Agreements made under a mutual mistake [Section 20].
3. Agreements, the object or consideration of which is unlawful [Section 23].
4. Agreements, the object or consideration is partly unlawful [Section 24].
5. Agreements made without consideration [Section 25].
6. Agreements in restraint of marriage [Section 26].
7. Agreements in restraint of trade [Section 27].
8. Agreements in restraint of legal proceedings [Section 28].
9. Agreements the meaning of which is uncertain [Section 29].
10. Agreements by way of wager [Section 30].
11. Agreements to do impossible acts [Section 56].

Agreements from 1 to 5 have already been discussed in earlier chapters. The other agreements are
discussed below:

AGREEMENTS IN RESTRAINT OF MARRIAGE [SECTION 26]

According to Sec. 26 of the Act, "every agreement in restraint of the marriage of any person, other than a minor, is void". The law regards the marriage as the right of every person. Restriction on the freedom of people shall be against public policy and, therefore, void.

Example: *A promised to marry B only and none else, and to pay Rs. 2000 in default. A married C and B sued A for recovery of Rs. 2000. It was held that B could not recover anything because the agreement was in restraint of marriage. [Lowe vs. Peers]*

It may be noted that an agreement which provides for a penalty upon remarriage may not be considered as a restraint of marriage.

AGREEMENTS IN RESTRAINT OF TRADE [SECTION 27]

According to Sec. 27 of Indian Contract Act, 1872, "every agreement by which anyone is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void". This is because Article 19 (g) of the Constitution of India regards the freedom of trade and commerce as a right of every individual. Therefore, no agreement can deprive or restrain a person from exercising
such a right.

Example: *In the case, Madhub Chander vs Raj Coomar, A and B were rival shopkeepers in a locality of Calcutta. A agreed to pay a sum of money to B if he would close his business in that locality. B closes his shop. On A's refusal to pay the amount, the court held that the agreement was void under Sec. 27 of the Act.*

EXCEPTIONS

The following are the exceptions to the rule that 'an agreement in restraint of trade is void'.

1. Statutory Exceptions

a) Sale of Goodwill: An agreement which restrains the seller of a goodwill from carrying on a business is valid if all the following conditions are fulfilled:

(i) The seller should be restrained only from carrying on a similar
business;

(ii) The restriction shall apply so long as the buyer or any person deriving title from him is carrying on a similar business;

(iii) The restraint should apply only within specified local limits.

(iv) The restraint must be reasonable having regard to the nature of the business.

b) Restrictions under Partnership Act: The following restrictions are provided in the Partnership Act, 1932:

(i) ***Restriction on existing partner [Section 11(2)]:*** A partner shall not carry on any business other than that of the firm while he is a partner.

(ii) ***Restriction on outgoing partner [Section 36(2)]:*** An agreement by an outgoing partner with the continuing partners not to carry on a business similar to that of the firm within a specified period or within specified local limits shall not be void.

(iii) ***Restriction in anticipation of dissolution [Section 54]:*** Agreement amongst partners that upon dissolution of the firm some or all of them shall not carry on similar business within a specified period or within specified local limits shall not be void.

(iv) ***Restriction in case of sale of goodwill of the firm [Section 55 (3)]:*** Agreement by a partner upon sale of goodwill of the firm, with the buyer thereof not to carry on any similar business within a specified period or within specified local limits shall not be void.

2. Under Judicial Interpretations

a) Trade Combinations: Trade combinations which have been formed to regulate the business or to fix prices are not void, but the trade combinations which tend to create monopoly and which are against the public interest are void.

b) Service Agreements: Agreements of service often contain a clause by which the employee
is prohibited from working anywhere else during the term of the agreement, such agreements are valid.
c) Sole Dealing Agreements: An agreement to deal in the products of a single manufacturer or to sell the whole produce to a single dealer is valid if their terms are reasonable.

AGREEMENTS IN RESTRAINT OF LEGAL PROCEEDINGS [SECTION 28]

An agreement by which any party is restricted absolutely from enforcing his legal rights under or in respect of any contract is void to that extent. An agreement which interferes with the course of justice is void on account of its being opposed to public policy.
The following are the four kinds of agreements which are in restraint of legal proceedings, and are therefore, void:
a) Absolute restrictions from enforcing legal rights: Any agreement that absolutely restricts a party to a contract from enforcing his contractual rights in ordinary tribunals is void.
b) Agreements curtailing the limitation period: An agreement which limits the time within which an action may be brought so as to make it shorter than that prescribed by the Law of Limitation, is void because its object is to defeat the provisions of law.
c) An agreement which extinguishes the rights of a party.
d) An agreement which discharges a party from liability.

Exceptions

There are the following two exceptions to the rule laid down in Section 28:
1. Restraints for referring the future disputes to arbitration.
2. Restraints for referring the existing or present disputes to arbitration.

AGREEMENTS THE MEANING OF WHICH IS UNCERTAIN [SECTION 29]

An uncertain agreement is one, the terms of which are uncertain or not capable of being made certain without further agreement between the parties are void. An agreement with uncertain, ambiguous or vague terms is void because in such cases, courts may not give a practical meaning to the contract.
Example: *A agreed to sell to B, 100 tons of oil. There is nothing whatever to show what kind of oil was intended. Therefore, the agreement is void for uncertainity*

AGREEMENTS BY WAY OF WAGER [SECTION 30]

The term ‘wagering agreement’ or ‘wager’ may be defined as an agreement in which one personagrees to pay certain amount of money to the other person on the happening or nonhappening
of aspecified uncertain event.
Examples:
i) *X agrees with Y that if there is rain on a certain day X will pay Y Rs. 1000. If there is no rain Y will pay X Rs. 1000. The agreement is of a wagering nature.*
ii) *A test match between India and Australia has ended in Kolkata today. Both A and B are ignorant of the result. A agrees with B to pay 1000 in case India wins and B agrees to pay A Rs. 1000 in case India does not win. The agreement is of a wagering nature.*

Essential Features of a Wager Agreement

1. Promise to pay money or money's worth: There must be a promise to pay money or money's worth by one party to the other.
2. Event: The promise must be conditional on the happening or not happening of an event.
3. Uncertainty of the event: The agreement must be conditional upon the determination of an uncertain event. An event may be uncertain not only because it relates to future but because it is not yet ascertained to the knowledge of the parties.
4. Mutual chances of gain or loss: Each party must stand an equal chance to win or lose on

the determination of the contemplated events.
5. No control over the event: Neither party should have control over the happening or nonhappening of the event.
6. Stake as the only interest: Neither party should have any interest other than the sum or stake that he stands to win or lose.
Effects of Wagering Agreement
a) Agreements by way of wager are void in India.
b) Agreements by way of wager have been declared illegal in the states of Maharashtra and Gujarat.
c) No suit can be filed to recover the amount won on any wager.
d) Transactions which are collateral to wagering agreements are not void in India except the states of Maharashtra and Gujarat (Wagering agreements which are illegal).

Exceptions to Wager

The following transactions are not wagers:
1. Horse race: An agreement to contribute or subscribe towards any plate, prize or sum of money, the amount of rupees five hundred or more to be awarded to the winners of any horse race is a valid agreement and not a wager. In 1996, the Supreme Court has held horse races to be "games of skill" and not gambling.
2. Crossword competitions: Crossword puzzles are games of skill. But if in crossword competition, the winning of the prize depends upon the tallying of competitors' entry with the solution kept with the editor of the magazine, then it is a wagering transaction. According to the Prize Competition Act, 1955, prize competitions in games of skills are not wagers provided the amount of prize does not exceed Rs. 1000.
3. Games of skill: Picture puzzles, literary and athletic competitions, being based on skill and intelligence, are games of skill.
4. Share market transactions: In the share market if the intention is to take and give delivery of stocks and shares, it is a valid transaction.
5. Contracts of insurance: It is a contract in which an insurer, in consideration of a certain sum of money, undertakes to make good the loss of the insured arising on the happening of an uncertain specified event.
6. Chit Fund: In it, a certain number of persons contribute a fixed sum for a specified period which is made over to one of them at the end of a pre-determined period in accordance with an agreed plan. These are not wagers.

Commercial Transaction and Wager

An agreement for the actual sale and purchase of goods is not a wagering agreement. But sometimes it becomes difficult to determine whether a particular transaction is by way of wager or a genuine business transaction.

Lotteries

A lottery is a game of chance, therefore, an agreement to buy a lottery ticket, is a wagering agreement. If the lottery is authorized by Government, it does not cease to be a wagering transaction, the only effect of such sanction is that the persons conducting the lottery will not be prosecuted

CONTINGENT CONTRACT

A contract may be absolute or contingent.

Absolute Contract

An absolute contract is one in which the promisor binds himself to performance independent of any condition of contingency i.e., the promisor undertakes to perform the contract in all events.

Contingent contract

According to Section 31 of the Contract Act, 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".
The performance of a contingent contract becomes due only upon the happening or nonhappening of some future uncertain event. In simple words, it is a conditional contract. Contracts of insurance, indemnity and guarantee etc. are some of the important examples of contingent contracts.
Example: *A contracts to pay Rs. 10,000 to B if his (B's) house is burnt. This is a contingent contract as its performance is dependent upon an uncertain event (i.e., burning of B's house).*

Essentials of a Contingent Contract

A valid contingent contract must satisfy these essential requirements:
1. There must be a valid contract: It must fulfill the basic requirements of a valid contract between the parties.
2. The performance of the contract must be conditional: The performance of a contingent contract must depend upon the happening or non-happening of some future event.
3. The event must be uncertain: The future event, upon which the performance of a contract depends, must be an uncertain event.
4. The event must be collateral to the contract: The event must be independent or ancillary to the contract.
5. The event should not be the discretion of the promisor: The 'mere will' or 'discretion' of the promisor is not an event for the purpose of a contingent contract.

RULES REGARDING CONTINGENT CONTRACTS

1. Contingent contracts dependent on the happening of future uncertain event: Sec. 32 provides that "contingent contract to do or not to do anything if an uncertain future event happens cannot be enforced by law unless and until that event has happened. If the event becomes impossible such contracts become void.
2. Contingent contracts dependent on the non-happening of future uncertain event: Sec. 33 provides that "contingent contract to do or not to do anything if an uncertain future event does not happen can be enforced when the happening of that event becomes impossible, and not before.
3. Contingent contracts dependent on the future conduct of a living person: According to Sec. 34, if a contract is contingent upon 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.
4. Contingent contracts dependent on the happening of specified uncertain event within afixed time: According to Sec. 35 (para. I), if a person is to perform something within a fixed time provided an uncertain event happens, then the person is bound to perform it, if such particular event happens within that time.
5. Contingent contracts dependent on the non-happening of specified uncertain event within a fixed time: Sec. 35 (para. II) provides that contingent contract 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 such event will not happen.
6. Contingent contracts dependent on the happening of an impossible event: Sec. 36 provides that contingent contract 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

DISCHARGE OF CONTRACT

Discharge of contract means termination of the contractual relations between the parties to a

contract. A contract is said to be discharged when the rights and obligations of the contracting parties are extinguished and their relationship comes to an end.

VARIOUS MODES OF DISCHARGE

A contract may be discharged in the following ways:

- By performance of contract.
- By agreement.
- By lapse of time.
- By operation of law.
- By impossibility of performance.
- By committing breach of contract.

(1) DISCHARGE BY PERFORMANCE OF CONTRACT

Performance of a contract is one of the most usual ways of discharge of a contract when the parties to the contract fulfill their obligations under a contract, the contract is said to have been performed and the contract comes to an end. Performance of contract may be classified as:

a) Actual Performance: A contract is said to be discharged by actual performance when the parties to the contract perform their promise in accordance with the terms of the contract.

b) Attempted Performance or Tender: A contract is said to be discharged by attempted performance when the promisor has made an offer of performance (i.e., a valid tender) to the promisee but it has not been accepted by the promisee.

(2) DISCHARGE BY AGREEMENT

As contract emerges from an agreement of both parties, it may also be terminated by another agreement or consent of both parties. A contract can be discharged by mutual agreement in any of the following ways:

a) **By novation (Substitution of a new contract):** Novation means substituting a new contract for the existing one, either between the same parties or between different parties, the consideration mutually being the discharge of the old contract. The novation may be of the following two types

i.e., (i) novation involving change of parties, but the contract remaining the same (ii) novation involving substitution of a new contract, but parties remaining the same.

b) **By alteration:** Alteration means change in one or more of the terms of a contract with the consent of all the parties. If any material alterations are made in the contract, the original contract will come to an end and in its place a new contract in an altered form comes into existence.

c) **By rescission:** Rescission means cancellation of the contract. A contract may be rescinded by agreement between the parties at any time before it is discharged by performance or in some other

way.

d) **By remission:** The term ‘remission’ may be defined as the acceptance of lesser fulfillment of the terms of the promise, e.g., acceptance of a less sum of money where more is due.

e) **By waiver:** When both the parties, by mutual consent, agree of abandon their respective rights, the contract need not be performed and the same is discharged. It is called waiver. To constitute a waiver, neither an agreement nor consideration is necessary.

f) **By merger:** It takes place when an inferior right accruing to a party under a contract merges into a superior right accruing to the same party under the same or some other contract, e.g., a tenant buying the house in which he is a tenant.

(3) DISCHARGE BY LAPSE OF TIME

The Limitations Act, 1963 provides that a contract must be performed within the period of limitation. If the contract is not performed and the promisee fails to take any action within the

period of limitation, then the contract is terminated or discharged by lapse of time.

(4) DISCHARGE BY OPERATION OF LAW

A contract may be discharged by operation of law in the following cases:

a) Death: A contract involving the personal skill or ability of the promisor is discharged automatically on the death of the promisor.

b) Insolvency: When a person is declared insolvent, he is discharged from his liability up to the date of his insolvency.

c) Unauthorized Material Alteration: If any party makes any material alteration in the terms of the contract without the approval of the other party, the contract comes to an end.

d) Merger: Where an inferior right accruing to a party in a contract merges into the superior rights accruing to the same party, the earlier contract is discharged.

(5) DISCHARGE BY IMPOSSIBILITY OF PERFORMANCE

A contract will be discharged when the performance of contract becomes impossible. The effects of impossibility of performance may be of the two types, namely,

a) Initial impossibility: It is the impossibility which exists at the time of formation of contract. It makes the contract *void ab initio, i.e.,* void from the very beginning.

b) Subsequent or supervening impossibility: Supervening impossibility means impossibility which does not exist at the time of making the contract but which arises subsequently after the formation of the contract and which makes the performance of the contract impossible or illegal.Supervening impossibility is an excuse for the non-performance of the contract in the following cases:

(i) Destruction of subject matter: If the subject-matter of a contract is destroyed after making the contract, without the default of either party, the contract is discharged.

(ii) Death or personal incapacity: The contract is discharged on the death or incapacity or illness of a person if the performance of a contract depends on his personal skill or ability.

(iii) Change of law: The contract is discharged if the performance of the contract becomes impossible or unlawful due to change in law after the formation of the contract.

(iv) Non-occurrence or non-existence of particular state of thing: Where a contract is made on the basis of continued existence or occurrence of a particular state of things, the contract comes to an end if the state of things ceases to exist or changes.

(v) Outbreak of war: The pending contracts at the time of declaration of war are either suspended or declared as void.

(6) DISCHARGE BY BREACH OF CONTRACT

A contract is said to be discharged by breach of contract if any party to the contract refuses or fails to perform his part of the contract or by his act makes it impossible to perform his obligation under the contract. Breach of contract is of two kinds, namely,

a) Anticipatory breach of contract: When a party to a contract refuses to perform his part of the contract, before the due date of performance, it is known as anticipatory or constructive breach of contract.

b) Actual breach of contract: Actual breach of contract occurs in the following two ways:

(i) On due date of performance: If a party to a contract fails to perform his obligation at the specified time, he is liable for its breach.

(ii) During the course of performance: If during performance of a contract, a party to it either fails or refuses to perform his obligation, there is said to be actual breach during performance of the contract

FRUSTRATION

Frustration may be defined as the pre-mature termination of the contract owing to the change of circumstances which are entirely beyond the control of the parties.

REMEDIES FOR BREACH OF CONTRACT

A breach of contract occurs if any party refuses or fails to perform his part of the contract or

by his act makes it impossible to perform his obligation under the contract. A breach of contract may arise in two ways, (a) anticipatory breach and (b) actual breach. A remedy is the course of action available to an aggrieved party (i.e., the party not at default) for the enforcement of a right under a contract. The various remedies available to an aggrieved party are as follows:

- Suit for rescission of the contract.
- Suit for damages.
- Suit for specific performance
- Suit for injunction
- Suit upon quantum meruit.
- Restitution.

I. RESCISSION OF THE CONTRACT

Recession of a contract means annulment of it. When all or some of the terms of the contract are cancelled, rescission of a contract takes place. When there is a breach of contract by one party, the aggrieved party may rescind the contract and need not perform his part of the contract. The aggrieved party has to file a suit for rescission. When rescission is granted, the aggrieved party is absolved form all his obligations under the contract.

The court grants rescission in the following cases:

a) Where the contract is voidable at the option of the plaintiff.

b) Where the contract, is unlawful for causes not apparent on its face and the defendant is more to blame than the plaintiff.

The court, may, however, refuse to grant rescission, in the following cases:

a) Where the plaintiff has expressly or impliedly ratified the contract; or

b) Where owing to change in the circumstances of the contract, the parties cannot be restored to their original position; or

c) Where the third parties have, during the subsistence of the contract, acquired right's in the contract in good faith and for value; or

d) Where only a part of the contract is sought to be rescinded and such part is not severable from the rest of the contract.

II. SUIT FOR DAMAGES

"Damages" are monetary compensation allowed for loss suffered by the aggrieved party due to breach of contract. The object of awarding damages is not to punish the party at fault but to make good the financial loss suffered by the aggrieved party due to the breach of contract.

Types of Damages

a) General or ordinary damages: These are the damages which are payable for the loss arising naturally and directly, in the usual course, from the breach of contract. In a contract for the sale of goods, the measure of ordinary damages is the difference between the contract price and the market price of such goods on the date of breach.

b) Special damages: These are the damages which are payable for the loss arising due to some special or unusual circumstances.

c) Exemplary or punitive or vindictive damages: These are the damages which are in the nature of punishment. The court may award these damages in case of:

i) Breach of contract to marry.

ii) Wrongful dishonour of cheque by a banker in violation of Section 31 of the Negotiable Instruments Act. The damages are estimated on the basis of loss of prestige and goodwill of the customer. The rule applied in this case is that smaller the amount of cheque, the higher shall be the damages.

d) Nominal damages: These are the damages which are very small in amount. Such damages areawarded simply to establish the right of the party to claim damages for the breach of contracteven though the party has suffered no loss.

e) Liquidated damages and penalty: When the amount of compensation fixed by an agreement between the parties to be paid in case of breach of contract is in the nature of a fair and honest pre-estimation of probable damages. It is called liquidated damages.
When the amount named in the contract at the time of its formation is disproportionate to the damages likely to accrue in the event of breach, it will be known as penalty.

Rules Regarding Determination of Damages

Section 73 of the Contract Act provides that when a contract has been broken the party who suffers by such breach, is entitled to receive, from the party who has broken the contract.

1. ***The ordinary damages are recoverable:*** The aggrieved party is entitled to receive such damages:

a) as may fairly and reasonably be considered to arise naturally from the breach; or

b) as may reasonably be supposed to have been in the contemplation of both the parties at the time of making of contract as the probable result of breach.

2. ***Remoteness of damage:*** Compensation shall not be granted for any remote or indirect damage. Damages are considered to be remote if they are not the necessary or probable consequence of breach or if they were not in the contemplation of the parties at the time when contract was made. Loss of profit is not to be taken in account in estimating damages unless otherwise agreed upon.

3. ***Primary aim of damages:*** The primary aim of the law of damages for breach of contract is to place the aggrieved party in the position which he would have occupied if the breach had not occurred.

4. ***Special damages, i.e., damages in the contemplation of the parties:*** Special damages which do not arise naturally from the breach cannot be recovered unless these were in the contemplation of the parties.

5. ***Only compensation, no penalties:*** Damages are allowed by way of compensation for the loss suffered and not by way of punishment except in the case of (a) breach of promise to marry, and (b) wrongful dishonour of a cheque by a bank.

6. ***Nominal damages:*** What the aggrieved party has not suffered any loss, the court may allow him nominal damages, in its discretion.

7. ***Mental pain and suffering:*** Damages are not allowed for injured feeling or mental pain except where (i) the breach was reckless, (ii) it caused bodily harm, and (iii) the defaulting party was aware that breach would cause mental suffering.

8. ***Duty to mitigate the loss:*** It is the duty of the injured party to take all reasonable steps to mitigate the loss caused by the breach. He cannot seek damages for loss which are not due to breach but due to his own neglect to mitigate the loss.

9. ***Difficulty of assessment:*** Any difficulty in assessing damages shall not prevent the injured party from recovering them. The court must do its best to determine the amount of damages.

10. ***Cost of decree:*** The aggrieved party can recover the cost of getting the decree along with the damages.

III. SUIT FOR SPECIFIC PERFORMANCE

This means demanding the court's direction to the defaulting party to carry out the promise according to the terms of the contract. Specific performance of the contract may be directed by the court in the following circumstances:

(i) Where actual damages arising from breach are not measurable.

(ii) Where monetary compensation is not an adequate remedy.

Specific performance of an agreement will not be granted –

a) Where the damages are considered as an adequate remedy;

b) Where the contract is of personal nature, e.g. contract to marry;

c) Where the contract is made by a company beyond its powers as laid down in its Memorandum of Association;

d) Where the court cannot supervise the performance of the contract;
e) Where one of the parties is a minor;
f) Where the contract is inequitable to either party.

IV. SUIT FOR INJUNCTION

An injunction is an order of the court requiring a person to refrain from doing some act which has been the subject matter of contract. The power to grant injunction is discretionary and it may be granted temporarily or for an indefinite period.

V. SUIT UPON QUANTUM MERUIT

The word '*quantum meruit'* literally means "as much as is earned" or "according to the quantity of work done". When a person has begun the work and before he could complete it, if the other party terminates the contract or does something which makes it impossible for the other party to complete the contract, he can claim for the work done under the contract.

VI. RESTITUTION

Restitution means 'an act of restoration'. If a person has been unjustly enriched at the expense of the other party, he should restore the benefit received or compensate the other party.

MODULE – II

SPECIAL CONTRACT

CONTRACT OF INDEMNITY AND GUARANTEE

The Contract of Indemnity and Guarantee are specific types of Contract. Specific provisions have been made in the Contract Act with regard to these types of contracts. The special legal provisions relating to these contracts are contained in Sections 124 to 147 of the Indian Contract Act, 1872.

CONTRACT OF INDEMNITY

The term 'indemnity' means security against hurt, loss or damage. A contract of indemnity refers to promise made by one person to make good any loss or damage another has incurred or may incur by acting at his request or for his benefit. A contract of Fire Insurance or Marine Insurance is a Contract of Indemnity.

DEFINITION

According to Sec. 124 of the Contract Act, the contract of indemnity has been defined as:

"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".

Indemnifier: The person who gives the indemnity, i.e., who promises to compensate for the loss, is known as indemnifier.

Indemnity-holder: The person, for whose protection the indemnity is given, i.e., who is protected against loss, is known as indemnity-holder or indemnified.

Example

A contract to indemnify B against the consequences of any proceeding which C may take against B in respect of a certain sum of Rs. 200. This is a contract of indemnity. A is the indemnifier (Promisor) and B is the indemnified (Promisee).

CHARACTERISTICS OF A CONTRACT OF INDEMNITY

The important features of an Indemnity Contract are as follows:

1. Essentials of a valid contract: It must have all the essential elements of a valid contract, such as agreement, free consent, competency of the parties, legality of object and consideration.

2. Compensation of loss: This is the most important element of a contract of indemnity. One party must promise to save the other party from any loss which he may suffer.

3. Express or Implied: The promise to indemnify a person against the loss suffered by him, may be express or implied. The express promise is one where a person promises in express terms to compensate the other from the loss. And the implied promise is one where the conduct of the promisor shows that he promised to indemnify the other party against the loss suffered by him

RIGHTS OF INDEMNITY-HOLDER

According to Section 125 of the Contract Act, the indemnity holder, when sued, is entitled to recover from the promiser.

1. All damages which he is compelled to pay in any suit in respect of any matter to which the promise to indemnify applies;

2. All costs which he is compelled to pay, in bringing or defending such suit:

a) he did not contravene the orders of the promiser, and acted as it would have been prudent for him to act in the absence of any contract of indemnity, or

b) the promisor authorized him to bring or defend th e suit;

3. All sums which he has paid under the terms of any compromise of any such suit:

a) the compromise was not contrary to the orders of the promisor, and was one which it would have been prudent for the promisee to make in the absence of any contract of indemnity, or

b) the promisor authorized him to compromise the suit.

4. Suit for specific performance: An indemnity holder is entitled to sue the indemnifier even

before he has suffered any damage provided an absolute liability has been incurred by him.

RIGHTS OF INDEMNIFIER

There is no provision in the Indian Contract Act about indemnifier's rights. The Act is silent on this point. It may, however, be said that indemnifier's rights are the same as those of a surety, which are the essential part of law.

CONTRACT OF GUARANTEE

The term 'guarantee' may be defined as undertaking by one person to pay the amount due from another person. And a contract to pay the amount due from another person, in case the latter fails to pay, is known as contract of guarantee.

DEFINITION

According to Section 126 of the Act,

"A contract of guarantee is a contract to perform the promise, or discharge the liability, of a third person in case of his default." A contract of guarantee involves three parties, the creditor, the surety and the principal debtor.

Surety: The person who gives the guarantee is called the surety.

Principal Debtor: The person in respect of whose default the guarantee is given is called the principal debtor.

Creditor: The person to whom the guarantee is given is called creditor.

Example

X advanced a loan of Rs. 10000 to Y at the request of Z. And Z promised to A that if Y does not repay the amount then he (Z) will pay. This is a contract of guarantee. In this case, A is the creditor, Y is the principal debtor and Z is the surety

CHARACTERISTICS OF A CONTRACT OF GUARANTEE

The essential features of a contract of guarantee are as follows:

1**. Three parties**: A contract of guarantee is a tripartite agreement between the principal debtor, creditor and surety.

2. **Consent or Identity of mind**: The contract of guarantee requires the identity of mind (concurrence) of all the said three persons in respect of the subject matter of the contract.

3**. Existence of a Liability:** There must be an existing liability or a promise whose performance is

guaranteed. Such liability or promise must be enforceable by law.

4. **Primary and secondary liability**: It is an essential requirement of a contract of guarantee that there must be someone primarily liable (i.e., liable as principal debtor) other than the surety. A contract of guarantee presupposes existence of some liability of the principal debtor to the creditor.

5**. Essentials of a valid contract:** All the essential elements of a valid contract must be present in a contract of guarantee. However, the following points are worth noting in this regard:

a) The principal debtor need not be competent to contract. In case the principal debtor is not competent to contract, the surety would be regarded as the principal debtor and would be personally liable to pay.

b) Surety need not be benefited. 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.

c) A contract of guarantee may be oral or in writing.

6. **No misrepresentation**: 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.

7**. No concealment**: Any guarantee which the creditor has obtained by means of keeping silence as to material circumstances is invalid.

8**. Surety's liability must be conditional**: The liability of surety should arise only when the principal debtor makes a 'default'. If surety's liability arises independent of the default of the principal debtor, it is not a contract of guarantee.

KINDS OF GUARANTEE

1**. Specific guarantee**: Where a guarantee is given for a single and particular transaction or debt, it is called specific or simple guarantee. Such guarantee comes to an end as soon as the transaction is duly performed or the debt is duly discharged.

2. **Continuing guarantee**: A guarantee which extends to a series of transactions called a continuing guarantee. It is not confined to single transactions.

3**. Retrospective guarantee**: Where a guarantee is given for an existing debt, is called a retrospective guarantee.

4. **Prospective guarantee**: When a guarantee is given for a future debt, it is called prospective guarantee.

5. **Absolute guarantee**: It means a guarantee where the surety unconditionally promises to pay in case of default of the principal debtor.

6**. Conditional guarantee:** It means a guarantee where the surety promises to pay in case of some event, in addition to the default of the principal debtor, happens.

7**. Fidelity guarantee**: A guarantee given for the good conduct or honesty of a person employed in a particular office is called a fidelity guarantee.

8**. Limited or unlimited guarantee**: A limited guarantee is one, restricted to a single transaction. An unlimited guarantee is one which is unlimited either as to time or amount.

REVOCATION OF CONTINUING GUARANTEE

A continuing guarantee as to future transactions may be revoked in any of the following ways:

(i) **By notice of revocation by the society [Section 130]:** A continuing guarantee may at any time be revoked by the surety as to the future transactions by notice to the creditor. In such a case the surety would not be responsible for future transactions which may be made by the principal debtor after surety has revoked the contract of guarantee.

(ii) **By the death of the surety [Section 131]:** In the absence of any contract to the contrary, the death of the surety operates as a revocation of a continuing guarantee as to the future transactions taking place after the death of surety.

(iii) **By modes of discharging the surety:** A continuing guarantee is also revoked in the same manner in which the surety is discharged such as:

a) By novation [Section 62];

b) By variance in terms of contract [Section 133];

c) By release or discharge of principal debtor [Section 134];

d) By creditors act of omission [Section 139];

e) By loss of security [Section 141].

RIGHTS OF SURETY

The Act recognizes certain rights of the surety, besides imposing liability on him by virtue of Section 128. This right may be studied under the following three heads:

1. Right against the principal debtor.

2. Right against the creditor.

3. Right against the co-sureties.

1. RIGHTS OF THE SURETY AGAINST THE PRINCIPAL DEBTOR

a) Right of subrogation [Section 140]: On the default of the principal debtor, the surety can, after paying off the creditor, claim all those rights which the creditor had against the principal debtor. In other words, the surety steps into the shoes of the creditor to exercise his rights. There is a need of assignment or transfer of rights from the creditor to the surety.

b) Right to claim indemnity [Section 145]: In every contract of guarantee, there is an implied promise by the principal debtor to indemnify the surety, and the surety is to recover from the principal debtor whatever sum he has paid rightfully under the guarantee but no sums which he has paid wrongfully, e.g. cost of fruitless litigation.

2. RIGHTS OF THE SURETY AGAINST THE CREDITOR

a) Rights to claim securities: A surety is entitled to the benefit of every security which the creditor has against the principal debtor at the time when the contract of suretyship is entered into, whether the surety knows of the existence of such security or not; and if the creditor loses, or without the consent of the surety, parts, with such security, the surety is discharged to the extent of the value of the security.

b) Right to claim set-off: The surety is also entitled to the benefit of the principal debtor's set off against the creditor if it arises out of the same transaction.

c) Right to share reduction: The surety is entitled to claim the proportionate reduction of his liability by the amount of dividend claimed by the creditor.

3. RIGHTS OF THE SURETY AGAINST THE CO-SURETIES

Where a debt is guaranteed by more than one surety, they are called co-sureties. In such a case it would be unfair if one co-surety is compelled to pay the entire debt of the principal debtor.

a) Right to contribution [Section 146]: Where co-securities have guaranteed the same debt either jointly or severally, each surety would be liable to contribute equally towards the debt or that part of the debt which unpaid.

b) Right to share benefits of securities: Sometimes, at the time of guarantee, one of the cosureties receives a security from the principal debtor, or on payment of the debt, he receives security from the creditor. In such cases, the co-sureties are entitled to share the benefit of the securities.

c) Liability of co-sureties bound in different sums [Section 147]: Where the co-sureties have agreed to guarantee different sums, they have to contribute equally subject to the maximum of the amount guaranteed by each one.

d**) Effect of release of a surety [Sec. 138]:** Where there are co-sureties, release by the creditor of one of them does not discharge the others nor does it free the surety so released from his liability to other sureties.

NATURE AND EXTENT OF SURETY'S LIABILITY

According to Section 28 of the Contract Act defines the nature and extent of surety's liability as "the liability of the surety is coextensive with that of the principal debtor, unless it is otherwise provided by the contract". The nature

1. Surety's liability is coextensive: The surety may limit his liability at the time of entering into the contract. In the absence of such express specification, the surety's liability will be coextensive with that of the principal debtor.

2. Secondary liability: The surety's liability arises only when the principal debtor makes a default. In this sense his liability is secondary.

3. Surety's liability arises immediately on default of the principal debtor: Unless specially agreed, the surety cannot demand a notice of the default from the creditor, because it is the responsibility of the surety to see that the principal debtor makes the payment.

4. **The creditor need not exhaust his remedies against the principal debtor before he proceeds against the surety.**

5. Surety's liability where the original contract between creditor and principal debtor is void or voidable: If the original agreement between the creditor and the principal debtor is void, the surety may still become liable not only as a surety but also as a principal debtor.

6**. If the creditor has obtained the guarantee by misrepresentation or by concealing some material**

information then the guarantee shall be invalid and the surety will not be liable.

DISCHARGE OF SURETY FROM LIABILITY

A surety is said to be discharged when his liability comes to an end. A surety may be discharged from liability by the

I. revocation of the contract of guarantee;

II. conduct of the creditor; or

III. invalidation of the contract.

I. DISCHARGE OF SURETY BY REVOCATION

a) revocation by giving notice [section 130]: A surety may revoke the guarantee, at any time, by giving notice of revocation to the creditor.

b) Revocation by death [Section 131]: In the absence of any contract to the contrary, the death of the surety operates as termination of a continuing guarantee as to future transactions.

c) Revocation by novation: A surety is discharged when a new contract of guarantee is substituted for an old one.

II. DISCHARGE OF SURETY BY THE CONDUCT OF THE CREDITOR

a) By variance in terms of contract [Section 133]: If without the consent of the surety, the creditor makes any material change in the nature or terms of his contract with the principal debtor, the surety is discharged from liability.

b) By release or discharge of the principal debtor [Section 134]: If there is any contract between the creditor and the principal debtor by which the debtor is released, then the surety will also be discharged.

c) By compounding with or giving time to the principal debtor [Section 135]: The surety is discharged if the creditor (a) makes a composition with the principal debtor, or (b) gives time to him, or (c) promises not to sue the principal debtor; without the consent of the surety.

d) By Creditor's act or omission impairing surety's eventual remedy [Section 139]: If the creditor does any act which is inconsistent with the right of the surety, or omits to do any act which his duty to the surety requires him to do, and the eventual remedy of surety against the principal debtor is thereby impaired, the surety is discharged.

e) By loss of securities [Section 141]: If the creditor loses or parts with the security without the consent of the surety, the surety is discharged from his liabilities to the extent of the value of the security.

III. Discharge of Surety by invalidation of contract

a) Guarantee obtained by misrepresentation [Section 142]: Any guarantee which has been obtained by means of misrepresentation made by a creditor or with his knowledge and assent, concerning a material part of the transaction, is invalid.

b) Guarantee obtained by concealment [Section 143]: Any guarantee which a creditor has obtained by means of keeping silence to material circumstances is invalid.

c) Failure of a person to join as Co-surety [Section 144]: Where a person gives a guarantee upon a contract that a creditor shall not act upon it until another has joined in it as cosurety, the guarantee is not valid if that person does not join.

d) Failure of consideration: The surety will be discharged on a substantial failure of consideration.

e) Lack of essential element of a valid contract: If any of the elements is not present, the contract is void and the surety is discharged.

CONTRACT OF BAILMENT AND PLEDGE

The Indian Contract Act, 1872 deals with the general rules relating to bailment but does not deal with all types of bailment for which separates acts have been enacted, for example, The Carrier Act 1865, The Railways Act 1889, The Carriage of Goods by Sea Act, 1925.

CONTRACT OF BAILMENT

The word ‘Bailment’ has been derived from the French word ‘Baillier’ which means ‘to deliver’. Bailment, therefore, means delivery of property or goods in trust to another for a special purpose and for a limited period.

Definition

According to Section 148 of the Contract Act has defined bailment as **"the delivery of goods by one person to another for some purpose upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them".**

Bailor: The person delivering the goods is called 'bailor'.

Bailee: The person to whom they are delivered is called "the bailee".

Example

1. X deposited his luggage in a cloak room at railway station. This is a contract of bailment between X and the Railways.
2. Y who is going out of station delivers a horse to Y for proper care.
3. S handsover a piece of cloth to B, a tailor, for making a shirt.
4. A gives his book to his friend B, for preparing lessons of an examination.
5. A handsover gold ornaments to B, a bank, as security for loan.

CHARACTERISTICS OF BAILMENT

The requisites or essential features of bailment can be summed up as under:

1. Delivery of possession goods: It is an essential and important element of the bailment that the possession of the goods must be delivered by the bailor to the bailee. Delivery may be either **(a)actual, or (b) constructive**.

a) Actual Delivery: A delivery is said to be actual where the goods are physically handed over by the bailor to the bailee. For example, Mr. A delivers a Car for repair to a workshop dealer.

b) Constructive Delivery: It may not always be possible to give physical possession due to

difficulty or inconvenience, or for any other reason. In such cases, delivery may be constructive or symbolic. For example, delivery of railway receipts [Morvi Mercantile Bank Ltd. vs. Union of India (1965)].

2. Delivery of goods must be for some purpose and upon a contract: Delivery of goods should be made for some purpose upon an agreement that when the purpose for which the goods are delivered is completed, the goods should be returned to the bailor.

3. Return of goods: In bailment the goods are given on the condition that when the pu rpose for which they are given, is accomplished they shall be returned to the bailor or disposed of according to his directions. The goods may be returned in their original form or in an altered form.

4. Movable goods: There can be a bailment of movable properties only but money is not included in the category of movable goods.

5. No transfer of ownership: In bailment, the bailor is not transferred the ownership to the bailee. Possession alone is transferred but ownership is retained by the bailor.

CLASSIFICATION OF BAILMENT

The bailment may be broadly classified on the basis of charges (i.e., reward) and benefits as discussed below:

1. Bailment on the basis of Charges or Reward

a) Gratuitous bailment: When the goods are delivered by the bailor to the bailee without any charges or remuneration, it is called gratuitous bailment.

b) Non-gratuitous bailment: Where either the bailor or the bailee gets remuneration, the bailment is termed as non-gratuitous.

2. Bailment on the basis of benefits

a) Bailment for the exclusive benefit of bailor: It is a contract of bailment which is executed only for the benefit of the bailor and the bailee does not derive any benefit from it.

b) Bailment for the exclusive benefit of bailee: It is a contract of bailment which is executed only for the benefit of the bailee and the bailor does not derive any benefit from it.

c) Bailment for the mutual benefit of both bailor and bailee: It is a contract of bailment

which is executed for the mutual benefit of both of them.

DUTIES OF BAILOR

1. To disclose known defects in the goods: Under Section 150, the duty of bailor to disclose faults in the goods bailed is different for gratuitous and non-gratuitous bailor. It is described below:

a) Duty of gratuitous bailor: A gratuitous bailor is a bailor who lends his goods to the bailee without any charge. In such a case, the bailor is bound to disclose to bailee the faults in the goods bailed of which the bailor is aware and which materially interfere with the use of them or expose the bailee to extraordinary risks. If the bailor fails to make such disclosure, he is liable to the bailee for damages.

b) Duty of a non-gratuitous bailor: Since a non-gratuitous bailor delivers goods for a reward, his duty is greater. He must ensure that the goods delivered are reasonably safe. Section 150 provides that if the goods are bailed for hire, the bailor would be liable for such damages, whether or not he was aware of the existence of any faults.

2. To bear ordinary expenses: In a gratuitous bailment, where the goods are to be kept or to be carried, or to have work done upon them by the bailee for the bailor, the bailor shall repay to the bailee the necessary expenses incurred by him for the purpose of bailment.

3. To bear extraordinary expenses: In case of non-gratuitous bailment, where the goods are bailed for reward or remuneration, the ordinary expenses are not to be borne by the bailor, but if there are some extraordinary expenses incurred, then it becomes the duty of the bailor to pay such extraordinary expenses.

4. To indemnify bailee: The bailor is responsible to the bailee for any loss which the bailee may suffer because of the defective title of the bailor.

5. To receive back the goods: It is the duty of the bailor to take back the goods when the bailee returns them after the expiry of period of bailment, or the accomplishment of the purpose for which the goods were bailed.

6. To bear the risks: The bailor must bear the risk of loss of goods provided the bailee has taken all reasonable steps to protect the goods from loss.

DUTIES OF BAILEE

1. To take reasonable care of the goods bailed: According to this duty, the bailee is required to take reasonable care of the goods bailed to him. The bailee must take as much care as an ordinary sensible man would take under the similar circumstances, in respect of his own of the same type (Section 151). If the bailee is negligent in taking the care of the goods bailed, then he is liable to pay damages for loss or destruction of the goods.

2. Not to make any authorized use of goods bailed: If the bailee makes any use of the goods bailed which is not according to the conditions of bailment, he is liable to make compensation to the bailor for any damage arising to the goods from or during such use of them.

3. Not to mix goods bailed with his own goods: It is the duty of the bailee not to mix the bailor's goods with his own goods. If the bailee mixes up his own goods with those of the bailor, the following rules apply:

a) Mixing of goods of bailor with that of bailee with bailor's consent: Bailee cannot mix the goods bailed with his own goods. But with the consent of the bailor, the goods may be mixed and in that case the parties shall have an interest in proportion to their respective shares in the mixture thus produced (Section 155).

b) Mixing of goods without bailor's consent, where the goods can be separated: If the bailee mixes the goods bailed with his own goods without the consent of the bailor, and the goods can be separated, the property in the goods remains in the parties respectively but the bailee must bear the expenses of separation and any damages arising from separating the mixture (Section 156).

c) Mixing of goods without bailor's consent, where goods cannot be separated: 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 them, the bailee shall compensate the bailor for the cost of goods (Section 157).

4. To return the goods: The bailee must return or deliver the goods according to the bailor's directions without demand, after the accomplishment of purpose or after the expiry of period of bailment. If he fails to do so, he is responsible to the bailor for any loss, destruction or

deterioration of the goods from that time.

5. Not to set up adverse title: The bailee must not do any act which is inconsistent with the title of the bailor. He must not set up his own title or a third party's title on the goods bailed to him.

6. To return any accretions to the goods bailed: In the absence of any contract to the contrary, the bailee is bound to deliver to the bailor, or according to his directions, any increase or profit which may have accrued from the goods bailed.

RIGHTS OF BAILOR

1. Right to terminate the bailment: If the bailee fails to follow the conditions of bailment, the bailor may terminate the bailment.

2. Right to claim damages in case of negligence: If the bailee has not taken reasonable care or special care, the bailor has a right to claim damages for the loss, destruction or deterioration of the goods bailed.

3. Right to demand return of goods: The bailor has a right to demand return of goods after the accomplishment of the purpose or after the expiry of period of bailment.

4. Right to file a suit against wrong-doer: A wrong-doer is a third person who does some wrongful act and deprives the bailee from the use of goods bailed or does injury to the goods bailed, the bailor has a right to file a suit against that third person and claim compensation from him.

5. Right to file a suit for the enforcement of the duties imposed upon a bailee: If the bailee neglects in his duties, the bailor has a right to enforce these duties by filing a suit against the bailee.

6. Right to claim any increase in value or profits: In the absence of contract to the contrary, the bailor has a right to demand any increase or profit which may have accrued from the goods bailed.

RIGHTS OF BAILEE

1. Right to enforce bailor duties: The bailee can, by a suit, enforce the duties of the bailor towards him.

2. Right to claim compensation in case of faulty goods: Bailee can sue the bailor for his failure

to disclose faults in the goods bailed which materially interfere with their use or expose the bailee to extraordinary risks.

3. Right to claim reimbursement of expenses: The bailee can claim reimbursement of expenses incurred by him in the case of a gratuitous bailment, and of extraordinary expenses in case of non-gratuitous bailment.

4. Right to return the goods to anyone of the joint bailors: If several joint owners of goods bail them, the bailee may deliver them back to, or according to the direction of, one joint owner without the consent of all, in the absence of any agreement to the contrary.

5. Right to recover agreed charges: Where there is no such agreement of charges, the bailee has the right to ask the bailor for the payment of necessary expenses incurred by him for the purpose of bailment.

6. Right to recover loss in case of Bailor's defective title: The bailee has a right to be indemnified in case he suffers any loss because of the defective title of the bailor.

7. Right of action against third parties: If a third person wrongfully deprives bailee of the use of possession of the goods bailed, he has a right of action against such third parties in the same manner as the true owner has against third persons.

8. Right to interplead: Where a person other than the bailor claims the goods bailed, bailee may apply to the court to stop delivery of the goods to the bailor and to decide the title to the goods.

9. Right of lien: The bailee has a right to claim his lawful charges and if they are not paid, the bailee is given the right to retain the goods until the charges due in respect of those goods are paid. This right is known as bailee's right of lien.

BAILEE'S LIEN

Lien means the right of a person, who has possession of the goods belonging to another person, to retain such possession of the goods until some debt due to him or claim is satisfied. This right is sometimes called "Possessory Lien".

A lien may be either a particular lien or a general lien.

a) Particular or Special Lien [Section 170]: A particular lien is a right to retain only those goods in respect of which some charges are due. This right is available only if the following

conditions are fulfilled:

(i) The bailee must have exercised labour or skill in respect of the goods bailed.

(ii) The bailee must have rendered the service in accordance with the purpose of the bailment.

(iii) The bailee must be in possession of the goods.

(iv) There must not exist any contract for payment of price in future.

(v) The bailee cannot exercise right of lien if he has agreed to perform the services on credit.

(vi) The bailee can exercise the right of particular lien only if there is no agreement to the contrary.

b) General Lien [Section 171]: A general lien is a right to retain all the goods as a security for the general balance of account until the full satisfaction of the claims due whether in respect of those goods or other goods. The right of general lien is a privilege and is given only to certain kinds of bailee's namely, (i) Bankers, (ii) Factors, (iii) Wharfinger, (iv) Attorneys of a High Court, and (v) Policy brokers.

FINDER OF LOST GOODS

Sec. 71 of the Act clearly lays down **that a person, who finds goods belonging to another and takes them into his custody, is called a finder of lost goods**. Generally there is no obligation on the part of a person who finds goods, but if he picks them up or to take charge of the goods, he becomesthe bailee of those goods.

RIGHTS OF THE FINDER OF LOST GOODS

1. Right of Lien [Section 168]: The finder of goods has a right to retain the goods found until he receives the compensation for trouble and expenses voluntarily incurred by him a) to preserve the goods; and

b) to find out the true owner.

It may be noted that the finder of goods has no right to sue the owner for such compensation.

2. Right to sue for reward [Section 168]: If the owner of the goods lost has offered a specific reward, for the return of goods lost, the finder may sue for such reward, and may retain the goods unless he receives it.

3. Right to sell [Section 169]: A finder of goods has a right to sell the goods found under the following circumstances:

a) If the owner cannot with reasonable diligence be found; or

b) If the owner refuses to pay the lawful charges of the finder; or

c) If the goods are of a perishable nature; or

d) If the lawful charges of the finder in respect of the goods found exceed two-thirds of the total value of goods.

DUTIES AND LIABILITIES OF THE FINDER OF LOST GOODS

 The finder of goods must take reasonable care of the goods found.

 The finder of goods must return the goods to the real owner, who has paid the expenses incurred by the finder.

 The finder of goods must not use the goods for his own purpose.

 The finder of goods must not mix up the goods with his own goods.

 The finder of goods must also return the increase in the goods.

 The finder of goods must make efforts to find the true owner.

TERMINATION OF BAILMENT

Every contract of bailment comes to an end under the following circumstances:

1. On the achievement of the object: Where the bailment is for a specific purpose, it terminates as soon as the purpose is achieved.

2. On the expiry of the period: If the contract of bailment is only for particular period, it is terminated on the expiry of that period.

3. Inconsistent use of goods: Where a bailee does something which is inconsistent with the terms of the contract, the bailment is terminated.

4. Destruction of the subject matter of bailment: A bailment is terminated if the subject matter of the bailment (a) is destroyed, or (b) becomes incapable of being used for bailment because of some charge in the nature of goods.

5. Gratuitous bailment: Where the bailment is gratuitous, the bailor may terminate the bailment even before the specified time or before the purpose is fulfilled.

6. Death of the bailor or bailee: A gratuitous bailment is terminates by the death of either the bailor or bailee.

PLEDGE OR PAWN

A pledge is a special kind of bailment. In this case, the goods are delivered as a security for a loan or for the fulfillment of an obligation. According to Sec. 172 of the Indian Contract Act defines **pledge as, "the bailment of goods as security for payment of a debt or performance of a promise".The bailor is in this case called the "pawnor" and the bailee is called the "pawnee".**

Example: Y borrows Rs. 50,000 from Citi Bank and keeps his shares as security for payment of a debt. It is a contract of pledge or pawn.

Pawnor or Pledger:

The person who delivers the goods as security for payment of a debt or performance of a promise is called the pawnor. In the aforesaid example, Y is the pawnor.

Pawnee or Pledgee:

The person to whom the goods are delivered as security for payment of a debt or performance of a promise is called the Pawnee or Pledgee. In the aforesaid example, Citi Bank is the pawnee.

RIGHTS OF PAWNEE OR PLEDGEE

1. Right of retainer: The pawnee may retain the goods pledged not only for payment of the debt or the performance of the promise, but for the interest of the debt, and all necessary expenses incurred by him in respect of the possession or for the preservation of the goods pledged.

2. Right of retainer for subsequent advance: When the pawnee lends money to the same pawnor after the date of the pledge, it is presumed that the right of retainer over the pledged goods extends to subsequent advances also.

3. Right to extraordinary expenses: The pawnee is entitled to recover from the pawnor extraordinary expenses incurred by him for preserving the goods pledged. This right is only a right of action but not a lien.

4. Right in case of default of the pawnor:

(a) To bring a suit on the debt and to retain the goods pledged as a collateral security.

(b) To sell the goods pledged after giving reasonable notice to the pawnor.

DUTIES OF PAWNEE

The pawnee has almost the same duties as those of the bailee. His duties as follows:

1. To take reasonable care of the goods pledged;

2. Not to make any unauthorized use of goods;

3. Not to mix goods pledged with his own goods;

4. To return goods; and

5. To return accretions to the goods.

RIGHTS OF PAWNOR

1. Defaulting pawnor's right to redeem:

The pawnor has an absolute right to redeem the goods pledged, upon the satisfaction of the debt. When the time is fixed for the payment of the debt, the pawnor may redeem the goods even after the expiry of the fixed time.

2. Preservation and maintenance of the goods:

It is implied that the pawnee as a bailee is bound to preserve the goods pledged and properly maintain them.

3. Protection as an ordinary debtor:

It is also implied that a pawnor has the rights of protection as an ordinary debtor by statutes meant for such protection e.g., the Moneylender's Act.

4. Right to receive the increase:

The pawnor has a right to receive any increase of profits from pledged goods.

DUTIES OF PAWNOR

The duties of pawnor are almost similar to those of a bailor which have already been discussed. However, the following are some additional duties of the pawnor.

a) Duty to repay the loan:

If he fails to repay the loan, as per the terms of the contract, the pawnee may bring a legal action against him for the recovery of the loan.

b**) Duty to pay the expenses in case of default:**

The pawnee must pay the expenses incurred by the pawnee due to default in repaying the loan at stipulated time.

PLEDGE BY NON-OWNERS

According to the general rule, only the true owner can pledge the goods but under the following cases, even a non-owner can make a valid pledge:

1. Pledge by a mercantile agent: The mercantile agent is an agent who has the authority either to sell the goods, or to consign the goods for the purpose of sale, or to buy the goods or to raise money on the security of the good. Following are the conditions for a valid pledge by a mercantile agent:

a) The mercantile agent must be in possession of goods or documents of title to goods.

b) The possession of goods must be with the consent of the owner.

c) The goods most he in the possession of the agent in his capacity as a mercantile agent.

d) The pawnee must act in good faith and should not have notice, at the time of pledge, that pawnor has no authority to sell.

2. Pledge by a person in possession under a voidable contract (Section 178-A): Where a person obtains possession of goods under a voidable contract, the pledge created by him is valid provided (a) the contract has not been rescinded at the time of pledge, and (b) the pawnee acts in good faith and without notice of pawnor's defect of title.

3. Pledge by a pawnor having only a limited interest (Section 179): Where a person pledges goods in which he has only a limited interest, the pledge is valid to the extent of that interest.

4. Pledge by co-owner in possession: Where there are several joint owners of goods then pledge by one of them who is in possession of the goods, with the consent of other co-owners, shall be valid.

5. Pledge by a seller in possession after sale [Section 30 (1) of the Sale of Goods Act]: A seller who continues to be in possession of the goods even after their sale, can make a valid pledge provided the pawnee acts in good faith and has no notice of sale.

6. Pledge by a buyer in possession before payment of price [Section 30 (2) of the Sale of Goods Act]: A buyer who obtains possession of goods with the consent of the seller before payment of price and pledges them, the pawnee will get a good t.tle provided he does not have notice of seller's right of lien or any other right.

CONTRACT OF AGENCY

A person who is competent to make a contract may do so (i) either by himself or (ii) through another person. When he makes contracts through another person; he is said to be making a contract through an agent. The person who acts on behalf of another or who represents a person in dealing with third parties is called as an 'agent' and the person on whose behalf he acts or who is thus represented, is called as 'principal'. The contract which creates the relationship of principal and agent is known as 'agency'. The legal provisions relating to agency are contained in Chapter X (Sections 182 to 238) of the Indian Contract Act, 1872.

AGENT

According to Section 182 of the Contract Act defines an 'agent' as "a person employed to do any act for another or to represent another in dealings with third parties".School of Distance Education Business Regulations Page 63

PRINCIPAL

The person for whom such act is done, or who is so represented, is called the principal.

AGENCY

The relationship between an agent and the principal is called agency, which may be created by an express or implied agreement.

Example:

X appointed Y to purchase 100 bags of rice on his behalf. In this case, X is the principal, and Y, the agent. And the relationship between X and Y is known as agency.

GENERAL RULE OF AGENCY

There are two important rule of agency:

1. Whatever a person can do personally, he can do through an agent: Whatever a person

competent to contract may do by himself, he may do through an agent except for acts involving personal skill and qualification such as painting, marriage, singing etc.

2. He who does an act through another does it by himself: This means that the acts of agent are, for all legal purposes, the acts of the principal (Sec. 226).

ESSENTIALS OF A CONTRACT OF AGENCY

1. Existence of agreement: There must be an agreement by which a person is appointed as an agent by the other. The agreement may be express or implied.

2. Competency of the Principal: According to Section 183, "any person who is of the age of majority according to the law to which he is subject and who is of a sound mind, may employ an agent". An appointment of an agent made by an incompetent person is void. An agent acting on behalf of an incompetent person will be personally liable to third parties.

3. Any person may become an agent: According to Section 184, any person may become an agent and he need not be competent to contract. For instance, a minor can bring about a contractual relation between the principal and third party without that agent being liable to the principal.

4. No consideration is required to create agency (Sec. 185): The detriment to the principal in consenting to be represented by the agent is sufficient to support the promise of the agent.

CREATION OF AGENCY

The creation of an agency, i.e., creation of principal and an agent, may take place in any of the following ways:

1. Agency by express agreement (Sec. 187): An agency by express authority arises when an express authority is given to the agent by spoken or written words.

2. Agency by implied agreement (Section 187): When agency arises from the conduct of the parties, or inferred from the circumstances of the case, it is called an implied agency. Partners, servants and wives are usually regarded as agents by implication.

3. Agency by estoppel (Section 237): Where a person, by his words or conduct has wilfully led another person to believe that certain set of circumstances or facts exists, and that other person has acted on that belief, then he is estopped from denying the truth of

such statements subsequently.

4. Agency by holding out: Agency by holding arises when a person by his past affirmative or positive conduct leads third person to believe that person doing some act on his behalf is doing with authority.

5. Agency by necessity: In certain circumstances, a person may be compelled to act as an agent of the other. In order to protect the interests of another, it may become necessary to take some action without waiting for the instructions of the owner. But the following conditions must be fulfilled before a person may act as an agent of necessity:

(a) There must be a real emergency to act on behalf of the principal,

(b) It may not possible for the agent to communicate with the principal or to obtain his instruction,

(c) The person acting as agent must act bonafide and in the interest of the parties concerned,

(d) The agent must adopt a reasonable and practical course under the circumstances of the case.

6. Husband and Wife relations: The wife is considered an implied agent of the husband for the purpose of buying household necessaries on credit, and the husband becomes bound to pay for the same.

7. Agency by operation of law: An agency may also come into existence by operation of law. In certain circumstances, the law treats one person as an agent of another. Example: Every partner is an agent of the partnership firm. Similarly, a legal advisor is the agent of his client.

8. Agency by ratification: Ratification means subsequent acceptance and adoption of an act by the principal originally done by the agent without authority. This is agency ex-post facto or agency arising after the event.

SUB-AGENT [SECTION 191]

A sub-agent is a person who is employed by the original agent and who acts under the control of the original agent in the business of agency.

Agent can appoint a sub-agent in the following circumstances:

1. If such appointment is permitted by the custom of the trade.

2. If the nature of the business makes such appointment necessary.

3. If the act to be done is purely ministerial and involves no exercise of discretion.

4. If principal agrees to such appointment.

5. In case of an unforeseen emergency.

SUBSTITUTED AGENT [SECTION 194]

A substituted agent is a person who, named by the original agent on the basis of an express or implied authority from the principal. He is taken as an agent o the principal for such part of the business of agency which is entrusted to him. A privity of contract is established between the principal and substituted agent.

DIFFERENT KINDS OF AGENTS

The relationship between the principal and agent and the extent of the authority of the latter are matters to be determined by agreement of the parties. A general classification of agents is as follows:

1. General Agent: A general agent is one who has authority to do all acts in the ordinary course of trade or profession. The authority of a general agent is continuous unless it is terminated.

2. Special Agent: A special agent is one who has authority to do a particular act in a particular transaction.

3. Universal Agent: A universal agent is one who has authority to do all acts which the principal can lawfully do and delegate. He has an unlimited authority to bind the principal.

4. Commercial or Mercantile Agent: A mercantile agent is a person having authority either to sell the goods or to consign the goods or to raise money on the security of goods. Mercantile agents may be of several kinds which are as follows:

a) Broker: He is an agent employed to make bargains and contracts in matters of trade, commerce, or navigation between other parties for a compensation commonly called brokerage.

b) Factor: A factor is one who is entrusted with the possession of goods and who has the authority to buy, sell or otherwise deal with the goods or to raise money on their security.

c) Auctioneer: An auctioneer is one who is entrusted with the possession of goods for sale at a public auction.

d) Commission Agent: The term 'commission agent' is a general term which is used in practice even for a factor or broker.

e) Banker: Banker acts as an agent of the customer when he collects cheques or drafts or bills or buys or sells securities on behalf of his customers.

f) Del-credere Agent: A del-credere agent is one who gives guarantee to his principal to the effect that the third person with whom he enters into contracts shall perform his obligation. 5. Non-mercantile Agent: An agent who does not deal in mercantile transactions. These include attorneys, solicitors, guardian, promoters, wife, etc.

DUTIES OF AN AGENT

The duties of an agent to his principal are as follows:

1. To conduct business as per directions or custom of trade [Section 211]: An agent is bound to conduct the business of his principal according to principal's direction s or the custom of trade (in the absence of principal's directions).

2. To act with reasonable care, skill and diligence [Section 212]: An agent is bound to conduct the business of the agency with reasonable care and skill.

3. Duty to render proper records [Section 213]: An agent is bound to render proper accounts to his principal on demand.

4. To communicate with principal [Section 214]: It is the duty of an agent, in cases of difficulty, to use all reasonable diligence in communicating with his principal and obtain his instructions.

5. Duty not to deal on his own account [Section 215 & 216]: An agent is bound to disclose all material circumstances which have come to his knowledge on the subject, to the principal and

obtain his consent if he desires to deal on his own account in the business of agency.

6. Duty to pay sum received [Section 218]: It is the duty of the agent to pay sum received on behalf of the principal subject to any lawful deductions for remuneration or expenses properly incurred.

7. To protect and preserve the interest [Section 209]: When an agency is terminated by the principal dying or becoming of unsound mind, the agent must take all reasonable steps for the protection and preservation of the interest entrusted to him.

8. Not to delegate authority [Section 190]: An agent cannot lawfully employ another to perform acts which he has expressly or impliedly undertaken to perform personally unless custom of trade or the nature of the agency so requires.

9. Duty not to set up adverse title.

10. Duty to pass the information to the principal.

11. Duty not to make any secret profit from agency.

RIGHTS OF AN AGENT

1. Right of Retainer [Section 217]: An agent has the right to retain, out of any sum received on account of the principal in the business of the agency such as remuneration and advances made or expenses properly incurred.

2. Right to receive remuneration [Section 219 & 220]: The agent has the right to receive agreed remuneration or usual remuneration as per the custom of the trade in which he has been employed.

3. Right of lien [Section 221]: An agent has a right to retain goods, papers and other movable or immovable property of the principal received by him until the amount due to him had been paid or accounted for.

4. Right to indemnification [Section 222]: The agent has a right to be indemnified against the consequences of all lawful acts done by him in exercise of the authority conferred upon him.

5. Right to be indemnified against consequences of facts done in good faith [Section 223]: An agent has right to be indemnified by the principal against the consequences of act done in good faith that causes an injury to the rights of third person.

6. Right to compensation [Section 225]: The agent has a right to be compensated for injuries sustained by him by neglect or want of skill on the part of the principal.

DUTIES OF PRINCIPAL

The main duties of principal are as follows:

1. To remunerate the agent for his services;

2. To indemnify the agent against the consequences of all lawful acts;

3. To indemnify the agent against the consequences of an act done in good faith, even though the act causes an injury to the rights of third persons; and

4. To make compensation to the agent in respect of injury caused to such agent by his negligence or want of skill.

RIGHTS OF PRINCIPAL

1. To get proper accounts on demand from his agent.

2. To see that the agency business is conducted according to his instructions, or in their absence, according to the custom which prevails in the place where similar business is conducted.

3. To be entitled to compensation in respect of the direct consequences of the agent's negligence, want of skill, or misconduct.

4. To give instructions in cases of difficulty, when contracted by the agent.

5. To be entitled to compensation for loss, or any profit accruing, owing to departure from instructions.

6. To claim the benefit, if any, arising from a transaction entered into by the agent on his agent on his own account.

7. To repudiate the transaction, if a material fact is concealed or the dealing by the agent on his own account is disadvantageous to him.

8. To receive all moneys due to him, subject to such deductions by the agent as are permissible.

9. To remunerate the agent only after the completion of the act.

10. To refuse to pay the remuneration if the agent is guilty of misconduct.

LIABILITY OF AGENT TO THIRD PARTIES [Agent Personally Liable]

In the absence of any contract to that effect, an agent cannot personally enforce contract entered into by him on behalf of his principal, nor is he personally bound by them. The circumstances under which an agent becomes personally liable are as follows:

1. Where the agent acts for a foreign principal [Sec. 230 (l)]: The agent will be personally liable if he acts for a merchant who is resident abroad unless there is an intention to the contrary.

2. Where the agent acting for a principal who cannot be sued [Sec. 230 (2)]: The instances of principals who cannot be sued are sovereigns and their accredited agents, a company before its incorporation, or an incompetent person, etc. In such cases, the agent is personally liable.

3. Where the agent acts for a principal who cannot be sued [230(3)]: The instances of principals who cannot be sued are sovereigns and their accredited agents, a company before its incorporation, or an incompetent person, etc. In such cases, the agent is personally lia ble.

4. Where an agent acts for a non- existent principal: If the agent contracts for a fictitious principal, he shall incur personally liability.

5. Where the agent acts for an undisclosed principal [Sec. 231]: When the agent does not disclose that he is acting as an agent for someone and he contracts in his own name, he becomes personally liable to third parties.

6. Where the agent expressly provides [Sec. 230]: The personal liability of agent may arise from express agreement to that effect.

7. Where the agency is one coupled with interest: If the agent has an interest in the subject matter of the contract, he will be personally liable thereon to the extent of his interest in the contract.

8. Where the agent exceeds his authority: If an agent exceeds his authority, or represents to have some kind of authority which he does not have, he commits breach of warranty of authority and is personally liable to third parties who have acted under such false

representation.

9. Where there is trade usage or custom: The agent is personally liable where there is trade usage or custom to that effect.

10. Where an agent receives money by mistake or fraud: Where a third party pays to an agent under a mistake, there can be suits personally against the agent for the refund of the amount.

11. Where the agent signs the negotiable instrument in his own name: If an agent puts signature on a negotiable instrument, etc., without making it clear that he is signing on behalf of the principal, the agent will be personally liable.

12. Pretended agent [Section 235]: If he induces a third party to enter into a contract with him, he will be personally liable to compensate the third party in case his alleged employer does not ratify his acts.

LIABILITIES OF PRINCIPAL TO THIRD PARTIES

In the following cases the principal is liable to third parties for the acts done by his agent:

1. Where the agent acts within the scope of his authority [Sec. 226]: When an agent is appointed, then his principal is bound by the acts of the agent within the scope of his real or apparent authority. Such acts of the agent may be enforced in the same manner and will have the same legal effect as if they were the acts of the principal.

2. Where the act within agent's authority is separable from that which is beyond his authority (Sec. 227): In case the act which is within the agent's authority, can be separated from that which lies beyond his authority, only the act which is within his authority is binding between him and the principal.

3. Liability of principal for misrepresentation or fraud of the agent (Sec.238): The principal is liable for and is bound by misrepresentation or fraud committed by the agent in respect of matters falling within his authority.

4. Where the Agent Acts for an Unnamed Principal: Where the agent discloses that he is an agent but does not disclose the name of the principal, the acts of the agent shall be binding on the principal. However, the agent will become personally liable

if:

(a) the agent declines to disclose the identity of the principal, or

(b) the agent does not disclose his representative character, or

(c) there is a trade custom to the contrary.

5. Responsibility of principal even where the agent is personally liable: In cases where the agent has rendered himself personally liable in respect of the transactions, a third person dealing with him may hold either him or his principal, or both of them, liable.

6. Bound by notice given to agent [Section 229]: Notice given to agent, in the course of business of agency is considered as a notice to the principal.

TERMINATION OF AGENCY

A contract of agency may be terminated in one of the following two ways:

1. Termination by the act of parties:

A contract of agency may come to an end either on account of the act of the principal or agent or both. Thus, agency may be terminated.

a) By agreement between the parties: An agency is terminated if the principal and agent mutually agree to do so.

b) By revocation of authority by the principal: The principal has the power to revoke the authority given to his agent at any time before the authority has been exercised so as to bind the principal.

c) By renunciation of agency by the agent: An agency may also be terminated by the agent by an express renunciation, but a reasonable notice must be given to the principal.

2. Termination by operation of law:

An agency will come to an end by operation of law in the following cases:

a) Completion of the business of agency: When the purpose for which the agency was created is completed, the agency comes to an end automatically.

b) Expiry of time: Where the agent is appointed for a fixed period it will terminate on the expiry of that period, it is immaterial whether the purpose of agency has been accomplished or not.

c) Death or insanity of the principal or agent: An agency comes to an end automatically on the death or insanity of the principal or agent.

d) Insolvency of the principal: An agency comes to an end automatically on the insolvency of the principal.

e) Destruction of the subject matter: If the subject matter of the agency is destroyed, the agency comes to an end.

f) Dissolution of company: When the principal or agent is an incorporated company, the agency will come to an end on the dissolution of the company.

g) Principal becoming an alien enemy: If the principal and the agent belong to two different countries, and war breaks out between the two countries, the authority of the agent ceases.

h) Termination of the sub-agent's authority: The termination of the authority of an agent causes the termination of the authority of all sub-agents appointed

MODULE – III

THE SALE OF GOODS ACT 1930

CONTRACT OF SALE

Under Section 4 (1) of the Sale of Goods Act, 1930, the contract of sale of goods is defined as follows:

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

A contract of sale may provide for:

a) Sale: A contract of sale may be absolute or conditional. Where the right of ownership in the goods is transferred from the seller to the buyer, the contract is sale.

b) Agreement to sell: Where under a contract of sale the transfer of property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell.

Essentials of a Valid Contract of Sale

1) Contract: All the essential elements of a contract must be present in a contract of sale.

2) Two parties: There must be two parties to constitute a contract of sale namely; a buyer and a seller. The same person cannot both be a seller and a buyer.

3) Goods: The subject matter of a contract of sale will always be goods. The goods may be either existing goods, future goods or contingent goods.

4) Transfer of property: In a contract of sale, the seller must transfer or agree to transfer property in the goods to the buyer.

5) Price: The consideration for a contract of sale must be money called the price.

CONDITIONS AND WARRANTIES

Stipulation

'Stipulation' means a requirement or a specified item in an agreement". In a contract of sale of goods, stipulation refers to representations made by the buyer and the seller reciprocally as a part of negotiation between them before they enter into a contract.

Meaning of Conditions and Warranties

Condition: According to Section 12(2), a condition is a stipulation essential to the main purpose of the contract, the breach of which gives a right to repudiate the contract.

For example: B wanted to purchase a car, suitable for touring purpose and M suggested him a 'Burgatti' car. B purchased the car from M, a car dealer. After some use, car was found unfit for the touring purpose. Held there was a breach of condition.

Warranty: According to Section 12(3), a warranty is a stipulation collateral to the main purpose of the contract, the breach of which gives a right to a claim for damages but not a right to reject goods and to treat the contract as repudiated.

For example: X purchased a car from a dealer with assured gifts and discount schemes. Dealer defaulted in delivery of these schemes as intended. There is a breach of warranty.

Express and Implied Conditions and Warranties

The conditions and warranties may be express or implied. 'Express' conditions and warranties are those, which have been expressly agreed upon by the parties at the time of the contract of sale. 'Implied conditions and warranties are those, which the law in corporates into the contract unless the parties stipulate to the contrary. They may be cancelled, or varied by an express agreement or by the course of dealing or by usage and custom.

Implied Conditions

1) Condition as to title [Sec. 14 (a)]: In every contract of sale, unless there is an agreement to the contrary, the first implied condition on the part of the seller is that:

a) In case of sale, the seller has a right to sell the goods, and

b) In case of an agreement to sell, the seller will have the right to sell at the time when the ownership is to pass from the seller to the buyer.

Example: If the goods can b e sold only by infringing the trademark, the seller shall be deemed to have broken the condition that he has a right to sell the goods. [Niblett vs. Confectioners Materials Co. Ltd (1921) 3KB 387]

2) Sale by description [Sec. 15]: Where there is a contract of sale of goods by description, there is an implied condition that the goods shall correspond with the description. This rule is based on the principle that "if you contract to sell peas, you cannot compel the buyer to take bean s." The term 'sale by description' includes the following:

a) Where the buyer has never seen the goods and buys them on the basis of the description given by the seller.

b) Where the buyer has seen the goods but he relies not on what he has seen but what was stated to him and the deviation of the goods from the description is not apparent.

c) Packing of goods may sometimes be a part of description.

d) Brand may also form part of the description.

For example: A sold B 'a new Maruti 800 car'. On delivery, the buyer finds that it is an old car. The buyer may reject the sale.

3) Sale by sample [Sec. 17]: In the case of contract for the sale of goods by sample, there is an implied condition:

a) that the goods must correspond with the sample in quality;

b) that the buyer must have reasonable opportunity of comparing the bulk with the sample.

c) that the goods must be free from any defect which renders them unmerchantable and which would not be apparent on reasonable examination of the sample.

For example: A seller undertakes to supply 100 tonnes of Java sugar warranted to be equal to the sample. The sugar when supplied corresponds to the sample but is not Java sugar. The

buyer can repudiate the contract.

4) Sale by sample as well as description (Section 15): Where the goods are sold by sample as well as by description, the implied condition is that the bulk of the goods supplied must correspond with the sample and the description.

5) Condition as to quality or fitness [Sec. 16 (1)]: Usually in a contract of sale, there is no implied condition as to quality or fitness of the articles for any particular purpose. It is the duty of the buyer to see and satisfy himself whether the article will be suitable for the purpose for which he requires them (Caveat Emptor). Section 16 constitutes an exception to the rule of caveat emptor in the following circumstances:

(i) the buyer makes the seller know, whether expressly or by implication, the purpose for which the goods are required,

(ii) the buyer relies on the skill and judgement of the seller, and

(iii) it is the business of the seller to supply goods of that kind in the ordinary course of his business.

For example: A contracts to make and deliver a set of false teeth to B. The false teeth did not fit in the mouth of B. B is entitled to reject the goods.

6) Condition as to merchantability [Sec. 16 (2)]: Where the goods are bought by description from a seller who deals in goods of that description (whether he is the manufacturer or producer or not), there is an implied condition that the goods shall be of merchantable quality.

For example: A agreed to sell B some motor horns. Goods were to be delivered by instalments. The first instalment was accepted but the second contained a substantial quantity of horns w hich were damaged owing to bad packing. Held, the buyer was entitled to reject the whole instalemnt, as the goods were not of a merchantable quantity.

7) Condition as to Wholesomeness: This condition applies in the case of provisions and foodstuffs which must not only be merchantable but also be wholesome and suitable for consumption.

For example: X purchased milk from Y, a milk dealer. The milk contained typhoid germs. X's wife, on taking the milk, got infection and died. Held, X was entitled to get damages.

Implied Warranties

1. Warranty of quiet possession [Sec. 14 (b)]: Under the circumstances are such as to show a different intention there is an implied warranty that the buyer shall have and enjoy quiet possession of the goods. The buyer, therefore, will be entitled to recover compensation for breach of both, a condition as well as a warranty.

For example: Anil purchased a secondhand typewriter from Rahul. Anil spent some money on its repairs but was dispossessed of it after six months by the true owner. It was held that Anil was entitled to recover from Rahul not only the price paid but also the cost of repair.

2. Warranty of freedom from encumbrances[Sec. 14 (c)]: There is an implied warranty that the goods shall be free from any charge or encumbrance in favour of a third party not declared or known to the buyer before or at the time when the contract is made.

For example: A borrowed Rs. 500 from B and hypothecated his radio with B as security. Later on A sold this radio to C who bought in good faith. Here, C can claim damages from A because his possession is distributed by B having a charge.

3. Warranty implied by usage of trade [Sec. 16 (3)]: An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade.

For example: There was a sale of drugs by auction. It was a trade usage to declare any sea damage in such cases. It was held that it could be implied that drugs so sold without any such declaration were free from sea damage.

4. Warranty to disclose dangerous nature of goods: Where the goods are dangerous to the knowledge of the seller and the buyer is ignorant of the same, there is an implied warranty that the seller should warn the buyer about the probable danger.

For example: X sold a tin of disinfectant powder to Y, X knew that the tin was to be opened with special care otherwise it might prove dangerous. He also knew that Y was ignorant about it. He did not warn Y. C opened the tin and his eyes were injured by the powder. It was held that A was liable as he should have warned Y of the probable danger.

Doctrine of Caveat Emptor

The term ‘caveat emptor’ is a Latin word which means ‘let the buyer beware’ i.e., a buyer purchases the goods at his own risk. The doctrine of caveat emptor means that the seller is not bound to disclose the defects in the goods, which he is selling. It is the duty of the buyer to satisfy

him before buying the goods that the goods will serve the purpose for which they are being bought. Section 16 of the Sale of Goods Act has enunciated the rule of caveat emptor as follows:

"Subject to the provisions of this Act and of any other law for the time being in force, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale".

Exceptions to the Doctrine of Caveat Emptor

The doctrine of caveat emptor is, however, subject to the following exceptions:

1) Fitness for buyer's purpose [Section 16(1)]: Where buyer lets the seller know the particular purpose and depends on the seller's skill and judgement who deals in goods of that kind, the condition is that the goods must be fit for that purpose.

2) Goods purchased under patent or brand name: In case where the goods are purchased under its patent name or brand name, there is no implied condition that the goods shall be fit for any particular purpose.

3) Condition as to merchantability [Section 16(2)]: This condition applies (i) where goods are sold by description, (ii) the seller deals in those goods, and (iii) the buyer has no opportunity to examine the goods being bought.

4) Good sold by sample as well as description [Section 15(1)]: Where the goods are sold by sample as well as by description, the doctrine does not apply if the bulk of the goods supplied do not correspond with the sample and the description.

5) Goods sold by sample [Section 17]: Where the goods are bought by sample the doctrine does not apply if the bulk does not correspond with the sample.

6) Condition implied by usage or custom of trade: Where trade usage attaches an implied condition or warranty regarding the quality of fitness of goods for a particular purpose, the doctrine of caveat emptor does not apply.

7) Goods sold by Misrepresentation: Where the seller sells the goods by making some misrepresentation or fraud and the buyer relies on it or where the seller knowingly conceals defects not discoverable on reasonable examination, then the rule of caveat emptor will not apply.

TRANSFER OF OWNERSHIP (PROPERTY) IN GOODS

In a contract of sale of goods, there are three stages in the performance of contract by a seller:

- Transfer of property in the goods;
- Transfer of possession of the goods; and
- Passing of the risk.

The expression 'transfer of property' means the transfer of ownership of goods from seller to buyer so as to constitute the buyer, the owner thereof. The time at which property passes from seller to buyer is important due to the following reasons:

1) Risk prima facie passes with property: Sec. 26 provides that "unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, the goods are at buyer's risk whether delivery has been made or not."

2) Action against third parties: When the goods are in any way damaged or destroyed by the action against them.

3) Right of resale: To determine whether buyer can resell the goods to a third party without incurring any liability is linked with transfer of ownership.

4) Suit for the price: Transfer of property confers upon the seller the right to sue the buyer for price.

5) Insolvency of the seller or the buyer: On the insolvency of a person, the Official Receiver or Assignee takes the possession of the property belonging to the insolvent.

Rules regarding Transfer of property

The rules for the transfer of ownership are contained in Sections 18 to 24 of the Sale of Goods Act. These rules determine the time at which the ownership of the goods is transferred from the seller to the buyer. As the general rule, the "transfer of ownership depends upon the intention of both the parties".

1) Transfer of property in case of Specific or Ascertained Goods –

a) When goods are in deliverable state (Sec. 20): Where there is an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to buyer when the contract is made, and it is immaterial whether the time of payment of the price or

the time of delivery of the goods, or both is postponed.

b) When goods are not in a deliverable state (Sec. 21): Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods for the purpose of putting them into a deliverable state, the property does not pass until such thing is done and the buyer has notice thereof.

c) When price of goods is to be ascertained (Sec. 22): Where there is a contract for the sale of specific goods in a deliverable state but the seller is bound to weigh, measure, test or do some other act or thing with reference to the goods for the purpose of ascertaining price, the property does not pass until such thing is done and the buyer has notice thereof.

2) Transfer of property in case of Unascertained Goods –

a) Goods must be ascertained (Sec. 18): Where there is a contract for the sale of unascertained goods, no title of property in the goods is transferred until the goods are ascertained.

b) Appropriation of goods to the contract (Sec. 23): The term 'appropriation' means the process by which the goods to be delivered under the contract are identified and set apart with the consent of the seller as well as buyer. The seller may appropriate the goods in one of the following ways:

(i) By separating the contracted goods from the other with the consent of the buyer.

(ii) By putting the contracted quantity in suitable receptacles with the consent of the buyer.

(iii) By delivering the contracted goods to the common carrier for transmission to the buyer without reserving the right of disposal.

3) When goods are sold on approval (Sec. 24) – When the goods are sent to the buyer on 'approval' or on 'sale or return basis', the property in the goods will pass from seller to buyer when any of the following conditions are satisfied:

a) When he accepts the goods;

b) When he adopt the transaction; or

c) When he fails to return the goods.

Sale by Non-owners

The general rule is that if a person, who has no right or title to the goods, sold the same, the

buyer, cannot obtain any right or title to the goods which he purchased even though he may acted honestly and paid the value for the goods. Thus a buyer cannot get a good title to the goods unless he purchases the goods from a person who is the owner thereof or who sells them under the authority or with the consent of the owner.

This is based on the following important Latin maxim, "Nemo dat quod non habet," which means that 'no one can give what he has not got'. Section 27 of the Sale of Goods Act also provided that "where goods are sold by a person who is not the owner thereof and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had. . ."

Exceptions to the Rule 'Nemo dat quod non habet'

1) Title by estoppels [Sec. 27]: When the owner of goods, by his conduct or by statement, wilfully leads the buyer to believe that the seller has the authority to sell, then he is stopped (i.e., prevented) from denying the seller's authority to sell.

2) Sale by merchantable agent [Sec. 27 (2)]: This exception will apply if the following conditions are satisfied:

a) The goods must have been sold by a mercantile agent;

b) He must be in possession of the goods or any document of title to the goods with the consent of the real owner;

c) The sale should be in the ordinary course of business;

d) The buyer must act in good faith; and

e) The buyer should not have, at the time of contract, notice that seller had no authority to sell.

3) Sale by a joint owner (co-owner) [Sec. 28]: In order to get a valid title to the buyer who buys the goods from one of the co-owners, the following conditions should be satisfied:

a) The co-owner must be in the sole possession of goods with the consent of other co-owners.

b) The buyer should purchase the goods for consideration and in good faith.

c) The buyer should not have notice or suspicion, at the time of sale, of any defect in seller's authority to sell.

4) Sale by person in possession under voidable contract [Sec. 29]: when the seller of goods has

obtained possession of the goods under a voidable contract and he sells those goods before the contract is repudiated, the buyer of such goods acquires a good title provided the buyer acts in good faith and without notice of the seller's defect of title.

5) Sale by seller in possession after sale [Sec. 30 (1)]: Where a person, having sold the goods, continues to be in possession of the goods or of the documents of title, and sells them over again to a buyer, the buyer gets a better title provided he has acted in good faith and without notice of the previous sale.

6) Sale by buyer in possession after sale [Sec. 30 (2)]: Where by the buyer has bought or agreed to buy the goods, with the consent of the owner obtains possession of the goods or documents of title to the goods, but the seller still has some lien or right over the goods, if the buyer sells the goods to a second buyer, who buys them in good faith, the second buyer gets a better title.

7) Sale by unpaid seller [Sec. 54 (3)]: Where an unpaid seller who is in possession of goods after having exercised the right of lien or stoppage in transit, resell the goods the buyer gets a good title there to as against the original buyer.

8) Exceptions under the provisions of other Acts: The following are valid transactions:

a) Sale by finder of lost goods u/s 169 of Contract Act;

b) Sale by pawnee or pledgee u/s 176 of the Contract Act;

c) Sale by an Official Receiver or Assignee in case of insolvency of an individual and Liquidator of companies.

d) The legal maxim ‘nemo dat quod non habet’ does not apply to negotiable instruments.

PERFORMANCE OF THE SALE OF CONTRACT

A contract of sale consists of two reciprocal promises:

(i) The seller’s duty to deliver the goods; and

(ii) The buyer’s duty to accept the goods and pay the price.

It may be noted that the delivery of goods and the payment of their price are the concurrent conditions, i.e., both these conditions should be performed simultaneously.

Delivery of Goods

Section 2 (2) of the Act defines, delivery to mean “voluntary transfer of possession from one person

to another." Such voluntary transfer can, as Sec. 33 states, be made by doing anything which has the effect of putting the goods in the possession of the buyer or his authorized agent.

Modes of Delivery

Delivery of goods may be made in any of the following ways:

a) Actual delivery: Where the goods are physically handed over by the seller to the buyer, the delivery is said to be actual.

b) Symbolic delivery: Where the goods are bulky and incapable of actual delivery, there are other means of obtaining possession of goods are delivered by the seller to the buyer.

c) Constructive or Delivery by attornment: Where the goods at the time of sale are in the possession of a third person, there is no delivery by seller to buyer unless and until such third person acknowledges to the buyer that he holds the goods on his behalf."

Rules Regarding Effective Delivery of Goods

1) Delivery and payment are concurrent conditions [Sec. 32]: The seller shall be ready and willing to give possession of goods to the buyer in exchange for the price and the buyer shall be ready and willing to pay the price in exchange for possession of the goods.

2) Delivery may be either actual, symbolic or constructive [Sec. 33]: The delivery of goods must have the effect of putting the goods in the possession of buyer or his authorized agent.

3) Effect of part delivery [Sec. 34]: A delivery of part of the goods, in progress of the delivery of the whole, has the same effect, for the purpose of passing the property in such goods, as a delivery of the whole.

4) Buyer should apply for delivery [See. 35]: Apart from any express contract the seller is not bound to make delivery until the buyer applies for delivery.

5) Place of delivery [Sec. 36 (I)]: The goods must be delivered at the specified place during the business hours and on a working day. But where no place is specified in the contract, the following rules contained in Section 36(1) shall apply:

(a) In case of sale, the goods sold are to be delivered at the place where they are, at the time of sale;

(b) In case of an agreement to sell, the goods are to be delivered at the place where they are, at

the time of agreement to sell;

(c) If at the time of agreement to sell, the goods are not in existence they are to be delivered at a place where they are manufactured or produced.

6) Time for delivery of goods [Sec. 36(2)]: Where under the contract of sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within the reasonable time. Demand for and the making of delivery must be done at reasonable hours [Sec. 36(4)].

7) Effect of goods in possession of a third party [Sec. 36(3)]: Where the goods at the time of sale are in the possession of a third person, effective delivery takes place when such person acknowledges to the buyer that he holds the goods on his behalf. However, if goods are sold by transfer of documents to title, the consent of third person having possession of the goods is not required.

8) Expenses of delivery [Sec, 36(5)]: Unless otherwise agreed, the expenses of and incidental to putting the goods into a deliverable state must be borne by the seller.

9) Delivery of wrong quantity [Sec. 37]: "Wrong quantity" may include short or excess delivery of goods than the agreed quantity, and also the delivery of agreed quality mixed with another quality. Section 37 deals with the following three cases:

a) Short delivery [Sec. 37(1)]: If the seller delivers a quantity less than he has contracted to sell, the buyer may reject them. But if he accepts the goods so delivered, he shall pay for them at the contract price.

b) Excess delivery [Sec. 37(2)]: If the seller delivers a larger quantity than he contracted to sell, the buyer has the option of accepting the quantity as per the contract and reject the rest or he may reject the whole. It he accepts the entire quantity, he has to pay for the excess at the contract price.

c) Mixed delivery [Sec. 37(3)]: If the seller delivers the goods mixed with the goods of a different description, the buyer may accept the contracted goods or reject the whole quantity of goods

10) Instalment deliveries [Sec. 38(1)]: Unless otherwise agreed, the buyer of goods is not bound to

accept delivery thereof by instalments.

11) Delivery to carrier or wharfinger [Sec. 39]: Where, in pursuance of a contract of sale, goods are delivery to a carrier for the purpose of transmission to the buyer or to a wharfinger for safe custody, delivery of goods to them is prima facie deemed to be a delivery of the goods to the buyer. In addition to delivery to the carrier or wharfinger, the seller has to perform the following duties:

(a) To make a suitable contract with the carrier or wharfinger [Sec. 39(2)]: The seller shall make a suitable contract with carrier or wharfinger for safe transmission or custody of goods as may be reasonable keeping in view the nature of goods and other circumstances. If the seller fails to do so, the buyer may refuse to treat the delivery to himself, or may hold the seller liable for damages.

(b) To give notice to the buyer to enable him to insure the goods [Sec. 39(3)]: This duty attaches when the goods are to be sent by a sea route.

12) Deterioration of goods during transit [Sec. 40]: Where the seller agrees to deliver the goods at his own risk at a place different from that where they were at the time of sale, the buyer shall bear the risk of deterioration of goods incidental to the course of transit.

UNPAID SELLER

According to Sec. 45 of the Sale of Goods Act, the seller of goods is deemed to be an unpaid seller:

(a) when the whole of the price has not been paid or tendered;

(b) when a bill of exchange or other negotiable instrument has been received as conditional payment, and the condition on which it was received has not been fulfilled by reason of the dishonour of the instrument or otherwise.

Rights of an Unpaid Seller

An unpaid seller has two-fold rights, viz:

I. Right of an Unpaid Seller against the goods; and

II. Rights of an Unpaid Seller against the buyer personally.

I. Right of an Unpaid Seller against the goods

An unpaid seller has the following rights against the goods notwithstanding the fact that the

property in the goods has passed to the buyer:

1. Right of lien;

2. Right of stoppage of goods in transit;

3. Right of resale.

1) Right of Lien [Sec. 47 to 49]

Lien is the right of an unpaid seller to retain the goods in his possession and refuse to deliver them to the buyer until the full payment of the price is made to him, or the price is offered to him.

The unpaid seller can exercise lien only in the following cases:

a) Where the goods have been sold without stipulation as to credit;

b) Where the goods have been sold on credit but the term of credit has expired;

c) Where the buyer becomes insolvent even though the period of credit may not have yet expired;

d) Where the unpaid seller has delivered a part of the goods, he may exercise his lien on the remaining part of the goods.

Termination of Lien or Loss of Lien

An unpaid seller of goods loses his right of lien on the goods in the following cases:

(i) By delivery to the carrier: When he delivers the goods to a carrier or other bailee for the purpose of transmission to the buyer without reserving the right of disposal of the goods.

(ii) By delivery to the buyer: When the buyer or his agent lawfully obtains possession of goods, unpaid seller losses his right of lien.

(iii)By waiver: When the seller expressly or impliedly waives his right of lien, the right of lien is terminated.

(iv) By tender of price: Where the buyer tenders price for the goods purchased by him, seller's lien is lost.

2) Right of stoppage of goods in transit [Sec. 50 to 52]

The right of stoppage in transit means the right of stopping further transit of the goods while they are with a carrier for the purpose of transmission to the buyer, resuming possession of them and retaining possession until payment or tender of the price. The right of stoppage can be

exercised only when the following conditions are satisfied:

a) The seller should be an unpaid seller;

b) The buyer must have become insolvent;

c) The seller must have parted with the possession of the goods; and

d) The goods must be in the course of transit.

Duration of transit

The goods are deemed to be in transit from the time when they are delivered to a carrier or other bailee for the purpose of transmission to the buyer or his agent takes delivery of them.

Termination of transit and Right of Stoppage

The transit comes to an end in the following cases:

(i) Delivery to the buyer: When the buyer or his agent obtains delivery of the goods before their arrival at the appointed destination.

(ii) Interception by the buyer: When the buyer or his agent takes delivery after the goods have reached destination

(iii) Acknowledgement to the buyer: When the goods have arrived at their destination and the carrier acknowledges to the buyer or his agent that he holds the goods on his behalf.

(iv) Goods delivered to buyer's carrier: When the goods are delivered to a carrier, who acting as an agent of the buyer, the transit ends as soon as the goods are delivered to the carrier.

(v) Wrongful refusal to deliver: When the carrier wrongfully refuses to deliver the goods to the buyer or his agent.

(vi) Part delivery of goods: When part delivery of the goods has been made to the buyer with an intention of delivering the whole of the goods, transit will be at an end for the remainder of the goods also which are yet in the course of the transit.

3) Right of Resale [Sec. 54]

If the buyer fails to pay or offer the price within a reasonable time, the unpaid seller has the right to resell the goods in the following circumstances:

a) Where the goods are of a perishable nature;

b) Where the unpaid seller has exercised his right of lien or of stoppage in transit and gives notice to the buyer of his intention to resell the goods;

c) Where the seller expressly reserve his right of resale.

II. Rights of an Unpaid Seller against the Buyer Personally

On breach of the contract of sale due to seller's default, the buyer has the following remedies (i.e., rights) against the seller.

1) Suit for price [Sec. 55]: When the property has passed to the buyer, and the buyer wrongly neglects or refuses to pay, the seller can sue him for the price.

2) Suit for damages [Sec. 56]: Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may sue him for damages for non-acceptance.

3) Suit for repudiation [Sec. 60]: The repudiation of the contract of sale by the seller before the date of delivery entitles the buyer to treat the contract as rescinded and sue the seller for damages for the breach.

4) Suit for interest [Sec. 61(2)]: In case of breach of contract on the part of the buyer, while filing a suit for the price, the seller may sue the buyer for interest from the date of the tender of the goods or from the date on which the price was payable.

THE CONSUMER PROTECTION ACT, 1986

MODULE 4

THE CONSUMER PROTECTION ACT, 1986

Objects of the Act

The Preamble to the Consumer Protection Act, 1986 reads as under:

"An Act to provide for the protection of the interests of consumers and for that purpose to make provision for the establishment of Consumer Councils and other authorities for the settlement of consumer's disputes and for matters connected therewith."

The rights given to the consumers under the Act are based on the basic rights as defined by the International Organization of Consumers (IOCU) i.e., the Rights to Safety, Information, Choice,

Redressal, Hearing, Education and Healthy environment.

Scope and Applicability

The Consumer Protection Act, 1986 extends to the whole of India except the State of Jammu and Kashmir. It applies to all types of goods and services, public utilities and public sector undertakings. Complaints of all types whether relating to goods, services or unfair trade practices have been brought within the purview of the Act. The provisions of the Act are in addition to and not in derogation of provision of any law for the time being in force (Sec. 3).

The Act may be regarded as a highly progressive social welfare legislation which providesmore effective protection to the consumers than any corresponding legislations.

Definition of Terms

Complainant [Sec. 2 (l) (b)]

The person who can make a complaint before a Consumer Redressal Forum may be:

i. a consumer, or

ii. any voluntary consumer association registered under the Companies Act, 1956 or under any other law for the time being in force, or

iii. the Central or State Government, or

iv. one or more consumers, where there are numerous consumers having the same interest, or

v. in case of death of a consumer, his legal their or representative.

The persons falling within the ambit of Section 2 (l) (b) are considered complainants and have a locus standi to file" a complaint under the Act. A public cause can be taken up by an association in the form of public interest litigation.

Complaint [Sec. 2 (1) (c)]

It means a written allegation by a complainant that:

i. An "unfair trade practice or a "restrictive trade practice" has been provided by any trader or service provider,

ii. The goods bought by him or agreed to be bought by him, suffer from one or more 'defects'.

iii. The services hired or availed or agreed to be hired or availed of by him suffer from "deficiency in any respect;

iv. A trader or the service provider has charged for the goods or for the service mentioned in the complaint, a "price in excess" of the price:

a) fixed by or under any law for the time being in force

b) displayed on the goods or any package containing such goods;

c) displayed on the price list established by him or under any Jaw for the time being in force;

d) agreed between the parties;

v. Goods which will be 'hazardous to life and safety' when used, are being offered for sale to the public:

a) in contravention of any standards relating to safety of such goods as required to be complied with by or under any law for the time being in force;

b) if the trader could have known with due diligence that the goods so offered are unsafe to the public;

vi. Services which are hazardous or are 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.

Consumer [Sec. 2 (1) (d)]

A consumer means:

(i) 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 person who uses such goods with the approval of the buyer. It does not include a person who buys goods for resale or for any commercial purpose; or

(ii) any person who hires or avails 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 person who is a beneficiary of such services with the approval of the hirer. It does not include a person who avails of such services for any commercial purpose.

Consumer Dispute [Sec. 2(1) (e)]

Consumer Dispute means “dispute, where the person against whom a complaint has been made, denies or dispute the allegation contained in the complaint”.

The allegations referred to may relate to any unfair trade practices adopted by a trader, or anydefects in goods or any deficiency in services or against charging exorbitant price. Defect [Sec. 2 (1) (f)]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 force, or underany contract, express or implied or as is claimed by the trader, in any manner whatsoever in relationto any goods".

Imperfection or shortcoming as claimed by the trader is to be determined with reference tothe warranties or guarantees expressly given by a trader.

Deficiency [Sec. 2 (1) (g)]

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 the time being in force, or has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service".

Goods [Sec. 2 (1) (i)]

Goods means “every kinds of movable property other than actionable claim and money andincludes stock and shares, growing crops, grass and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale”.

Services [Sec. 2 (1) (o)]

Service means “service of any description which is made available its potential users and includes but not limited to the provision of facilities in-connection with banking, financing, insurance, transport processing supply of electrical or other energy, board or lodging or both, housing construction, entertainment, 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”.

Unfair Trade Practices [Sec. 2 (1) (r)]

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 services, adopts any unfair method or unfair or deceptive practice. The following six categories of such practices have been declared as unfair trade practices:

(1) False Representation and Misleading Advertisements[Sec. 2 (1) (r) (1)]:

a) False representation as to standards, etc., of goods: It consists of a written, oral or visible

representation which falsely represents the goods to be of particular standard, quality, quantity, grade, composition, style or model.

b) False representation as to standard, etc., of services: It consists of making false representation as to standard, quality or grade of service such as an assertion about professional qualifications which one does not possess. [R vs. Breeze (1973) 2 All ER 1143].

It may also consist of falsely representing any rebuilt, second-hand, renovated or reconditioned goods as new.

c) Making false representation as to sponsorship, approval, performance, characteristics, accessories, users or benefits of such goods or services.

d) Misleading representation concerning the need for usefulness, etc., of any goods or services: It may consist of giving the public any warranty or guarantee of performance, etc., of any goods that is not based on adequate or proper test; or misleading promise to replace, maintain or repair an article, etc.,

e) Misrepresentation as to price.

f) Disparagement of goods, services or trade of others.

(2) False offer of Bargain Price [Sec. 2 (1) (r) (2)]: Explanation appended to sub-clause (2) has defined "bargain price to mean:

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 like products are sold.

(3) Offer of Gifts, prizes, etc., [Sec. 2 (1) (r) (3)]: This type of unfair trade practice may consist of:

a) Offer of any gifts or other items with the intention of not providing them.

b) Creating an impression that something is being given free of charge when it is fully or

partly covered by the amount charged in the transaction,

c) Conducting 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.

(4) Withholding any scheme [Sec. 2 (1) (r) (3A)]: It will be an unfair trade practice for a trader to withhold from the participants of any scheme offering any gifts, etc., information about final results of the scheme on its closure. The participants are deemed to have been informed of the final results of the scheme if the results are published prominently in the newspaper in which the scheme was originally advertised within a reasonable time.

(5) Sale or supply of goods not complying with prescribed standard [Sec. 2 (1) (r) (4)]: The prescribed standards may relate to performance, composition, contents, design, packaging, etc., as are necessary to prevent or reduce the risk of injury to the person using the goods.

(6) Hoarding destruction or refusal to sell [Sec. 2 (1) (r) (5)]: Hoarding, destruction or refusal to sell the goods which raises or tends to raise the cost of those or other similar goods or services shall amount to an unfair trade practice.

(7) Manufacturing or sale of spurious goods [Sec. 2 (1) (r) (6)]: 'Spurious goods and services' means such goods and services which are claimed to be genuine but are not so.

Restrictive Trade Practices [Sec. 2 (1) (nn)]

Restrictive Trade Practice means a trade practice which tends to bring about manipulation of price, or its conditions of delivery or to affect flow of supplies in the market relating to goods or in such a manner as to impose on the consumers unjustified costs or restrictions and shall include:

a) delay beyond the period agreed to by a trader in supply of such goods or in providing the services which has led or is likely to lead to rise in the prices.

b) any trade practice which requires a consumer to buy, hire or avail or any goods or services as a condition precedent to buying, hiring or availing of other goods or services.

RIGHTS OF CONSUMERS

According to Section 6 of the Consumer Protection Act, the following rights are available to consumers.

1) Right to be protected or right to safety: Every consumer has the right to be protected against

the marketing of goods and services which are spurious or hazardous to life and property.

2) Right to be informed: 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 consumers

against unfair trade practices.

3) Right to be assured/choose: Every consumer has a right to be assured, wherever possible,

access to a variety of goods and services at competitive prices.

4) Right to be heard: The right to be heard and to be assured that consumers interest will receive due consideration at appropriate forums.

5) Right to seek redressal: The right to seek redressal against unfair trade practices or restrictive trade practices or unscrupulous exploitation of consumers.

6) Right to consumer education: The responsibility of creating awareness amongst the

consumers has been assigned to the Central Consumer Protection Council.

7) Right to Basic Needs: The basic needs mean those goods and services which are necessary

for a dignified living of people. It includes adequate food, clothing, shelter, energy, sanitation, health care, education and transportation. All the consumers have the right fulfil these basic needs.

8) Right to healthy environment or quality of life: This right provides the consumers, protection against environmental pollution so that the quality of life is enhanced. Not only this, it also stresses the need to protect the environment for the future generations as well.

Consumer Protection Councils

The Consumer Protection Councils are established at Central Level, State Level and District Level. These councils work towards the promotion and protection of the rights of the consumers. They give publicity to the matters concerning consumer interests; take necessary steps for consumer education and protecting consumers from exploitation.

Central Consumer Protection Councils

Section 4 provides that:

(1) The Central Government shall, by notification, establish a council to be known as the Central Consumer Protection Council (hereinafter referred to as the Central Council).

(2) The Central Council shall consist of the following members, namely:

a) the Minister-in-charge of 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.

State Consumer Protection Councils

Section 7 provides that:

(1) The State Government shall, by notification, establish a council to be known as the State Consumer Protection Council (hereinafter referred to as the State Council).

(2) The State Council shall consist of the following members, namely:

a) the Minister-in-charge of Consumer Affairs in the State Government, who shall be its Chairman, and

b) such number of other official or non-official members representing such interests as may be prescribed by the State Government.

c) such number of other official or non-official members, not exceeding 10, as may be nominated by the Central Government.

(3) The State Council shall meet as and when necessary but not less than 2 meetings shall be held every year.

(4) The procedure to be observed in regard to the transaction of its business at such meetings shall prescribed by the State **Government.**

District Consumer Protection Council

Section 8-A provides that:

(1) The State Government shall establish for every district, by notification, a council to be known as the District Consumer Protection Council (hereinafter referred to as the District Council).

(2) The District Council shall consist of the following members, namely:

a) the Collector of the District (by whatever name called), who shall be its chairman; and

b) such number of other official or non-official members representing such interests as may be prescribed by the State Government.

(3) The District Council shall meet as and when necessary but not less than 2 meetings shall be held every year.

(4) The procedure to be observed in regard to the transaction of its business at such meetings shall prescribed by the State Government.

Consumer Disputes Redressal Agencies

Consumer Protection Act, 1986 has set up a three-tier quasi-judicial redressal machinery for expeditious and inexpensive settlement of consumer disputes. It is an active to the ordinary process of instituting actions before a civil court. According to Section 9, there shall be established for the purpose of the Act, the following agencies, namely:

 Consumer Disputes Redressal Forum to be known as the "District Forum". The State Government shall establish a District Forum ach district of the state. However, more than one District Forum may be established strict if it is deemed fit.

 State Consumer Disputes Redressal Commission (SCDRC) to be known as "State Commission". This is also to be established by the State Government in the state by notification.

 National Consumer Disputes Redressal Commission (NCDRC) to be known as "National Commission". This is to be established by the Central Government by notification.

District Forum

The District Forum shall have jurisdiction to entertain complaints where the value of goods and services complained against and the compensation claimed, if any, is less than Rs. 20 Lakhs.

Composition of District Forum

According to Section 10 (1), each District Forum shall consist of the following:

a) President: He shall be a person who is, or has been or is qualified to be a District Judge.

b) Members: There shall be two other members, one of whom shall be a woman. A member must have the following qualifications:

(i) be not less than 35 years of age;

(ii) possess a bachelor's degree from a recognized university;

(iii) must be a person of ability, integrity and standing and have adequate knowledge and experience of at least 10 years in dealing with problems relating to economics, law, commerce, accountancy, industry, public affairs, or administration.

Jurisdiction

The District Forum shall have jurisdiction to entertain complaints where the value of goods and services and the compensation, if any claimed, does not exceed Rs. 20 Lakhs. A complaint shall be filed in district forum within the local limits of whose jurisdiction the opposition party (or parties) reside or carry on business or the cause of action has arisen.

The complaint may be filed by any of the following persons:

- The consumer concerned;
- Any recognized consumer association;
- One or more consumers for the benefit of all consumers;
- The Central or the State Government.

State Commission

The State Commission shall have jurisdiction for such complaints and claims if the value thereof is exceeding Rs. 20 Lakhs but not exceeding Rs. 1 Crore.

Composition of State Commission

According to Section 16 (1), each State Commission shall consist of the following:

a) President: He shall be a person who is or has been a judge of the High Court. His appointment shall not be made except after consultation with the Chief Justice of the High Court.

b) Members: There shall be not less than two or not more than such number of members asmay be prescribed, who shall be the person of ability, integrity and standing and have adequate knowledge or experience of at least 10 years in dealing with problems relating to economics, law, commerce, accountancy, industry, public affairs, or administration, one of whom shall be a women.

Jurisdiction

The State Commission shall have the jurisdiction:

(i) to entertain:

 complaints where the value of the goods or services and compensation, if any

claimed exceeds rupees 20 Lakhs but does not exceed rupees one crore; and

 appeals against the orders of any District Forum within the State; and

(ii) 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.

National Commission

The National Commission shall have jurisdiction for complaints and claims of the value exceeding Rs. 1 Crore.

Composition of National Commission

Section 20 (1) provides that the National Commission shall consists of:

a) President: He shall be a person who is or has been judge of the Supreme Court, to be appointed

by the Central Government (in-consultation with the Chief Justice of India.

b) Members: There shall be not less than four and not more than such number of members as may

be prescribed, possessing the qualifications as are prescribed for a member of the State

Commission.

Jurisdiction

The National Commission shall have the jurisdiction:

(iii)to entertain:

 complaints where the value of the goods or services and compensation, if any

claimed exceeds rupees one crore; and

 appeals against the orders of any State Commission; and

(iv) to call for the records and pass appropriate orders in any consumer dispute which is pending

before or has been decided by any State Commission where it appears to the National

Commission that such State Commission has exercised a jurisdiction not vested in it by law,

or has failed to exercise a jurisdiction so vested, or has acted in exercise of its jurisdiction

illegally or with material irregularity.

Manner of Making the Complaint who can file a complaint? (Sec. 12]

The following may file a complaint before the District Forum:

(a) the consumer to whom the goods are sold or delivered, or agreed to be sold or delivered, or

the service has been provided, or agreed to be provided

(b) any recognized consumer association, regardless of whether the consumer is a member of

such association or not,

(c) one or more consumers, where there are numerous consumers having the same interest with

the permission of the District Forum on behalf of or for the benefit of all consumers so

interested,

(d) The Central or State Government, either in its individual capacity or as a representative of the

interests of consumers in general.

Every complaint shall be accompanied with such amount of fee and payable in such manner

as may be prescribed. The District Forum may, on receipt of the complaint, allow it to be proceeded

with or rejected. However, the complaint shall not be rejected unless an opportunity of being heard

has been given to the complainant. The admissibility of the complaint shall ordinarily be decided

within 21 days of its receipt. On its admission, the complaint shall not be transferred to any other

court or tribunal or any other authority. In case a consumer cannot file the complaint due to

ignorance, illiteracy or poverty, any recognized consumer association may be file a complaint.

Procedure on Receipt of Complaint [Sec 13]

[A] Complaints where laboratory testing is possible or required [Sec. 13 (1)]

(i) Referring a copy of complaint to the opposite party: Within 21 days of admission of complaint, a copy thereof shall be referred to the opposite party mentioned in the complaint, directing him to file his version of the case within 30 days or such extended period not exceeding 15 days. If the opposite partly admits the allegations contained in the complaint, the matter will be decided on the basis of materials on the record.

(ii) Denial of allegations or failure to take action to represent the case by the opposite party: Where the opposite party denies or disputes the allegations contained in the complaint, or omits or fails to take any action to represent his case within the specified time, the dispute will be settled as follows:

a) Reference of sample to appropriate laboratory: Where the complaint alleges a defect in the goods which cannot be determined without proper analysis or test of the goods, a sample of the goods shall be obtained from the complainant, sealed, and authenticated in the prescribed manner. The sample shall be referred to appropriate laboratory for analysis or test. The report of the appropriate laboratory shall be sent to the referring authority (District Forum or State Commission) within 45 days of receipt of reference or within the extended period prescribed by the District Forum.

b) Deposit of fees by complainant for payment to appropriate laboratory: The complainant shall deposit the fee to the credit of District Forum. The amount so deposited shall be remitted to the appropriate laboratory.

c) Forwarding of report of analysis or test to the opposite partly.

d) Objections to the laboratory/test report: If any of the parties disputes the correctness of the methods of analysis/ test adopted by the appropriate laboratory, the concerned partly will be required to file his objections in writing in regard thereto.

e) Providing reasonable opportunity of hearing to the parties: Both the parties shall be provided with a reasonable opportunity of being heard as to correctness or otherwise of the

report made by the appropriate laboratory and the objections made in relation thereto. After such hearing, appropriate orders shall be made under Section 14.

[B] Complaints relating to services, i.e., where laboratory testing is not possible or required [Sec. 13(2)]

(i) Reference of complaint to opposite party: The opposite party is directed to give his version within 30 days or an extended period of 15 days.

(ii) Denial or disputing of allegation or failure of opposite party to take action to represent his case: In such a case, the District Forum shall proceed to settle the consumer dispute as under:

(a) on the basis of evidence brought to its notice by the parties to the dispute; or

(b) decide the matter ex parte on the basis of evidence brought to its notice by the complainant;

(c) on failure of complainant to appear on the date of hearing, either to dismiss the complaint for default or decide it on merits. A proceeding complying with the above procedure cannot be called in question on the ground that principles of natural justice have not been complied with

Nature and Scope of Remedies under the Act [Sec. 14]

In case the goods complained against suffer from any defect specified in the complaint, or any ofthe allegations contained in the complaint about the services are proved the District Forum/State Commission/National Commission may pass one or more or the following orders:

(1) to remove the defects pointed out by the appropriate laboratory from all the goods in question;

(2) to replace the goods with new goods of similar description which shall be free from any defect;

(3) to return to the complainant the price or the charges paid by him;

(4) to pay such amount, may be awarded by it as compensation to the consumer for any loss orinjury suffered by the consumer due to the negligence of the opposite party.

(5) to remove the defects m goods or deficiencies m the services in question;

(6) to discontinue the unfair trade practice or the restrictive trade practice or not to repeat them;

(7) not to offer the hazardous goods for sale;

(8) to withdraw the hazardous goods from being offered for sale;

(9) to cease manufacture of hazardous goods and to desist from offering services which arehazardous in nature;

(10) to issue corrective advertisement to neutralize the effect of misleading advertisement at the cost of opposite party responsible for issuing such misleading advertisement; to provide for adequate costs to the parties.

MODULE – V

NEGOTIABLE INSTRUMENTS

A negotiable instrument is a document guaranteeing the payment of a specific amount of money, either on demand, or at a set time, whose payer is usually named on the document.

What is negotiable instruments?

The term negotiable instruments means a written document which entitles a person to a sum of money. A negotiable instruments is transferable by delivery or by endorsement and delivery.The transfer entitles a person to the sum of money mentioned there in.“ Thus the negotiable instrument is a document which is legally recognized by custom of trade or law, transferable by delivery or by endorsement and delivery.”

Characteristics Of a Negotiable Instrument

Freely transferable: The property in a negotiable instrument passes from one person to another by a simple process, i.e., by mere delivery if it is payable to bearer, and by endorsement and delivery if it is payable to order.

Holder’s title free from all defects: The holder in due course (one who acquires the instrument in good faith and for consideration) gets it free from all defects.

Recovery: One can sue upon the instrument in his own name.¬ Payable to order or bearer: - It must be payable either to order or bearer

Presumption as to Holder:- Every holder of negotiable instrument is presumed to be holder in due course.

Presumption as to considerations:- Every negotiable instrument is presumed to have been made, drawn, accepted, endorsed , negotiated or transferred for consideration.

TYPES OF NEGOTIABLE INSTRUMENTS

1. **Promissory note**.

A promissory note, sometimes referred to as a note payable, is a legal instrument, in which one party promises in writing to pay a determinate sum of money to the other, either at a fixed or determinable future time or on demand of the payee, under specific terms.

Parties

- MAKER : The person who makes the promissory note and promises to pay is called the Maker.
- PAYEE: The person to whom the payment is to be made is called the Payee.
- HOLDER: The holder is either the payee or someone to whom he may have indorsed (transfer) the note is known as Holder.
- ENDORSER: The person who indorses the note to another is called the Endorser .¬
- ENDORSEE: The person to whose favor the note is endorsed is called the Endorsee .

2. bill of exchange.

Bill Of ExchangeA bill of exchange is an instrument in writing containing anunconditional order signed by the maker, directing a certainperson to pay a certain sum of money only to, or to the orderof certain person to the bearer of the instrument.

Parties

- DRAWER: The person who makes the bill of exchange is called drawer.
- DRAWEE: The person who is directed to pay is called drawee.
- PAYEE: The person to whom the payment is to be made is called payee.
- ACCEPTOR: When the drawee accepts the bill is called acceptor.

chacteristics of the Bill of Exchange

1. The amount payable must be certain.
2. The payment must be made in money.
3. The bill payable may be either on demand or after a specified period.
4. The bill may be payable either to the bearer or to the order of payee.

3. **cheque**

cheque is a bill of exchange drawn on a specified bankerand expressed to be payable otherwise than on demand.The maker of a bill of exchange or Cheque is called the“Drawer"; the person thereby directed to pay is called the"Drawee".

Parties

- DRAWER: The person who makes a cheque is called Drawer.
- DRAWEE: The person who is directed to pay is called Drawee.
- PAYEE: The person to whom the payment is to be made.

characteristics of a Cheque

- In writing
- Express order to pay
- Definite and unconditional order
- Signed by drawer
- Order to pay certain amount
- Payable on demand

4. crossing of cheques

A cheque is said to be crossed when it bears across its face two parallel transverse lines which are usually drawn on the left hand top corner of the Cheque Legally there are two kinds of crossing.

General crossing: The drawing up of two parallel lines on the face of the check at the top left hand corner with or without the words & Co not negotiable or Account payee only is known as a General Crossing.

Special crossing: A check is deemed to be crossed specially when it bears across its face the name of the banker either with or without the words not negotiable.

Negotiation

An instrument is said to be negotiated:♣ When a promissory note, BOE, cheque is transferred to any person so as to constitute that person the holder of the instrument Transfer with an intention to transfer the title of the instrument. ¬ Negotiation by delivery ¬ Negotiation by endorsement and delivery

Dishonor

A negotiable instrument is said to be dishonored by non-payment when the maker, acceptor or drawee, as the case maybe makes default in payment upon being duly required to pay the same.

Dishonor by non payment

Dishonor by non acceptance

MODULE – VI

THE INFORMATION TECHNOLOGY ACT, 2000

Introduction

Now-a-days the information technology has played an important role in the business transactions all over the world. The people were used digital technology and new communication systems for communicating business transactions in the business. Now businessmen as well as individuals are increasingly using computers to create, transmit and store information in the electronic form instead of traditional paper documents, as it is cheaper, easier and speedier. Information stored in electronic form has many advantages. Although people are aware of these advantages of electronic medium, they are reluctant to conduct business or conclude an y transaction in the electronic form due to lack of appropriate legal framework. It is, therefore, proposed to provide for legal recognition of electronic records and digital signatures. To prevent the possible misuse arising out of transactions and other dealings concluded over the electronic medium, it is also proposed to create civil and criminal liabilities for contravention of the provisions of the proposed legislation. The Information Technology Bill was passed by both Houses of Parliament and it received theassent of the President on 9thJune, 2000 and became The Information Technology Act, 2000 (21 of2000). The Act came into force on 17thOctober, 2000 vide G.S.R 788 (E) dated 17th October, 2000.

The Information Technology Act, 2000 is based on the Model Law on Electronic Commerce which

was adopted by the United Nations Commission on International Trade and Law (UNCITRAL) in

1996. The Model Laws provide for equal legal treatment of users of electronic communication and paper based communication.

Scope and Extent

- The Information Technology Act, 2000 shall extend to the whole of India.

- Unless otherwise provided in the Act, it applies also to any offence or contravention there under

committed outside India by any person.

- The Act shall not apply to the following:

a) a negotiable instrument as defined in Section 13 of the Negotiable Instruments Act, 1881;

b) a Power-of-Attorney as defined in Section 1 A of the Power-of-Attorney Act, 1882;

c) a Trust as defined in Section 3 of the Indian Trusts Act, 1882;

d) a Will as defined in clause (h) of Section 2 of the Indian Succession Act, 1925 including any

other testamentary disposition by whatever name called;

e) any contract for the sale or conveyance of immovable property or any interest in such

property;

f) any such class of documents or transactions as may be notified by the Central Government in the Official Gazette.

Objectives of IT Act

The Information Technology Act, 2000 seeks to achieve the following objectives.

(i) To grant legal recognition to electronic records.

(ii) To grant legal recognition to Digital Signature for authentication of the information or matters requiring authentication under any law of the country.

(iii) To facilitate electronic filing of documents with Government department.

(iv) To facilitates electronic storage of data.

(v) To provide legal sanction to electronic fund transfers to and between banks and financial institutions.

(vi) To provide legal recognition for keeping books of account in electronic format by bankers.

(vii) To amend the Indian Penal Code, Indian Evidence Act, 1872, the Banker's Book Evidence

Act, 1891 and RBI Act, 1934.

(viii) To provide legal infrastructure to promote e-commerce and secure information system.

(ix) To manage crimes at national and international levels by enforcing laws.

Definitions of the Terms used in the Act

The terms and expressions used in the Information Technology Act, 2000 are defined in various

sub-sections of Section 2 of the Act and are discussed in the following pages:

Access [Sec. 2(1) (a)]

Access with its grammatical variations and cognate expressions means gaining entry into, instructing or communicating with the logical, arithmetical, or memory function resources of a computer, computer system or computer network.

Addressee [Sec. 2(1) (b)]

It means a person who is intended by the originator to receive the electronic record but does notinclude any intermediary.

Adjudicating Officer [Sec. 2(1) (c)]

It means adjudicating officer appointed u/s 46(1) of the Act. Certifying Authority [Sec. 2(1) (g)]It means a person who has been granted a license to issue an Electronic Signature Certificate u/s 24of the Act.

Computer [Sec. 2(1) (i)]

Computer means any electronic, magnetic, optical or other high-speed data processing device or system which performs logical, arithmetic and memory functions by manipulations of electronic,magnetic or optical impulses, and includes all input, output, processing, storage, computer software or communication facilities which are connected or related to the computer in a computer system or computer network.

Computer Network [Sec. 2 (1) (j)]

It means the interconnection of one or more computers through:

i) the use of satellite, microwave, terrestrial line or other communication media; and

ii) terminals or a complex consisting of two or more interconnected computers whether or not the interconnection is continuously maintained.

Computer Resource [Sec. 2 (1) (k)]

It means computer, computer system, computer network, data, computer database or software.

Computer System [Sec. 2 (1) (l)]

It means a device or collection of devices, including input and output support devices and excluding

calculators which are not programmable and capable of being used in conjunction with externalfiles, which contain computer programmes, electronic instructions, input data, and output data, thatperforms logic, arithmetic, data storage and retrieval, communication control and other functions.

Controller [Sec. 2 (1) (m)]

It means the Controller of Certifying Authorities appointed under section 17(1) of this Act.

Electronic form [Sec. 2 (1) (r)]

The term 'electronic form' with reference to information it means any information generated, sent, received or stored in media, magnetic, optical, computer memory, micro film, computer generated micro fiche or similar device.

Electronic gazette [Sec. 2 (1) (s)]

It means Official Gazette published in the electronic form.

Electronic record [Sec. 2 (1) (t)]

It means data, record or data generated, image or sound stored received or sent in an electronic form or micro film or computer generated micro fiche.

Function [Sec. 2 (1) (u)]

It is in relation to computer, it includes logic, control, arithmetical process, deletion, storage and retrieval and communication or telecommunication from or within a computer.

Information [Sec. 2 (1) (v)]

It includes data, text, images, sound, voice, codes, computer programmes, software and data bases or micro film or computer generated micro fiche.

Intermediary [Sec. 2 (1) (w)]

Intermediary with respect to any particular electronic records, means any person who on behalf of another person receives, stores or transmits that message or provides any service with respect to that message.

Key Pair [Sec. 2 (1) (x)]

Key pair, in an asymmetric crypto system, means a private key and its mathematically related public key, which are so related that the public key can verify a digital signature created by the private key.

Originator [Sec. 2 (1) (za)]

It means a person who sends, generates stores or transmits any electronic message; or causes any electronic message to be sent, generated, stored or transmitted to any other person but does not include an intermediary.

Private Key [Sec. 2 (1) (zc)]

It means the key of a key pair used to create a digital signature.

Public Key [Sec. 2 (1) (zd)]

It means the key of a key pair used to verify a digital signature and listed in the Digital Signature Certificate.

Secure System [Sec. 2 (1) (ze)]

It means computer hardware, software, and procedure that-(a) are reasonably secure from unauthorized access and misuse;

(b) provide a reasonable level of reliability and correct operation;

(c) are reasonably suited to performing the intended function; and

(d) adhere to generally accepted security procedures.

Subscriber [Sec. 2 (1) (zg)]

It means a person in whose name the Digital Signature Certificate is issued.

Verify [Sec. 2 (1) (zh)]

It is in relation to a digital signature, electronic record or public key, with its grammatical variations

and cognate expressions, it means to determine whether—

(a) the initial electronic record was affixed with the digital signature by the use of private key

corresponding to the public key of the subscriber;

(b) the initial electronic record is retained intact or has been altered since such electronic record

was so affixed with the digital signature.

Digital signature means authentication of any electronic record by a subscriber by means of an electronic method or procedure in accordance with the provisions of Section 3 of the Act.

Following points are important to note in connection with digital signature:

1) Affixing Digital Signature [Sec. 2(1) (d)]: Affixing digital signature with its grammatical

variations and cognate expressions means adoption of any methodology or procedure by a

person for the purpose of authenticating an electronic record by means of Digital Signature.

2) Authentication of electronic records by subscribers: Sec. 3 provides that any subscriber may

authenticate an electronic record by affixing his digital signature. The following provisions

regarding authentication of electronic records:

a) Asymmetric Crypto System [Sec. 2(1) (f)]: It means a system of a secure key pair consisting of a private key for creating a digital signature and a public key to verify the digital signature.

b) Hash function [Sec. 3 (2)]: Hash function as defined in explanation means an algorithm mapping or translation of one sequence of bits into another, generally smaller, set known as "hash result" such that an electronic record yields the same hash result every time the algorithm is executed with the same electronic record as its input making it computationally infeasible –

i) to drive or reconstruct the original electronic record from the hash result produced by the algorithm.

ii) that two electronic records can produce the same hash result using the algorithm.

c) Verification: Any person by the use of a public key of the subscriber can verify the electronic record. The private key and the public key are unique to the subscriber and constitute a functioning key pair.

Digital Signature Certificate (Sec. 35)

The purpose of a digital signature certificate is to authenticate the identity of an individual. It ensures that the purported send is in fact the person who sent the message. It is signed digitally by the Certifying Authority.

Legal Provisions relating to issue of Digital Signature Certificate

1) Application to Certifying Authority [Sec. 35 (1), (2) & (3)] : The following points are important in connection with the application:

a) Every such application shall be accompanied by such fee not exceeding twenty-five thousand rupees as may be prescribed by the Central Government, to be paid to the Certifying Authority.

b) Every such application shall be accompanied by a certification practice statement or where

there is no such statement, a statement containing such particulars, as may be specified by regulations.

2) Grant of Digital Signature Certificate [Sec. 35 (4)]: On receipt of an application for issue of

Digital Signature Certificate, the Certifying Authority may, after consideration of the certification practice statement or the other statement referred above and after making such enquiries as it may deem fit, grant the Digital Signature Certificate or for reasons to be recorded

in writing, reject the application.

3) Representations by the Certifying Authority upon the issue of certificate [Sec. 36]: While issuing a Digital Signature Certificate, the Certifying Authority certifies that the information contained in it is accurate and that:

a) it has complied with the provisions of this Act and the rules and regulations made thereunder;

b) it has published the Digital Signature Certificate or otherwise made it available to such person relying on it and the subscriber has accepted it;

c) the subscriber holds the private key corresponding to the public key, listed in the Digital Signature Certificate;

d) the subscriber's public key and private key constitute a functioning key pair; and

e) it has no knowledge of any material fact, which if it had been included in the Digital Signature Certificate would adversely affect the reliability of the representations made in clauses (a) to (d).

4) Suspension of Digital Signature Certificate [Sec. 37]: The Certifying Authority which has issued a Digital Signature Certificate may suspend such Digital Signature Certificate:

a) on receipt of a request to that effect from –

(i) the subscriber listed in the Digital Signature Certificate; or

(ii) any person duly authorized to act on behalf of that subscriber;

b) if it is opinion that the Digital Signature Certificate should be suspended in public

interest.

c) The Certifying Authority shall communicate the suspension to the subscriber.

d) A digital certificate shall not be suspended for a period exceeding fifteen days unless the subscriber has been given an opportunity of being heard in this matter.

5) Revocation of Digital Signature Certificate [Sec. 3]:

a) The Certifying Authority may revoke a Digital Signature Certificate issued by it:

(i) where the subscriber or any other person authorized by him makes a request to that effect; or

(ii) upon the death of the subscriber; or

(iii) upon the dissolution of the firm or winding up of the company where the subscriber is a firm or a company.

b) The Certifying Authority may also revoke a Digital Signature Certificate which has been issued by it any time, if it is of opinion that:

(i) a material fact represented in the Digital Signature Certificate is false or has been concealed;School of Distance Education

(ii) a requirement for issuance of the Digital Signature Certificate was not satisfied;

(iii) the Certifying Authority's private key or security system was compromised in a manner materially affecting the Digital Signature Certificate's reliability;

(iv) the subscriber has been declared insolvent or dead or where a subscriber is a firm or a company, which has been dissolved, wound-up or otherwise ceased to exist.

c) A Digital Signature Certificate shall not be revoked unless the subscriber has been given an opportunity of being heard in the matter.

d) The Certifying Authority shall communicate the revocation to the subscriber.

6) Notice of Suspension or Revocation [Sec. 39]: The Certifying Authority shall publish a notice of such suspension or revocation, as the case may be, in the repository specified in the Digital Signature Certificate for publication of such notice.

Electronic Governance

The object of the Information Technology Act, 2000 is to provide legal recognition for transactions carried out by means of electronic data interchange and other means of electronic communication commonly referred to as 'electronic commerce'. The Act facilitates electronic governance to accord legal recognition to electronic record, digital signatures, and electronic form of dealing with government offices and its agencies. Following legal provisions relating to the electronic governance are provided in the Act:

1) Legal recognition of electronic records [Section 4]: Where any law provides that information or any other matter shall be in writing or in the typewritten or printed form, then, inspite of anything contained in such law, such requirement shall be deemed to have been satisfied if such information or matter is —

(a) rendered or made available in an electronic form; and

(b) accessible so as to be usable for a subsequent reference.

2) Legal recognition of digital signature [Section 5]: Where any law provides that information or any other matter shall be authenticated by affixing the signature or any document shall be signed or bear the signature of any person, then, inspite of anything contained in such law, such requirement shall be deemed to have been satisfied, if such information or matter is authenticated by means of digital signature affixed in such manner as may be prescribed by the

Central Government.

3) Use of electronic records and digital signatures in government and its agencies

[Section 6]: Where any law provides for the following requirements i.e.,

a) the filing of any form, application or any other document with any office, authority, body or agency owned or controlled by the appropriate Government in a particular manner;

b) the issue or grant of any licence, permit, sanction or approval by whatever name called in a particular manner;

c) the receipt or payment of money in a particular manner, then, inspite of anything contained in any other law for the time being in force, such requirement shall be deemed to have been satisfied if such filing, issue, grant, receipt or payment, as the case may be, is effected by means of such electronic form as may be prescribed by the appropriate Government [Section 6(1)].

4) Retention of electronic records [Section 7]: Where any law provides that documents, records or information shall be retained for any specific period, then, that requirement shall be deemed to have been satisfied if such documents, records or information are retained in the electronic form, if—

a) the information contained therein remains accessible so as to be usable for a subsequent reference;

b) the electronic record is retained in the format in which it was originally generated, sent or received or in a format which can be demonstrated to represent accurately the information originally generated, sent or received;

c) he details which will facilitate the identification of the origin, destination, date and time of despatch or receipt of such electronic record are available in the electronic record:

5) Publication of rules, regulation etc. in electronic Gazette [Section 8]: where any rule, regulation, order, by-law, notification or any other matter is published in the Official Gazette or Electronic Gazette, the date of publication shall be deemed to be the date of the Gazette which was first published in any form.

6) No right to insist that the document should be accepted in Electronic Form [Section 9]: Sections 6, 7 and 8 shall not confer a right upon any person to insist that any Ministry or Department of the Central Government or the State Government or any authority or body established by or under any law or controlled or funded by the Central or State Government should accept issue, create, retain and preserve any document in the form of electronic records

or effect any monetary transaction in the electronic form.

7) Central Government empowered to make Rules in respect of Digital Signature (Sec. 10): The Central Government is empowered to make Rules in respect of Digital Signature prescribinga) the type of digital signature;

b) the manner and format in which the digital signature shall be affixed;

c) the manner or procedure which facilitates identification of the person affixing the digital signature;

d) control processes and procedures to ensures adequate integrity, security and confidentiality

of electronic records or payments; and

e) any other matter which is necessary to give legal effect to digital signatures.

Attribution, Acknowledgement and Dispatch of Electronic RecordsSchool of Distance Education

Under the Information Technology Act, 2000 contains provisions - (a) when the electronic record is

considered to be attributed to the originator? (b) would the addressee/receiver be bound to

acknowledge the receipt of that electronic record; and c) how to determine the time and place of

dispatch and receipt of electronic record?

1. Attribution of electronic records [Section 11]: An electronic record shall be attributed to the

originator, if it was sent:

a) by the originator himself

b) by a person who had the authority to act on behalf of the originator in respect of that

electronic record; or

c) by an information system programmed by or on behalf of the originator to operate

automatically.

2. Acknowledgement of receipt [Section 12]: This makes the following provision regarding the

form of acknowledgement and the circumstances when the electronic record

is considered to have been sent by the originator:

a) No agreement [Section 12 (1)]: Where the originator has not agreed with the addressee that

the acknowledgement of receipt of electronic record be given in a particular form or by a

particular method, an acknowledgement may be given by—

(i) any communication by the addressee, automated or otherwise; or

(ii) any conduct of the addressee, sufficient to indicate to the originator that the electronic

record has been received.

b) Stipulation by originator binding himself [Section 12(2)]: Where the originator has stipulated that the electronic record shall be binding only on receipt of an acknowledgement of such electronic record by him, then, unless acknowledgement has been so received, the electronic record shall be deemed to have been never sent by the originator.

c) No stipulation by originator binding himself [Section 12(3)]: Where the originator has not stipulated, such acknowledgement, and the acknowledgement has not been received, then, the originator may give notice to the addressee specifying a reasonable time by which the acknowledgement must be received. If no acknowledgement is received within the aforesaid time limit he may after giving notice to the addressee, treat the electronic record as though it has never been sent.

3. Time and place of dispatch and receipt of electronic record [Section 13]: The originator and

the addressee may themselves agree about the time and place of dispatch

and receipt of electronic record. If there is no such agreement, then it is governed by the following rules as provided in Section 13 of the Act.

(a)Dispatch of electronic record [Section 13(1)]: Save as otherwise agreed to between the originator and the addressee, the despatch of an electronic record occurs when it enters a computer

resource outside the control of the originator.

(b)Time of receipt of electronic record [Section 13(2)] : Save as otherwise agreed between the

originator and the addressee, the time of receipt of an electronic record shall be determined as follows, namely:—

(i) if the addressee has designated a computer resource for the purpose of receiving electronic records,—

(a) receipt occurs at the time when the electronic record enters the designated computer resource; or

(b) if the electronic record is sent to a computer resource of the addressee that is not the

designated computer resource, receipt occurs at the time when the electronic record is

retrieved by the addressee;

(ii) if the addressee has not designated a computer resource along with specified timings, if any,

receipt occurs when the electronic record enters the computer resource of the addressee.

(c) Place of dispatch and receipt of electronic record [Section 13 (3)]: Save a otherwise agreed

to between the originator and the addressee, an electronic record is deemed to be dispatched at the

place where the originator has his place of business, and is deemed to be received at the place wherethe address has his place of business.

Regulation of Certifying Authorities

Certifying Authority is a person who has been granted a licence to issue a digital signature. Sections 17 to 34 contained in Chapter VI of the Information Technology Act, 2000 make provisions relating to regulation of certifying authorities. These provisions are as follows:

A) Appointment of Controller and other Officers (Sec. 17)

1. The Central Government may, by notification in the Official Gazette, appoint a Controller

of Certifying Authorities and such number of Deputy Controllers and Assistant Controllers

as it deems fit.

2. The Controller shall discharge his functions under this Act subject to the general control and directions of the Central Government while the Deputy Controllers and Assistant

Controllers shall perform the functions assigned to them by the Controller.

3. The qualifications, experience and terms and conditions of service of Controller, Deputy

Controllers and Assistant Controllers shall be such as may be prescribed in the Central

Government.

4. The Head Office and Branch Office of the office of the Controller shall be at such places as the Central Government may specify, and these may be established at such places as the

Central Government may think fit.

5. There shall be a seal of the Office of the Controller.

B) Functions of Controller (Sec. 18)

The Controller may perform all or any of the following functions, namely:

a) exercising supervision over the activities of the Certifying Authorities;

b) certifying public keys of the Certifying Authorities;

c) laying down the standards to be maintained by the Certifying Authorities;

d) specifying the qualifications and experience which employees of the Certifying Authorities should possess;

e) specifying the conditions subject to which the Certifying Authorities shall conduct their business;

f) specifying the contents of written, printed or visual materials and advertisements that may be distributed or used in respect of a Digital Signature Certificate and the public key;

g) specifying the form and content of a Digital Signature Certificate and the key;

h) specifying the form and manner in which accounts shall be maintained by the Certifying Authorities;

i) specifying the terms and conditions subject to which auditors may be appointed and the remuneration to be paid to them;

j) facilitating the establishment of any electronic system by a Certifying Authority either solely or jointly with other Certifying Authorities and regulation of such systems;

k) specifying the manner in which the Certifying Authorities shall conduct their dealings with the subscribers;

l) resolving any conflict of interest between the Certifying Authorities and the subscribers;

m) laying down the duties of the Certifying Authorities;

n) maintaining a database containing the disclosure record of every Certifying Authority containing such particulars as may be specified by regulations which shall be accessible to public.

C) Recognition of Foreign Certifying Authorities (Sec. 19)

The Controller may with the previous approval of the Central Government, and by

notification in the Official Gazette, recognize any foreign Certifying Authority as a Certifying

Authority for the purposes of this Act. Where any such Certifying Authority is recognized, the

Digital Signature Certificate issued by such Certifying Authority shall be valid for the purpose

of this Act.

D) Controller to Act as Repository (Sec. 20)

A 'repository' is an online database of Digital Signature Certificates and other related

information useful for those who conduct their business operations through the medium of

computer internet or e-commerce.

i) The controller shall be the repository of all Digital Signature Certificates issued under this

Act.School of Distance Education

Business Regulations Page 106

ii) The Controller shall make use of hardware, software and procedures that are secure from

intrusion and misuse. He shall also observe such other standards as may be prescribed by the

Central Government to ensure that the secrecy and security of the digital signatures are

assured.

iii) The Controller shall maintain a computerized database of all, public keys in such a manner

that such database and the public keys are available to any member of the public.

E) Grant Licence to Certifying Authorities to issue Digital Signature Certificate (Sec. 24)

A licence granted under this Section shall –

i) be valid for such period as may be prescribed by the Central Government;

ii) not be transferable or heritable;

iii) be subject to such terms and conditions as may be specified by the regulations.

F) Application for Licence (Sec. 22)

i) Every application for issue of a licence shall be in such form as may be prescribed by the

Central Government.

ii) The application for issue of a licence shall be accompanied by –

a) a certification practice statement;

b) a statement including the procedures with respect to identification of the applicant;

c) payment of such fees, not exceeding twenty-five thousand rupees as may be prescribed by the Central Government;

d) such other documents, as may be prescribed by the Central Government.

G) Renewal of Licence (Sec. 23)

An application for renewal of a licence shall be in such form and accompanied by such fees, not exceeding five thousand rupees, as may be prescribed by the Central Government and shall be made not less than forty-five days before the date of expiry of the period of validity of the licence.

H) Procedure for grant or rejection of Licence (Sec. 24)

The Controller may, on receipt of an application after considering the documents accompanying the application and such other factors, as he deems fit, grant the licence or reject the application.

I) Suspension of Licence (Sec. 25)

i) The Controller may, if he is satisfied after making an enquiry, revoke the licence where a Certifying Authority has –

a) made an incorrect or false statement in the application for the issue or renewal of the licence.

b) failed to comply with the terms and conditions subject to which the licence was granted.

c) failed to maintain the standards specified in Sec. 20 (2) (b).

d) contravened any provisions of this Act, rule, regulation or order made thereunder .

ii) The Controller may, if he has reasonable cause to believe that there is any ground for revoking a licence, by order, suspend such licence pending the completion of any inquiry

ordered by him.

iii) No Certifying Authority whose licence has been suspended shall issue any Digital Signature

Certificate during such suspension.

J) Notice of Suspension or Revocation of Licence (Sec. 26)

Where the licence of the Certifying Authority is suspended or revoked, the Controller shall

publish notice of such suspension or revocation, as the case may be, in the data database

maintained by him.

K) Display of Licence (Sec. 32)

Every Certifying Authority shall display its licence at a conspicuous place for the premises

in which it carries on its business.

L) Surrender of Licence (Sec. 33)

Every Certifying Authority whose licence is suspended or revoked shall immediately after

such suspension or revocation, surrender the licence to the Controller. If he fails to surrender the

licence, he shall be guilty of an offence and shall be punishable.

PENALTIES

The penalties are imposed upon persons who contravene the provisions of the Act. A duly appointed officer is required for adjudication and imposing penalties. Contravention of certain provisions amounts to criminal offence for which punishment by way of imprisonment and fine isimposed. The legal provisions relating to civil penalties contained in Section 43 to 45 of The

Information Technology Act are as follows:

1. Penalty for damage to computer, computer systems etc. [Section 43]: Any person who, without permission of the owner or any other person who is incharge of a computer system or computer network, indulges in any of the following facts, shall be liable to pay damages by way of compensation not exceeding 1 Crore rupees to the person so affected.

(a) accesses or secures access to such computer, computer system or computer network;

(b) downloads, copies or extracts any data, computer database or information from such

‘computer resources’;

(c) introduces or causes to be introduced any computer contaminant or computer virus into any

computer, computer system or computer network;

(d) damages or causes to be damaged any such 'computer resources';

(e) disrupts or causes disruption of any such computer resources';

(f) denies or causes the denial access to any person authorized to access any computer,

computer system or computer network by any means;

(g) provides any assistance to any person to facilitate access to a computer, computer system orcomputer network in contravention of the provisions of this Act rules or regulations made thereunder ;

(h) charges the services availed of by a person to the account of another person by temperingwith or manipulating any computer, computer system, or computer network.

2. Penalty for failure to furnish information, return etc. [Section 44]: If any person who isrequired under this Act or any rules or regulations made thereunder to-(a) furnish any document, return or report to the Controller or the Certifying Authority fails tofurnish the same, he shall be liable to a penalty not exceeding one lakh and fifty thousandrupees for each such failure;

(b) file any return or furnish any information, books or other documents within the time

specified therefore in the regulations fails to file return or furnish the same within the time

specified therefore in the regulations, he shall be liable to a penalty not exceeding five

thousand rupees for every day during which such failure continues;

(c) maintain books of account or records, fails to maintain the same, he shall be liable to a

penalty not exceeding ten thousand rupees for every day during which the failure continues.

3. Penalty where no specific Penalty is provided elsewhere in the Act [Section 45]: Whoever

contravenes any rules or regulations made under this Act, for the contravention of which no penalty

has been separately provided, shall be liable to pay a compensation not exceeding Rs. 25,000 to the

person affected by such contravention or a penalty not exceedingRs.25,000.

ADJUDICATION

The legal provisions relating to adjudication are contained in Sections 46 and 47 of the Act and maybe discussed under the following heads:

1. Power to adjudicate [Section 46 (1)]: The power of adjudication has been vested in theadjudicating officer appointed by the Central Government.

2. Appointment of adjudicating officers [Sections 46(1) (3)]: For the purposes of adjudgingwhether any person has committed a contravention of any of the provisions of this Act or of anyrule, regulation, direction or order made thereunder, the Central Government shall appoint anofficer to be an adjudicating officer for holding an inquiry.

3. Decision by adjudicating officer [Section 46 (2)]: The adjudicating officer shall, aftergiving the concerned person a reasonable opportunity for making representation m the matter and if on such inquiry, he is satisfied that the person has committed contravention, he may impose suchpenalty or award such compensation as he thinks ht in accordance with the provisions of thatsection.

4. Adjudicating officer to have powers of a civil court [Section 46 (5)]: Every adjudicatingofficer shall have the powers of a civil court which are conferred on the Cyber Appellate Tribunal.

5. Factors to be taken into account by the adjudicating officer [Section 47]: Whileadjudging the quantum of compensation, the adjudicating officer shall have due regard to amount of gain of unfair advantage as well as the amount of loss caused to any person as a result ofthe default and the repetitive nature of the default.

OFFENCES

Section 65 to 76 of the IT Act dealing with criminal penalty which is criminal in nature, i.e., either imprisonment for the offence or imposition of fine or both.

1. Tampering with computer source document [Section 65]: Any person who knowingly or

intentionally conceals, destroys or alters or intentionally or knowingly causes another to conceal,destroy, or alter any computer source code used for a computer, computer programme, computersystem or computer network, when the computer source code is required to be kept or maintainedby law for the time being in force, shall be punishable with imprisonment up to three years, or withfine which may extend up to two lakh rupees, or with both.

2. Hacking with computer system [Section 66]: whoever with the intent tocause or knowing that he is likely to cause wrongful loss or damage to the public or anyperson, destroys or deletes or alters any information residing in a computer resource ordiminishes its value or utility or affects it injuriously by any means, commits hacking[Section 66(1)]. Whoever commits hacking shall be punished with imprisonment upto three years orwith fine upto two lakh rupees or with both [Section 66(2)].

3. Publishing of information which is obscene in electronic form [Section 67]: Anyperson who publishes or transmits or causes to be published in the electronic form anymaterial which is lascivious or appeals to the prurient interest or if its effect is such 'as totend to deprave and corrupt persons who are likely, having regard to all relevantcircumstance, to read, see or hear the matter contained or embodied in it, shall be punishedas under:

i) On first conviction with imprisonment of either description for a term whichmay extend to five years and with fine which may extend to one lakh rupeesand

ii) In the event of a second or subsequent conviction with imprisonment of either descriptionfor a term which may extend to ten years and also with fine which may extend to two lakhrupees.

4. Securing access to protected system contravened [Section 70]: Any person who securesaccess or attempts to secure access to a protected system in contravention of the provisions of this section shall be punished with imprisonment of either description for a term which may extend to ten years and shall also be liable to fine.

5. Penalty for misrepresentation [Section 71]: Any person who makes any misrepresentationto, or suppresses any material fact from the Controller or the Certifying Authority for obtaining anylicence or Digital Signature Certificate, as the case may be, shall be punished with imprisonmentfor a term which may extend to two years, or with fine which may extend to one lakh rupees, with both.

6. Penalty for breach of confidentiality and privacy [Section 72]: Any person who, inpursuance of any of the powers conferred under this Act, rules or regulations made thereunder, hassecured access to any electronic information, documents shall be punished with imprisonment for aterm which may extend to two years, or with fine which may extend to one lakh rupees, or withboth.

7. Penalty for publishing Digital Signature Certificate false in certain particulars [Section

73]: Any person who publishes a Digital Signature Certificate false in certain particulars shall bepunished with imprisonment for a term which may extend to two years, or with fine which mayextend to one lakh rupees, or with both.

8. Penalty for publication for fraudulent purposes [Section 74]: Whoever knowinglycreates, publishes or otherwise makes available a Digital Signature Certificate for any fraudulent orunlawful purpose shall be punished with imprisonment for a term which may extend to two years,or with fine which may extend to one lakh rupees, or with both.

9. Confiscation of articles [Section 76]: Any computer, computer system, floppies, compactdisks, tape drives or any other accessories related thereto, in respect of which any provision of thisAct, rules, orders or regulations made thereunder has been or is being contravened, shall be liable toconfiscation.

10. Penalties and Confiscation not to interfere with other punishments [Section 77]: Anypenalty imposed or confiscation made under this Act shall not prevent the imposition of any otherpunishment to which the person affected thereby is liable under any other law for the time being inforce.

11. Power to investigate offences [Section 78]: A police officer not below the rank of DeputySuperintendent of Police is empowered to in