

# **BUSINESS LAW**

**Second Year : B.Com.**

**SEMESTER – IV**

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**2<sup>nd</sup> Year B.Com. Semester – IV**

# **BUSINESS LAW**

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## FOREWORD

Since its establishment in 1976, Acharya Nagarjuna University has been forging ahead in the path of progress and dynamism, offering a variety of courses and research contributions. I am extremely happy that by gaining a 'A' Grade from the NAAC in the year 2014, the Acharya Nagarjuna University is offering educational opportunities at the UG, PG levels apart from research degrees to students from over 285 affiliated colleges spread over the two districts of Guntur and Prakasam.

The University has also started the Centre for Distance Education with the aim to bring higher education within reach of all. The centre will be a great help to those who cannot join in colleges, those who cannot afford the exorbitant fees as regular students, and even housewives desirous of pursuing higher studies. With the goal of bringing education in the door step of all such people. Acharya Nagarjuna University has started offering B.A, and B, Com courses at the Degree level and M.A, M.Com., L.L.M., courses at the PG level from the academic year 2021-22 on the basis of Semester system.

To facilitate easier understanding by students studying through the distance mode, these self-instruction materials have been prepared by eminent and experienced teachers. The lessons have been drafted with great care and expertise in the stipulated time by these teachers. Constructive ideas and scholarly suggestions are welcome from students and teachers invited respectively. Such ideas will be incorporated for the greater efficacy of this distance mode of education. For clarification of doubts and feedback, weekly classes and contact classes will be arranged at the UG and PG levels respectively.

It is aim that students getting higher education through the Centre for Distance Education should improve their qualification, have better employment opportunities and in turn facilitate the country's progress. It is my fond desire that in the years to come, the Centre for Distance Education will go from strength to strength in the form of new courses and by catering to larger number of people. My congratulations to all the Directors, Coordinators, Editors and Lesson -writers of the Centre who have helped in these endeavours.

**Prof. P.Rajasekhar**  
**Vice –Chancellor,**  
**Acharya Nagarjuna University**

**PROGRAMME: THREE-YEAR B COM**

(General and Computer Applications)

**Course Code:**

**Domain Subject: Commerce**

Semester-wise Syllabus under CBCS

(w.e.f. 2020-21 Admitted Batch)

II Year B Com (Gen & CA)– Semester – IV

404BCO21- **Course 4D: Business Law**

**Learning Outcomes:**

At the end of the course, the student will be able to;

- Understand the legal environment of business and laws of business.
- Highlight the security aspects in the present cyber-crime scenario.
- Apply basic legal knowledge to business transactions.
- Understand the various provisions of Company Law.
- Engage critical thinking to predict outcomes and recommend appropriate action on issues relating to business associations and legal issues.
- Integrate concept of business law with foreign trade.

**Syllabus:**

**Unit-I: Contract:**

Meaning and Definition of Contract - Essential Elements of Valid Contract -Valid, Void and Voidable Contracts - Indian Contract Act, 1872

**Unit-II: Offer, Acceptance and Consideration:**

Definition of Valid Offer, Acceptance and Consideration - Essential Elements of a Valid Offer, Acceptance and Consideration.

**Unit-III: Capacity of the Parties and Contingent Contract:**

Rules Regarding to Minors Contracts - Rules Relating to Contingent Contracts - Different Modes of Discharge of Contracts - Rules Relating to Remedies to Breach of Contract.

**Unit-IV: Sale of Goods Act 1930 and Consumer Protection Act 2019:**

Contract of Sale - Sale and Agreement to Sell - Implied Conditions and Warranties - Rights of Unpaid Vendor- Definition of Consumer - Person - Goods - Service - Consumer Dispute - Consumer Protection Councils - Consumer Dispute Redressal Mechanism

**Unit-V: Cyber Law:**

Overview and Need for Cyber Law - Contract Procedures - Digital Signature – Safety Mechanisms.

## **References:**

1. J. Jaysankar, Business Laws, Margham Publication. Chennai.
2. ND Kapoor, Business Laws, S Chand Publications.
3. Balachandram V, Business law, Tata McGraw Hill.
4. Tulsian, Business Law, Tata McGraw Hill.
5. Pillai Bhagavathi, Business Law, S Chand Publications.
6. Business Law, Seven Hills Publishers, Hyderabad.
7. K C Garg, Business Law, Kalyani Publishers.

## **Suggested Co-Curricular Activities**

- ◆ Seminar on Basics of Indian Contract Act, 1872
- ◆ Quiz programs
- ◆ Co-operative learning
- ◆ Seminar on Cyber Law
- ◆ Group Discussions
- ◆ Debate on Offer, Agreement, and Contract
- ◆ Creation of Contract by abiding rules of Indian Contract Act, 1872
- ◆ Making a sale by abiding rules of Sale of Goods Act, 1930
- ◆ Guest lecture by a Lawyer/Police officer
- ◆ Celebrating consumers day by creating awareness among the students
- ◆ Examinations (Scheduled and surprise tests)
- ◆ Any similar activities with imaginative thinking beyond the prescribed syllabus

**MODEL QUESTION PAPER**

**(404BCO21)**

**B. Com.(General / Comp. Appl.s) Degree Examination**

**Second Year – Fourth Semester**

**Part – II : Commerce**

**Paper – IV : BUSINESS LAWS**

**Time : Three hours**

**Maximum Marks : 70**

**Section – A**

**Answer any FIVE of the following questions. (5 × 4 = 20 Marks)**

- 1) Valid contract.  
చెల్లుబాటు ఒప్పందం.
- 2) Valid consideration.  
చెల్లుబాటు అయ్యే ప్రతిఫలము.
- 3) Minor.  
మైనరు.
- 4) Contingent contract.  
ఆగంతుక కాంట్రాక్టు.
- 5) Warranties.  
పూచీలు.
- 6) Electronic Records.  
ఎలక్ట్రానిక్ రికార్డులు.
- 7) Agreement to sale.  
అమ్మకము నిమిత్తము ఒప్పందము.
- 8) Family Agreement.  
కుటుంబపరమైన ఒప్పందము.

## Section – B

**Answer the following questions. (5 x 10 = 50 Marks)**

- 9) (a) What are the essentials of valid contract?  
చెల్లుబాటు అయ్యే ఒప్పందానికి కావలసిన ఆవశ్యకతలేమిటి?
- Or
- (b) Explain Indian Contract Act, 1872.  
ఇండియన్ కాంట్రాక్టు చట్టం 1872 వివరించండి.
- 10) (a) Explain essentials elements of valid offer.  
చెల్లుబాటు అయ్యే ఆఫర్ యొక్క ముఖ్యమైన ముఖ్యమైన అంశాలను వివరించండి.
- Or
- (b) Define Acceptance. Explain essentials elements of valid acceptance.  
అంగీకారం నిర్వచించి, చెల్లుబాటు అయ్యే అంగీకారం యొక్క ముఖ్యమైన ముఖ్యమైన అంశాలను వివరించండి.
- 11) (a) Write about the rules regarding minor's agreement.  
మైనరు ఒప్పంద నియమములు గురించి వ్రాయండి.
- Or
- (b) Explain about the modes of discharge of contract.  
కాంట్రాక్టు విమోచనము చెందు వివిధ పద్ధతులను వివరింపుము.
- 12) (a) Explain the Rights of unpaid sellers.  
చెల్లించని విక్రేత యొక్క హక్కులను వివరించండి.
- Or
- (b) Define consumer. Explain consumer protection councils.  
వినియోగదారుని నిర్వచించి, వినియోగదారుని రక్షణ మండలిని వివరించండి.
- 13) (a) Explain the digital signature in detail.  
డిజిటల్ సంతకాలను గురించి వివరముగా వివరించండి.
- Or
- (b) Explain the need and overview of cyber law.  
సైబర్ చట్టం యొక్క అవసరం మరియు పర్యావలోకనం వివరించండి.
-



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## LESSON - 1

# LAW OF CONTRACT

### 1.0 OBJECTIVES :

After studying this lesson, you should be able to understand

- ◆ to learn the nature and importance of contract
- ◆ Definitions of Contract
- ◆ History of Contract Act
- ◆ Essentials of Valid Contract
- ◆ Classification of Contracts

### STRUCTURE :

- 1.1 Introduction
- 1.2 Sources of Business Law
- 1.3 Contract Definitions
  - 1.3.1 Legal obligations
  - 1.3.2 Agreement
- 1.4 Essentials of Valid Contract
- 1.5 Classification of Contracts
  - 1.5.1 Validity or enforceability
  - 1.5.2 Formation
  - 1.5.3 Performance
- 1.6 Summary
- 1.7 Technical Terms
- 1.8 Self-Assessment Questions
- 1.9 Reference Books

### 1.1 INTRODUCTION :

The Indian Contract is the most important constituents of Indian Mercantile Law. It affects every person since every one of us enters into a contract virtually every day. When a person takes a seat in a bus or lends a book to the friend or deposits money in a bank account or purchases goods on credit, he enters into a contract though he may not be conscious of this fact. The law of contract is of immense importance to a businessman since all his transactions are based on contracts.

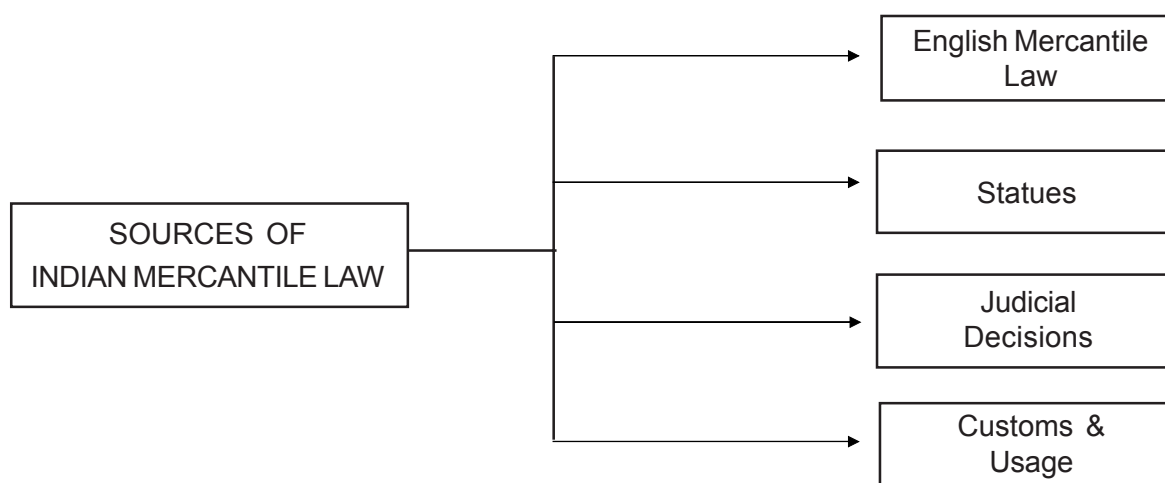
The Indian Contract Act came into force from 1st September, 1872. It has been amended several times. The notable amendments have been in 1886, 1891, 1899, 1930, 1932 and 1997. The Act has been mainly enacted to ensure that the obligations prescribed by agreements and the reasonable expectations created by them are fulfilled by the concerned parties to the agreement. The Act applies to the whole of India except the state of Jammu and Kashmir.

### 1.2 SOURCES OF INDIAN BUSINESS LAW :

The main source of Indian Mercantile Law are as follows :

**1. English Mercantile Law :** Indian Mercantile Law is largely based on English Mercantile Law. As a matter of fact, even after independence, in the absence of provisions regarding any matter of the Indian Law, the provisions of the English Law are generally accepted in the Indian courts.

**2. Statutes of Indian Legislatures :** Most of Indian Laws are in the form of Acts passed by the Legislatures. Both the Central Legislatures (i.e., the Parliament) and the State Legislatures are empowered to enact laws relating to matters which come within their Jurisdiction. For example the Companies Act 1956 enacted by the Parliament while the different State Legislatures have enacted the Sales Tax Acts applicable to their respective states.



**3. Judicial Decisions :** Past Judicial decisions acquire the force of precedents and are generally followed by Law courts in deciding similar cases. In our country, the courts have been divided into three groups : (i) the Supreme Court, (ii) the High Courts and (iii) the Sub-ordinate Courts. The Supreme is the final court of appeal. For the court of same stature, earlier decisions have only a guiding and persuasive value. However, for a court of a lower stature, the decision given by the court of a higher stature, the decision given by the court of a higher stature regarding the same subject matter is usually taken as having binding effects.

**4. Customs and Usage :** Customs and usage also play a significant role in regulating business transactions. This fact has been accepted by many Indian statutes. For example : Section 1 of the Indian Contract Act states that 'nothing therein' contained shall affect any usage or customs of trade'. Similarly Section 1 of the Negotiable Instruments Act also provides that 'nothing therein contain shall affect any legal usage relating to instruments in an oriental language.

### 1.3 CONTRACT DEFINITIONS :

It will be appropriate to go through definitions given by some eminent Jurists to understand the meaning of the term contract.

1. "A contract is an agreement enforceable at law made between two or more persons, by which rights are acquired by one or more to acts or forbearances on the part of the other or others" - Sir William Anson.

2. "An agreement creating and defining obligations between the party" - Salmond.
3. "Rule of external human actions enforced by sovereign political authority" - Halland.
4. "A rule of conduct imposed and enforced by the sovereign" - Austin.

The term Business Law, Commercial Law and Mercantile Law are synonymous. Business Law deals with rights and obligations arising out of mercantile transactions among mercantile persons. Business Law denotes the aggregate body of legal rules connected with trade, industry and commerce.

Business or mercantile laws include law relating to contracts, sale of goods, negotiable instruments, partnership, companies, insurance, carriage of goods, insolvency consumer protection etc.

Simple stated, "Law" operates, to regulate the actions of persons with respect to one another and entire group or society and the state.

However the scope of mercantile law is ever widening due to increasing complexities of business world.

### 1.3.1 Legal Obligation :

The agreement should give rise to a legal obligation, i.e., obligation which is enforceable at law. Agreements which give rise only to social or domestic obligations cannot be termed as contracts. An agreement to go to a picture or attend a marriage ceremony is not a contract as it does not give rise to any legal obligation.

### 1.3.2 An Agreement :

There has to be an agreement between two parties. An offer when accepted becomes an agreement. Thus, an agreement implies an offer and acceptance. The term offer implies the willingness of a person to do or not to do something and its communication to the other, while acceptance means assent by the party to whom the offer has been made.

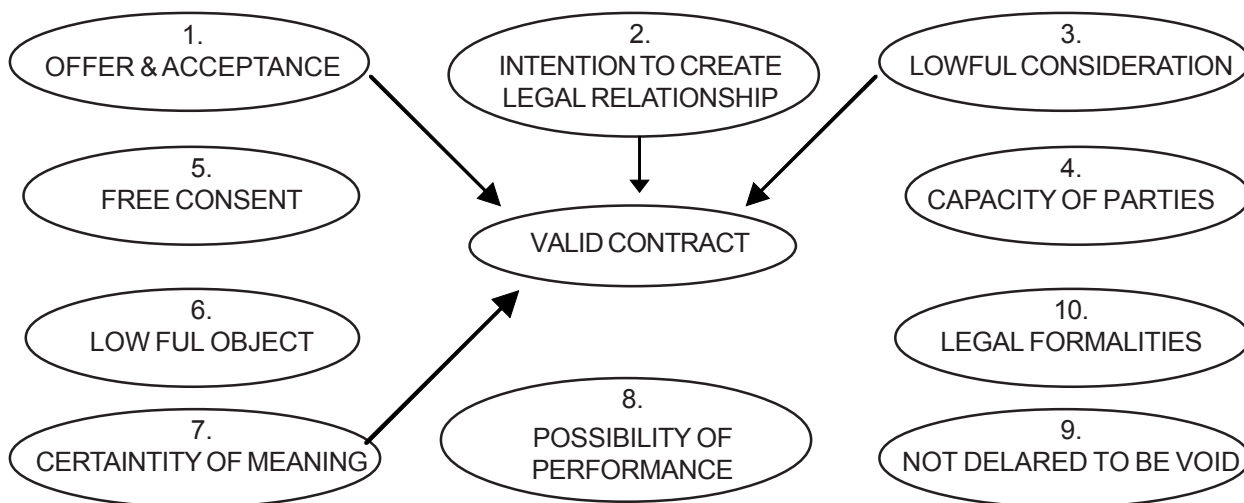
For Example : If 'A' says to 'B' that he is willing to sell him his car for a sum of Rs. 70,000/-, it is an offer from 'A'. If 'B' gives his assent to this offer, it will be said that he has accepted the offer and an agreement will come into existence.

## 1.4 ESSENTIAL ELEMENTS OF A VALID CONTRACT :

All agreements are not contracts. Only that agreement which is enforceable at law is a contract. An agreement which is not enforceable at law cannot be a contract. Thus, the term agreement is more wider in scope than contract. **All contracts are agreements but all agreements are not contracts.**

An agreement, to be enforceable by law, must possess the essential elements of a valid contract as contained in Section 10 of the Indian Contract Act. According to Section 10, all agreements are contracts if they are made by the free consent of the parties, competent to contract, for a lawful consideration and with a lawful object and are not expressly declared to be void. As the details of these essentials from the subject - matter of our subsequent lessons.

## ESSENTIAL ELEMENTS OF A VALID CONTRACT



1. **Offer and Acceptance** : In order to create a valid contract, there must be a “lawful offer by one party and lawful acceptance” of the same by the other party. The objective “lawful” means ‘offer’ and its acceptance must confirm to the rules laid down in the Indian Contract Act regarding valid ‘offer’ and acceptance and its communication.
2. **Intention to create Legal relationship** : In case, there is no such intention on the part of parties, there is no contract. Agreement of social or domestic nature do not contemplate legal relating.

The leading case on this point is :

### **BALFOUR VS BALFOUR (1919)**

A husband (Mr. Balfour) promised to pay his wife (Mrs. Balfour) a household allowance of £ 30 (Pounds) every month. Later the parties separated and the husband failed to pay the amount. The wife sued for the allowance. Held, agreements such as these were outside the realm of contract altogether.

In commercial and business agreements, the presumption is usually that the parties intended to create legal relations. But this presumption is refutable which means that it must be shown that the parties did not intent to be legally bound. Therefore, the wife and husband relationship is not legal relationship. So, this contract is void (an agreement not enforceable by law).

Another leading case on this point is :

### **ROSE AND FRANK CO. VS CROMPTON BROS (1923)**

Two firms entered into a written contract for the sale and purchase of tissue paper. The agreement contained a clause to the effect that “this arrangement is not entered into, nor is this memorandum, written, as a formal or a legal document, and shall not be subject to legal jurisdiction in the law courts”. Since the goods were not delivered, the buyer brought an action for non-delivery. It was held that there is no contract as the parties never intended to created legal relationship.

3. **Lawful consideration** : Consideration has been defined in various ways. According to Blackstone, "Consideration is recompense given by the party contracting to another". In the words of Rollock; "Consideration is the price for which the promise of another is brought".

Consideration is known as quid pro-quo or something in return.

Consideration is an essential element in a contract, promises made for nothing are unenforceable under the Indian Contract. An agreement without consideration subject to certain exceptions is void. In the absence of consideration a promise or undertaking is purely gratuitous and, however, sacred and binding in honour, creates no legal obligation. The legal maxim being *Ex nudo pacto non oritur actio* (out of a bare agreement no action arises). Consideration may take the form of money, goods, services, a promise to marry, a promise to forbear from suing the promisee etc. Consideration may be past, present or future. But it must be real and lawful.

4. **Capacity of Parties** : The Parties to an agreement must be competent to contract. If either of the parties does not have the capacity to contract, the contract is not valid.

According to Section 11 "every person is competent to contract, who is of the age of majority according to the law to which he is subject, and who is of sound mind and is not disqualified from contracting by any law to which he is subject". Accordingly, the following persons are incompetent to contract : (a) Minors, (b) Persons of unsound mind and (c) Persons disqualified by law to which they are subject.

5. **Free Consent** : 'Consent' means the parties must have agreed upon the same thing in the same sense. According to Sec. 13, "Two or more persons are said to consent when they agree upon the same thing in same sense". This is called *consensus ad idem* in English Law.

**Example** : A who owns two cars, one Maruti and the other Santro, offers to sell B one car. A intending it to be the Maruti Car. B accepts the offer thinking that it is the Santro. There is no consensus and hence no contract.

According to Section 14, "consent is said to be free when it is not caused by - 1) Coercion or (2) undue influence, (3) Fraud or (4) Misrepresentation or (5) Mistake.

6. **Lawful Object** : The object of an agreement must be lawful. Object has nothing to do with consideration. It means the purpose or design of the contract. Thus, when one hires a house for use as a gambling house.

The object is said to be unlawful if -

- a) it is forbidden by law;
- b) it is of such nature that if permitted it would defeat the provisions of any law;
- c) it is fraudulent;
- d) it involves an injury to the person or property of any other;
- e) the court regards it as immoral or opposed to public policy.

7. **Certainty of Meaning** : According to Section 29, "Agreements the meaning of which is not certain or capable of being made certain are void". The terms of the contract must be precise and certain. It cannot be left vague. A contract may be void on the ground of uncertainty. Thus, a purported acceptance of an offer to buy a lorry, on hire-purchase terms' does not

constitute a contract if the hire purchase terms are never agreed. Similarly an agreement 'subject to war clause' is too vague to be enforceable.

8. **Possibility of Performance** : If the act is impossible in itself, physically or legally, it cannot be enforced at law. For example, Mr. A agrees with B to discover treasure by magic. Such agreement is not enforceable.
9. **Not declared to be void or illegal** : The agreement though satisfying all the conditions for a valid contract must not have been expressly declared void by any law in force in the country. Agreements mentioned in Section 24 to 30 of the Act have been expressly declared to be void for example agreements in restraint of trade, marriage legal proceedings etc.
10. **Legal formalities** : An oral contract is a perfectly valid contract, except in those cases where writing is required in cases of sale, mortgage, lease and gift of immovable property, negotiable instruments, memorandum and articles of association of a company etc. Registration is required in cases of documents coming within the scope of Section 17 of the Registration Act.

All the elements mentioned above must be present in order to make a valid contract. If any one of them is absent the agreement does not become a contract.

## 1.5 CLASSIFICATION OF CONTRACTS :

Contracts may be classified on the basis of their

- a) Validity
- b) Formation
- c) Performance

### A. Validity or Enforceability

- \* Valid Contracts
- \* Void Contracts
- \* Void agreements
- \* Voidable Contracts
- \* Unenforceable Contracts
- \* illegal agreements

### B. Formation

- \* Express Contracts
- \* Implied Contracts
- \* Quasi Contracts
- \* EDI Contracts

### C. Performance

- \* Executed Contracts
- \* Executory Contracts
- i) Unilateral Contracts
- ii) Bilateral Contracts

### 1.5.1 Classification of Contracts :

They are briefly discussed as under :

- A. 1. **Valid Contract** : An agreement enforceable at law is a valid contract. An agreement becomes a contract when all the essentials of a valid contract as laid down in Section 10 are fulfilled.
2. **Void Contract** : An agreement which was not enforceable at law is called as Void Contract. A void contract is not necessarily unlawful, but is devoid of legal effects. The law will not enforce such a contract, nor can it be made valid by the parties.

**Ex** : A contract between a citizen of Pakistan and India is a valid contract during peace but if war breaks out between the two countries, the agreement will come void contract.



3. **Void Agreement** : According to Sec. 2 (g), "An agreement which is not enforceable by law by either of the parties is void".  
No legal rights of obligations can arise out of a void agreement.
4. **Voidable Contract** : According to Section 2 (i), "An agreement which is enforceable by law at the option of one or more of the parties but not at the option of other or others is a voidable contract.  
**Ex** : A, a person of weak intelligence made a gift of his entire property to B, who was in a position to dominate him. The gift having been obtained by undue influence is voidable at the option of 'A'.
5. **Unenforceable Contracts** : It is contract which is otherwise valid, but cannot be enforced because of some technical defects like absence of a written form or absence of a proper stamp.
6. **Illegal Agreements** : A contract which is either prohibited by law or otherwise against the policy of law is an illegal agreement.  
**Ex** : A contract to commit dacoity is an illegal contract and cannot be enforced at law.

### 1.5.2 Contracts classified according to formation :

- B. 1. **Express Contract** : An express contract is one entered into by words which may be either spoken or written, where the proposal and acceptance is made in words, it is an express contract.
2. **Implied Contract** : When the proposal or acceptance is made otherwise than in words, it is an implied contract. Implied contracts can be smelted out of the surrounding circumstances and the conduct of the parties who made them. So, where a person employs another to do some work the law implies that the former agrees to pay for the work.
3. **Construction or Quasi Contract** : It is a contract in which there is no intention on either side to make a contract, but the law imposes a contract. Thus, a finder of lost goods is under an obligation to find out the true owner and return the goods.
4. **E.D.I. Contracts** : These contracts are entered into between the parties using internet. In electronic commerce, different parties / persons create network which are linked to other networks through EDI (Electronic Data Inter-change). This helps in doing business transactions using electronic mode.

### 1.5.3 Classification on the basis of Performance :

Contracts may be classified on the basis of extent of their performance. Such contracts may be :

- C. 1 **Executed Contract** : An executed Contract is one where both the parties have performed their obligations or carried out the terms of the contracts. In other words, it is a completed contract.  
**Ex** : A sells a TV set to B for Rs. 20,000/-. B pays the price and A hands over TV set to B.
2. **Executory Contract** : Where the contract is yet to be performed either wholly or partially or one or both the parties have yet to perform their obligations, the contract is executory contract. Thus, executory contract may be (a) Unilateral, (b) Bilateral.



- a) **Unilateral Contract** : A unilateral contract is one in which a promise on one side is exchanged for an act on the other side.
- b) **Bilateral Contract** : These are the contracts where a promise on one side is exchanged for a promise on the part of the other party.

## 1.6 SUMMARY :

A contract is made between two or more parties which the law will enforce. According to Sec. 2 (h), a contract is an agreement enforceable by Law.

**Essential of Contract** : The valid contract has having the essential features, those are (1) Offer and acceptance, (2) legal relationship, (3) Lawful consideration, (4) Capacity of parties, (5) Free consent, (6) Lawful object, (7) Certainty of meaning, (8) Possibility of performance, (9) Declared to be void or illegal, (10) Legal formalities.

**Classification of Contracts** : Contracts may be classified on the basis of their (a) validity, (b) formation and (c) performance.

## 1.7 TECHNICAL TERMS :

- 1. Agreement : An offer when accepted becomes an agreement.
- 2. Contract : An agreement enforceable by law.
- 3. Illegal Agreement : An agreement against the provisions of law.
- 4. Void Agreement : An agreement enforceable at the time when it was made.
- 5. Voidable Contract : An agreement enforceable at the option of one or more parties thereto, but not at the option of the other or others.

## 1.8 SELF-ASSESSMENT QUESTIONS :

- 1. What is the object and nature of the law of contract ?
- 2. Describe the essentials of a valid contract ?
- 3. All agreements are not contracts but all contracts are agreements. Discuss.
- 4. Define Contract Act ? Explain the various types of contracts.

## 1.9 REFERENCE BOOKS :

- 1. K.C. Garg & R.C. Chawla and other; *Business Law*, Kalyani Publishers, New Delhi, 2007.
- 2. N.D. Kapoor, *Mercantile and Industrial Law*, Sultan Chand & Sons, New Delhi, 2003.
- 3. S.N. Maheswari & S.K. Maheswari, *Business Laws*, Himalaya Publishing House, New Delhi, 2004.
- 4. S.I. Inyengar, *Mercantile Law*, S. Chand & Co., New Delhi.
- 5. *Bare Acts - Indian Contract Act*, 1872.

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## LESSON - 2

# OFFER AND ACCEPTANCE

### 2.0 OBJECTIVES :

On completion of this lesson, you should be able to understand

- ◆ Definition and meaning of offer
- ◆ Essentials of valid offer
- ◆ Acceptance, its meaning and definitions
- ◆ Essentials of valid acceptance

### STRUCTURE :

- 2.1 Introduction
- 2.2 Offer Definition - Meaning
- 2.3 Essentials of valid offer
- 2.4 When communication of an offer is revocation is complete
- 2.5 Acceptance meaning and definitions
- 2.6 Essentials of valid acceptance
- 2.7 Revocation of Acceptance
- 2.8 Summary
- 2.9 Technical Terms
- 2.10 Self-Assessment Questions
- 2.11 Reference Books

### 2.1 INTRODUCTION :

A contract is an agreement enforceable by law. An agreement is every promise and every set of promises forming the consideration for each other section 2 (e). Section 2 (b) defines a promise follows : "A proposal, when accepted, becomes a proposal". It means an agreement is an accepted proposed.

Therefore, these must be proposal or offer by one party and its acceptance by the other party for making an agreement. A offer to sell his Matiz car to Mr. B for Rs. 3 lacs. B accepts the offer. It will result into a contract.

Thus, offer and its acceptance subsequently is the universally accepted process for creating a contract where it is express or implied.

### 2.2 OFFER - DEFINITION - MEANING :

Offer or proposal is the starting point in the formation of a contract. Section 2 (a) defines offer as "when one person signifies to another his willingness to do or to obtain from doing anything with a view to obtaining the assent of that other to such act or abstinence". Thus, an offer consists of two parts.

1. a promise by the offerer to do or obtain from doing something and
2. a request to the offeree for giving his acceptance offerer is not bound by his promise until the offeree accepts it unconditionally.

## 2.3 ESSENTIALS OF VALID OFFER :

### 1. Offer must be capable of creating legal relations :

The offerer must intend the creation of legal relations. He must intend that if this offer is accepted a legally binding agreement shall result the essential element is that there must be an express or tact reference to the legal relations of the consenting parties. The leading case is Balfour v Balfour.

### 2. Offer must be communicated to the offeree :

There can be no offer by a person to himself. It must always be communicated to the offeree. If there is no communication of an offer, there is no acceptance resulting in the contract.

The leading case on this point is :

#### **Lalman Shukla V Gauri Dutt 1913**

L sent his servant 'G' to trace his missing nephew.

L in the mean time announced a reward for providing information about the missing boy. G, in ignorance of the announcement traced the boy and informed L. 'G' later on came to know of the reward and he claimed it. His claim was dismissed on the ground that he was ignorant of the offer. It was further held that it was the duty of the servant to search for the boy.

### 3. Offer must be made with a view to detaining the assent of the other party :

An offer must be distinguished from mere expression of intention :

The leading case on this point is

#### **Harris V Nickerson (1873)**

N advertised in the news to effect sale of his goods on a particular day at a particular place. 'H' travelled a long distance to bid for the things. On arrival, he found that the sale was cancelled. He sued N for breach of contract. It was held that advertisement was merely expression of an intention and not an offer which could be accepted by travelling to the place of intended sale.

### 4. An offer may be conditional :

An offer can be made subject to a condition. In that case it can be accepted only subject to the condition. A conditional offer lapses when the condition is not accepted.

The leading case on this point is :

#### **Thomson V. L.M. & S. Railway (1930)**

T, who could not read, took an excursion ticket on the railway. On the front of the ticket was printed "for conditions see back". One of the conditions was that the railway company would not be liable for personal injuries to passengers. 'T' was injured by a railway accident. Held 'T' was bound by the conditions and could not recover any damages. Where a condition attached to an offer is against public policy, it will not be enforced merely because it had been implied accepted by the offeree.

### 5. Offer should not contain a term the non-compliance of which would amount to acceptance.

One cannot say while making the offer that if the offer is not accepted before a certain date, it will be presumed to have been accepted.

**Example :** A writes to B, "I offer to sell my house for Rs. 40,000/-. If I do not receive a reply to Monday next, I shall assume that you have accepted the offer," there will be no contract if B does not reply.

### 6. Lapse of an offer : An offer lapses

- a) If either offeror or offeree dies before acceptance
- b) If it is not accepted within (i) the specified time or (ii) a reasonable time, if not time is specified what is a reasonable time ? It depends on the circumstances. Five months has been held to be an unreasonable delay in accepting an offer to buy shares in a company.
- c) An offer can also lapse by revocation.
- d) If the offeree does not make a valid acceptance.

### 7. An invitation to offer is not an offer :

An offer must be distinguished from an invitation to offer. In the case of an invitation to offer the aim is merely to circulate information or realness to negotiate business with anybody who on such information comes to the person sending it. Such invitations are not offers in the eyes of law and do not become promises on acceptance.

The leading case on this point is :

#### **Harvey V Facie**

Harvey sent a telegram to Facie stating "will you sell us the estate of Bumper Hall Pen - Pounds 900".

Harvey sent another telegram to Facie, stating "we agree to buy Bumper Hall Pen for sum of Pounds 900 asked by you. Please send us your title deeds in order that we may get early possession.

But Facie did not send any reply to the last telegram sent by Harvey. Hence Harvey filed a case against Facie claiming the Bumper hall pen estate. The court held that there was no concluded contract.

## 2.4 WHEN COMMUNICATION OF AN OFFER IS REVOCATION :

When the contracting parties are physically present and negotiate in person, an agreement comes into existence the moment, the offeree gives his absolute and unqualified acceptance to the proposal made by the offeror. When the parties are at a distance and the offer and acceptance are exchanged through post, rules contained in Sections 4 and 5 apply.

### 1. Communication of an Offer (Section 4) :

The communication of a proposal is completed as soon as it comes to the knowledge of the offeree.

**Example :** A proposes by letter to sell a brouse to B at a certain price. The communication of the proposal is complete when B receives the letter. Section 4 clearly indicates that actual communication of the offer is not necessary. It is sufficient if the offer comes to the knowledge of the offeror. Then it is for the latter to accept or reject the offer.

## 2.5 ACCEPTANCE - MEANING AND DEFINITION :

When the person to whom the offer is made signifies the assent thereto, the offer is said to be accepted [Sec. 2 (b)]. Thus, acceptance is the consent of the party to whom the offer has been made to the establishment of legal relations between himself and the offerer. It is an assent to the terms of the offer.

**Examples :** 'A' offers to sell his house to 'B' for Rs. 1,00,000/-. 'B' accepts the offer to purchase the house Rs. 1,00,000/-.

### Acceptance may be express or implied :

When acceptance is made by words, spoken or written, it is an express acceptance. If it is accepted by conduct, it is an implied acceptance. Thus, where a person boards a train or bus, the impliedly accepts to pay the usual fare. Similarly, when a person goes to a hotel and eats some food, he impliedly accepts to pay for it.

### Who may accept :

An offer can be effected only by the person to whom it is made. It means that the person to whom the offer is made can alone accept it. It cannot be accepted by another without the consent of the person making it. Thus, where offer is made by 'A' to 'B', the acceptance by 'C' would be inoperative.

## 2.6 ESSENTIALS OF VALID ACCEPTANCE :

### 1. Acceptance must be absolute and unconditional :

An acceptance must unconditional and unqualified. Accepting an offer with conditions, variations and reservations amounts to counter offer and rejection of the original offer. The acceptor must comply with the terms of the offer. A variation or alteration, however, small of the offer, will make the acceptance invalid.

The leading case on the point is

#### **Neele V Mrritt (1930)**

'M' offered to sell land to 'N' at \$ 280 'N' replied accepting the offer and enclosing \$ 30 and promised to pay balance amount by monthly instalments of \$ 50 each. Since 'N' accepted the offer subject to making payments in instalments, it was held that the acceptance conditional and qualified.

### 2. Acceptance must be communicated to the offerer :

Acceptance must be communicated to the offerer to create a binding contract. Mere mental acceptance not evidenced by words or conduct is in the eyes of laws no acceptance. But where the offer is to be accepted by being acted upon, no communication to the offerer will be necessary unless the communication is stipulated for in the offer itself.

**Example :** The manager of railway company received a draft agreement relating to the supply of coal, wrote 'approved' on it and kept it in his drawer, it was held that there was no contract as the acceptance had not been communicated.

### 3. Acceptance must be made with in a reasonable time :

Acceptance to be valid must be made within the time allowed by the offerer and if no time is specified, it must be made within a reasonable time. What is a reasonable time is question of fact

depending on the particular circumstances. Acceptance must be made at any time till the offer is alive. Acceptance made after the offer has been withdrawn is invalid.

The leading case on this point is :

**Ramsgate Victoria Hotel Co V Montefiore (1866) :**

A person applied for shares in a company in June. He cannot be found by an allotment made late in November.

**4. If must be according to the mode prescribed or usual or reasonable time (Sec. 7 (2) :**

The proposer may lay down the manner of acceptance in his offer. In case the acceptance is not given in the prescribed mode, the proper may reject the acceptance and inform the offeree within a reasonable time. But he fails to do so, he shall be taken to have accepted the acceptance. If the proposer has not prescribed any mode of acceptance, the acceptance must be given in some usual and reasonable manner.

**Example :** An offer is made to take shares indicating that the answer is to come by a telegram. It is accepted but the acceptance is sent by an ordinary letter. The offerer can reject the acceptance as not being in the prescribed mode.

**5. The acceptance must be aware of the proposal at the time of the offer :**

Acceptance follows offer. In the acceptor is not aware of existence of the offer and conveys his acceptance, no contract comes into being. There must be a knowledge of the offer before anyone could consent to it. An act done in ignorance of the offer of a reward cannot be called an acceptance.

The leading case is :

**Lalman Shukla V Gauri Dutt (1913)**

'A' sold his business to his manager 'B' without disclosing the fact to his customers. 'C', a customer, who had a running account with 'A', sent an order for the supply of goods to 'A' by name. 'B' received the order and executed the same. 'C' refused to pay the price. It was held that there was no contract between 'B' and 'C' because 'C' never made any offer to 'B' and as such 'C' was not liable to pay the price to 'B'.

**6. Acceptance must be given before the offer lapses or before the offer is revoked :**

It means that acceptance must be made while the offer is in force i.e., before the offer has been revoked or offer has lapsed.

**7. Acceptance cannot be implied from silence :**

No contract is formed if the offeree remains silent and does nothing to show that he has accepted the offer.

The leading case on this point is :

**Brogdon V Metropolitan Railway Co. (1877)**

A draft agreement relating to the supply of coal was sent to the manager of a railway company for his acceptance. The manager wrote the word 'approved' on the agreement but by an oversight the document remained in his drawer. Held there was no contract as it was only mentally accepted and there was no expression of his mental determination.

Acceptance of a proposal may sometimes be inferred from silence or inaction. As a rule silence does not imply acceptance, but in the silence may be indicative of assent to the proposal.

## 2.7 REVOCATION OF ACCEPTANCE :

An acceptance can be revoked at any time before the communication of acceptance complete as against the acceptor, but not afterwards.

Where an acceptance is sent by post, it stands complete against the acceptor when the letter reaches offerer. It means that acceptance can be revoked before the letter actually reaches the offerer.

Therefore, the communication of revocation of acceptance can be revoked before the letter actually reaches the offerer.

Therefore, the communication of revocation of acceptance must reach the offerer before acceptance. But in English law once an acceptance given cannot be revoked at all.

## 2.8 SUMMARY :

According to Sec. 2 (e) every promise and every set of promises forming consideration for each other is called an agreement. A proposal when accepted by another party becomes a promise. Sec 2 (a) defines proposal or offer as “when one person signifies to another his willingness to do or to obtain from doing anything with a view to obtaining the assent of what other the such one act or he is said to make an offer.

When the person to whom the offer is made signifies his assent thereto, the offer is said to accepted (Sec. 2 (b)). Thus the acceptance is the consent of the party to whom the offer has been made to the establishment of legal relations between himself and the offerer. The acceptance required some important essentials, then only it is valid. The word ‘revocation’ means taking back. Both an offer as well as an acceptance may be revoked.

According to Sec. 5, a proposal may be revoked any time before its acceptance is complete as against the proposer but not afterwards. Revocation of an offer after its acceptance ineffective. According to Sec. 5, an acceptance may be revoked at any time before the communication of acceptance is completed as against the acceptor but not after words.

## 2.9 TECHNICAL TERMS :

Acceptance	:	The consent of the parties to whom the offer has been made
Revocation	:	Taking back of an offer or acceptance
Offer	:	A communication by one person to other of his willingness to do or abstain from doing with the objective of getting the acceptance of the other.

## 2.10 SELF - ASSESSMENT QUESTIONS :

1. Define offer. What are the essentials of a valid offer ?
2. What do you understand by the term “acceptance” ? What conditions must be fulfilled to convert a proposal into a promise.



3. Discuss the rules relating to offer, acceptance and revocation with suitable examples.
4. Acceptance is to an offer what a lighted match is to a train of gun-power.

### 2.11 REFERENCE BOOKS :

1. K.C. Garg and others, '*Business Law*', Kalyani Publishers, New Delhi, 2007.
2. S.N. Maheshwari and S.K. Maheshwari, '*Business Laws*', Himalaya Publishing House, New Delhi, 2004.
3. Bare Act, '*Indian Contract Act, 1872*'.
4. S.I. Inyengar, '*Mercantile Law*', S. Chand & Co, New Delhi,

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## LESSON - 3

# CONSIDERATION

### 3.0 OBJECTIVES :

On completion of this lesson, you should be able to understand

- ◆ the concept of consideration
- ◆ the essentials of consideration
- ◆ the stranger to contract
- ◆ no consideration no contract

### STRUCTURE :

- 3.1 Introduction
- 3.2 Definitions
- 3.3 Essentials of Valid Consideration
- 3.4 Stranger to Consideration
- 3.5 Importance of Consideration
- 3.6 No consideration no Contract - Exceptions
- 3.7 Summary
- 3.8 Technical Terms
- 3.9 Self-Assessment Questions
- 3.10 Reference Books

### 3.1 INTRODUCTION :

Consideration is the foundation of every contract. The law enforces only those promises which are made for consideration. Where one party promises to do something, it must get something in return. This 'something in return' is called consideration. Consideration is the life-blood of every contract. In the absence of consideration a promise or undertaking is purely gratuitous. However, sacred and binding in honour, it creates no legal obligation.

### 3.2 DEFINITIONS :

According to Pollock "Consideration is the price for which the promise of other is bought and the promise thus given for value is enforceable". According to English case 'Currie v Misa' as "Some right, interest, profit or benefit accruing to one party or some forbearance, detriment, loss or responsibility, given suffered or undertaken by the other". [(1875) 10 Ex. 162].

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

- a) when at the desire of the promisor
- b) the promise or any other person
- c) has done or abstained from doing, or does or abstains from doing, or promises to do or abstain from doing.
- d) something, such act or abstinence or promise is called a consideration for the promise.

### 3.3 ESSENTIALS OF VALID CONSIDERATION :

Following are the essential elements of consideration.

**1. It must move at the desire of the Promisor:**

The first essential element of consideration is that the act or abstinence must have been done at the desire of a third party cannot be a consideration. The desire of the promisor may be express or implied.

The leading case on this point is :

**Durga Prasad V Baldeo [1880]**

'D' promised to pay 'P' a commission on articles sold by him in a bazar in which he occupied a shop in consideration of 'P' having expended money in the construction of such bazar. The money had not been spent by 'P' at the request of 'D' but was spent by him at the desire of the collector of the district. In a suit by 'P' it was held that there was no consideration for the promise made by 'D' and hence no contract.

A promise to subscribe to a public or a charitable object is unenforceable because there is no benefit to the promisor. But where the other party has undertaken a liability on the faith of the promise made by the promisor, it is enforceable.

**2. It must move from the promisee or any other person :**

As long as there is a consideration for a promise, it is immaterial who has given it. It may move from the promisee, or if the promisor has no objection, from any other person. This is wider than the concept in England, where consideration can move only from the promisee. Consideration may move from a stranger but it must flow at the desire of the promisor.

The leading case is :

**Chinnayya V Ramayya (1882)**

An old lady made a gift of her property to her daughter with a direction to pay a certain sum of money to the maternal uncle by way of annuity. On the same day, the daughter executed a writing in favour of the brother agreeing to pay the amount. The daughter did not, however, pay the annuity and the uncle sued to recover it. It was held that there was sufficient consideration for the uncle to recover the money from the daughter.

**3. Consideration may be past, present or future :**

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

**Past Consideration :**

A looks after the children of 'B' at B's request. A year later 'B' agrees to pay a sum of Rs. 1,000/- for his services. For the promise of 'B', the services of 'A' will be taken as past consideration. When the promisor receives consideration simultaneously with his promise, the consideration is termed as 'present consideration'.

**Present Consideration :**

Ex : 'A' agrees to sell his car to 'B' for a sum of Rs. 90,000/-. 'B' pays money to 'A' at the time of making of the contract. Consideration will be taken as present for 'A'.

**Future Consideration :**

**Ex :** 'A' look after the children of 'B' and 'B' promises to pay 'A' all expenses incurred by him in this connection at the end of the year. Consideration is a future one for 'A'.

**4. It need not be adequate :**

It is nowhere laid down that the consideration should be adequate to the promise. Adequate is for the parties to decide at the time of making the agreement. Inadequacy of consideration is no ground for refusing the performance of the promise, unless it is evidence of fraud. It should be of some value in the eyes of law. Even a smallest consideration is sufficient provided it has some value.

**Ex :** A agrees to sell his house worth Rs. 10 lacs to 'B' for Rs. 10 thousand. As consent to the agreement was freely given, the agreement is a contract notwithstanding the inadequacy of the consideration.

**5. Consideration must be real :**

Though consideration need not be adequate yet it must be real and not illusory. Thus, a promise to do that which a person is by law bound to do, does not amount to consideration. Consideration has also to be competent. If it is physically impossible, vague or legally impossible, the contract cannot be enforced. Thus, a promise by a man to make two parallel meet is no good consideration.

A promise not to sue for a reasonable time is a good consideration. Similarly if a person compromises and agrees to accept a smaller sum in settlement of his claim, this would be sufficient consideration for the opposite party's promise to pay sum.

The leading case is :

**Indira Bai V Makrand, AIR 1931.**

A's husband did not give maintenance allowance to her which he had promised to pay. When she was about to sue her husband for this, husband requested her not sue and promised her to pay monthly maintenance allowance. It was held that A's forbearance to sue is a consideration for husband's agreement for payment of maintenance allowance.

**6. Consideration must be lawful :**

The consideration for an agreement must be lawful. An agreement is void, if it is based on unlawful consideration. The consideration of an agreement is lawful unless -

- i) it is forbidden by law; or
- ii) is of such a nature that if permitted it would defeat the provisions of any law; or
- iii) is fraudulent; or
- iv) involves or implies injury to the person or property of another; or
- v) the court regards it as immoral or opposed to public policy.

**Example :** A promise to obtain for 'B' an employment in the public service and 'B' promises to pay Rs. 1,000/- to A. The agreement is void as the consideration for it is unlawful.

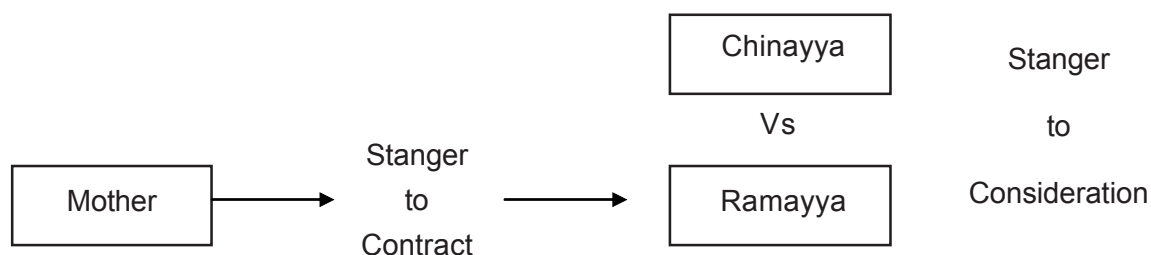
### 7. It must be something which the promisor is not already bound to do :

A promise to do what one is already bound to do, either by general law or under an existing contract, is not a good consideration for a new promise. There will be no detriment to the promisee or benefit to the promisor over and above their existing rights or obligations.

### 3.4 STRANGER TO CONSIDERATION :

Under the Indian Contract Act 1872 consideration for a contract may move from the promisee or any other person i.e., a stranger to the consideration can also enforce the contract. But under the English Law the consideration for the contract must move from the promisee and promisee only, therefore a strange to consideration cannot enforce it. So, in India the consideration may move from a stranger. This law was established in the case of : Chinayya V Ramayya

An old lady Lakshmi Rani gifted her property to her own daughter Ramayya, with the direction to pay a certain sum of money annually to Chinnayya, her maternal uncle. On the same day Ramayya executed an agreement with Chinnayya agreeing to pay the amount annually. Later on, Ramayya refused to honour the agreement on the ground that there is no consideration. Chinayya sued for the recovery of the annuity. It was held that there was sufficient consideration i.e., the property given to her by the sister of Chinayya.



### 3.5 IMPORTANCE OF CONSIDERATION :

Consideration is the foundation of every contract. The law insists on the existence of consideration if a promise is to be enforced as creating legal obligations. A promise without consideration is null and void. It is called a naked promise or 'Nudum Ractum'. Thus if 'A' promises to pay 'B' Rs. 10,000/- without anything in return, this constitutes a bare promise and gives no right of action.

### 3.6 NO CONSIDERATION NO CONTRACT EXCEPTIONS :

Every agreement to be enforceable at law must be supported by valid consideration. An agreement made without consideration is void and is unenforceable except in certain cases. Section 25 specifies the cases where an agreement through made without consideration will be valid. These are as follows :

**1. Natural love and affections [Sec. 25 (2)] :**

The mere existence of a near relation between the parties without the motivating force of natural love and affection will not render an agreement enforceable even though it is in writing and registered.

**2. Compensation for Services rendered [Sec. 25 (2)] :**

An agreement made without consideration may be valid if it is a promise to compensate wholly or in part a person who has already voluntarily done something for the promisor or something which the promisor was legally compellable to do.

**3. Time-barred debt [Sec. 25 (3)] :**

A promise to pay a time-barred debt is also enforceable.

**4. Agency [Sec. 185] :**

There is one more exception to the general rule. It is given in Section 185 which says that no consideration is needed to create an agency.

**5. Guarantee [Sec. 127] :**

A contract of guarantee is made without consideration.

**6. Remission [Sec. 63] :**

No consideration is required for an agreement to receive less than what is due. This is called remission in the law.

**3.7 SUMMARY :**

Consideration is the foundation of every contract. It means something accepted and agreed upon as a return or equivalent for the promise. According to the Contract Act the consideration is valid and enforceable by law when it has some important essentials. Contracts without consideration are void. But it has some exceptions, those are natural love and affection, compensation for services rendered, Time - barred debt agency, guarantee contracts and remission.

**3.8 TECHNICAL TERMS :**

1. Consideration : some thing accepted and agreed upon as a return.
2. Past Consideration : Consideration received by the promisor before the date of the promise.
3. Present Consideration : The consideration received by the promisor simultaneously with this promise.
4. Future Consideration : Consideration to be received by the promisor in future for his present promise.

**3.9 SELF - ASSESSMENT QUESTIONS :**

1. Define consideration ? Explain the essentials of valid contract.
2. Consideration is present, past and future. Explain with suitable examples.

3. An agreement without consideration void. Explain the exemptions.
4. No consideration - No Contract - Comment.
5. A stranger to consideration can sue, but a stranger to contract cannot sue, comment.

### 3.10 REFERENCE BOOKS :

1. S.N. Maheswari & S.K. Maheshwari, *Business Laws*, Himalya Publishing House, New Delhi, 2004.
2. *Contract Act 1872*, Bare Fet.
3. K.C. Garg & Others, *Business Laws*, Kalyani Publishers, New Delhi, 2007.

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## LESSON - 4

# CAPACITY OF PARTIES

### 4.0 OBJECTIVES :

On completion of this lesson, you should be able :

- ◆ to learn which parties competence to enter into valid contract
- ◆ to learn which parties / persons are incompetent to contract
- ◆ disqualify by status
- ◆ disqualify by mental status - Minors
- ◆ disqualified by unsound mind
- ◆ persons disqualified by any law to which they are subject matter

### STRUCTURE :

- 4.1 Introduction
- 4.2 Competent parties to enter a valid contract
- 4.3 Incompetent Parties
- 4.4 Minor Agreements
  - 4.4.1 Effects of minor's agreement
- 4.5 Persons of unsound mind
- 4.6 Persons disqualified from contracting by any other law
- 4.7 Summary
- 4.8 Technical Terms
- 4.9 Self-Assessment Questions
- 4.10 Reference Books

### 4.1 INTRODUCTION :

For a valid contract, the parties to a contract must have capacity i.e, competence to enter into a contract. Every person is presumed to have capacity to contract but there are certain persons whose age, condition or status renders them incapable of binding themselves by a contract in capacity must be proved by the party claiming the benefit of it and until proved the ordinary presumption remains.

### 4.2 COMPETENT PARTIES :

Section 11 of the Contract Act deals with the competency of parties and provides that, every person is competent to contract who is the age of majority (Eighteen year completed) according to the law to which he is subject, and who is of sound mind and is not disqualified from contracting by any Law.

### 4.3 Incompetent Parties :

That the following persons are incompetent to enter into the contract.

- a) Minors : Below 18 years
- b) Reason of unsound mind : Idiocy, lunacy or insanity, drunkenness, hypnotism, mental decay.

- c) Other persons : 1) Alien enemies, 2) Ambassadors and foreign sovereign, insolvents, convict, corporations, married women, professional persons.

#### 4.4 MINOR AGREEMENTS :

An infant or a minor is a person who is not a major. According to the Indian Majority Act, 1875, a minor is one who has not completed his or her 18th year of age. A person attains majority on completing his 18th year in India. In the following two cases, a person continues to be a minor until he completes the age of 21 years.

- a) Where a guardian of a minor person or property has been appointed under the Guardians and Wards Act, 1890 or  
b) Where the superintendence of a minor's property is assumed by a court of wards.

An amendment to this act was made by Indian Majority (Amendment) Act, 2000 which fixed uniform age of majority as 18 Years irrespective of the fact whether any guardian has been appointed but president's assent to the act has yet to be obtained.

#### 4.4.1 EFFECTS OF MINOR'S AGREEMENT :

A minor's agreement being void is wholly devoid of all effects. When there is no contract there should be no contractual obligation on either side. The various rules regarding minor's agreement are discussed in the lesson :

##### 1. An agreement with or by a minor is void :

Section 10 of the Contract Act requires that the parties to a contract must be competent and Section 11 says that a minor is not competent.

##### The leading case is :

Mohari BIBI V. Dharmo Das Ghose (1903)

"A minor borrowed Rs. 20,000/- from 'B' and as a security for the same executed a mortgage in his favour. He became a major a few months later and filed a suit for the declaration that the mortgage executed by him during his majority was void and should be cancelled. It was held that a mortgage by a minor was void and B was not entitled to repayment of money".

##### 2. No ratification :

An agreement with minor is completely void. A minor cannot ratify the agreement even on attaining to authorise an act cannot give it validity by ratifying it.

##### 3. Minor can be a promisee or beneficiary :

If a contract is beneficial to a minor it can be enforced by him. There is no restriction on a minor from being a beneficiary, for example, being a payee or a promisee in a contract. Thus a minor is capable of purchasing immovable property and he may sue to recover the possession of the property upon tender of the purchase money. Similarly a minor in whose favour a promissory note has been executed can enforce it.

The leading case is :

Raghava Chariar V Srinivasa

A mortgage was executed in favour of minor, and it was held that he could get a decree for enforcement.



**4. No estoppel against a minor :**

Where a minor by misrepresenting his age has induced the other party to enter into a contract with him, he cannot be made liable on the contract. There can be no estoppel against a minor.

The leading case is :

Sadiqui Alikhan V Jai Kishore

It was held that a rule of estoppel cannot be applied against a minor. This does not mean that the minor should be allowed to retain the benefit of his own fraud. But in India, it was held that the court can direct the minor to pay back compensation to other party in such cases.

**5. No specific performance except in certain cases :**

A minor's contract being absolutely void, there can be no question of the specific performance of such a contract. A Guardian of a minor by an agreement for the purchase of immovable property; so the minor cannot ask for the specific performance of the contract which the guardian had no power to enter into.

But a contract entered into by the guardian or manager on minor's behalf can be specifically enforced if

1. The contract is within the authority of the guardian or manager.
2. It is for the benefit of the minor.

The leading case is :

Lalchand V Narhar

A bond was executed by widow acting as guardian of her minor son for the payment of her deceased husband's debts, the minor's estate can be held liable for the payment as per the bond.

**6. Liability for Torts :**

A tort is a civil wrong. A minor is liable in tort unless the tort in reality is a breach of contract. But a minor cannot be made liable for a breach of contract by framing the action on tort. You cannot convert a contract into a tort to enable you to sue an infant.

**7. No insolvency :**

A minor cannot be declared insolvent as he is incapable of contracting debts and dues are payable from the personal properties of minor and he is not personally liable.

**8. Partnership :**

A minor being incompetent to contract cannot be a partner in a partnership firm, but under Sec. 30 of the Indian Partnership Act, he can be admitted to the benefits of the partnership.

**9. Minor can be an agent :**

A minor can act as an agent. But he will not be liable to his Principal for his acts. A minor can draw, deliver and endorse negotiable instruments without himself being liable.

**10. Minor as Shareholder :**

A minor, being incompetent to contract cannot be a shareholder of the company.

**11. Surety for a minor :**

In a contract of guarantee when an adult stands surety for a minor then he (adult) is liable to third party as there is direct contract between the surety and the third party.

**12. Liability for necessities :**

The case of necessities supplied to a minor or to any other person whom such minor is legally bound to support is governed by Section 68 of the Indian Contract Act. A claim for necessities supplied to a minor is enforceable by law. But a minor is not liable for any price that he may promise and never for more than the value of the necessities. There is no personal liability of the mind, but only his property is liable.

The leading case is :

Nash. V Inman

Inman an infant undergraduate in Cambridge bought eleven fancy waistcoats from Nash. He was at the time adequately provided with clothing. Held the waistcoats were not necessary and the price could not be recovered. Thus, the case is void.

Certain services rendered to a minor have been held to be 'necessaries'. These include education, medical advice, a house given to a minor on rent for the purpose of living and continuing his studies, etc.

**4.5 PERSONS OF UNSOUND MIND :**

As per Section 11 of Contract Act, for a valid contract each party to the contract must have a sound mind. Contracts made by persons of unsound mind are void.

Unsoundness of mind may arise from :

- i) Idiocy : An idiot is a person with no intervals of sanity. He is incapable. His mental powers of understanding even ordinary matters are absent because of lack of development of brain. The agreement with an idiot is void.
- ii) Lunacy or Insanity : It is a disease of brain. A person loses the use of his reason due to some mental strain or disease.
- iii) Drunkenness : It produces temporary incapacity till the man is under the effect of intoxication creating impairment of mind. He stands on the same footing as a lunatic.
- iv) Hypnotism : It also produces temporary incapacity till the person is under the impact of artificially induced sleep.
- v) Mental decay : It is on account of old age etc. Thus, an agreement with person of unsound mind is void.

**4.6 PERSONS DISQUALIFIED FROM CONTRACTING BY ANY OTHER LAW :**

It refers to statutory disqualifications imposed on certain persons in respect of their capacity to contract

**1. Alien enemies :**

An alien is competent to contract with citizens of India living in India. He can maintain an action on a contract entered into by him during peace time. But if a war is declared, an alien enemy cannot enter into any contract with an Indian citizen.

**2. Foreign Sovereigns ambassadors :**

These persons are immune from the jurisdiction of local courts. These persons have a right to contract but can claim the privilege of not being sued.

**3. Insolvents :**

An insolvent cannot enter into a contract as his property vests in the official receiver or official assignee. This disqualification of an insolvent is removed after he is discharged.

**4. Convict :**

A convict while undergoing imprisonment is incapable of entering into a contract. But this disability comes to an end on the expiry of the sentence.

**5. Corporations :**

A corporation is an artificial person recognised by law. It exists only in the eyes of law. It is competent to enter into a contract only through its agents.

**6. Married women :**

A woman is competent to enter into a contract. Marriage does not affect the contractual capacity of a woman. She can even find her husband in cases of pressing necessity. A married woman may sue or be sued in her own name in respect of her separate property.

**7. Professional Persons :**

Doctors and advocates are included in this class. In India these personal disqualifications do not exit. According to the Bar Council Act 1927, an advocate of the High Court can enter into a contract with his client and can also bring a suit against him for his fees.

**4.7 SUMMARY :**

According to 1872 Contract Act, the capacity of parties has an essential pre-request. For a valid contract, the parties to a contract must have capacity i.e., competence to enter into a contract. Section 11 of the Contract Act deals with the competence of parties. When a person having age of majority and who is of sound mind is competence to enter into a contract. Therefore, those persons are - Minors, persons of unsound mind, and persons disqualified by any law to which they are subject. These contracts entered into by the above persons are void.

**4.8 TECHNICAL TERMS :**

1. Minor : A minor is one who has not completed his / her 18th Year of age.
2. Major : A person attains majority on completing his / her 18 year of age in India.
3. Convict : A person undergoing imprisonment is incapable of entering into a contract.
4. Insolvent : Ones property vests in the official receiver or official assignee.

**4.9 SELF - ASSESSMENT QUESTIONS :**

1. Parties to a contract must be competent to contract. Explain.
2. Discuss the provisions of law relating to contracts by minors.
3. Discuss the law relating to contracts by persons of unsound mind.

**4.10 REFERENCE BOOKS :**

1. K.C. Garg & Others, *Business Laws*, Kalyani Publishers, New Delhi, 2007.
2. S.N. Maheswari & S.K. Maheshwari, *Business Laws*, Himalya Publishing House, New Delhi, 2004.
3. N.D. Kapoor, *Mercantile and Industrial Law*, Sultan Chand & Sons, New Delhi, 2000.
4. Contract Act, 1872, Bare Act.

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## LESSON - 5

# FREE CONSENT

### 5.0 OBJECTIVES :

On completion of this lesson, you should be able to :

- ◆ know the meaning and definition of consent
- ◆ know the free consent
- ◆ circumstances when consent is not free
- ◆ understand the terms, coercion, undue influence, fraud, misrepresentation and mistake

### STRUCTURE :

- 5.1 Introduction
- 5.2 Meaning of Free Consent
- 5.3 Circumstances when consent is not free
- 5.4 Coercion
- 5.5 Undue influence
- 5.6 Fraud
- 5.7 Misrepresentation
- 5.8 Mistake
- 5.9 Summary
- 5.10 Technical Terms
- 5.11 Self-Assessment Questions
- 5.12 Reference Books

### 5.1 INTRODUCTION :

Free Consent of all the parties to a contract is one of the essential elements of a valid contract as per requirement of Section 10. The parties to a contract should have identity of minds. This is called “consensus ad idem” in English Law. A contract which is valid in all other respects may still fail because there is no real consent to it by one or both of the parties.

### 5.2 MEANING AND DEFINITION OF FREE CONSENT :

Section 13 of Contract Act, two or more persons are said to consent when they agree upon the same thing in the same sense.

Not only the parties to a contract should have identity of mind but the consent of the parties must also be real and free. Free consent is an essential requisite of a valid contract. Free consent is the consent which has been obtained by the free will of the parties out of their own accord.

### 5.3 CIRCUMSTANCES WHEN CONSENT IS NOT FREE :

According to Section 14, consent is said to be free when it is not caused by -

1. Coercion or 2. undue influence or 3. Fraud or 4. Misrepresentation or 5. mistake.

When consent to an agreement is caused by coercion, undue influence, misrepresentation or fraud, the contract is voidable at the option of the party whose consent was so caused. But when consent is caused by mistake, the agreement is void,

#### 5.4 COERCION :

In simple words, coercion is threat or force used by one party against another for compelling him to enter into an agreement. Section 15 of the Indian Contract Act defines coercion or the committing or threatening to commit any act forbidden by the Indian Penal Code or an unlawful detaining or threatening to detain, any property to the prejudice of any person with the intention of inducing any person to enter into an agreement.

**The leading case is : Ranganayakamma V Alwar (1889)**

- A girl of 13, last her husband and her husbands relatives refused to have the husband's corpse removed unless she adopted one child of their choice. It was held that the adoption was not bringing on her as her consent was obtained under Coercion within the meaning of Section 15 since any person who obstructed a dead body from being removed would be guilty of an offence under Section 297 of the Indian Penal Code.

**Duress :** Coercion in India is know as duress in England. If the consent of the other party to a contract is obtained under fear caused by threats of bodily harm, it is known as the use of duress. The scope of the term coercion is wider than the term duress.

#### 5.5 UNDUE INFLUENCE :

Sometimes the parties to an agreement are so related to each other than one party is in a position to dominate the will of the other. One party is compelled to enter into an agreement against his will as a result of 'Undue influence' exerted by the other party who is in dominating position. Section 16 of the Indian Contract Act provides that, "a consent is said to be induced by 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 use the position to detain an unfair advantage over the other.

**The leading case is - Rane Annapurni V Swaminatha**

A poor Hindu widow who was in dire need of money, was forced by a money lender to agree to pay 100 percent rate of interest. It was held to be a case of exerting undue influence upon a person in mental distress. The court reduced the rate of interest to 24 percent.

**Effect of Undue influence :** When consent to an agreement is caused by undue influence, the agreement is a contract voidable at the option of the party whose consent was so caused.

#### 5.6 FRAUD :

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

According to Section 17, fraud means and includes any of the following acts done with intent to deceive or to induce a person to enter into a contract.

1. A false suggestion as to a fact known to be false or not believed to be true.
2. The active concealment of fact by one having knowledge or belief of fact.
3. A promise made without any intention of performing it.
4. Any other act fitted to deceive.
5. Any such act or omission as the law specially declares to be fraudulent.

**ELEMENTS OF FRAUD :**

1. The fraud must have been committed by a party to the contract or with his convenience or by his agent. Fraud by a stranger to contract does not affect its validity.
2. There must be any one of the above mentioned ingredients in Act of fraud.
3. The Act of fraud must have been committed with intent to deceive and must actually deceive.
4. The other party must have suffered a loss.
5. The representation must have been aimed at the other party to the contract or his agent or with a view to induce the other party to enter into the contract.

**MERE SILENCE IS NOT FRAUD :**

A party to the contract is under no obligation to disclose the whole truth to the other party. "Caveat Emptor" i.e., let the buyer beware is the rule applicable to contracts. There is no duty to speak in such cases and silence does not amount to fraud. Similarly, there is no duty to disclose facts which are within the knowledge of both the parties.

**Example :** Wood v Hobbs (1878) : H sold to W some pigs which were to his knowledge suffering from fever. The pigs were sold with all faults and H did not disclose the facts of fever to 'W'. Held there was not fraud.

**SILENCE IS FRAUD :** Where the circumstances of the case are such that it is the duty of the person observing silence to speak - for example in contracts of utmost good faith.

**EFFECT OF FRAUD :** When consent to an agreement is caused by fraud, the agreement is a contract voidable at the option of the party whose consent was so caused. A party whose consent to an agreement was caused by fraud has two remedies namely :

- a. he may rescind the contract or
- b. he may insist that the contract shall be performed and that he shall be put in the position in which he would have been, if the representation made had been true.

**5.7 MISREPRESENTATION :**

The word 'representation' means a statement of fact made by one party to the other before or at the time made by one party to the other before or at the time contract is made with regard to some existing fact or some past event which materially induces the formation of the agreement. A wrong representation when made innocently is misrepresentation.

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

**ESSENTIAL REQUIREMENTS OF MISREPRESENTATION :**

- i. There should be a representation or assertion.
- ii. Such representation must relate to a matter of fact which has become untrue; and
- iii. It was made before the finalisation of transaction with a view to induce the other party to enter into a contract.
- iv. It must actually have been acted upon by the party.
- v. It must have been made either by the party himself or by his duly authorised agent.

## CONSEQUENCES OF MISREPRESENTATION :

When a misrepresentation has been made, the aggrieved party has the following alternative courses open to him.

- i. He may avoid or rescind the contract; or
- ii. He may affirm the contract and insist on the misrepresentation being made good;
- iii. He may rely upon the misrepresentation, as a defence to an action on the contract.

When the consent is induced by misrepresentation and the aggrieved party has the means of discovering the truth with ordinary diligence, the contract cannot be set aside.

**Ex :** 'A' by misrepresentation leads 'B' erroneously to believe that 500 mounds of indigo are made annually at 'A's factory. B examines the accounts of the factory, which show that only 400 mounds of indigo have been made. After this, B buys the factory. The contract is not voidable on account of A's misrepresentation, because 'A' had the means of discovering the truth with ordinary diligence.

## 5.8 MISTAKE :

Mistake may be defined as an erroneous belief concerning something. It means that parties intending to do one thing have by intentional error done something else. It is a slip made not by design but by mis-chance. Mistake may be of two types. 1. Mistake of Law, 2. Mistake of fact.

**1. Mistake of Law :** May be three types.

- a. Mistake of general law of the country.
- b. Mistake of foreign law
- c. Mistake of private rights of a party relating to property and goods etc.

**a. Mistake of general law of the country :**

The contract is binding because everybody is supposed to know the law of the country. The maxim *ignorantia Juris non excusat* (ignorance of law is no excuse) is applicable and the party cannot be allowed any relief on that ignorance. According to Section 21, "a contract is not voidable because it was caused by a mistake as to any law in force in India.

**Example :** A and B make a contract under the impression that a particular debt is barred by law of limitation. The contract is valid.

## MISTAKE OF FOREIGN LAW AND PRIVATE RIGHTS OF A PROPERTY RELATING TO PROPERTY AND GOODS ETC. :

These are treated as mistake of fact. Here the agreement will be void in case of bilateral mistake only.

### MISTAKE OF FACT

Mistake of fact may be either bilateral mistake or mistake of only one party i.e., unilateral mistake.

**Bilateral Mistake :** A mistake of fact in the minds of both the parties negatives consent and the contract becomes void. Section 20 provides that 'where both the parties to an agreement are under a mistake as to a matter of fact, essential to the agreement, the agreement is void.

Four conditions must be fulfilled before a contract can be avoided on the ground of mistake. These conditions are :



- a. There must be mistake as to the formation of contract.
- b. The mistake must be of both the parties, i.e., bilateral and not unilateral.
- c. It must be mistake of fact and not of law.
- d. It must be about a fact essential to the agreement.

**The leading case is : Galloway V. Galloway (1914)**

A man and a woman made a separation deed under which the man agreed to pay a weekly allowance to which the man agreed to pay a weekly allowance to the woman under a mistaken assumption that they were lawfully married. It was held that the agreement was void as there was common mistake on a point of fact which was material to the existence of the agreement. However, an erroneous opinion as to the value of the thing which forms subject matter of the agreement is not deemed to be a mistake as to a matter of fact.

The cases falling under bilateral mistakes are :

**1. Mistake as to the subject - matter :**

Mistake as to a subject-matter falls into six heads, namely a) existence, b) identity, c) title, d) price, e) quantity, f) quality.

**2. Mistake as to the possibility of performing the contract :**

**a. Physically impossibility :** A contract for the hiring of a room for witnessing the coronation procession was held to be void because unknown to the parties the procession had already been cancelled.

**b. Legal impossibility :** An agreement is void if it provides that something should be done while cannot legally be done. Thus a person cannot take lease of his own land.

**UNILATERAL MISTAKE :**

Section 22 provides that if one party alone is under a mistake of fact, the contract is not rendered voidable. In other words, while bilateral mistakes render a contract void, unilateral mistake is of no account. When the contract is clear, mistake of one of the parties cannot affect it. If a man due to his own negligence or lack of reasonable care does not ascertain what he is contracting about, he must face the consequences.

**The leading case is : HIGGINGS Ltd. Vs Northampton Corporation (1927)**

'H' contracted with the 'N' Corporation to build a number of houses. In calculating the cost of the houses, 'H' by mistake deducted a particular sum twice and submitted his estimates accordingly. The corporation agreed to the terms which were naturally lower than actual cost. It was held that the agreement was binding even though it was based upon erroneous estimates.

**5.9 CONCLUSION :**

Consent means the parties must have agreed upon the same thing in same sense". According to Sec. 13 "Two or more persons are said to consent when they agree upon the same thing in same sense". This is called consensus ad idem in English Law. According to Section 14, consent is said to be free when it is not caused by :



1) Coercion or 2) undue influence or 3) Fraud or 4) Mis-representation or 5) Mistake.

### 5.10 TECHNICAL TERMS :

- Consent : Agreeing upon the same thing in the same sense by the parties concerned.
- Fraud : International misrepresentation of facts
- Free Consent : Consent is said to be free when it is not caused by coercion, under influence fraud, misrepresentation.

### 5.11 SELF -ASSESSMENT QUESTIONS :

1. Explain when a consent is not said to be free. What is effect of such consent on the formation of the Contract ?
2. Distinguish between coercion and undue influence illustrate your answer.
3. State the effect of mistake on validity of contract.
4. Distinguish between fraud and misrepresentation.

### 5.12 REFERENCE BOOKS :

1. K.C. Garg and others, '*Business Law*', Kalyani Publishers, New Delhi, 2007.
2. S.N. Maheshwari and S.K. Maheshwari, '*Business Laws*', Himalaya Publishing House, New Delhi, 2004.
3. N.D. Kapoor; '*Business Laws*', Sultan Chandra Sons, New Delhi, 2000.

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## LESSON - 6

# LEGALITY OF THE OBJECT

### 6.0 OBJECTIVES :

On completion of this lesson, you should be able to :

- ◆ know the difference between consideration and object
- ◆ identify the cases where the objects and consideration of an agreement are unlawful.

### STRUCTURE :

- 6.1 Introduction
- 6.2 Unlawful Consideration and Object
- 6.3 Agreements opposed to Public Policy
- 6.4 Agreements, the consideration or object of which is unlawful in part.
- 6.5 Recovery of benefits given under illegal agreements
- 6.6 Summary
- 6.7 Technical Terms
- 6.8 Self-Assessment Questions
- 6.9 Reference Books

### 6.1 INTRODUCTION :

According to Section 23 Indian Contract Act, an agreement of which the object or consideration is unlawful is void. Object means purpose or design of the contract. It implies the manifestation of intention. Thus, if a person, while in insolvent circumstances transfers to another for consideration some property with the object of defrauding his creditors, the consideration of the contract is lawful but the object is unlawful. Both the object and consideration of agreement must be lawful, otherwise the agreement would be void. The word 'lawful' means 'permitted by law'. Section 23 of the Contract Act speaks as the things :

1. Consideration for the agreement
2. Object for the agreement; and
3. Agreement

### 6.2 UNLAWFUL CONSIDERATION AND OBJECT :

The consideration or the object an agreement unlawful 1) when it is forbidden by law, 2) If it is fraudulent, 3) If the court regards it as immoral, 5) It is being opposed by Public policy.

#### 1. If it is forbidden by Law :

If the consideration or object for a promise is such as is forbidden by law, the agreement is void. It is forbidden by law, if the legislature penalises it as prohibitory. It is illegal and cannot become valid even if the parties act according to such agreement. Section 26, 27, 28 and 30 of the contract Act deal with cases where the consideration or object if an agreement is considered unlawful.

#### 2. If it is fraudulent :

Agreements which are entered into to promote fraud are void. Thus, an agreement for the sale of goods for the purpose of smuggling them out of the country is void and the price of the goods so sold, cannot be recovered.

**3. If the court regards it as immoral :**

Where the consideration or object of an agreement is such that the court regards it as immoral, the consideration is void. The word immoral means inconsistent with what is right.

**4. It is being opposed by Public Policy :**

Public Policy is that principle of law which holds that no citizen can lawfully do that which has a tendency to be injurious to the public. Any agreement which tends to promote corruption or injustice or is against the interests of the public is considered to be opposed to public policy.

**6.3 AGREEMENTS OPPOSED TO PUBLIC POLICY :****1. Trading with enemy :**

Trading with enemy is clearly against public policy in so far as it helps the enemy to the detriment of the country. Besides, it is against national honour to indulge in such acts in times of national emergency. But where a contract is made during peace times and their war breaks out, one of the two things may result. Either the contract is suspended or it stands dissolved depending upon the intention of the parties.

**2. Stibling Prosecutions :**

It is in public interest that criminals should be prosecuted and punished. An agreement to stifle or prosecution i.e., to prevent proceedings already instituted from running their normal course or to compromise a prosecution is illegal and void. Further, the withdrawal of prosecution with good motive, for example, for providing relief to the victims of a disaster was not considered to be against public policy by the Supreme Court. [Union Carbide Corporation V Union of India (1991)]

**3. Maintenance and Champerty :**

Maintenance may be defined as an agreement whereby a person promises to maintain a suit in which he has no interest. Champerty is an agreement whereby a person agrees to assist another in litigation in exchange of a promise to hand over a portion of the proceeds of the action.

The agreement for supplying funds by way of 'maintenance' or champerty is valid, unless :

- a) It is unreasonable so as to unjust to the other party or,
- b) It is made by a malicious motive like that of gambling in litigation or oppressing other party by encouraging unrighteous suits, and not with the bonafide object of assisting a claim believed to be just.

**4. Traffic relating to public offices :**

Agreements concerning the sale of public offices are bad as they promote corruption. Sec.6(f) of the transfer of property Act provides that a public office cannot be transferred nor can be salary of a public officer.

**5. Agreements tending to create interest opposed to duty :**

An agreement which tends to create an interest in favour of a person which would conflict with his duty is illegal on the ground that it is opposed to public policy. It is the essence of public policy that a servant must not be deterred from doing his duty. Thus an agreement by a person in Government Service for the purchase of land situated within his circle is illegal as opposed to public policy.

**6. Marriage brocage Agreements :**

A marriage brocage agreement is an agreement whereby a person promises for reward to procure the marriage of another. Such agreements are void being against public policy.

**7. Agreements tending to create monopolies :**

Any agreement to create monopoly is void as opposed to public policy. There can be monopoly right given to one person to the exclusion of others, in matters like selling of vegetables.

**8. Agreements to influence elections to Public Offices :**

Any agreement with voters tending to influence them by improper means and agreement with third persons to influence voters by indirect means are all invalid. Similarly an agreement between rival candidates that one shall withdraw in condition of a promise by the other to oppose him to office is void.

**9. Agreement in restraint of personal liberty :**

A contract which restricts the liberty of an individual is illegal.

Example : 'A' borrowed money from a money lender and agreed that he would not without the lender's written consent leave his job, borrow money dispose of his property or move from house. It was held that the contract was illegal as it unduly restricted the liberty of 'A'. Harwood V Millers, Timber and Trading Company (1917).

**10. Agreements interfering with marital duties :**

Agreements which interfere with the performance of marital duties are void as being opposed to public policy. Thus an agreement to lend money to a woman in consideration of her getting a divorce and marrying the lender is void.

**6.4 AGREEMENTS, THE CONSIDERATION OR OBJECT OF WHICH IS UNLAWFUL IN PART :**

Agreements of which consideration or object is unlawful in part, are subject to the following rules :

1. If the legal part of the agreement cannot be separated from the illegal part there :
  - a) if there are several objectives but a single consideration the agreement is void if any of the objects is unlawful (Sec. 24)
  - b) if there is a single object but several considerations, the agreement is void if any one of the considerations is unlawful (Sec. 24)

**Example :** 'A' promises to superintend on behalf of 'B' a legal manufacture of Indigo, and an illegal traffic in other articles. 'B' promises to pay to 'A' a salary of 10,000 rupees a month. The agreement is void, the object of A's promise and the consideration for B's promise being in part unlawful.

2. Where there is a receiprocal promise to do things legal and also other things illegal, and the legal part can be separated from the illegal part, the legal part is a contract and the illegal part is a void agreement (Sec. 57).

**Example :** 'A' and 'B' agree that 'A' shall sell to 'B' a house for Rs. 1 lack but that if 'B' used it as a place for gambling, he shall pay Rs. 2 lacks for it to 'A'. The first part of the agreement shall be valid and binding but the second part shall be void and unenforceable.

3. In the case of an alternative promise, one branch of which is legal and the other illegal the legal branch alone can be enforced.

**Example :** 'A' and 'B' agree that 'A' shall pay 'B' Rs. 1000/- for which 'B' shall afterwards deliver to 'A' either rice or smuggled opium. There is a valid contract to deliver rice and a void contract as to opium.

### 6.5 RECOVERY OF BENEFITS GIVEN UNDER ILLEGAL AGREEMENTS :

Money paid or property transferred under an illegal agreement is irrecoverable except in the following cases :

- i. where the transferor is not equally guilty with the other party, i.e., transferee.
- ii. where the transferor repents of making the agreement before any part of the illegal purpose is carried out.
- iii. where the transferee was under a fiduciary duty to protect the plaintiff interests and had abused his duty by making the illegal agreement.

### 6.6 SUMMARY :

Consideration for a contract is different from its 'object'. Consideration is the act, abstinence or promise made at the desire of the promisor whereas the 'object' is the purpose for which the agreement is entered into. In order to make the contract valid both consideration and object of the contract should be lawful. An agreement, the consideration or the object of which is not lawful, cannot be enforced by law. This is because courts will not allow polluted hands to touch the pure foundations of Justice.

### 6.7 TECHNICAL TERMS :

1. Object : The purpose for which an agreement is made
2. Public Policy : A principle providing that no person can lawfully do what which has a tendency to be injurious to the public or to the public good.

### 6.8 SELF - ASSESSMENT QUESTIONS :

1. In what cases the consideration and object of an agreement are said to be unlawful ?
2. A contract shall not be enforced if the court regards it as opposed to public policy, Discuss?
3. Discuss how far agreements in restraints of trade are enforceable in India ?

### 6.9 REFERENCE BOOKS :

1. S.N. Maheswari & S.K. Maheshwari, *Business Laws*, Himalya Publishing House, New Delhi, 2004.
2. K.C. Garg & Others, *Business Laws*, Kalyani Publishers, New Delhi, 2007.

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## LESSON - 7

# CONTINGENT CONTRACTS

### 7.0 OBJECTIVES :

On completion of this lesson, you should be able to understand

- ◆ the meaning of a contingent contract
- ◆ the characteristics of a contingent contract
- ◆ differentiate between a contingent contract and a wagering agreement.
- ◆ Essentials of valid acceptance

### STRUCTURE :

- 7.1 Introduction
- 7.2 Meaning of Contingent Contract
  - 7.2.1 Collateral Event
- 7.3 Essential Characteristics
- 7.4 Rules Regarding Performance
- 7.5 Contingent Contract and Wagering Agreement
- 7.6 Summary
- 7.7 Technical Terms
- 7.8 Self-Assessment Questions
- 7.9 Reference Books

### 7.1 INTRODUCTION :

Contingent Contracts 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.

It is a sort of conditional contract in which the performance becomes due only upon the happening as non-happening of some events which is uncertain in nature.

**Ex :** A contract to pay 'B' Rs. 10,000/-, if B's house is burnt. This is a contingent contract. All contracts of insurance (except Life Insurance) guarantee and indemnity are contingents contracts.

### 7.2 MEANING OF CONTINGENT CONTRACT :

A contract may be (1) Absolute, (2) Contingent.

**An absolute Contract** is one where the promisor undertakes to perform the contract in all events.

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 (Sec. 31).

### Example :

- 1) On 1st January, 'A' agrees with 'B' that he will sell his car to him for Rs. 70,000/- on the 15th January. This is an Absolute Executory Contract. In all circumstances both the parties must perform their respective obligations.

- 2) A promises, to pay, B Rs. 10,000/-, if B's house is burnt. The performance of the contract depends on a future event. It is, therefore, also a Contingent Contract.

### 7.2.1 COLLATERAL EVENT :

In a Contingent Contract, the even on which the performance of the contract depends is only collateral to the contract. It is an event regarding which neither of the parties makes any promise. It is important only because it marks the moment of which the rights created by the contract become enforceable.

The Act does not define the term ' Collateral Event'. But on the whole it seems to mean 'an event which is neither a performance directly promised as part of the contract, nor the whole of the consideration for a promise.

**Ex :** 'B' agrees to marry 'C' and 'A' in consideration of this agrees to pay B sum of Rs. 80,000/-. In this case each party has given a promise to another party and one's promise is consideration for the other. In case a party fails to perform his part, the other can have recourse to legal remedies. The performance of the contract does not depend on a collateral event. This is, therefore, not a contingent contract.

### 7.3 ESSENTIAL CHARACTERISTICS :

The essential characteristics of a contingent contract are :

1. The performance of the contract depends upon the happening or non-happening of a certain event in future.
2. The event is uncertain. If the event is bound to happen, the contract is due to be performed in every case, and therefore, it will not amount to a contingent contract.
3. The uncertain future event is collateral to the contract.

Contracts of insurance, contracts of indemnity and guarantee etc., are some of important examples of contingent contracts.

### 7.4 RULES REGARDING PERFORMANCE :

The rules regarding the performance of the contingent contracts are contained in Secs. 32 to 36 of the Contract Act, these rules are given below :

1. Contingent Contracts 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 (Sec. 32).

**Ex :** A makes a contract with B to buy B's house if 'A' survives 'C'. This contract cannot be enforced unless and until 'C' dies in A's life time.

2. Contingent contracts 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 (Sec.33).

**Ex. :** 'A' agrees to pay 'B' a sum of money if a certain ship does not return. The ship is sunk. The contract can be enforced when the ship sunks.



3. If a contract is contingent upon how a person will act at an unspecified time, that 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.  
**Ex. :** 'A' agrees to pay 'B' sum of money if 'B' marries 'C'. 'C' marries 'D'. The marriage of "B" to 'C' must now be considered impossible, although it is possible that 'D' may die and that 'C' may afterwards marry 'B'.
4. Contingent contracts to do or not to do anything, if a specified uncertain event happens within a fixed time, become void if, at the expiration of the time fixed, such event has not happened or if, before the time fixed, such event becomes impossible (Sec. 35).  
**Ex :** 'N' promises to pay 'O' a sum of money if a certain ship does not return within a year, or is burnt within the year. The contract may be enforced if the ship does not return within a year, or is burnt within the year.
5. Contingent agreement 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 (Sec. 36).  
**Ex :** 'Z' agrees to pay 'X' Rs. 10,000/- if 'X' will marry 'Z's daughter 'Y'. 'Y' was dead at the time of agreement. The agreement is void.

### 7.5 CONTINGENT CONTRACT AND WAGERING AGREEMENT :

1. **Contingent Contract means** - A Contingent Contracts may not consist of reciprocal promises.  
**Wagering Agreement means** - A Wagering agreement consists of reciprocal promises. The performance of promise by each party, depends of the happening of an uncertain event.
2. Every Wagering Agreement is of a contingent nature, while every contingent contract is not a wagering nature.
3. In case of a wagering agreement the parties to the agreement have no other interest in the subject matter of the agreement. But in a contingent contract parties do have some other interest in the subject matter.
4. In a wagering agreement, the future event is the sole determining factor, while in a contingent contract, the future event is only collateral.
5. A wagering agreement is a absolute void while a contingent contract is perfectly valid.

### 7.6 SUMMARY :

In this lesson, we have discussed about the Contingent Contract, its characteristics, rules regarding performance and differences between Wagering Contract and Contingent Contract.

### 7.7 TECHNICAL TERMS :

1. Absolute Contract : A Contract where the promisor undertakes to perform a contract in all events
2. Contingent Contract : A contract to do or not to do something if some event collateral to the contract does or does not happen.



3. Wagering Agreement : It consists of reciprocal promises, but agreement.
4. Collateral Agreement : An event which is neither a performance directly promised as part of the contract nor the whole of the consideration for a promise.

## 7.8 SELF - ASSESSMENT QUESTIONS :

### A. Short Answer Questions :

1. Define Contingent Contract. Discuss all the essential elements of a Contingent Contract.
2. Differentiate between Wagering Agreement and Contingent Contract.
3. To what extent the impossibility of the contingency affects the performance of the Contract.

## 7.9 REFERENCE BOOKS :

1. S.N. Maheswari & S.K. Maheshwari, *Business Laws*, Himalya Publishing House, New Delhi, 2004.
2. N.D. Kapoor, *Business Laws*, Sultan Chand & Sons, New Delhi, 2000.
3. K.C. Garg & Others, *Business Laws*, Kalyani Publishers, New Delhi, 2007.

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**LESSON -8****DISCHARGE OF CONTRACTS**

**14.0. Object :** After going through this lesson the student can know. What is discharge of contract ? and what are the various modes of discharge of a contract.

**Structure :**

- 8.1. Introduction**
- 8.2. Modes of discharge**
- 8.3. Discharge by Agreement**
- 8.4. Discharge by operation of law.**
- 8.5. Discharge by Breach**
- 8.6. Discharge by performance**
- 8.7. Discharge by impossibility of performance**
- 8.8. Discharge by lapse of time.**
- 8.9. Summary**
- 8.10. Self Assessment Questions**
- 8.11. Reference Books**

**8.1. Introduction :**

When the rights and obligations arising out of a contract are extinguished, the contract is said to be discharge or terminated. A contract may be discharged in many ways. The discharge of a contracts means that the parties are no more liable under the contracts:

**8.2 Modes of discharge :**

A contract may be discharged in many ways. The following are the various modes in which a contract may be discharged :

- 1) Discharge by agreement [Sec 62 & 63]
- 2) Discharge by operation of law
- 3) Discharge by breach [sec 39]
- 4) Discharge by performance [sec 37 & 38]
- 5) Discharge by impossibility [sec 56]
- 6) Discharge by lapse of time

### 8.3 Discharge by Agreement :

A contract may discharge by mutual agreement of the concerned parties. The rights and obligations created by an agreement can be discharged without their performance by means of another agreement between the parties which provides for the extinguishment of the earlier rights and obligations the parties may agree to terminate the existence of the contract by any of the following ways.

- a) Novation
- b) Rescission
- c) Alteration
- d) Remission
- e) Waiver
- f) Accord and satisfaction
- g) Merge
- a) Novation :-

The term 'Novation' means substitution of a new contract for the existing one. The new contract may be between the same parties or between different parties; the consideration mutually being the discharge of old contract. It is a transaction by which, with the consent of all the parties concerned, the old contract is revoked and substituted by a new contract. Unless there is an extinguishment of all rights and obligations under the old contract there is no novation. Since novation implies a fresh contract in place of original one, all the parties to the old contract must agree to it. The new agreement should be valid and enforceable. If the new agreement is unenforceable then the old contract revives..

When an existing mortgage was replaced by a new agreement of mortgage which was not enforceable for want of registration, it was held that the parties were still bound by the original mortgage as was decided in the case of 'Shankar Lal Damoodhar vs. Ambalal Ajaipal AIR 1946'.

#### **Novation may occur in two ways:-**

1. New parties substituted for the old one. In this type the parties to the contract are changed but the contract remains the same. The usual and most common form of novation is substituting a new debtor in place of an old one with the consent of the creditor. Example: A. is indebted to B and B to C By mutual agreement B's debt to C and A's debt to B is cancelled and C accepts A as his debtor. This is novation.

#### **2. Novation without changes of parties :-**

Substitution of a contract may take place even without change of parties that is, sometimes the concerned parties to a contract agree to substitute the existing contract for a new contract. In such situations the original contract is discharged. Example : A owes B Rs 20000. A enters into an agreement with B and gives B a mortgage of his estate for Rs.10,000 in place of the debt of Rs. 20,000. This is new contract and extinguishes the old.

#### **Rules regarding Novation are as follows :-**

1. Novation must be done before the expiry of the original contract.
2. It is possible only by mutual consent of the parties and may not be compulsory.

3. New contract replacing the old one must be capable of legal enforcement
4. It must substitute the present contract, An agreement to substitute a contract in future will not be novations.
5. As a result of novation, old contract is totally discharged and law does not entertain any action based upon the terms of the old contract.

## 2. Rescission [sec.64]

Rescission means cancellation of the contract. If the parties to a contract agree to rescind it, the original contract need not be performed. This is discharged by rescission which requires mutual consent and consideration. Rescission means cancellation of the contract. Rescission results in the dissolution of the contract while novation results in dissolution and replacement of the contract.

**Example :** A promises to supply certain goods to B on a certain day. Before the actual date of performance A and B mutually agree that the contract will not be performed.

A contract can be rescinded in any of the following ways:

**1. By mutual consent :** Parties may enter into a simple agreement to rescind the contract before its breach.

**2. By the aggrieved party :** When any of the parties has committed a breach of contract without, in any way, affecting the right to compensation from the breach of contract.

**3. By the party whose consent is not free:** In case of a voidable contract the party whose consent is not free, may rescind the contract if it so desires.

**4. Non-performance till a long time:** Where none of the parties has performed its part for a long time and no other party has objected against it, the contract may be taken as rescinded.

Rescission may either be total or partial. Former is the discharge of the whole contract while the latter is the variation of the original contract either by:

- a) Rescinding some of the terms of the contract : or
- b) Substituting new terms for the ones which are rescinded : or
- c) Adding new terms without rescinding any of the terms of the original contract.

## 3. Remission (section 63)

It means acceptance of lesser amount or lesser degree of performance than what was actually due under the contract. It is a unilateral act of the promisee discharging at his will and pleasure of the obligation of another.

**Example :** A owes large sums of money to B. C offered to pay lesser sum in satisfaction of B's claim on A. B accepted it. It was held that the acceptance was in full satisfaction and B cannot claim balance from A after receiving payment in full satisfaction [Kapur Chand vs. Himayat Ali Khan. A.I.R. 1963 sc.250]

## 4. Waiver :

It means the abandonment of right which a person is entitled to a party to. a contract waives his right the other party is released of his obligations to constitute a waiver neither an agreement nor consideration is necessary.

**Example :** A agrees to repair the car of B. B later on forbids A to repair the car. A is no longer bound to perform the promise. Thus the contract is terminated by waiver.

### **5. Merger:**

Merger takes place when an inferior right accruing to a party under a contract merges into a superior right accruing to the same party either under the same or the other contract. In such cases, the inferior rights merge into the superior rights. And on merger the inferior rights vanish and are not required to be enforced.

Examples : A purchases a house which he was having on lease. His right as a lessee will merge into his right as an owner as right of a lessee is inferior to the right of an owner.

### **6. Accord and satisfaction :**

Accepting any other satisfaction than the performance originally agreed is known in English law as accord and satisfaction. Accord means the promise to accept less than what is due under the old contract. Satisfaction means the payment or the fulfillment of the smaller obligation. An accord is unenforceable; but an accord followed by satisfaction discharges the pre-existing obligation.

Once the promisee accepts such satisfaction as discharge of the original obligation, the obligation is discharged.

**Example:** A owes Rs.1000. B agrees to accept Rs.750 in full satisfaction. The agreement to pay Rs.750 is an accord and the actual payment is the satisfaction.

## **8.4. Discharge by operation of law :**

Following are the circumstances under which the law regards the contract as discharged :

### **8.4.1. Unauthorised material Alteration :**

A material alteration made in a written document or contract by one party without the consent of the other, will make the whole contract void. An alteration which is not material or which is authorised will not affect the validity of the contract.

A) material alteration is one which changes in a significant manner, the legal identity or character of the contract or the rights and liabilities of the parties to the contract.

### **8.4.2. Death :**

Death of the promisor results in termination of the contract in cases involving personal skill or ability. In other cases, the rights and liabilities of the deceased person pass on to the legal representatives.

### **8.4.3. Insolvency :**

A contract is discharged by the insolvency of one of the parties to it when an insolvency court passes "order of discharge".

### **8.4.4. Merger :**

This has been explained in the previous point

## 8.5 Discharge by Breach of contract :

The breach of contract means the failure of a party to perform his obligations the party who fails to perform his obligations, is said to have committed a breach of contract. Breach is also a method of discharge of a contract. A breach of a contract may either be a) Actual Breach of contractor b) Anticipatory Breach of contract.

### 8.5.1. Actual breach of Contract :

Actual breach may take place a) at the time when the performance is due or b) during the performance of the contract. Actual breach of contract, at the time when the performance is Due.

Actual breach of contract occurs at the time when the performance is due, when one party fails or refuses to perform his obligation under the contract. For example, Where on the appointed day the seller does not deliver the goods or the buyer refuses to accept the delivery. If the time was the essence of the contract, the failure to perform the contract within the specified time results in breach of the contract.

**Example :** A agrees to deliver 5 bags of sugar to B on 1st August, but fails to do so on that date, he is said to have committed a breach of contract. Similarly on 1st August A tenders the sugar but B for no valid reason, refuses to accept then B becomes guilty of breach.

### 8.5.2. Actual Breach during the performance of the contract :

It occurs when one party fails or refuses to perform the obligation under the contract during the performance of the contract. It is an actual breach of contract during its performance refusal of performance may be express or implied. This type of breach of contract occurs in the case of instalments contracts such as sale of goods delivery by instalments, payments by instalment etc.,

**Example :** Cort VS Ambergate Railway co(1851).

The plaintiff contracted to supply to the defendant co. 3900 tons of railway chairs at a certain price. After 1787 tons had been delivered the company told him that no more will be required. This is a breach of contract by the company.

### 8.5.3. Anticipatory Breach of contract:

It occurs when a party refused to perform his promise under the contract before the time for performance arrives. It is a declaration by one party of his intention not to perform his obligation under the contract.

Section 39 of Indian contract Act lays down “when a party to the contract i) has refused to perform or ii). Disabled himself from performing the contract, iii) in its entirety, the promises may put an end to the contract. Iv) Unless he had signified by words or conduct, his acquiescence in its continuance”.

Anticipatory breach is premature destruction of the contract rather than a failure to perform it. A cancellation of the betrothal is an anticipatory breach of contract of marriage.

The promises can choose one of the following rights :-

a) He can treat the contract as broken and put an end to it on that ground. In such a case he is entitled to claim damages against other party as on breach of the whole agreement.

b) He is at liberty to keep the contract alive accept performance of it if made by the other party and claim damages for the part not performed. This is called waiving the breach in the continuance of the contract even after its breach by the other side.

**Example :-** A, a singer, enters into a contract with B, the manager of a theatre to sign at his theatre two nights, every week during the next two months, and B engages to pay her at the rate of Rs.100 for each night. On the sixth night A willfully absent herself from the theatre, B at liberty to put an end to the contract.

The anticipatory breach may take place either by express refusal to perform the contract or by some act of the promisor. Which makes the performance impossible. In other words, it may be i) express or ii) implied anticipatory breach.

**i) Express Renunciation :** It takes place when one party renounces his liability under the contract expressly, before the performance becomes due.

**Example:** A agreed to supply certain goods to B on 1<sup>st</sup> January. But before this date A expressly informed B that he would not supply the goods to him. This is an anticipatory breach of contract by express refusal to perform it.

**ii) Implied Repudiation:**

A promisor may before the time of performance arrives by doing some act make the performance of the contract impossible it discharges the contract.

Example : A agreed to marry B. But before the agreed date of marriage, A married C. This is anticipatory breach of contract by A's conduct which has made the performance impossible.

### **8.5.3. Consequence of anticipatory Breach [Sec 39]:**

When anticipatory breach occurs the aggrieved party can take the following steps.

1. He can treat the whole contract as broken and to claim damages against the other party although the time for the performance of contract has not yet arrived.

**Hochester Vs De la tour [1853]**

The defendant agreed on 12<sup>th</sup> April to employ the plaintiff as his courier and to accompany him upon a tour. The employment was to commence on 1<sup>st</sup> June. On 11<sup>th</sup> May, he wrote to the plaintiff that he had changed his mind, and hence, would not require a courier the plaintiff sued for damages before 1<sup>st</sup> June and succeeded. Lord Campbell observed that. "it cannot be laid down as a universal rule that, whereby an agreement an act is to be done on a future day, no action can be brought for a breach of the agreement till the day for doing the act has arrived".

iii) He can treat the contract as still operative and wait for the time of the performance and then hold the other party responsible for all the consequences of non-performance. But if he elects to take this course. The contract still remains operative for the benefit of both parties. By difference between the contract price and the price prevailing on the date fixed for performance.

When the contract is terminated, the aggrieved party may bring an action for damages for breach, but he will be bound to restore to the other party the benefits he may have received under the contract.



A contract is discharged if its performance becomes impossible. In other words there is no question of discharge of a contract which is entered into to perform something that is obviously impossible. For instance an agreement to discover treasure by magic. In such cases, there is no contract to terminate. The impossibility in these cases is inherent in the transactions. Such a contract is void ab-initio. The impossibility of performance may be of two types.

### **Avery Vs Bowden (1856)**

B chartered A's ship agreeing to load cargo within 45 days. However, on arrival of the ship, B showed his inability to load cargo. A, however, did not treat the repudiation as an immediate breach of contract and chose to wait till 45 days. Before expiry of 45 days war broke out which rendered performance illegal. It was held that A could not succeed as the contract had ended by frustration and not by breach.

#### **8.5.4. Measure of damages :**

When an anticipatory breach of contract takes place, damages are measured as under .

i) If repudiation of the contract is accepted and the contract is put to an end immediately, the damage will be measured by the difference of price prevailing on the date of breach and the contract price;

ii) If the contract is kept operative and subsisting then the damages will be measured .

a) Initial Impossibility

b) Subsequent Impossibility

#### **a) Initial Impossibility (pre-contractual impossibility)**

It is the impossibility which exists at the time of formation of a contract. If an agreement contemplates doing something which is absolutely impossible, the same becomes void ab-initio. The rule is based on the following two maxims.

i) *Zex on cogit ad impossibilitatem* i.e. the law does not recognise what is impossible and

ii) *Impossibilium nulla obligatio est* i.e., what is impossible does not create an obligation.

#### **b) Subsequent impossibility:[sec 56]**

Impossibility which arises subsequent to the formation of a contract is known as subsequent or supervening impossibility. A contract, which at the time it was entered into, was capable of being performed may subsequently become impossible to perform or unlawful.

**Example :** A contracts to take in cargo for B at a foreign port, A's government afterwards declares war against the country in which the port is situated. The contract becomes void when war is declared.

A contract becomes void on the ground of subsequent impossibility only if the following conditions are satisfied.

i) The act should have become impossible

ii) The impossibility should have been caused by circumstances which were beyond the control of the concerned parties.

iii) The impossibility should not be self-induced by the promisor or due to his negligence.



Subsequent or supervening impossibility may occur in many ways, some of which are explained below:

### 1) Destruction of subject matter :

When the subject–matter of a contract subsequent to its formation, is destroyed, without the fault of the promisor or promisee, the contract is discharged. In the case, Taylor Vs Caldwell (1863), Black burn observed as follows . “In contracts in which the performance depends on the continued existence of a given person or thing, a condition is implied that the impossibility of performance arising from the perishing of the person or thing shall excuse the performance”.

**Example :-** Taylor Vs Caldwell (1863)

A music hall was let for a series of concerts on certain days. The hall was burnt down before the date of the first concert. The contract becomes void.

### 2. Death or personal Incapability:

A promise may become physically incapable of performance by reason of the death or incapacity of some person whose life and health are necessary for the performance of the contract. Such impossibility discharges the promisor from liability.

**Example:-** Robinson Vs Davison(1871):

An artist undertook to sign at a theatre on a particular day. On the day in question, the dependent was unable to perform owing to illness. It was held that the artist was not liable to damages.

### 2. Change of law:

A contract is discharge by impossibility of performance by the subsequent change in the law. The parties are also excused from performing their obligations if the performance of the contract becomes impossible by delegated legislation of powers under an Act or delegated legislation. Impossibility created by law is valid excuse for non-performance.

**Example :-** Re shipton, Anderson & Co (1915)

A agreed to sell to B a specific quantity of wheat lying in his godown before the delivery could be made, the godown was sealed by the government and it requisitioned the whole quantity of wheat under statutory powers. It was held the contracts is discharged as the delivery of the wheat become impossible.

### 4. Declaration of War

A contract entered into before the commencement of war remains suspended during the war. However, such a contract may be revived and may be enforced at the end of the war. If the performance of the contract goes to help the enemy it becomes void.

**Example :** A contracts to take in cargo for B at a foreign port. A’s government after wards declares war against the country in which the port is situated. The contract becomes void when the war is declared.

### 5. Failure of pre-condition:

When certain things necessary for performance cease to exist the contract becomes void on the ground of impossibility. If a contract depends on the occurrence of an event, which does not in fact happen the contract is discharged.

**Example :** Krell Vs Henry (1903):-

A contract was to hire a flat for viewing the coronation procession of the king. The procession had to be cancelled on account of king's illness. In a suit for the recovery of the rent, it was held that the contract become impossible of performance and that the hirer need not pay the rent.

## **8.6 Discharge by performance :**

Performance is the usual mode of discharge of a contract. The contract is said to be discharged when parties to a contract, perform their respective obligation which they have agreed to do. That is, when the parties to a contract fulfill their obligations arising out of the contract within the time and in the manner prescribed, the contract is said to have been discharged by performance.

### **8.7.1. Cases not covered by supervening Impossibility:-**

“He that agrees to do an act must do it or pay damages for not doing it” is the general rule of the law of contract some of the circumstances in which a contract is not discharged on the ground of subsequent below:-

#### **1. Difficulty of performance :**

A contract is not discharged by reason of the fact that the performance is more difficult, more expensive or more burdensome or less profitable than the parties anticipated. Difficulty does not excuse performance.

**Example :** Black burn Bobbin co. Vs. Allen & sons (1918).

A sold B a certain quantity of Finland timber to be supplied between July and September. Before any timber was supplied war broke out in the month of August and transport was disorganised. So that A could not bring any timber from Finland. It was held that the difficulty in getting the timber from Finland did not excuse A from performance.

#### **2. Commercial Impossibility:**

The impossibility contemplated in section 56 is a physical and legal impossibility and not a commercial impossibility . Commercial impossibility means that the situation has so changed that if the contract is performed. It will result in a loss to the promisor. Such a situation may arise on account of higher price of raw materials, increase in wages, increase in taxes etc,

Commercial impossibility does not discharge a contract.

**Example :-** Kart Enlinger Vs chagards & co (1915)

The defendant agreed to supply goods to the plaintiff, to be sent from Bombay to Antwerp owing to the outbreak of war before the shipment there was a sharp increase in the shipping rates. When the defendant contended frustration. It was held that the increase in freight rates did not excuse performance.

#### **3. Failure of a third party:**

The doctrine of supervening impossibility does not cover cases where the contract could not be performed because of the impossibility created by the failure of a third person on whose work the promise relied.

**Example :** Ganga saran Vs Ram charan R gopal (1952)

The respondent agreed to supply to the appellant 61 bales of cloth to be manufactured by the New Victoria mills kanpur, “as soon as they are supplied to him by the said mill”. In a suit for damages for non-delivery of goods the defendant pleaded impossibility on the ground that the goods were not supplied to him by the Mill. Held, that the words “ as soon as they are supplied to him by the mill” simply indicate the process of delivery and did not convey the meaning that the delivery was contingent on their being supplied by the mill. Hence the case did not fall within the provisions of sec.32 and 56 as the default was due to the fault of the defendant.

**3. Self induced impossibility:**

When the impossibility is due to the default of the contracting party himself sec.56 would not apply. In such cases the contract is not discharged on the ground of frustration. That is, a contract is not discharged in case of self-induced impossibility.

**4. Failure of one of the several objects :**

When a contract is entered into for several objects, failure of one of the objects does not terminate the contra. That is, when the contract is for multiple objects, failure of any one or more of them does not make the contact discharged.

**Example :** Herne Bag Steamboat Co. Vs. Hulton (1903)

X Agreed to let out a boat to Y for the purpose of viewing a naval review to be held on the occasion of the coronation of Edward, VII and to cruise round the fleet. Owing to the king’s illness the naval review was abandoned but the fleet was assembled and the boat could have been used to cruise round the fleet. Held the contract was not terminated.

**6. Strikes Lockouts and civil Disturbances :-**

These events do not discharge a party from a providing that in such cases the contract is not to be performed or that the time of performance is to be extended .

**Example :** Jacobs Vs credit Lyonnais (1884)

A agreed to supply B certain goods to be produced in Algeria. The goods could not be produced because of riots and civil disturbances in that country. Held, there was no excuse for non-performance of the contract.

**8.7.2. The Effects of supervening Impossibility :-****1. Contract becomes void:**

According to para 1 of section 56 “an agreement to do an act impossible in itself is void”.

According to para 2 of section 56 “A contracts to do an act which after the contract is made becomes impossible or by reason of some event which the promise, could not prevent, unlawful becomes void when the act becomes impossible or unlawful.

**2. Benefits to be Restored :**

Section65 provides that “when an agreement is discovered to be void or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it. Or to make compensation for it to the person from whom be received it”.

### 3.Compensation for Non-performance :

Sec 56, para 3 provides that “when one person has promised to do something which he knew or with reasonable diligence might have known, and which the promisee did not know to be impassible or unlawful, such promisor must make compensation to such promise for any loss which such promisee sustains through the non-performance of the promise”.

**Example :** A pays B Rs. 1000 in consideration of B’s promising to marry C, A’s daughter, C dies before marriage. B must repay A Rs.1,000.

### 8.8 Discharge by lapse of time :

A contract is discharged by lapse of time. The limitation Act 1940 lays down that in case of breach of a contract legal action should be taken within a specified period. If it is not performed and if no action is taken by the promise in the court of law within the specified period, he is debarred from enforcing the contract. Lapse of time terminates a contract. The period of limitation for simple contract is three years. If the three years expire and creditors fails to file a suit to recover his amount, the debtor is discharged from his liability.

### 8.9 Summary:

When the rights and obligations arising out of a contract are cancelled, the contract is said to be discharged or terminated. This termination may be, with mutual agreement of the parties; by operation of law, by breach of contract, by performance or by impossibility, by lapse of time.

### 8.10 Self Assessment Questions :

- 1) In how many ways a contract may be terminated ?
- 2) What is Novation, alteration ?
- 3) What is the difference between novation and alteration ?
- 4) When does discharge of contract by rescission take place ?
- 5) When does merger take place ?
- 6) When does a contract terminate by operation of law ?
- 7) What is an anticipatory breach of contract ? How the damages are measured ?
- 8) Discuss the effect of supervening impossibility on the performance of a contract ?

### 8.11 Reference Books :

- |                               |   |  |
|-------------------------------|---|--|
| 1. Bank Act                   | - | Indian Contract Act, 1872                            |
| 2. Elements of Mercantile Law | - | N.K. Kapoor  |
| 3. Mercantile Law             | - | V.K. Batra, N.K. Batra                               |
| 4. Business Law               | - | P.C. Tulsian   |
| 5. Business Law               | - | K.C. Garg, Mukesh Sharma, V.K. Sareen<br>R.C. Chawla |
| 6. Business Law               |   |  |

Dr. Ch. Suravinda

**LESSON -9****BREACH OF CONTRACT - REMEDIES FOR  
BREACH OF CONTRACT**

**9.0. Object :** In the previous lesson you learned what is Breach of contract. After going through this lesson the student can know what are the Remedies for Breach of contract under law”

**Structure :**

- 9.1. Introduction
- 9.2. Suit for Rescission
- 9.3. Suit for damages
- 9.4. Suit upon Quantum Meruit
- 9.5. Suit for specific performance
- 9.6. Suit for Injunction
- 9.7. Summary
- 9.8. Self Assessment Questions
- 9.9. Reference Books

**9.1. Introduction :**

Parties to a lawful contract are expected to perform their respective promises. When one of the parties refuses to perform his promise, he is said to have committed a breach of the contract. Whenever there is breach of contract, the injured party is entitled to bring an action for damages. They are as follows.

1. Suit for Rescission
2. Suit for Damages
3. Suit upon Quantum Meruit
4. Suit for specific performance.
5. Suit for injunction.

**9.2. Suit for Rescission**

Rescission means setting aside or cancelling. When a contract is broken by one party, the other party may treat the breach as discharge and refuse to perform his part of the contract.

**Example :** A promises B to sell his car for Rs.60,000 on certain date. B agreed to pay the price on receipt of the car. A refused to sell his car to B. B need not pay the price.

According to Sec.75 of the Indian contract Act, ‘A person who rightly rescinds a contract is entitled to compensation for any damage which he has sustained through the non-fulfilment of the contract’.

**Example :** A, a singer, contracts with B, the manager of a theatre, to sing at his theatre for two nights in every week during the next two months, and B engages to pay her Rs.100 for each night's performance. On the sixth night A willfully absents herself from the theatre, and B in consequence, rescinds the contract, B is entitled to claim compensation for the damage which he has sustained through the non-fulfilment of the contract.

Sec.66 of the contract Act provides that such rescission may be communicated in the same manner as the communication of revocation of a proposal.

### **2.1. Grant of Rescission :**

The court may grant rescission of the contract in case :

- a. The contract is voidable or terminable by the plaintiff.
- b. The contract is unlawful for causes apparent on its face and the defendant is more to blame than the plaintiff.

### **2.2. Refusal of Rescission :**

The court may refuse to grant rescission of the contract in case :

- a. The plaintiff has expressly or impliedly ratified the contract.
- b. Owing to the change of circumstances, the parties cannot be restored to their original position.
- c. The third parties have, during the subsistence of the contract acquired rights in good faith and for value.
- d. Only a part of the contract is sought to be rescinded and such part is not severable from rest of the contract.

## **9.3. Suit for Damages**

The damages are a monetary compensation allowed to the injured party for the loss or injury suffered by him as a result of the breach of contract. In the event of a breach of contract, the other party earns certain rights including the right to claim damages or loss arising there from. The term 'damages' is used to mean compensation in money as a substitute for the promised performance. The fundamental principle underlying damages is not punishment but compensation. Damages are to be awarded for losses which naturally arose from the breach. The law of contract does not seek to punish the guilty. The guilty party is liable to pay damages to the aggrieved party. The court will compel the party in breach to make good the loss by paying to the other party.

### **3.1. Kinds of Damages :**

Damages are of the following kinds :

- 1) Ordinary Damages
- 2) Special Damages
- 3) Exemplary or punitive or vindictive Damages.
- 4) Nominal Damages

### 3.1.1. Ordinary Damages :

Ordinary damages are those which naturally arose in the usual course of things from such breach. Damages, awarded to compensate the injured party for the actual amount of loss suffered by him consequent upon the breach, are known as general damages. General damages are assessed on the basis of actual loss. The measure of ordinary damage is the difference between the contract price and market price, on the date of breach.

**Example :** A contracts to deliver 100 bags of rice at Rs.1,000 a bag on a future date. On the due date he refuses to deliver. The price on that day is Rs.1,100 per bag. The measure of damages is the difference between the market price on the date of breach and the contract price i.e. Rs.10,000 (100 x Rs.100).

### 3.1.2. Special Damages :

Special damages are those resulting from a breach of contract under some special or unusual circumstances. These damages constitute the indirect loss suffered by the injured party due to the breach of contract. These are the damages which are known to the parties when they made the contract, as likely to arise from the breach of the contract. When a special or extraordinary circumstance present, and it is communicated to the promisor, the non-performance of the promise entitles to the promisee not only the ordinary damages but also special damages that may result there from. It is important to note that notice to this effect must have been given to the other party. If he had no knowledge, he is not answerable, subsequent knowledge of special circumstances will not create any special liability on the guilty party.

**Example :** A builder, contracts to erect and finish a house by first of January, in order that B may give possession of it at that time to C, to whom B has contracted to let it. A is informed of the contract between B and C. A builds the house so badly that, before the first January, it falls down and has to be rebuilt by B, who in consequence, loses the rent which he was to have received from C and is obliged to make compensation to C for the breach of his contract. A must make compensation to B for the cost of rebuilding the house, for the rent lost, and for the compensation made to C.

### 3.1.3. Exemplary or punitive or vindictive Damages :

These are such damages which are awarded by way of compensation for the loss suffered and not by way of punishment. Exemplary damages are granted for injured feeling, sufferings etc. Exemplary damages have no place in the law of contract and are not recoverable for a breach of contract. But there were two exemptions.

- a) Breach of a contract to marry : In this case the amount of the damages will depend upon the extent of injury to the party's feelings.
- b) Dishonour of a cheque by a banker when there are sufficient funds to the credit of the customer. In this case the rule of ascertaining damages is, "the smaller the cheque, the greater the damage". Of course, the actual amount of damages will differ according to the status of the party.

### 3.1.4. Nominal Damages

These are the damages which are very small in amount. In some cases there may be a breach of contract but no material loss would have been caused thereby. Thus nominal damages are awarded only for the name sake.



### 3.2. Rules Regarding Damages :

According to Sec.73 of the Indian contract Act, “When a contract has been broken, the party who suffers by such breach is entitled to receive from the party who have broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of thing from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it”.

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

Explanation to Sec.73 provides that “In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by non-performance of the contract must be taken into account.” The principles regarding the measure of damages is based on the decision given in “Hadley Vs Baxendle. The rules are summarised as follows :

#### 3.2.1. General Damages :

A party who suffers by breach of a contract is entitled to only such damages which arise naturally in the usual course of things as a result of such breach. Rest of the damages will be deemed to be a remote consequence and are not recoverable.

**Example :** A agreed to sell B two bales of cotton at Rs.10,000 per bale, the delivery to be given on 15<sup>th</sup> January. A failed to give delivery. The remedy for B would be to claim the difference between the market price and the contract price for the same quality of cotton in case the market price is higher than the contract price.

#### 3.2.2. Special Damages :

Special damages are recoverable only if the special circumstances were brought to the notice of the defaulting party. That is where a party claims special damage for any loss sustained he must prove that the other party knew at the time of the making of the contract that special loss was likely to result from the breach of the contract.

**Example :** Pinnock Bros. Vs. Lewis & Peat Ltd. (1923)

P bought from L. some Copra cake. P sold the cake to B, who sold it to various dealers who in turn sold it to farmers; who used it for feeding cattle. The copra cake was poisonous and the cattle fed on it died. The various buyers filed suits against P and obtained damages. P claimed from L damages and costs he had to pay. Held, as it was within the contemplation of the parties that the copra cake was to be used for feeding cattle. L. was liable to pay damages.

#### 3.2.3. Remote Damages :

The remote or indirect damages are not due to natural and probable consequences of the breach of the contract. In other words, these are the damages which arise indirectly from the breach. The injured party is not entitled to any remote or indirect loss.

**Example :** Hobbs Vs London & S.W. Railway Co. (1875)

Mr. Hobbs and family travelled from Hampden to Wimbledon. But the train went in wrong direction and the family had to get down at a place, where there was no conveyance and no place to stay. The



result that they had to walk home several miles at midnight on drizzling night. Mrs. Hobbs got ill. Mr. Hobbs filed a suit i) for damages for inconvenience and ii) also damages for wife's illness. The court awarded damages in respect of the first claim. But the second claim did not arise in the usual course of things and was too remote a consequence.

#### **3.2.4. Restitution and compensation :**

Damages are paid as restitution and compensation and not as punishment. If a contract is broken, law will endeavour, so far as money can do it, to place the injured party in the same position as if the contract had been performed.

**Example :** In a contract of sale of goods, the damages are measured equal to the profit i.e. the difference between the contract price and market price of such goods on the date of breach.

#### **3.2.5. Mitigation of Loss :**

The injured party has to take all reasonable steps to minimise the loss caused by the breach. The damages which results due to the negligence of the aggrieved party, are not recoverable.

**Example :** Neki Vs Prabhu.

The plaintiff took a shop on lease and paid an advance. The defendant could not give him possession and the plaintiff chose to do no business for 8 months though there were other shops available in the vicinity. Held, he was entitled only to a refund of his advance, and nothing more, as he had failed in his duty to minimise the loss by not taking another shop in the neighbourhood.

#### **3.2.6. Nominal Damages :**

Nominal damages are small amount awarded by the court when the aggrieved party cannot prove any substantial loss suffered by him. These are neither awarded by way of compensation to the aggrieved party nor by way of punishment to the guilty party. If instance if the contract price is Rs. 100 and after a breach the party obtained the goods from the market also for Rs. 100, he may get only nominal damages for his worries and in convenience.

#### **3.2.7. Actual loss :**

Ordinarily, to aggrieved party is entitled to recovery by way of compensation, only the actual loss suffered by him. In a breach of contract for the sale of goods, the damages payable would be the difference between the contract price and the market price at the date the breach takes place.

#### **3.2.8. Vindictive or Exemplary Damages :**

Vindictive or exemplary damages are not usually awarded for breach of contract except in case of breach of contract of marriage or wrongful refusal by the bank to honour the customer's cheque. Such damages are awarded by way of lesson to the wrongdoer.

#### **3.2.9. Liquidated Damages :**

When the parties to a contract mutually agreed that in the event of a breach, the one shall pay to the other a specified sum of money; called liquidated damage. When such an amount has been mentioned in the contract, under Sec. 74 of the Indian Contract Act, the injured party is entitled to get reasonable compensation not exceeding the amount mentioned.

**Example :** A contract with B to pay B Rs.10,000 if he fails to pay B Rs.5,000 on a given day. A fails to pay B Rs.5,000 on that day. B is entitled to recover from A such compensation exceeding Rs.10,000 as the court considers reasonable.

### 3.2.10. Damages in Quasi contracts :

According to Sec.73, Para 3, “When an obligation resembles those created contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default, as if such person had contracted to discharge it and had broken his contract”.

### 3.2.11. Difficulty of Assessment :

Difficulty in calculating damages is no ground for refusing damages. The court must make an assessment of loss and pass a decree for it.

### 3.3. Other types of Damages :

The other types of damages are as follows :

#### a) Damages for loss of Reputation :

Generally such damages are not recoverable. An exception to this rule arises in case of a banker, who wrongfully refuses to honour a customer's cheques. If the customer is a business man, he can recover damages in respect of any loss to his business reputation by such breach.

b) **Cost of Decree :** The aggrieved party is entitled, in addition to the damages, to get the cost of getting the decree for damages. However, the cost of suit for damages is at the discretion of the court.

c) **Damages from carriers :** Damages can be claimed from the carriers even without notice for deterioration caused to goods by delay in transit.

### 3.4. Liquidated Damages and penalty :

A contract sometimes mentions that in case of breach of contract, a particular sum is payable by the party committing the breach. The sum so stipulated or agreed upon, may either be liquidated damage or penalty.

#### 3.4.1. Liquidated damage :

It is a sum fixed or ascertained by the parties to the contract, which is a fair and genuine pre-estimate of the probable loss that might occur as a result of breach of contract. Thus, liquidated damages are an assessment of loss, which in the opinion of the parties, will occur due to breach. Such damages are effective and recoverable by the aggrieved party from the other.

#### 3.4.2. Penalty :

It is a sum mentioned in the contract at the time of its formation which is disproportionate to the damage likely to occur as a result of the breach of the contract. Penalty is fixed with a view to getting the contract performed, but it has no concern with the probable loss likely to occur to the parties due to the breach of the contract.

Thus the liquidated damages are the fair assessment of the amount which will compensate the aggrieved party for the loss suffered due to breach of the contract. Whereas, the penalty is not a fair

assessment of the loss for breach. It is fixed with a view to prevent the party from committing to breach of the contract, that is, to compel the other party to perform the contract.

#### 9.4. Suit upon Quantum Meruit

The Phrase ‘Quantum Meruit means “Payment in proportion to the amount of work done” or “Reasonable value of work done”. A person can, under certain circumstances, claim payment for work done or goods supplied without any contract and in cases where the original contract has terminated by breach of contract by one party or has become void for some reason. This is known as the Doctrine of Quantum meruit. This doctrine is applied where there is no express promise to definite remuneration to a person.

##### 9.4.1. Claim for Quantum Meruit Arises in the following cases :

###### 4.1.1. When a contract is found to be void :

Section 65 lays down that when a contract is discovered to be unenforceable for some technical reason, any person who has done something under the contract, is entitled to reasonable technical reason, any person who has done something under the contract, is entitled to reasonable compensation.

Example : Craven Ellis Vs Canons Ltd. (1936) C was employed as managing director of a company by the board of directors of the company under written contract. The contract was found to be void because the directors who constituted the board were unqualified. C actually worked as a managing director for sometime. It was held that he was entitled to remuneration on the basis of quantum meruit.

###### 4.2. When something is done without any intention to do so gratuitously.

###### 4.3. When one party Abandons or Refuses to perform the contract :

Sometimes, a party performs a part of the contract, but abandons it without completing, or refuses to perform the remaining part. In such cases, the compensation for the work done may be recovered on the basis of quantum meruit.

###### Example : Planche Vs Colburn (1831)

P was required by C to write a story for a children’s magazine, and the story would be published serially. After P had written a few chapters and delivered them to C, the publication of the magazine was stopped by C. It was held that P could recover remuneration proportionate to his work from C.

###### 4.4. When a contract is Divisible :

When a contract is divisible, and the party not in default has enjoyed the benefit of the part performance, the party in default may sue on quantum meruit.

Example : A contract with B to deliver to him 250 mounds of rice before the 1st May. A delivers 130 mounds only before that day, and none after. B retained 130 mounds of rice. He is bound to pay A for them.

###### 4.5. When an indivisible contract is performed Badly :

When an indivisible contract for a lump sum is completely performed but badly, the person who has performed the contract can claim the lump sum; but the other party can make a deduction for bad work.

**Example : Hoeing Vs Isaacs (1952)**

P agreed to decorate D's flat for a lump sum of L 750, certain requirements having been laid down. P did the work but D complained of faulty workmanship. It cost DL 204 to remedy defect. Held, P could recover from DL 750 less L204.

**9.5. Suit for specific performance :**

Specific performance means the actual carrying out of the contract as agreed where damages are not an adequate remedy for breach of the contract, the court may direct the party in breach to carry out his promise according to the terms of the contract. This is called "Specific Performance" of the contract. Specific performance of the contract cannot be claimed as a matter of right. Rules regarding the granting of this relief are contained in the Specific Relief Act.

Some of the causes in which specific performance of the contract may be enforced are as follows :

- 1) Where monetary consideration is not an adequate remedy for the breach of a contract.
- 2) Where there exists no standard for ascertaining the actual damage caused by the non-performance of the act.
- 3) When it is probable that compensation in money on non-performance of the contract cannot be obtained.

**5.1. Specific performance is not granted in the following cases, when :**

1. Damages are an adequate remedy.
2. The contract is not certain.
3. The contract is inequitable to either party.
4. The contract is of revocable nature.
5. The contract is made by the trustee in breach of trust.
6. The contract is of personal nature (contract to marry).
7. The contract made by a company ultra vires of its memorandum of Association and
8. The court cannot supervise its carrying out.

**9.6. Suit for Injunction**

Injunction is an order of a court restraining a person from doing a particular act. It is a mode of securing the specific performance of the negative terms of the contract. That is, it is order of the court restraining a person from doing something which he promised not to do. This type of order is generally issued in cases where the compensation in terms of money is not an adequate relief. Thus, injunction is a preventive relief.

**Example : Metropolitan Electrical supply Co. Vs. Ginder (1901)**

G Agreed to take the whole of his electricity from a certain company. The agreement was interpreted as a promise not to buy electricity from any other company. He was, therefore, restrained by an injunction from buying electricity from any other company.

### 9.7. Summary

Parties to a lawful contract are bound to perform their respective obligations. When one of the parties failed to perform his obligations he is said to have committed a breach of contract. In case of breach of contract, the law provides certain remedies as 1. Cancellation or Rescission 2. Restitution 3. Specific Performance 4. Injunction 5. Quantum Meruit and 6. Damages.

### 9.8. Self Assessment Questions :

1. What are the various remedies available to a party in case of breach of contract ?
2. Explain fully the principles on which the court would award damages for a breach of contract.
3. Distinguish between liquidated damages and penalty.
4. When do a claim on quantum meruit arise ?
5. Under what circumstances is a party entitled to specific performance.
6. What is meant by injunction ?
7. What are liquidated damages ?

### 9.9. Reference books.

- |                               |   |                           |
|-------------------------------|---|---------------------------|
| 1. Bank Act                   | - | Indian Contract Act, 1872 |
| 2. Elements of Mercantile Law | - | N.K. Kapoor               |
| 3. Mercantile Law             | - | V.K. Batra, N.K. Batra    |
| 4. Business Law               | - | P.C. Tulsian              |
| 5. Business Law               | - | K.C. Garg                 |
|                               |   | Mukesh Sharma             |
|                               |   | V.K. Sareen               |
|                               |   | R.C. Chawla               |

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**LESSON -10****SALE OF GOODS ACT - 1930**

**10.0 Object :** After going through this lesson the student can know the law relating to the sale of goods or movables in India.

**Structure :**

- 10.1 Introduction**
- 10.2 Contract of sale**
- 10.3 Essentials of a contract of sale**
- 10.4 Distinction between sale and agreement to sell**
- 10.5 Sale Distinguished from other Transactions.**
- 10.6 Goods**
- 10.7 Classification of goods**
- 10.8 Effects of Destruction of subject matter**
- 10.9 Price**
- 10.10 Modes of fixing the price**
- 10.11 Summary**
- 10.12 Self Assessment Questions**
- 10.13 Reference Books**

**10.1 Introduction :**

The law relating to the sale of goods or movables in India is contained in the sale of goods Act, 1930. Before the passing of the present Act, the law relating to the sale of goods was contained in chapter VII of the Indian Contract Act, 1872. The Act came into force in 1st July 1930. It contains 66 Sections and extends to the whole of India except the state of Jammu and Kashmir. It is based mainly on the English Act.

**10.2 Contract of Sale :**

Section 4 of the sale of goods Act defines a contract of sale as under.

“A contract of sale of goods is a contract where by the seller transfers or agrees to transfer the property in goods to a buyer for a price”.

A contract of sale consists of the following :

1. Sale
2. Agreement to sell

**1. Sale :**

Where the ownership of the goods is immediately transferred from the seller to the buyer and nothing is left on the part of the seller, then it is called sale or absolute sale.

**2. Agreement to sell :**

Where the transfer of property or ownership of goods shall take place in future or on the fulfilment of certain conditions, it shall be an agreement to sell or a conditional sale. The property or ownership in goods shall not be transferred from the seller to the buyer until and unless some condition is fulfilled for the completion of the contract of sale.

**10.3 Essentials of a contract of sale :**

To constitute a valid contract of sale, the following essentials must be present.

**1. Contract :**

The word contract means an agreement enforceable at law. It presumes free consent on the part of the parties who should be competent to contract. Thus, a compulsory transfer of goods under a Nationalisation Act is not a sale. The agreement must be made for a lawful consideration and with a lawful object. In other words all the essential elements of a valid contract must also be present in a contract of sale.

**2. Two parties :**

In a contract of sale there must be two persons, one the seller and the other the buyer. These parties must be competent to contract.

**3. Transfer the property :**

In a contract of sale, there should be a transfer or agreement to transfer the absolute or general property in the goods sold or agreed to be sold. The sale of goods Act contemplates the transfer of general property in goods from the seller to the buyer.

**4. Goods :**

The subject – matter of the contract of sale must be the goods, the property in which is to be transferred from the seller to the buyer. Goods of any kind except immovable goods may be transferred. The seller must be the owner of the goods.

**5. Price :**

To constitute a valid contract of sale, consideration for transfer must be money paid or promised. Where there is no money consideration the transaction is not a contract of sale.

**10.4 Distinction between sale and agreement to sell :**

The distinction between sale and an agreement to sell is very necessary to determine the rights and the liabilities of the parties to the contract. The main points of distinction are :



Sale	Agreement to sell
1. A sale is an executed contract.	1. An agreement to sell is an executory contract.
2. The property in the goods passes from the seller to the buyer immediately so that the seller is no more the owner of goods sold.	2. The transfer of property in the goods is to take place at a future time or subject to certain conditions to be fulfilled.
3. If the goods are destroyed, the loss falls on the buyers even though they were in the possession of the seller.	3. If the goods are destroyed, the loss falls on the seller, even though they were in the possession of the buyer.
4. It creates a right in rem i.e. against the whole world.	4. It creates a right in personam i.e. against a specified person only.
5. Performance of sale is absolute and without any condition.	5. Performance is conditional and is made in future.
6. The property is with the buyer and as such the seller cannot resell the goods. If he does so, the buyer can recover the goods, sometimes, even from third parties.	6. The property in the goods remains with the seller and he can dispose of the goods as he likes, although he may thereby commit a breach of his contract.
7. If the buyer is declared insolvent before making the payment of the price for goods, the seller in the absence of lien on goods, will have to deliver the goods to the official receiver and can claim only the rateable dividend.	7. If the buyer who is declared insolvent, has not paid the price, the seller is not bound to deliver the goods as the property in goods has not passed to him.
8. If the seller is declared insolvent, the buyer is entitled to recover the goods from the official receiver as the buyer has the ownership of the goods sold.	8. The buyer who has paid the price, cannot claim the title of goods from the seller, if he is declared insolvent. He can only claim a rateable dividend.
9. If the buyer wrongfully neglects or refuses to pay the price of the goods, the seller can sue for the price, even though the goods are still in his possession.	9. If the buyer fails to accept and pay for the goods, the seller can only sue for damages and not for the price, even though the goods are in the possession of buyer.

### 10.5 Sale Distinguished from other Transactions :

There are some transactions which bear a close resemblance to a contract of sale, but which are quite different from sale of goods. Therefore, it is necessary to point out the distinguishing features of such transaction.

#### 5.1. Sale and Hire purchase

Under hire-purchase agreement the owner of the goods let them out on hire for a periodic rent on the terms on completion of the agreed number of payments, the hirer is to have the option to buy the goods. On payment of the full amount, the property in the goods passes to him but the owner have the



right to resume possession of the goods on the hire's failure to pay any of the instalments of rent. The difference between a contract of sale and hire purchase agreement are as follows.

<b>Sale</b>	<b>Hire purchase agreement</b>
1. A sale is an executed contract in which the ownership is transferred from the seller to the buyer as soon as the contract is entered into.	1. In a hire purchase agreement it becomes the property of the buyer only after a certain agreed number of instalments is paid.
2. The buyer in this case cannot terminate the contract and as such is bound to pay the price of the goods.	2. The hire purchaser can terminate the contract at any stage and cannot be forced to pay the remaining instalments.
3. In a sale the seller takes the risk of any loss resulting from the insolvency of the buyer.	3. In a hire purchase the owner is not at any risk because if the hirer does not pay any instalment the seller has a right to take back the goods.
4. A sale is subject to the implied conditions and warranties provided under the sale of goods Act 1930.	4. A hire purchase agreement is not subject to such implied warranties and conditions. It is however, subject to the implied conditions provided in the hire purchase agreement.
5. In a sale even if the payment is made by the buyer in instalments, it is towards price of the goods.	5. The instalments paid by the hire purchaser are not regarded as payment towards the price of the goods. It is treated as hire charges till the last instalment paid.
6. The buyer in a sale can resell the goods.	6. The hire purchaser cannot resell unless he has paid all the instalments of hire.

### 5.2. Sale and bailment :

Bailment is the delivery of goods by one person to another for some purpose upon a condition. After the condition is accomplished they must be returned. Sale is the transfer of property in goods from the seller to the buyer for a price. The following are the main points of difference between the two.

<b>Sale</b>	<b>Bailment</b>
1. In a sale, the property in the goods is transferred from the seller to the buyer and the buyer can deal with the goods in any way he likes.	1. In a bailment, there is only transfer of possession of goods from the bailor to the bailee upon a condition. The bailee can only deal with the goods according to the directions of the bailor.
2. Goods once sold normally cannot be returned unless there is a breach of some condition.	2. In bailment the bailee must return the goods to the bailor on the accomplishment of the purpose for which the bailment was made.
3. In a sale the consideration is the price in terms of money.	3. In a bailment the consideration is an undertaking to return the goods after the accomplishment of purpose.

**5.3. Sale and gift :**

Where goods are transferred by one person to another person without any price or consideration. the transaction is called a gift not a sale. Sale is always for a consideration.

**5.4. Sale and Barter :**

Where the consideration for transfer of property in goods from one person to another consists of delivery of other goods, it is a contract of barter. But where property in the goods is transferred from the seller to the buyer against a price is called a sale.

**5.5. Sale and mortgage :**

A mortgage differs from a contract of sale in the following respects.

Sale	Mortgage
1. In a sale, there is a transfer of the whole interest of the seller in the goods.	1. In a mortgage there is a transfer of a limited interest.
2. The buyer becomes the absolute owner of the goods sold.	2. The ownership of the goods remains vested in the mortgagor.
3. The consideration in the case of sale is the price.	3. The consideration in a mortgage is the advance of the loan and the securing of the debt.

**5.6. Sale and contract for work and labour :**

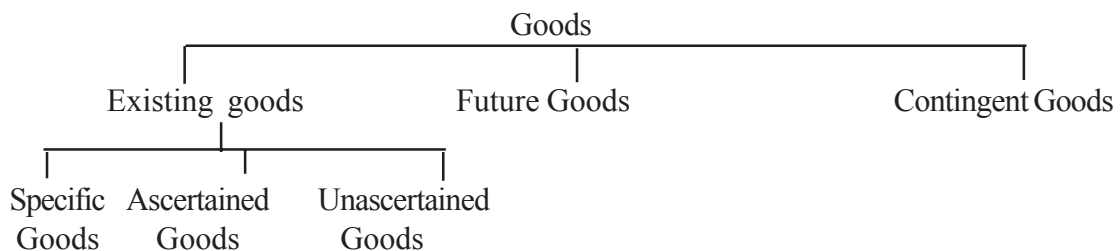
A contract of sale involves the delivery of goods whereas a contract for work and materials involves exercise of skill and labour by one party in respect of materials supplied by another the delivery of goods being subsidiary or incidental to the contract.

**10.6 Goods :**

Section 6 provides that “goods” form the subject matter of a contract of sale. “Goods” means every kind of movable property other than actionable claims and money; and includes 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. The interest of a partner in partnership also comes within the definition of goods.

**10.7 Classification of goods :**

Goods which form the subject matter of a contract of sale may be divided as under :



**7.1. Existing goods :**

Goods owned and possessed by the seller at the time of making the contract of sale are called existing goods. Sometimes, the seller may be in possession but may not be the owner of the goods. The existing goods may be of the following types :

**a) Specific goods :** Goods identified and agreed upon at the time of the making of the contract of sale are called specific goods.

**b) Ascertained goods :** ‘Ascertained goods’ has not been defined in the Act. These are the goods which are ascertained subsequent to the formation of contract of sale. Ascertained goods mean goods identified in accordance with the agreement after the contract of sale is made. The identification takes place at a later date. For example : if a merchant agreed to supply one bag of rice from his godown to a buyer; it is a sale of unascertained goods because it is not known which bag will be delivered.

**c) Un ascertained goods :** The goods which are not specifically identified at the time of contract of sale, are known as unascertained goods. Unascertained goods are not definite and specific.

**7.2. Future goods :**

“Future goods” means goods to be manufactured or produced or acquired by the seller after making the contract of sale” These are the goods which are not in existence at the time of contract of sale. The seller acquires such goods after the making of the contract of sale. It is important to note that the future goods are neither in existence nor in possession of the seller at the time of contract of sale.

**7.3. Contingent goods :**

Contingent goods are future goods. There may be a contract for the sale of goods, the acquisition of which by the seller depends upon a contingency which may or may not happen. It is important to note that a contract of sale of contingent goods is enforceable only if the event on the happening of which the performance of the contract is dependent happens; otherwise the contract becomes void. Such contracts give no right of action if the contingency does not happen.

**10.8 Effects of Destruction of subject matter :**

Section 7 and 8 of the sale of goods Act 1930 deal with the effect of perishing of goods on the rights and obligations of the parties to a contract of sale. Goods are said to perish when they physically or commercially cease to exist before and after the contract. The effects of perishing of goods may be discussed under the following heads:

**8.1. Goods perishing before making of the contract :**

According to Sec.7 of the Act, “Where there is a contract for the sale of specific goods, the contract is void if the goods without the knowledge of the seller have, at the time when the contract was made perished or become so damaged as no longer to answer to their description in the contract”.

To make a contract void under this section the following conditions must be fulfilled.

1. The contract must be for the sale of specific goods.
2. The goods must have been perished before the contract is made.
3. The seller must not have the knowledge of the destruction of the goods.

**8.2. Goods perishing before sale but after Agreement to sell (Sec.8) :**

Sec.8 of sale of Goods Act reads as “Where there is an agreement to sell specific goods, and subsequently the goods, without any fault on the part of the seller or buyer, perish or become so damaged as no longer to answer to their description in the agreement before the risk passes to the buyer, the agreement thereby avoided” In such cases, the contract of sale becomes void if the contract is for the sale of specific goods and the goods are destroyed without any fault of the seller or buyer. The provision is based on the ground of supervening impossibility of performance which makes a contract void.

To make a contract void under this section, the following conditions must be fulfilled.

1. The contract is an agreement to sell and not an actual sale.
2. The contract should be for specific goods and not for unascertained goods.
3. The goods must have been perished without the fault of seller or buyer.
4. The goods must have perished or damaged before the property or the risk passes to the buyer.

**10.9 The price :**

Price is an essential element of sale. Price means the money consideration for the sale of goods. No valid sale can take place without a price. The price constitutes the essence of a contract of sale as no sale can take place without a price. The price may be money actually paid or promised to be paid depending on whether the agreement is for cash or credit sale.

**10.10 Modes of fixing the price :**

Section 9 provides the following modes of the determination of the price.

1. The price may be expressly stated in the contract. The parties may fix such price for the goods as they may please.
2. The contract may provide for the manner in which the price is to be fixed.
3. The price may be determined by the course of dealing between the parties.
4. Where the price is not determined in accordance with the above three modes, the buyer shall pay the seller a reasonable price, if nothing is said as to price when the goods are sold, the law implies an intention that it is to be paid for at what is reasonably worth. What is a reasonable price is a question of fact dependent upon the circumstances of each particular case.
5. The agreement may provide that the price is to be fixed by the valuation of a third party. When such third party makes the valuation, there is a determination of the price and the agreement becomes a contract of sale.

**10.11 Summary :**

A contract of sale of goods is a contract where by the seller transfers or agrees to transfer the property in goods to a buyer for a price. All the essential elements of a valid contract must be present in a contract of sale.

**10.12 Self Assessment questions :**

1. What is contract of sale ?
2. What is an agreement to sell.
3. Distinguish between a sale and an agreement to sell.
4. What is a contract of sale ? State its essential characteristics.
5. Distinguish between a sale and a hire purchase agreement.
6. Define the terms 'goods'. Distinguish between specific and unascertained goods.
7. Explain the rules regarding ascertainment of price in a contract of sale.

**10.13 Reference Books :**

- |                               |   |                           |
|-------------------------------|---|---------------------------|
| 1. Bank Act                   | - | Indian Contract Act, 1872 |
| 2. Elements of Mercantile Law | - | N.K. Kapoor               |
| 3. Mercantile Law             | - | V.K. Batra, N.K. Batra    |
| 4. Business Law               | - | P.C. Tulsian              |
| 5. Business Law               | - | K.C. Garg                 |
- Mukesh Sharma  
V.K. Sareen  
R.C. Chawla

- Dr. Ch. Suravinda.

## Lesson – 11

# CONSUMER PROTECTION ACT, 2019

### Objectives :

After studying this lesson, one should be able to understand

- Definition of Consumer
- Meaning of Person
- Meaning of Consumer
- Complaint means
- Definition of goods and services
- Scope of CP Act 2019
- Scope of Goods and services
- Know about the provisions of Law
- Understand the importance of Consumer for services
- Consumer Protection Act, 2019

### Structure of the Lesson :

- 11.1 Introduction
- 11.2 Objectives of New Consumer Protection Act , 2019
  - 11.2.1 The New Act is for Speedy Disposal of the Redressal of Consumer Disputes
  - 11.2.2 Rights of The Consumers
- 11.3 Definition of Consumer
  - 11.3.1 Meaning of Complaint
- 11.4 Significance of Consumer Protection Act 2019
- 11.5 The Doctrine of Caveat Emptor
- 11.6 Genesis of Consumer Protection Laws
- 11.7 The Basic Rights of Consumers
- 11.8 Scope of The New Act2019
  - 11.8.1 Time – Bound Redressal
- 11.9 Consumer Means Any Person Who ...
- 11.10 Definition of Goods And Service
- 11.11 Contract of Service And Contract For Service

- 11.12 Services Rendered Under Medicare Insurance Scheme
- 11.13 Case References
- 11.14 Trepidations of the New Act Of 2019
- 11.15 Summary
- 11.16 Technical Terms
- 11.17 Self Assessment Questions
- 11.18 Reference Books

## 11.1 INTRODUCTION :

Every individual is a consumer, regardless of occupation, age, gender, community, cast, creed, religion or race. Consumer rights and welfare are an integral part of the life of an individual and we all have made use of them at some or the other point in our daily routine. Consumer is the real deciding factor for all economic activities. It is now universally accepted that the extent of consumer protection is a true indicator of the level of progress in a nation. Taking into account the interests and needs of consumers in all countries, particularly those in developing countries, recognizing that consumers often face imbalances in economic terms, educational level and bargaining power, and bearing in mind that consumer should have the right of access to non-hazardous products, as well as importance of promoting just, equitable and sustainable economic and social development, the Secretary General, United Nations submitted draft guidelines for consumer protection to the Economic and Social Council in 1983. Thereupon on an extensive discussions and negotiations among various countries on the scope and content of such impending legislation certain guidelines were arrived at. In line with the international development on consumer protection, the Parliament enacted Consumer Protection Act, 1986 provides a forum for speedy and simple redressal of consumer disputes. The rights under the consumer protection flow from the rights enshrined in Articles 14 to 19 of the Constitution of India. **The new Consumer Protection Act, 2019 was passed by Parliament in 2019. It came into force in July 2020 and replaced the Consumer Protection Act, 1986.**

The core objective of the new act is to protect the interests of the consumers; The Act extends to the whole of India except the State of Jammu and Kashmir. The Act covers all goods and services, except goods for resale or for commercial purpose and services rendered free of charge and a contract of personal service. Complaints (i.e., any allegation should be in writing made by a complainant to obtain any relief provided by or under this Act).

The complaint may be made by the complainant which includes a consumer or any voluntary consumer association registered under the Companies Act,1956 amended act of 2013 or any other law or the Central or State Government or one or more consumers, having the same interest and in case of death of a consumer his/ her legal heirs or representative.

## 11.2 OBJECTIVES OF NEW CONSUMER PROTECTION ACT , 2019 :

Consumer Protection Act, 2019 is a law to protect the interests of the consumers. This

Act provides safety to consumers regarding defective products, dissatisfactory services, and unfair trade practices.

The basic aim of the Consumer Protection Act, 2019 is to save the rights of the consumers by establishing authorities for timely and effective administration and settlement of consumers' disputes.

#### **11.2.1 The New act is for speedy disposal of the Redressal of Consumer Disputes....**

- Consumer councils are established to promote and protect the rights of consumers. The Central Council has the jurisdiction for the entire country, followed by the State Council for each state and District Council for each district. The Councils at the State level is headed by the chairman of the council, i.e., the Minister-in-Charge of the Consumer Affairs in the State Government.
- The consumers' complaints are dealt by District Forum, State and National Commission. District forum and State Commission are established by the State Governments, and the National Commission established by Central Government. District Forum has powers to deal with cases up to 20 lakhs. The State Commission deals with complaints exceeding value of ` 20 lakh and below One crore and appeals against the orders of any District forum within the State. The cases exceeding one crore would be handled by the Central Commission. They also deal with appeals against the order of any State Commission. Complaints should be in a prescribed manner, with full details, evidence and applicable fee. Supporting affidavit is required. Admissibility of complaint is to be decided within twenty one days. Similarly, other procedures and requirements as per the Act which are in force, would be applicable.

#### **11.2.2 RIGHTS OF THE CONSUMERS :**

- Consumers have the right to information on various aspects of goods and services. This could be information about the quantity, quality, purity, potency, price, and standard of goods or services.
- To be protected from hazardous goods and services. Right to protection against goods and services that can be dangerous to life and property.
- To be protected from unfair or restrictive trade practices.
- Consumers have the right to access a variety of goods and services at competitive prices.
- Consumers should have the right to redressal.

#### **11.3 DEFINITION OF CONSUMER :**

A consumer is defined as a person who buys products or receives services for a consideration that has been paid or promised or partly paid and partly promised, or under any delayed payment system, according to the definition of consumer under Consumer Protection



Act 1986 .A consumer is a user of goods and services, therefore, every producer is also a consumer.

➤ **Who is A Consumer?**

A 'consumer' is generally understood as a person who uses or consumes goods or avails of any service. Under the Consumer Protection Act 2019, a consumer is a person who buys any goods or avails services for a consideration, which has been paid or promised, or partly paid and partly promised, or under any scheme of deferred payment. It includes any user of such goods or beneficiary of services through electronic means or by teleshopping or direct selling or multilevel marketing. However, any person who obtains goods or avails if such use is made with the approval of the buyer. It applies to both offline and online transactions through electronic means or by teleshopping or direct selling or multilevel marketing. However, any person who obtains goods or avails services for resale or commercial purpose is not treated as a consumer and is outside the scope of Consumer Protection Act 2019. Section 2(1) of the Act defines various terms used in the Act. Some of the definitions are given hereunder :

➤ **Terms & Definitions :**

**1. Complaint :** Any allegation in writing made by the complainant for obtaining relief w.r.t restrictive trade practice, defect in goods or deficiency in services provided, overcharging of price or offer of goods or service injurious to life and safety.

**2. Complainant :** means one or more consumers, or any voluntary consumer association, central or state government or the central authority or a legal heir or legal representative or a parent or legal representative in case of a minor.

**3. Spurious goods :** Goods that are falsely claimed to be genuine.

**4. Unfair trade practice :** A trade practice for the purpose of promoting sale, use or supply of any goods or service falsely represents its quality, standard, quantity, composition, style or model.

**5. Restrictive trade practice :** A trade practice which manipulates price or affect the flow of supplies in the market relating to goods and services in such a manner that an unjustified cost is imposed on the consumer.

**6. Defect :** Any fault, imperfection, shortcoming or inadequacy in quality, nature and manner of performance in relation to goods or a product.

**7. Deficiency :** Any fault, imperfection, shortcoming or inadequacy in quality, nature and manner of performance in relation to in relation to any service and includes act of negligence or omission or commission or withholding relevant information which causes loss or injury to the consumer.

**8. Injury :** Any harm illegally caused to any person in body, mind or property.

**9. Product :** Any article or goods or substance or raw material or any extended cycle of such product either in gaseous , liquid or solid state possessing intrinsic value capable of delivery either as assembled or a component produced or manufactured to trade. It does not include human tissues, blood, blood products and organs.

**10. Product Seller :** Any person in the course of business imports, sells, distributes, leases, installs, prepares, labels, markets, repairs, maintains or otherwise involved in placing the product for commercial use or a service provider.

**11. Product Liability:** Responsibility of a product manufacturer or seller of any product or service to compensate for any harm caused to a consumer by defective product manufactured or sold or by deficiency in services.

### 11.3.1 MEANING OF COMPLAINT :

- (i) a consumer, or
  - (ii) any voluntary consumer association registered under the Companies Act, 1956 amended act of 2013 or under any other law for the time being in force; or
  - (iii) the Central Government or any State Government, who or which makes a complaint; or
  - (iv) one or more consumers where there are numerous consumers having the same interest;
  - (iv) in case of death of a consumer, his legal heir or representative; who or which makes a complaint [Section 2(1)(b)]
- An association of persons, to have **locus standi** as consumer, it is necessary that all the individual persons forming the association must be consumers under Section 2(1)(d) of the Act having purchased the same goods / hired the same service from the same party i.e. they should have a common cause of action. Thus, unlike MRTP Act, 1969, the Redressal Machinery under Consumer Protection Act, 1986 has no power to initiate cases suo-moto.
  - **Complaint means** any allegation in writing made, with a view to obtaining any relief, by a complainant that
    - (i) an unfair trade practice or a restrictive trade practice has been adopted 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 of or agreed to be hired or availed of by him suffer from deficiency in any respect;
    - (iv) a trader or the service provider, as the case may be, has charged for the goods or for the services mentioned in the complaint, a price in excess of the price

- fixed by or under any law for the time being in force;
  - displayed on the goods or any package containing such goods;
  - displayed on the price list exhibited by him by or under any law for the time being in force
  - agreed between the parties.
- (v) goods which will be hazardous to life and safety when used are being offered for sale to the public,
- in contravention of any standards relating to safety of such goods as required to be complied with, by or under any law for the time being in force;
  - 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 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. [Section 2(1)(c)].

#### **11.4 SIGNIFICANCE OF CONSUMER PROTECTION ACT, 2019 :**

##### **Empowering Consumers :**

- The new Act will empower consumers and help them in protecting their rights through its various rules and provisions. The new Act will help in safeguarding consumer interests and rights.
- Consumer – driven businesses such as retail, e-commerce would need to have robust policies dealing with consumer redressal in place.
- The new Act will also push the consumer – driven businesses to take extra precautions against unfair trade practices and unethical business practices.

##### **Inclusion of the e – commerce sector :**

- The earlier Act did not specifically include e – commerce transactions, and this lacuna has been addressed by the new Act.
- E-commerce has been witnessing tremendous growth in recent times. The Indian e-commerce market is expected to grow to US\$ 200 billion by 2026.
- The Act also enables regulations to be notified on e – commerce and direct selling with a focus on the protection of interest of consumers. This would involve rules for the prevention of unfair trade practices by e-commerce platforms.
- As per the notified rules, every e – commerce entity is required to provide information relating to return, refund, exchange, warranty and guarantee, delivery

and shipment, modes of payment, grievance redressal mechanism, payment methods, the security of payment methods, charge – back options, etc. including country of origin which are necessary for enabling the consumer to make an informed decision at the pre-purchase stage on its platform.

- The e – commerce platforms will have to acknowledge the receipt of any consumer complaint within forty – eight hours and redress the complaint within one month from the date of receipt under this Act. This will bring e-commerce companies under the ambit of a structured consumer redressal mechanism.
- E – commerce entities that do not comply will face penal action.

According to the preamble, the Consumer Protection Act, 2019 to provide for better 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 consumers disputes and for matters connected therewith. However, conflicting interests have categorised them, inevitably, into two different groups. The industrial revolution brought in the concept of standardisation and mass production and over the years, the type of goods and the nature of services available grew manifold.

#### **Need for the New Act :**

- The Digital Age has ushered in a new era of commerce and digital branding, as well as a new set of customer expectations. Digitisation has provided easy access, a large variety of choices, convenient payment mechanisms, improved services and shopping as per convenience. However, there are also associated challenges related to consumer protection.
- To help address the new set of challenges faced by consumers in the digital age, the Indian Parliament passed the landmark Consumer Protection Bill, 2019 which aims to provide timely and effective administration and settlement of consumer disputes.

#### **11.5 THE DOCTRINE OF CAVEAT EMPTOR :**

The doctrine of ‘Caveat Emptor’ or ‘let the buyer beware’ which came into existence in the middle ages had been replaced by the principle of ‘Consumer Sovereignty or ‘Consumer is the King’. But, with tremendous increase in the world population, the growing markets were unable to meet the rising demand which created a gap between the general ‘demand’ and ‘supply’ levels in the markets. This to some extent watered down the concept of ‘Consumer Sovereignty’, what with consumers being forced to accept whatever was offered to them. On the other hand, the expanding markets necessitated the introduction of various intermediaries between the producer and the ultimate consumer. ‘Advertising’, though ostensibly directed at informing potential consumers about the availability and uses of a product began to be resorted to as a medium for exaggerating the uses of ones products or disparaging others products so as to have an edge over competitors. Unfair and deceptive practices such as selling of defective or sub – standard goods, charging exorbitant prices,

misrepresenting the efficacy or usefulness of goods, negligence as to safety standards, etc. became rampant. It, therefore, became necessary to evolve statutory measures, even in developed countries, to make producers/traders more accountable to consumers. It also became inevitable for consumers to unite on a common platform to deal with issues of common concern and having their grievances redressed satisfactorily.

## **11.6 GENESIS OF CONSUMER PROTECTION LAWS :**

The need to ensure the basic rights to health, safety, etc. of consumers has long been recognised the world over and various general legislations were enacted in India and abroad in this direction. In India, the general enactments other than the law of torts which ultimately aimed at protection of consumers interests are the Indian Contract Act, 1872, the Sale of Goods Act, 1930, the Dangerous Drugs Act, 1930, the Agricultural Produce (Grading and Marketing) Act, 1937, the Drugs and Cosmetics Act, 1940, the Indian Standards Institution (Certification Marks) Act, 1952, the Prevention of Food Adulteration Act, 1954, the Drugs and Magic Remedies (Objectionable Advertisements) Act, 1954, the Essential Commodities Act, 1955, the Standards of Weights and Measures Act, 1976 (Now Legal Metrology Act, 2009), the Trade and Merchandise Marks Act, 1958, (Now Trade Marks Act, 1999), the Patents Act, 1970, the Hire Purchases Act, 1972 and the Prevention of Black Marketing and Maintenance of Supplies of Essential Commodities Act, 1980.

These legislations contained regulatory provisions and contravention of these provisions attracted civil liability. This meant that an ordinary consumer had no other remedy but to initiate action by way of a civil suit which involved lengthy legal process proving to be too expensive and time consuming for lay consumers. In fact, at times, the time and cost involved in the legal process was disproportionate to the compensation claimed and granted to an individual consumer. Though the MRTP Commission proved to be far more accessible and less time-consuming than the Civil Courts, its single central location at New Delhi did not make the redressal agency accessible to all consumers, especially those located in the remote towns and villages of the country. Therefore, it became necessary to evolve laws directed at protecting the consumers and at the same time, providing for remedies which are simpler, more accessible, quicker and less expensive. This paved the way for enactment of the Consumer Protection Act in 1986 providing for simple, quick and easy remedy to consumers under a three-tier quasi-judicial redressal agency at the District, State and National levels. To make the Act more effective and meaningful, necessary changes have been brought by Consumer Protection (Amendment) Act, 2002, which came into force w.e.f. March 15, 2003, further amended in 2019.

## **11.7 THE BASIC RIGHTS OF CONSUMERS :**

The basic rights of consumers that are sought to be promoted and protected are :

- the right to be protected against marketing of goods and services which are hazardous to life and property;

- the right to be informed about the quality, quantity, potency, purity, standard and price of goods, or services so as to protect the consumer against unfair trade practices;
- the right to be assured, wherever possible, access to variety of goods and services at competitive prices;
- the right to be heard and to be assured that consumers interests will receive due consideration at appropriate forums;
- the right to seek redressal against unfair trade practices or restrictive trade practices or unscrupulous exploitation of consumers; and
- right to consumer education

This is based on the basic rights of consumers as defined by the International Organisation of Consumers(IOCU) viz., the Rights to Safety, to Information, of Choice, to be Heard, to Redressal, to Consumer Education, to Healthy Environment and to Basic Needs.

## **11.8 SCOPE OF THE ACT :**

The Act extends to the whole of India and applies to all goods and services unless otherwise notified by the Central Government. The Act was notified on August 9th 2019. However, it came into effect from July 20th 2020. Consumer Protection Act, 2019 was made applicable to Jammu and Kashmir under the Jammu and Kashmir Reorganisation Act 2019. The said Act replaced the applicability of Consumer Protection Act, 1986 in the region.

### **11.8.1 Time-Bound Redressal :**

- A large number of pending consumer complaints in consumer courts have been common across the country. The new Act by simplifying the resolution process can help solve the consumer grievances speedily.
- A main feature of the Act is that under this, the cases are decided in a limited time period.

#### **Responsible endorsement :**

- The new Act fixes liability on endorsers considering that there have been numerous instances in the recent past where consumers have fallen prey to unfair trade practices under the influence of celebrities acting as brand ambassadors.
- This will make all stakeholders – brands, agencies, celebrities, influencers and e-commerce players – a lot more responsible. The new Act would force the endorser to take the onus and exercise due diligence to verify the veracity of the claims made in the advertisement to refute liability claims.

#### **Upholding consumer interests :**

- For the first time, there will be an exclusive law dealing with Product Liability.

- Product liability provision will deter manufacturers and service providers from delivering defective products or deficient services.
- The new legislation empowers the National Consumers Dispute Redressal Committee as well as the State Commission to declare null and void any terms of a contract while purchasing a product. This will go a long way in protecting consumers, who are often subject to contract conditions that favour a seller or manufacturer.

#### **Alternate dispute redressal mechanism :**

- The provision of Mediation will make the process of dispute adjudication simpler and quicker.
- This will provide a better mechanism to dispose of consumer complaints in a speedy manner and will help in the disposal of a large number of pending cases in consumer courts across the nation.

#### **Simplified process for grievance redressal :**

- The new Act would ease the overall process of consumer grievance redressal and dispute resolution process. This will help reduce inconvenience and harassment for the consumers.
- The enhanced pecuniary jurisdiction and provisions providing statutory recognition to mediation processes, enabling filing of complaints from any jurisdiction and for hearing parties through video-conferencing will increase accessibility to judicial forums and afford crucial protection in times when international e-commerce giants are expanding their base.

### **11.9 CONSUMER MEANS ANY PERSON WHO ....**

- (a) buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any user of such goods other than the person who buys such goods for consideration paid or promised or partly paid or partly promised, or under any system of deferred payment when such use is made with the approval of such person, but does not include a person who obtains such goods for resale or for any commercial purpose; or
- (b) hires or avails of any services for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any beneficiary of such services other than the person who hires or avails of the services for consideration paid or promised, or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the first mentioned person but does not include a person who avails of such services for any commercial purpose.

- It has been clarified that the term commercial purpose does not include use by a consumer of goods bought and used by him exclusively for the purpose of earning his livelihood by means of self – employment.

Therefore, to be a ‘consumer’ under the Act :

- (i) the goods or services must have been purchased or hired or availed of for consideration which has been paid in full or in part or under any system of deferred payment, i.e. in respect of hire purchase transactions;
- (ii) goods purchased should not be meant for re-sale or for a commercial purpose. Goods purchased by a dealer in the ordinary course of his business and those which are in the course of his business to supply would be deemed to be for ‘re-sale; and
- (iii) in addition to the purchaser(s) of goods, or hirer(s) or users of services, any beneficiary of such services, using the goods/services with the approval of the purchaser or hirer or user would also be deemed a ‘consumer under the Act.

A purchase of goods can be said to be for a ‘commercial purpose only if the goods have been purchased for being used in some profit making activity on a large-scale, and there is close and direct nexus between the purchase of goods and the profit-making activity.

**In Laxmi Engineering Works vs. P.S.G. Industrial Institute, Supreme Court held** that the explanation to Section 2(1)(d) is clarificatory in nature. It observed that whether the purpose for which a person has bought goods is a ‘commercial purpose’ is always a question of facts and to be decided in the facts and circumstances of each case. If the commercial use is by the purchaser himself for the purpose of earning his livelihood by means of self employment such purchaser of goods would yet be a consumer. The Supreme Court further observed that if a person purchased a machine to operate it himself for earning his livelihood, he would be a consumer. If such person took the assistance of one or two persons to assist him in operating the machine, he would still be a consumer. But if a person purchases a machine and appoint or engage another person exclusively to operate the machine, then such person would not be a consumer.

**In Bhupendra Jang Bahadur Guna vs. Regional Manager and Others (II 1995 CPJ 139), the National Commission held** that a tractor purchased primarily to till the land of the purchaser and let out on hire during the idle time to till the lands of others would not amount to commercial use.

The question as to whether the widow of the deceased policy holder was a ‘consumer’ under the Act was decided in the affirmative by the State Commission in Andhra Pradesh in the case of A Narasamma v. LIC of India. The State Commission held that as the term ‘consumer’ includes any beneficiary of service other than the person who hires the services for consideration, the widow being the beneficiary of services is a ‘consumer’ under the Act entitled to be compensated for the loss suffered by her due to negligence of the LIC.



**In Laxmiben Laxmichand Shah v. Sakerben Kanji Chandan and others 2001 CTJ 401 (Supreme Court) (CP)**, the Supreme Court held that the tenant entering into lease agreement with the landlord cannot be considered as consumer under Section 2(1)(d) of the Act. Where there was no provision in the lease agreement in respect of cleaning, repairing and maintaining the building, the rent paid by tenant is not the consideration for availing these services and therefore, no question of deficiency in service.

### **11.10 DEFINITION OF GOODS AND SERVICE :**

**Goods**, in terms of Section 2(1)(i) has been defined to mean goods as defined in the Sale of Goods Act, 1930. As per Section 2(7) of the Sale of Goods Act, 1930 Goods means every kind of movable property other than actionable claims and money; and includes 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. Therefore, most consumer products come under the purview of this definition.

**In Morgan Stanley Mutual Fund vs. Kartik Das (1994) 3 CLJ 27, the Supreme Court** held that an application for allotment of shares cannot constitute goods. It is after allotment, rights may arise as per the articles of association of the company. At the stage of application there is no purchase of goods for consideration and again the purchaser cannot be called the hirer of services for consideration.

**SERVICE** : The term 'service' is defined under Section 2(1)(o) as to mean service of any description which is made available to 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, amusement or the purveying of news or other information, but does not include the rendering of any service free of charge or under a contract of personal service. Passengers travelling by trains on payment of the stipulated fare charged for the ticket are 'consumers' and the facility of transportation by rail provided by the railway administration is a 'service' rendered for consideration as defined in the Act. Subscribers of telephones would also be 'consumer' under the Act.

### **11.11 CONTRACT OF SERVICE AND CONTRACT FOR SERVICE :**

The Supreme Court in the case of *Indian Merchants Association v. V P Santha*, (CA No. 688 of 1993 decided on 13th November 1995) observed that a contract for service implies a contract whereby one party undertakes to render services e.g. professional or technical services to or for another in the performance of which he is not subject to detailed direction and control but exercises professional or technical skill and uses his own knowledge and discretion. A contract of service on the other hand implies relationship of master and servant and involves an obligation to obey orders in the work to be performed and as to its mode and manner of performance. The Parliamentary draftsman was well aware of this well-accepted distinction between 'contract of service' and 'contract for services' and had deliberately chosen the expression 'contract of service' instead of the expression 'contract for service' in the exclusionary part of the definition of 'service', this being the reason being that

an employer could not be regarded as a consumer in respect of the services rendered by his employee in pursuance of contract of employment. By affixing the adjective 'personal' to the word 'service' the nature of the contracts which were excluded were not altered. The adjective only emphasised that what was sought to be excluded was personal service only. The expression contract of personal service in the exclusionary part of Section 2(1)(o) must, therefore, be construed as excluding the services rendered by an employee to his employer under the contract of personal service free from the ambit of the expression service

### **11.12 SERVICES RENDERED UNDER MEDICARE INSURANCE SCHEME :**

Service rendered by a medical practitioner or hospital / nursing home can not be regarded as service rendered free of charge, if the person availing the service has taken an insurance policy for medical care where under the charges for consultation, diagnosis and medical treatment are borne by the insurance company and such service would fall within the ambit of 'service' as defined in Section 2(1)(o). Similarly, where as a part of the conditions of service, the employer bears the expenses of medical treatment of an employee and his family members dependent on him, service rendered to such an employee and his family members would not be free of charge and would constitute 'service' under Section 2(1)(o) of the Act.

**In State of Haryana v. Santra [2000(3) SCALE 417], the Supreme Court held** that in a country where the population has been increasing rapidly and the Government has taken up the family planning as an important programme, the medical officer as also the State Government must be held responsible in damages if the family planning operation is a failure on account of the medical officers negligence because this has created additional burden on the parents of the child.

**In the case of Alex J. Rebello v. Vice Chancellor, Banglore University and others, 2003 CTJ 575 (CP)(NCDRC)** the National Commission has held that the University in conducting examination, evaluating answer sheets and publishing the result was not performing any service for consideration and a candidate who appeared for the examination cannot be regarded as a consumer.

**CONSUMER DISPUTE** means a dispute where the person against whom a complaint has been made, denies or disputes the allegation contained in the complaint .

**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 services 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 price;
- (b) any trade practice which requires a consumer to buy, hire or avail of any goods or, as the case maybe, services as condition precedent to buying, hiring or availing of other goods or services.[Section2(1)(nn)].

**DEFECT MEANS** any fault, imperfection or shortcoming in the quality, quantity, potency, purity or standard which is required to be maintained by or under any law for the time being in force or under any contract, express or implied, or as is claimed by the trader in any manner whatsoever in relation to any goods .

It is clear from the above definition that non-fulfilment of any of the standards or requirements laid down under any law for the time being in force or as claimed by the trader in relation to any goods fall under the ambit of defect. Therefore, contravention of any of the provisions of enactments such as the Drugs & Cosmetics Act, 1950, the Prevention of Food Adulteration Act, 1955, the Indian Standards Institution (Certification Marks) Act, 1952 etc. or any rules framed under any such enactment or contravention of the conditions or implied warranties under the Sale of Goods Act, 1930 in relation to any goods have also been treated as a defect under the Act. Fault, imperfection or shortcoming in quality, quantity, potency, purity or standard as claimed by the trader in any manner whatsoever in relation to goods is to be determined with reference to the warranties or guarantees expressly given by a trader.

**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.

**Failure to maintain** the quality of performance required by the law or failure to provide services as per warranties given, by the provider of the service would amount to 'deficiency'.

### 11.13 CASE REFERENCES :

**In Divisional Manager, LIC of India vs. Bhavanam Srinivas Reddy, the National Commission** observed that default or negligence in regard to settlement of an insurance claim (on allegation of suppression of material facts, in this particular case) would constitute a deficiency in service on the part of the insurance company and it will be perfectly open for the aggrieved consumer to approach the Redressal Forums to seek appropriate relief.

**In Jaipur Metals and Electrical Ltd. vs. Laxmi Industries,** the National Commission held that a reading of Section 2(1)(g) of the Act shows that deficiency must pertain to the 'performance' in terms of quality, nature and manner to be maintained or had been undertaken to be performed in pursuance of a contract.

**In Punjab National Bank vs. K.B. Shetty** (First Appeal No. 7 of 1991 decided on 6th August, 1991), ornaments kept in the banks locker were found lost though the certificate recorded by the custodian of the bank on the day the customer operated the locker stated that all lockers operated during the day have been checked and found properly locked. The National Commission un holding the decision of the State Commission, held the bank guilty of negligence and therefore, liable to make good the loss.

**Failure of a Housing Board** to give possession of the flat after receiving the price and after registering it in favour of the allottee was held to be 'deficiency in service' in the case of Lucknow Development Authority vs. Roop Kishore Tandon F.N. No. 54/1990 decided on 10.10.1990

**Cancellation of train services** by the railways due to disturbance involving violence so as to safeguard the passengers as well as its own property was held by the National Commission as not constituting 'deficiency in service' on the part of the Railway. [Dainik Rail Yatri Sangh (Regd.) vs. The General Manager, Northern Railway - I (1992) CPJ 218 (NC)]. Failure of the Railways to provide cushioned seats in the first class compartments as per specifications laid down by the Railway Board and to check unauthorised persons from entering and occupying first class compartments was held to be 'deficiency' [N. Prabhakaran vs. General Manager, Southern Railway, Madras - I (1992) CPJ 323 (NC)]. In Union Bank of India v. Seppo Rally OY (1999) 35 CLA 203, the Supreme Court held that delay in payment of an unconditionally guaranteed amount by a bank in India to a non-resident in Finland in foreign currency can not be attributed to any deficiency in the service of the bank when the bank's stand is that the delay is caused by the failure of a bank in Finland, to which the remittance was to have been made under the non-resident's instructions to reply to the Indian Bank's valid query in this connection and the RBI took time to grant the necessary permission to make the remittance.

## 11.14 TREPIDIATIONS OF THE NEW ACT OF 2019 :

### State regulation :

- As part of the Consumer Protection Act, 2019, the Ministry of Consumer Affairs will compile a code of conduct for advertisers and agencies, a move designed to curb unfair practices and misleading claims. The planned code will detail penalties for advertisers and their agencies and publishers if misleading advertising and false claims are found.
- There have been concerns that this approach would mark a move from self-regulation to a more federated oversight.

### Implementational challenges :

- The existing vacancies at the district commission level would undermine the effective implementation of the new Act.

### Lack of differentiated approach:

- As per the proposed rules for the e-commerce businesses, companies are not allowed to "manipulate the price" of goods and services offered on their platforms to gain unreasonable profit or discriminate between consumers of the same class or make any arbitrary classification of consumers affecting their rights under the Act.
- The clause on the manipulation of price by e-commerce companies appears irrelevant as sometimes, the e-commerce companies would want to reduce the

price to enhance sales volume. For a country with market size of around \$25 billion, the guidelines should have taken a deeper view of the e-commerce ecosystem, covering all prevailing business models between consumers, marketplaces and sellers.

### **11.15 SUMMARY :**

It is now universally accepted that the extent of consumer protection is a true indicator of the level of progress in a nation. Taking into account the interests and needs of consumers in all countries, particularly those in developing countries, recognizing that consumers often face imbalances in economic terms, educational level and bargaining power, and bearing in mind that consumer should have the right of access to non-hazardous products, as well as importance of promoting just, equitable and sustainable economic and social development, the Secretary General, United Nations submitted draft guidelines for consumer protection to the Economic and Social Council in 1983. In line with the international development on consumer protection, the Parliament enacted Consumer Protection Act, 1986 provides a forum for speedy and simple redressal of consumer disputes. The rights under the consumer protection flow from the rights enshrined in Articles 14 to 19 of the Constitution of India. The new Consumer Protection Act, 2019 was passed by Parliament in 2019. It came into force in July 2020 and replaced the Consumer Protection Act, 1986. Consumer Protection Act, 2019 is a law to protect the interests of the consumers. This Act provides safety to consumers regarding defective products, dissatisfactory services, and unfair trade practices.

The basic aim of the Consumer Protection Act, 2019 is to save the rights of the consumers by establishing authorities for timely and effective administration and settlement of consumers' disputes. The Act extends to the whole of India and applies to all goods and services unless otherwise notified by the Central Government. The Act was notified on August 9th 2019. However, it came into effect from July 20th 2020. Consumer Protection Act, 2019 was made applicable to Jammu and Kashmir under the Jammu and Kashmir Reorganisation Act 2019. The said Act replaced the applicability of Consumer Protection Act, 1986 in the region

#### **Responsible endorsement :**

- The new Act fixes liability on endorsers considering that there have been numerous instances in the recent past where consumers have fallen prey to unfair trade practices under the influence of celebrities acting as brand ambassadors.
- This will make all stakeholders – brands, agencies, celebrities, influencers and e-commerce players – a lot more responsible. The new Act would force the endorser to take the onus and exercise due diligence to verify the veracity of the claims made in the advertisement to refute liability claims.

#### **Upholding consumer interests :**

- For the first time, there will be an exclusive law dealing with Product Liability.

- Product liability provision will deter manufacturers and service providers from delivering defective products or deficient services.
- The new legislation empowers the National Consumers Dispute Redressal Committee as well as the State Commission to declare null and void any terms of a contract while purchasing a product. This will go a long way in protecting consumers, who are often subject to contract conditions that favour a seller or manufacturer.

### **11.16 TECHNICAL TERMS :**

1) **C.P ACT OF 2019** : Consumer Protection Act, 2019

2) **Consumer** :

A person who buys any goods or services for a consideration, which has been paid or promised or partly paid and partly promised, or under any system of deferred payment also includes the user with approval of such goods or beneficiary of services.

3) **Time-Bound Redressal** :

The e-commerce platforms will have to acknowledge the receipt of any consumer complaint within forty-eight hours and redress the complaint within one month from the date of receipt under this Act.

4) **Locus Standi** :

Section 2 (1)(d) defines the locus standi of a consumer on the basis of him having brought/availed of goods/services respectively. The section also defines who qualifies or does not qualify as a consumer.

### **11.17 SELF ASSESSMENT QUESTIONS :**

- 1) Explain the importance of consumer protection from the point of view as consumers?
- 2) Briefly explain the significance of the new consumer act 2019?
- 3) What is Locus Standi ?
- 4) Define consumer as per the consumer protection act 2019?
- 5) What is deficiency of service ? What is complaint as per C.P Act 2019?

### **11.18 REFERENCE BOOKS :**

- 1) J Jaya Shankar , Business Laws, Margham Publications , Chennai
- 2) ND Kapoor, Business Laws , S chand Publications
- 3) Balachandram V , Business Law, Tata McGraw Hill
- 4) Pillai Bhavathi, Business Law, S chand Publications

- 5) Tulsain Business Law, Tata MecGraw Hill
- 6) Business Law seven hills publishers , Hyderabad
- 7) K.C Garg , Business Law, Kalyani Publishers.
- 8) Consumer Protection act 2019

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## Lesson – 12

# CONSUMER PROTECTION COUNCILS AND DISPUTE REDRESSAL MECHANISM

### Objectives :

After studying this lesson, one should be able to understand

- Definition of Consumer Protection Councils
- Scope of consumer rights
- Meaning of Consumer
- Consumer Obligations
- Consumer Protection under the act
- Definition of Dispute
- Dispute Redressal Mechanism
- Understand the importance of Consumer for services
- Consumer Protection Act, 2019 arrangements for redressal of disputes

### Structure of the Lesson :

- 12.1 Introduction
  - 12.1.1 Meaning of the Word ‘Consumer’
- 12.2 Need for the Consumer Protection Act, 2019
- 12.3 Objective of the Consumer Protection Act 2019
- 12.4 Consumer Rights under Consumer Protection Act , 2019
- 12.5 Unfair Trade Practices under Consumer Protection Act, 2019
- 12.6 Structural Changes in New Consumer Protection Act, 2019
- 12.7 Essential Provisions of Consumer Protection Act , 2019
  - 12.7.1 Central Consumer Protection Council
  - 12.7.2 State Consumer Protection Councils
  - 12.7.3 District Consumer Protection Council
- 12.8 Central Consumer Protection Authority:
  - 12.8.1 Functions and Duties of the Central Authority
- 12.9 Consumer Disputes Redressal Commission



- 12.10 Mediation
- 12.11 Product Liability
  - 12.11.1 Liability of Product Manufacturer
  - 12.11.2 Liability of Product Service Provider
  - 12.11.3 Liability of Product Seller
  - 12.11.4 Exceptions to Product Liability
- 12.12 Offences and Penalties under Consumer Protection Act 2019
- 12.13 How do Consumers benefit from Consumer Protection Act,2019
- 12.14 Complaints before the District Forum and State Commission
- 12.15 Summary
- 12.16 Technical Terms
- 12.17 Self Assessment Questions
- 12.18 Reference Books

## **12.1 INTRODUCTION :**

The consumer protection bill 2019 primarily defines the following consumer rights. Be protected against marketing of goods and services which are hazardous to life and property. Be informed of the quality, quantity, potency, purity, standard and price of goods and services. Consumer protection is the practice of safeguarding buyers of goods and services against unfair practices in the market. It refers to the steps adopted for the protection of consumers from corrupt and unscrupulous malpractices by the sellers, manufacturers, service providers, etc. and to provide remedies in case their rights as a consumer have been violated. In India, the protection of the rights of the consumers is administered by the Consumer Protection Act, 2019. The Consumer Protection Act, 2019 was introduced to replace the Consumer Protection Act, 1986. The new Act contains various provisions which incorporate the challenges faced by modern and technology-dependent consumers. The Act also contains various provisions for the protection and promoting the rights of the consumers.

### **12.1.1 Meaning of the word ‘consumer’**

A consumer is an individual or group of individuals who purchase goods and services for their own personal use and not for the purpose of manufacturing or resale. Section 2(7) of the Consumer Protection Act, 2019 defines a consumer as any person who buys goods or services in exchange for consideration and utilises such goods and services for personal use and for the purpose of resale or commercial use. In the explanation of the definition of consumer, it has been distinctly stated that the term ‘buys any goods’ and ‘hires or avails any services’ also includes all

online transactions conducted through electronic means or direct selling or teleshopping or multi-level marketing.

## **12.2 NEED FOR THE CONSUMER PROTECTION ACT, 2019 :**

The Consumer Protection Act, 2019 was enacted by the Indian legislature to deal with matters relating to violation of consumer's rights, unfair trade practices, misleading advertisements, and all those circumstances which are prejudicial to the consumer's rights. The intention of the Parliament behind enacting the Act was to include provisions for e-consumers due to the development of technology, buying and selling of goods and services online have considerably increased during the last few years.

The Act seeks to provide better protection of the rights and interests of the consumers by establishing Consumer Protection Councils to settle disputes in case any dispute arises and to provide adequate compensation to the consumers in case their rights have been infringed. It further provides speedy and effective disposal of consumer complaints through alternate dispute resolution mechanisms. The Act also promotes consumer education in order to educate the consumer about their rights, responsibilities and also redressing their grievances.

## **12.3 OBJECTIVE OF THE CONSUMER PROTECTION ACT 2019 :**

The main objective of the Act is to protect the interests of the consumers and to establish a stable and strong mechanism for the settlement of consumer disputes. The Act aims to :

- 1) Protect against the marketing of products that are hazardous to life and property.
- 2) Inform about the quality, potency, quantity, standard, purity, and price of goods to safeguard the consumers against unfair trade practices.
- 3) Establish Consumer Protection Councils for protecting the rights and interests of the consumers.
- 4) Assure, wherever possible, access to an authority of goods at competitive prices.
- 5) Seek redressal against unfair trade practices or unscrupulous exploitation of consumers.
- 6) Protect the consumers by appointing authorities for timely and sufficient administration and settlement of consumers' disputes.
- 7) Lay down the penalties for offences committed under the Act.
- 8) Hear and ensure that consumers' welfare will receive due consideration at appropriate forums in case any problem or dispute arises.
- 9) Provide consumer education, so that the consumers are able to be aware of their rights.

- 10) Provide speedy and effective disposal of consumer complaints through alternate dispute resolution mechanisms.

#### **12.4 CONSUMER RIGHTS UNDER CP ACT, 2019 :**

There exist six rights of a consumer under the Consumer Protection Act, 2019. The rights of the consumers are mentioned under Section 2(9) of the Act, which are as follows :

1. The right of a consumer to be protected from the marketing of goods and services that are hazardous and detrimental to life and property.
2. The right of a consumer to be protected against unfair trade practices by being aware of the quality, quantity, potency, purity, standard and price of goods, products or services.
3. The right of a consumer to have access to a variety of goods, services and products at competitive prices.
4. The right to seek redressal at respective forums against unfair and restrictive trade practices.
5. The right to receive adequate compensation or consideration from respective consumer forums in case they have been wronged by the seller.
6. The right to receive consumer education.

#### **12.5 UNFAIR TRADE PRACTICES UNDER CP ACT, 2019 :**

Section 2(47) of the Consumer Protection Act, 2019 defines the term 'unfair trade practices' which include :

- Manufacturing spurious goods or providing defective services.
- Not issuing cash memos or bills for the goods purchased or services rendered.
- Refusing to take back or withdraw the goods or services and not refunding the consideration taken for the purchase of the goods or services.
- Disclosing the personal information of the consumer.

#### **12.6 STRUCTURAL CHANGES IN NEW CP ACT, 2019 :**

The changes that were incorporated with the enactment of the Consumer Protection Act, 2019 are :

- 1) The District Commissions will have the jurisdiction to entertain complaints where the value of the goods, services or products paid as consideration to the seller does not exceed 50 lakh rupees.

- 2) State Commissions will have the jurisdiction to entertain complaints where the value of the goods, services or products paid as consideration to the seller exceeds 50 lakh rupees but does not exceed two crore rupees.
- 3) The National Commission will have the jurisdiction to entertain complaints where the value of the goods, services or products paid as consideration to the seller exceeds two crore rupees.
- 4) The Act further states that every complaint concerning consumer dispute shall be disposed of as expeditiously as possible. A complaint filed under this Act shall be decided within the period of three months from the date of receipt of notice by the opposite party in the cases the complaint does not require analysis or testing of the goods and services and within a period of 5 months, if it requires analysis or testing of the goods and services.
- 5) The Consumer Protection Act, 2019 also facilitates the consumers to file complaints online. In this regard, the Central Government has set up the E-Daakhil Portal, which provides a convenient, speedy and inexpensive facility to the consumers all over India so that they are able to approach the relevant consumer forums in case of any dispute arises.
- 6) The Act lays down the scope for e-commerce and direct selling.
- 7) The Consumer Protection Act, 2019 lays down provisions for mediation and alternative dispute resolution so that the parties are able to dispose of the case conveniently without going through the trouble of litigation.
- 8) The Consumer Protection Act, 2019 contains provisions for product liability, unfair contracts and it also includes three new unfair trade practices. In contrast, the old Act just stated six types of unfair trade practices.
- 9) The Act of 2019 acts as the advisory body for the promotion and protection of consumer rights.
- 10) Under the Consumer Protection Act, 2019 there is no scope for selection committees, the Act authorises the Central Government to appoint the members.

Therefore, with the changes in the digital era, the Indian Parliament enacted and brought the Consumer Protection Act, 2019 in force to include the provisions for e-commerce as digitalization has facilitated convenient payment mechanisms, variety of choices, improved services, etc.

### **12.7 ESSENTIAL PROVISIONS OF CP ACT, 2019 :**

The essential provisions of the Consumer Protection Act, 2019 are :

**Consumer Protection Councils :**

The Act establishes consumer protection councils to protect the rights of the consumers at both the national and state levels.

**12.7.1 Central Consumer Protection Council :**

Under Chapter 2 Section 3 of the Consumer Protection Act, 2019 the Central Government shall establish the Central Consumer Protection Council which is known as the Central Council. It is an advisory body and the Central Council must consist of the following members;

- 1) The Minister-in-charge of the Department of Consumer Affairs in the Central Government will be appointed as the chairperson of the council, and
- 2) Any number of official or non-official members representing necessary interests under the Act.

The Central Council may meet as and when necessary, however, they must hold at least one meeting every year. The purpose of the Central Council is to protect and promote the interests of the consumers under the Act.

**12.7.2 State Consumer Protection Councils :**

Every state government shall establish a State Consumer Protection Council known as the State Council having jurisdiction over that particular state. The State Council acts as an advisory body.

The members of the State Council are :

- 1) The Minister-in-charge of the Consumer Affairs in the State Government will be appointed as the chairperson of the council,
- 2) Any number of official or non-official members representing necessary interests under the Act, and
- 3) The Central Government may also appoint not less than ten members for the purposes of this Act.

The State Councils must hold at least two meetings every year.

**12.7.3 District Consumer Protection Council :**

Under Section 8 of the Act, the state government shall establish a District Consumer Protection Council for every district known as the District Council. The members of the District Council are :

- 1) The collector of that district will be appointed as the Chairperson of the District Council, and

- 2) Any other members representing necessary interests under the Act.

## **12.8 CENTRAL CONSUMER PROTECTION AUTHORITY :**

The Central Government shall establish a Central Consumer Protection Authority which is known as the Central Authority under Section 10 of the Consumer Protection Act, 2019, to regulate matters relating to violation of the rights of consumers, unfair trade practices and false or misleading advertisements which are prejudicial to the interests of the public and consumers and to promote, protect and enforce the rights of consumers. The Central Government will appoint the Chief Commissioner and the other Commissioners of the Central Authority as required under the Act.

The Central Authority must have an 'Investigative Wing' under Section 15 of the Act to conduct an inquiry or investigation. The investigative wing must comprise of the Director-General and the required number of Additional Director-General, Director, Joint Director, Deputy Director and Assistant Director possessing the required experience and qualifications to carry out the functions under this Act.

### **12.8.1 Functions and duties of the Central Authority :**

The functions and responsibilities of the Central Authority are laid down in Section 18 of the Act which includes;

1. To protect and promote the rights of the consumers as a class and to prevent violation of consumer rights,
2. To prevent unfair trade practices,
3. To ensure no false or misleading advertisements regarding any goods or services are promoted,
4. To ensure no person takes part in false or misleading advertisements,
5. Inquire or investigate in cases of violation of consumer rights or unfair trade practices.
6. File complaints before the National, State or District Commission as the case may be,
7. To review matters relating to the factors hindering the enjoyment of consumer rights.
8. To recommend the adoption of international covenants and best international practices concerning consumer rights
9. Promote research and awareness of consumer rights.
10. Lay down necessary guidelines to prevent unfair trade practices and protect the interests of the consumers.

Furthermore, the Central Authority also has the power to investigate after receiving any complaint or directions from the Central Government or of its own motion in cases where there is an infringement of consumer rights or unfair trade practices are carried out. And if the Central Authority is satisfied that infringement of consumer rights or unfair trade practices has occurred then it may :

- Recall the goods or services which are hazardous and detrimental to the consumers,
- Reimburse the prices of the goods and services to the consumers, and
- Discontinue the practices that are prejudicial and harmful to the consumers.

Under Section 21 of the Act, the Central Authority is authorised to issue directions to false and misleading advertisements which may extend to ten lakh rupees. While determining the penalty of the offence the Central Authority must keep in mind factors such as; the population affected by the offence, frequency of the offence and gross revenue from the sales of such product. The Central Authority can also direct search and seizure for the purposes of this Act and in that case the provisions of the Criminal Procedure Code, 1973 will apply.

## **12.9 CONSUMER DISPUTES REDRESSAL COMMISSION :**

The state government shall establish a District Consumer Disputes Redressal Commission, known as the District Commission in each district of the state under the Consumer Protection Act, 2019. The District Commission shall comprise of a President and not less than two members prescribed by the Central Government.

Section 34 of the Act authorises the District Commission to entertain complaints where the value of the goods or services paid as consideration does not exceed one crore rupees. The complaint relating to goods and services can be filed to the District Commission by the consumer, recognized consumer association, Central Government, Central Authority, State Government, etc.

Section 36 states that all the proceedings before the District Commission shall be conducted by the President and at least one member of the commission.

## **12.10 MEDIATION :**

Chapter 5 Section 74 of the Consumer Protection Act, 2019 states that a Consumer Mediation Cell shall be established by the Central Government at the national level and every state government shall establish Consumer Mediation Cell exercising within the jurisdiction of that state. The mediator nominated to carry out the mediation shall conduct it within such time and in such manner as may be specified by regulations.

Section 75 of the Act talks about the empanelment of the mediators. It states the qualifications, terms and conditions of service, the procedure for appointing, and the fee payable to the empanelled mediators.

It is the duty of the mediator to disclose certain facts such as; any personal, financial or professional in the result of the consumer dispute, the circumstances giving rise to their independence or impartiality and any other necessary information for the protection of consumer rights.

## **12.11 PRODUCT LIABILITY :**

Under Section 83 of the Act, a product liability action may be brought by a complainant against a product manufacturer, product service provider or product seller.

### **12.11.1 Liability of product manufacturer :**

A product manufacturer will be held liable in a product liability action under the following circumstances :

- The product contains manufacturing defects.
- The product is defective.
- There is a deviation from manufacturing specifications.
- The product does not conform to the express warranty.
- The product fails to contain adequate information for proper usage.

### **12.11.2 Liability of product service provider :**

A product service provider will be held liable in a product liability action under the following circumstances :

- The service provider will be responsible when the service provided by them is faulty or imperfect.
- There was an act of negligence on their part.
- The service provider failed to issue adequate instructions and warnings for the services.
- The service provider failed to conform to the express warranty or terms and conditions of the contract.

### **12.11.3 Liability of product seller :**

A product seller will be held liable in a product liability action under the following circumstances :



- They altered or modified the product which resulted in being detrimental to the consumer.
- They failed to exercise reasonable care in assembling, inspecting or maintaining such product
- They exercised substantial control over the product which resulted in causing harm to the consumer.

#### **12.11.4 Exceptions to product liability :**

There are certain exceptions to product liability action mentioned in Section 87 of the Act, such as;

- The product was altered, modified or misused by the consumer,
- A consumer cannot bring product liability action when the manufacturer has given adequate warnings and instructions for the use of the product,
- The manufacturer would not be liable in case of a product liability action for not warning about any danger that is commonly known to the general public.

#### **12.12 OFFENCES AND PENALTIES UNDER CP ACT 2019 :**

The offences and penalties listed under this Act are mentioned as follows.

- **Punishment for false and misleading advertisements:** Under Section 89 of the Act any manufacturer or service provider who promotes false or misleading advertisements will be punished with imprisonment for a term that may extend to two years and with fine that may extend to ten lakh rupees.
- **Punishment for manufacturing, selling, distributing products containing adulterants:** Under Section 90 of the Consumer Protection Act, 2019 any person who sells, manufactures, distributes products containing adulterants shall be penalised in case of the following circumstances;
- If the adulterated product does not cause any injury to the consumer then the term for imprisonment will extend to a period of six months and fine which may extend to one lakh rupees,
- If the product containing adulterant causes injury not amounting to grievous hurt then the term for imprisonment will extend to a period of one year and fine which may extend to three lakh rupees,
- If the product containing adulterant causes injury amounting to grievous hurt then the term for imprisonment will extend to a period of seven years and fine which may extend to five lakh rupees,

- If the product results in causing death to the consumer then the term for imprisonment will be for a period of seven years which may extend to life imprisonment and fine not less than ten lakh rupees.
- Punishment for manufacturing, selling, and distributing spurious products: Section 91 states that any person who sells, manufactures, or distributes spurious products shall be punished for such acts.

### 12.13 HOW DO CONSUMERS BEFEFIT FROM CP ACT,2019 :

The Consumer Protection Act, 2019 is a significant piece of legislation brought as it is beneficial for the consumers. The Act widens the scope of protection regarding the rights and interests of consumers.

1. **Unfair contracts** : The Act introduced ‘unfair contract’ under Section 2(46) of the Act, which includes contracts requiring excessive security deposits to be given by the consumer for the performance of contractual obligations. However, the inclusion of unfair contracts in the Act would enable the consumer to file complaints in such cases and would also keep the fraudulent businesses in check.
2. **Territorial jurisdiction** : The Act enables the consumers to file complaints where the complainant resides or personally works for gain thus it would benefit the consumers in seeking redressal for their grievances when their rights have been violated.
3. **False and misleading advertisements** : The Act defines the term ‘false and misleading advertisements’ and also lays down strict penalties for such acts or omissions.
4. **Product liability** : The term ‘product liability’ has been defined by this Act, which states that it is the duty of the product manufacturer, service provider or seller to compensate for any harm caused to a consumer by such defective product manufactured or service provided to the consumer.
5. **Mediation and alternative dispute resolution** : The Act enables the consumer to opt for mediation and alternative dispute resolution mechanisms for speedy and effective settlement of consumer disputes.
6. **E-filing of complaints** : The Act also facilitates e-filing of the complaints and seeking video conference hearings by the Commission. Thus, providing convenient means for the consumers to voice their grievances.

### 12.14 COMPLAINTS BEFORE THE DISTRICT FORUM AND STATE COMMISSION :

Section 34 of The Consumer Protection Act , 2019

34. Jurisdiction of District Commission

(1) Subject to the other provisions of this Act, the District Commission shall have jurisdiction to entertain complaints where the value of the goods or services paid as consideration does not exceed one crore rupees :

Provided that where the Central Government deems it necessary so to do, it may prescribe such other value, as it deems fit.

(2) A complaint shall be instituted in a District Commission within the local limits of whose jurisdiction,--

- (a) the opposite party or each of the opposite parties, where there are more than one, at the time of the institution of the complaint, ordinarily resides or carries on business or has a branch office or personally works for gain; or
- (b) any of the opposite parties, where there are more than one, at the time of the institution of the complaint, actually and voluntarily resides, or carries on business or has a branch office, or personally works for gain, provided that in such case the permission of the District Commission is given; or
- (c) the cause of action, wholly or in part, arises; or
- (d) the complainant resides or personally works for gain.

(3) The District Commission shall ordinarily function in the district headquarters and may perform its functions at such other place in the district, as the State Government may, in consultation with the State Commission, notify in the Official Gazette from time to time.

This section provides for the pecuniary and geographical jurisdiction for filing of complaints in the District Commission. The pecuniary jurisdiction shall be for value of goods or service not exceeding one crore rupees. A consumer may file a complaint in a District Commission within the local limits of whose jurisdiction he resides or personally works for gain. This section also makes provision for Circuit Benches of District Commission.

#### **Section 47 of the Consumer Protection Act, 2019 :**

Sec. 47. Jurisdiction of State Commission.- (1) Subject to the other provisions of this Act, the State Commission shall have jurisdiction—

(a) to entertain—

- (i) complaints where the value of the goods or services paid as consideration, exceeds rupees one crore, but does not exceed rupees ten crore:

Provided that where the Central Government deems it necessary so to do, it may prescribe such other value, as it deems fit;

(ii) complaints against unfair contracts, where the value of goods or services paid as consideration does not exceed ten crore rupees;

(iii) appeals against the orders of any District Commission within the State; and

(b) to call for the records and pass appropriate orders in any consumer dispute which is pending before or has been decided by any District Commission within the State, where it appears to the State Commission that such District 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.

(2) The jurisdiction, powers and authority of the State Commission may be exercised by Benches thereof, and a Bench may be constituted by the President with one or more members as the President may deem fit :

***Provided that the senior – most member shall preside over the Bench.***

(3) Where the members of a Bench differ in opinion on any point, the points shall be decided according to the opinion of the majority, if there is a majority, but if the members are equally divided, they shall state the point or points on which they differ, and make a reference to the President who shall either hear the point or points himself or refer the case for hearing on such point or points by one or more of the other members and such point or points shall be decided according to the opinion of the majority of the members who have heard the case, including those who first heard it :

***Provided that the President or the other members, as the case may be, shall give opinion on the point or points so referred within a period of one month from the date of such reference.***

(4) A complaint shall be instituted in a State Commission within the limits of whose jurisdiction,--

(a) the opposite party or each of the opposite parties, where there are more than one, at the time of the institution of the complaint, ordinarily resides or carries on business or has a branch office or personally works for gain; or

(b) any of the opposite parties, where there are more than one, at the time of the institution of the complaint, actually and voluntarily resides, or carries on business or has a branch office or personally works for gain, provided in such case, the permission of the State Commission is given; or

(c) the cause of action, wholly or in part, arises; or

(d) the complainant resides or personally works for gain.

### **12.15 SUMMARY :**

The Consumer Protection Act, 2019 is a modified piece of legislation that offers the consumers a great variety of benefits and rights to protect them from unfair trade practices, false or misleading advertisements, etc. The Act enables the consumers to seek alternative dispute resolution mechanisms and mediation so that the parties can opt for speedy and effective settlement of consumer disputes. The scope of e-filing of complaints and e-consumers in the Act portrays forward-thinking in part of the legislature. Furthermore, the Act also introduced new terms such as product liability, unfair contracts, etc. thereby widening the scope of protection of consumer rights and enabling the consumers to file complaints when their rights have been violated under the Act.

Thus, the inclusion of the provisions in this fills up the lacunae in the Consumer Protection Act, 1986. The enactment of the Act was paramount and it changed the ambit of protecting the rights of consumers in the country. To protect the interests of the consumers, the Consumer Protection Act was enacted. The Act extends to the whole of India except the State of Jammu and Kashmir. The Act covers all goods and services, except goods for resale or for commercial purpose and services rendered free of charge and a contract of personal service. Complaints (i.e., any allegation should be in writing made by a complainant to obtain any relief provided by or under this Act). The complaint may be made by the complainant which includes a consumer or any voluntary consumer association registered under the Companies Act, 1956 or any other law or the Central or State Government or one or more consumers, having the same interest and in case of death of a consumer his/ her legal heirs or representative.

A consumer is defined as a person who buys products or receives services for a consideration that has been paid or promised or partly paid and partly promised, or under any delayed payment system, according to the definition of consumer under Consumer Protection Act 2019 . A consumer is a user of goods and services, therefore, every producer is also a consumer. A consumer mean who buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any user of such goods other than the person who buys such goods for consideration paid or promised or partly paid or partly promised, or under any system of deferred payment when such use is made with the approval of such person, but does not include a person who obtains such goods for resale or for any commercial purpose

### **12.16 TECHNICAL TERMS:**

#### **1) Consumer :**

A consumer mean who buys any goods for a consideration which has been paid or promised or partly paid and partly promised,

#### **2) Complaint :**

Complaint means any allegation in writing made, with a view to obtaining any relief, by a complainant that

**3) Service:**

The term 'service' is under Section 2(1)(o) as to mean service of any description which is made available to potential users .

**4) Consumer Councils :**

Consumer councils are a statutory bodies empowers the Central Government to establish a Council to be known as the Central Consumer Protection Council (hereinafter referred to as the Central Council), state councils and district councils by respective state governments.

**5) Territorial jurisdiction:**

The Act enables the consumers to file complaints where the complainant resides or personally works for gain thus it would benefit the consumers in seeking redressal for their grievances when their rights have been violated.

**6) Mediation cell :**

Chapter 5 Section 74 of the Consumer Protection Act, 2019 states that a Consumer Mediation Cell.

### **12.17 SELF ASSESSMENT QUESTIONS :**

- 1) Explain briefly about structural changes made in C.P Act, 2019.
- 2) Explain the nature and scope of the dispute redressal mechanism.
- 3) Write short note on the following :
  - (i) Consumer
  - (ii) Type of councils in dispute resolution.
- 4) Discuss consumers rights under Consumer Protection Act, 2019
- 5) Write about Types of Jurisdiction and Jurisdiction of State Commission ?
- 6) Explain about Powers of National Commission ?

### **12.18 REFERENCE BOOKS :**

- 1) Gulshan S.S & Kapoor G.K : A Hand Book of Business Law
- 2) R.C Chawla & K.C Garg : Industrial Law
- 3) N.D Kapoor : Elements of Mercantile Laws
- 4) Consumer Protection act 1986 Bare act .

**Dr. Prasad Chundi**

**Lesson – 13**  
**CYBER LAW**

**Objectives :**

After studying this lesson, one should be able to understand

- Definition of Cyber Law
- Need for Cyber Laws
- Significance of Internet and world wide web
- Important terms related to cyber law
- History of cyber law in India
- Scope of Information Technology Act 2000
- Know about the provisions of Law
- Cyber contracting procedures
- Cyber Frauds
- Digital Signature its importance
- Regulatory and safety mechanism

**Structure of the Lesson :**

- 13.1 Introduction
- 13.2. History of Internet and World Wide Web
- 13.3 Need for cyber law
- 13.4 Cyber crime on the rise
- 13.5. Important terms related to cyber law
- 13.6 Cyber law in India
  - 13.6.1 Need for cyber law in India
- 13.7 History of cyber law in India
- 13.8 Contract Procedures in Cyber Laws
- 13.9 Digital Signature
- 13.10 Digital Signature under IT Act 2000
- 13.11 Electronic Signature
- 13.12 Cyber Crimes / Cyber frauds and safety
  - 13.12.1 Definition of Cyber Crime
  - 13.12.2 Cyber Crimes in India

- 13.13 Preventive measures and safety
- 13.14 Regulatory Authorities
- 13.15 Summary
- 13.16 Technical Terms
- 13.17 Self Assessment Questions
- 13.18 Reference Books

### **13.1 INTRODUCTION :**

"Cyber" is a prefix used to describe a person, thing, or idea as part of the computer and information age. Taken from kybernetes, Greek word for "steersman" or "governor," it was first used in cybernetics, a word coined by Norbert Wiener and his colleagues. The virtual world of internet is known as cyberspace and the laws governing this area are known as Cyber laws and all the netizens of this space come under the ambit of these laws as it carries a kind of universal jurisdiction. Cyber law can also be described as that branch of law that deals with legal issues related to use of inter-networked information technology. In short, cyber law is the law governing computers and the internet.

The growth of Electronic Commerce has propelled the need for vibrant and effective regulatory mechanisms which would further strengthen the legal infrastructure, so crucial to the success of Electronic Commerce. All these regulatory mechanisms and legal infrastructures come within the domain of Cyber law.

Cyber law is important because it touches almost all aspects of transactions and activities on and involving the internet, World Wide Web and cyberspace. Every action and reaction in cyberspace has some legal and cyber legal perspectives.

Cyber law encompasses laws relating to –

- Cyber crimes
- Electronic and digital signatures
- Intellectual property
- Data protection and privacy

### **13.2 HISTORY OF INTERNET AND WORLD WIDE WEB :**

The Internet is a global system of interconnected computer networks that use the standardized Internet Protocol Suite (TCP/IP). It is a network of networks that consists of millions of private and public, academic, business, and government networks of local to global scope that are linked by copper wires, fiber – optic cables, wireless connections, and other technologies. The Internet carries a vast array of information resources and services, most notably the inter-linked hypertext documents of the World Wide Web (WWW) and the infrastructure to support electronic mail, in addition to popular services such as online chat,



file transfer and file sharing, online gaming, and Voice over Internet Protocol (VoIP) person-to-person communication via voice and video. The origins of the Internet dates back to the 1960s when the United States funded research projects of its military agencies to build robust, fault-tolerant and distributed computer networks. This research and a period of civilian funding of a new U.S. backbone by the National Science Foundation spawned worldwide participation in the development of new networking technologies and led to the commercialization of an international network in the mid 1990s, and resulted in the following popularization of countless applications in virtually every aspect of modern human life.

The terms Internet and World Wide Web are often used in everyday speech without much distinction. However, the Internet and the World Wide Web are not one and the same. The Internet is a global data communications system. It is a hardware and software infrastructure that provides connectivity between computers. In contrast, the Web is one of the services communicated via the Internet. It is a collection of interconnected documents and other resources, linked by hyperlinks and Uniform Resource Locator [URLs].

The World Wide Web was invented in 1989 by the English physicist Tim Berners-Lee, now the Director of the World Wide Web Consortium, and later assisted by Robert Cailliau, a Belgian computer scientist, while both were working at CERN in Geneva, Switzerland. In 1990, they proposed building a "web of nodes" storing "hypertext pages" viewed by "browsers" on a network and released that web in December.

Overall Internet usage has seen tremendous growth. From 2000 to 2009, the number of Internet users globally rose from 394 million to 1.858 billion. By 2010, 22 percent of the world's population had access to computers with 1 billion Google searches every day, 300 million Internet users reading blogs, and 2 billion videos viewed daily on YouTube.

After English (27%), the most requested languages on the World Wide Web are Chinese (23%), Spanish (8%), Japanese (5%), Portuguese and German (4% each), Arabic, French and Russian (3% each), and Korean (2%). By region, 42% of the world's Internet users are based in Asia, 24% in Europe, 14% in North America, 10% in Latin America and the Caribbean taken together, 6% in Africa, 3% in the Middle East and 1% in Australia/Oceania.

### **13.3 NEED FOR CYBER LAWS :**

In today's techno-savvy environment, the world is becoming more and more digitally sophisticated and so are the crimes. Internet was initially developed as a research and information sharing tool and was in an unregulated manner. As the time passed by it became more transactional with e-business, e-commerce, e-governance and e-procurement etc. All legal issues related to internet crime are dealt with through cyber laws. As the number of internet users is on the rise, the need for cyber laws and their application has also gathered great momentum.

In today's highly digitalized world, almost everyone is affected by cyber law. For example :

- Almost all transactions in shares are in demat form.
- Almost all companies extensively depend upon their computer networks and keep their valuable data in electronic form.
- Government forms including income tax returns, company law forms etc. are now filled in electronic form.
- Consumers are increasingly using credit cards for shopping. □ Most people are using email, cell phones and SMS messages for communication.
- Even in "non-cyber-crime" cases, important evidence is found in computers / cell phones e.g. in cases of divorce, murder, kidnapping, tax evasion, organized crime, terrorist operations, counterfeit currency etc.
- Cyber-crime cases such as online banking frauds, online share trading fraud, source code theft, credit card fraud, tax evasion, virus attacks, cyber sabotage, phishing attacks, email hijacking, denial of service, hacking, pornography etc are becoming common.
- Digital signatures and e-contracts are fast replacing conventional methods of transacting business.

Technology per se is never a disputed issue but for whom and at what cost has been the issue in the ambit of governance. The cyber revolution holds the promise of quickly reaching the masses as opposed to the earlier technologies, which had a trickle-down effect. Such a promise and potential can only be realized with an appropriate legal regime based on a given socio-economic matrix.

### 13.4 IMPORTANT TERMS RELATED TO CYBER LAW :

**"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. (Sec.2(1)(a) of IT Act, 2000)

**"Addressee"** means a person who is intended by the originator to receive the electronic record but does not include any intermediary. (Sec.2(1)(b) of IT Act, 2000)

**"Affixing Electronic 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 Electronic Signature. (Sec.2(1)(d) of IT Act, 2000)

**"Asymmetric Crypto System"** 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. (Sec.2(1)(f) of IT Act, 2000) **"Certifying Authority"** means a person who has been granted a license to issue a Electronic Signature Certificate under section 24. (Sec.2(1)(g) of IT Act, 2000)

**"Communication Device"** means Cell Phones, Personal Digital Assistance (Sic), or combination of both or any other device used to communicate, send or transmit any text, video, audio, or image. (Sec.2(1)(ha) of IT Act, 2000)

**"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 (Sec.2(1)(i) of IT Act, 2000)

**"Computer Network"** means the interconnection of one or more Computers or Computer systems or Communication device through- (i) the use of satellite, microwave, terrestrial line, wire, wireless or other communication media; and (ii) terminals or a complex consisting of two or more interconnected computers or communication device whether or not the interconnection is continuously maintained. (Sec.2(1)(j) of IT Act, 2000)

**"Computer Resource"** means computer, communication device, computer system, computer network, data, computer database or software. (Sec.2(1)(k) of IT Act, 2000)

**"Computer System"** 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 external files, which contain computer programmes, electronic instructions, input data, and output data, that performs logic, arithmetic, data storage and retrieval, communication control and other functions. (Sec.2(1)(l) of IT Act, 2000)

**"Cyber cafe"** means any facility from where access to the Internet is offered by any person in the ordinary course of business to the members of the public. (Sec.2(1)(na) of IT Act, 2000)

**"Cyber Security"** means protecting information, equipment, devices, computer, computer resource, communication device and information stored therein from unauthorized access, use, disclosure, disruption, modification or destruction. (Sec.2(1)(nb) of IT Act, 2000)

**"Data"** means a representation of information, knowledge, facts, concepts or instructions which are being prepared or have been prepared in a formalized manner, and is intended to be processed, is being processed or has been processed in a computer system or computer network and may be in any form (including computer printouts magnetic or optical storage media, punched cards, punched tapes) or stored internally in the memory of the computer. (Sec.2(1)(o) of IT Act, 2000)

**"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. (Sec.2(1)(p) of IT Act, 2000)

**"Electronic Form"** with reference to information means any information generated, sent,

received or stored in media, magnetic, optical, computer memory, micro film, computer generated micro fiche or similar device. (Sec.2(1)(r) of IT Act, 2000)

"Electronic Record" 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. (Sec.2(1)(t) of IT Act, 2000).

"Electronic signature" means authentication of any electronic record by a subscriber by means of the electronic technique specified in the second schedule and includes digital signature. (Sec.2(1)(ta) of IT Act, 2000).

"Function", in relation to a computer, includes logic, control, arithmetical process, deletion, storage and retrieval and communication or telecommunication from or within a computer. (Sec.2(1)(u) of IT Act, 2000).

"Information" includes data, message, text, images, sound, voice, codes, computer programmes, software and databases or micro film or computer generated micro fiche. (Sec.2(1)(v) of IT Act, 2000).

"Intermediary" with respect to any particular electronic records, means any person who on behalf of another person receives, stores or transmits that record or provides any service with respect to that record and includes telecom service providers, network service providers, internet service providers, web hosting service providers, search engines, online payment sites, online-auction sites, online market places and cyber cafes. (Sec.2(1)(w) of IT Act, 2000).

"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. (Sec.2(1)(x) of IT Act, 2000).

"Originator" 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. (Sec.2(1)(za) of IT Act, 2000).

"Private Key" means the key of a key pair used to create a digital signature. (Sec.2(1)(zc) of IT Act, 2000).

"Public Key" means the key of a key pair used to verify a digital signature and listed in the Digital Signature Certificate. (Sec.2(1)(zd) of IT Act, 2000).

"Secure System" 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 functions; and
- (d) adhere to generally accepted security procedures. (Sec.2(1)(ze) of IT Act, 2000).

"Subscriber" means a person in whose name the Electronic Signature Certificate is issued. (Sec.2(1)(zg) of IT Act, 2000).

### **13.5 CYBER CRIME ON THE RISE :**

- As per the cyber crime data maintained by the National Crime Records Bureau (NCRB), a total of 217, 288, 420 and 966 Cyber Crime cases were registered under the Information Technology Act, 2000 during 2007, 2008, 2009 and 2010 respectively. Also, a total of 328, 176, 276 and 356 cases were registered under Cyber Crime related Sections of Indian Penal Code (IPC) during 2007, 2008, 2009 and 2010 respectively. A total of 154, 178, 288 and 799 persons were arrested under Information Technology Act 2000 during 2007-2010. A total number of 429, 195, 263 and 294 persons were arrested under Cyber Crime related Sections of Indian Penal Code (IPC) during 2007-2010.
- As per 2011 NCRB figures, there were 1,791 cases registered under the IT Act during the year 2011 as compared to 966 cases during the previous year (2010) thereby reporting an increase of 85.4% in 2011 over 2010.
- Of this, 19.5% cases (349 out of 1,791 cases) were reported from Andhra Pradesh followed by Maharashtra (306), Kerala (227), Karnataka (151) and Rajasthan (122). And 46.1% (826 cases) of the total 1,791 cases registered under IT Act, 2000 were related to loss/damage to computer resource/utility reported under hacking with computer systems.
- According to NCRB, the police have recorded less than 5,000—only 4,829 cases and made fewer arrests (3,187) between 2007 and 2011, under both the Information Technology (IT) Act as well as the Indian Penal Code (IPC).
- And convictions remain in single digits, according to lawyers. Only 487 persons were arrested for committing such offences during the year 2011. There were 496 cases of obscene publications/transmission in electronic form during the year 2011 wherein 443 persons were arrested.
- Out of total 157 cases relating to hacking under Sec. 66(2), most of the cases (23 cases) were reported from Karnataka followed by Kerala (22 ) and Andhra Pradesh (20 cases). And 20.4% of the 1184 persons arrested in cases relating to IT Act, 2000 were from Andhra Pradesh (242) followed by Maharashtra (226).
- The age-wise profile of persons arrested in cyber crime cases under the IT Act, 2000 showed that 58.6% of the offenders were in the age group 18–30 years (695 out of 1184) and 31.7% of the offenders were in the age group 30-45 years (376 out of 1184). Madhya Pradesh (10), Maharashtra (4), Kerala (3) and Delhi (2) reported offenders whose age was below 18 years.
- Meanwhile, a total of 422 cases were registered under the Indian Penal Code or IPC Sections during the year 2011 as compared to 356 such cases during 2010 thereby reporting an increase of 18.5%. Maharashtra reported maximum number of such cases (87 out of 422 cases i.e. 20.6%) followed by Chhattisgarh 18.0% (76 cases) and Delhi 11.6% (49 Cases).

- Majority of the crimes out of total 422 cases registered under IPC fall under 2 categories--forgery (259) and Criminal Breach of Trust or fraud (118). Although such offences fall under the traditional IPC crimes, these cases had the cyber overtones wherein computer, Internet or its enabled services were present in the crime and hence they were categorised as Cyber Crimes under IPC.
- Crime head-wise and age-wise profile of the offenders arrested under Cyber Crimes (IPC) for the year 2011 reveals that offenders involved in forgery cases were more in the age-group of 18-30 (46.5%) (129 out of 277). 50.4% of the persons arrested under Criminal Breach of Trust/Cyber Fraud offences were in the age group 30-45 years (65 out of 129).
- Meanwhile 9 out of 88 mega cities did not report any case of cyber crime i.e., neither under the IT Act nor under IPC Sections during the year 2011.
- And 53 mega cities have reported 858 cases under IT Act and 200 cases under various sections of IPC. There was an increase of 147.3% (from 347 cases in 2009 to 858 cases in 2011) in cases under IT Act as compared to previous year (2010), and an increase of 33.3% (from 150 cases in 2010 to 200 cases in 2011) of cases registered under various sections of IPC.
- Bangalore (117), Vishakhapatnam (107), Pune (83), Jaipur (76), Hyderabad (67) and Delhi (City) (50) have reported high incidence of cases (500 out of 858 cases) registered under IT Act, accounting for more than half of the cases (58.3%) reported under the IT Act. Delhi City has reported the highest incidence (49 out of 200) of cases reported under IPC sections accounting for 24.5% followed by Mumbai (25 or 12.5%).

A major programme has been initiated on development of cyber forensics specifically cyber forensic tools, setting up of infrastructure for investigation and training of the users, particularly police and judicial officers in use of this tool to collect and analyze the digital evidence and present them in Court. Indian Computer Emergency Response Team (CERT-In) and Centre for Development of Advanced Computing (CDAC) are involved in providing basic and advanced training of Law Enforcement Agencies, Forensic labs and judiciary on the procedures and methodology of collecting, analyzing and presenting digital evidence.

Cyber forensic training lab has been set up at Training Academy of Central Bureau of Investigation (CBI) to impart basic and advanced training in Cyber Forensics and Investigation of Cyber Crimes to Police Officers associated with CBI. In addition, Government has set up cyber forensic training and investigation labs in Kerala, Assam, Mizoram, Nagaland, Arunachal Pradesh, Tripura, Meghalaya, Manipur and Jammu & Kashmir.

In collaboration with Data Security Council of India (DSCI), NASSCOM, Cyber Forensic Labs have been set up at Mumbai, Bengaluru, Pune and Kolkata. DSCI has organized 112 training programmes on Cyber Crime Investigation and awareness and a total of 3680 Police officials, judiciary and Public prosecutors have been trained through these programmes.

Indian Computer Emergency Response Team (CERT-In) issues alerts, advisories and guidelines regarding cyber security threats and measures to be taken to prevent cyber incidents and enhance security of Information Technology systems.

## **13.6 CYBER LAW IN INDIA**

In India, cyber laws are contained in the Information Technology Act, 2000 ("IT Act") which came into force on October 17, 2000. The main purpose of the Act is to provide legal recognition to electronic commerce and to facilitate filing of electronic records with the Government.

The following Act, Rules and Regulations are covered under cyber laws:

1. Information Technology Act, 2000
2. Information Technology (Certifying Authorities) Rules, 2000
3. Information Technology (Security Procedure) Rules, 2004
4. Information Technology (Certifying Authority) Regulations, 2001

### **13.6.1 Need for cyber law in India :**

Firstly, India has an extremely detailed and well-defined legal system in place. Numerous laws have been enacted and implemented and the foremost amongst them is The Constitution of India. We have inter alia, amongst others, the Indian Penal Code, the Indian Evidence Act 1872, the Banker's Book Evidence Act, 1891 and the Reserve Bank of India Act, 1934, the Companies Act, and so on. However the arrival of Internet signalled the beginning of the rise of new and complex legal issues. It may be pertinent to mention that all the existing laws in place in India were enacted way back keeping in mind the relevant political, social, economic, and cultural scenario of that relevant time. Nobody then could really visualize about the Internet. Despite the brilliant acumen of our master draftsmen, the requirements of cyberspace could hardly ever be anticipated. As such, the coming of the Internet led to the emergence of numerous ticklish legal issues and problems which necessitated the enactment of Cyber laws.

Secondly, the existing laws of India, even with the most benevolent and liberal interpretation, could not be interpreted in the light of the emerging cyberspace, to include all aspects relating to different activities in cyberspace. In fact, the practical experience and the wisdom of judgment found that it shall not be without major perils and pitfalls, if the existing laws were to be interpreted in the scenario of emerging cyberspace, without enacting new cyber laws. Hence, the need for enactment of relevant cyber laws.

Thirdly, none of the existing laws gave any legal validity or sanction to the activities in Cyberspace. For example, the Net is used by a large majority of users for email. Yet till today, email is not "legal" in our country. There is no law in the country, which gives legal validity, and sanction to email. Courts and judiciary in our country have been reluctant to grant judicial recognition to the legality of email in the absence of any specific law having been enacted by the Parliament. As such the need has arisen for Cyber law.

Fourthly, Internet requires an enabling and supportive legal infrastructure in tune with the times. This legal infrastructure can only be given by the enactment of the relevant Cyber laws as the traditional laws have failed to grant the same. E-commerce, the biggest future of Internet, can only be possible if necessary legal infrastructure compliments the same to enable its vibrant growth.

All these and other varied considerations created a conducive atmosphere for the need for enacting relevant cyber laws in India.

### **13.7 HISTORY OF CYBER LAW IN INDIA :**

The information Technology Act is an outcome of the resolution dated 30th January 1997 of the General Assembly of the United Nations, which adopted the Model Law on Electronic Commerce, adopted the Model Law on Electronic Commerce on International Trade Law. This resolution recommended, inter alia, that all states give favourable consideration to the said Model Law while revising enacting new law, so that uniformity may be observed in the laws, of the various cyber-nations, applicable to alternatives to paper based methods of communication and storage of information.

The Department of Electronics (DoE) in July 1998 drafted the bill. However, it could only be introduced in the House on December 16, 1999 (after a gap of almost one and a half years) when the new IT Ministry was formed. It underwent substantial alteration, with the Commerce Ministry making suggestions related to e-commerce and matters pertaining to World Trade Organization (WTO) obligations. The Ministry of Law and Company Affairs then vetted this joint draft.

After its introduction in the House, the bill was referred to the 42-member Parliamentary Standing Committee following demands from the Members. The Standing Committee made several suggestions to be incorporated into the bill. However, only those suggestions that were approved by the Ministry of Information Technology were incorporated. One of the suggestions that was highly debated upon was that a cyber café owner must maintain a register to record the names and addresses of all people visiting his café and also a list of the websites that they surfed. This suggestion was made as an attempt to curb cyber crime and to facilitate speedy locating of a cyber criminal. However, at the same time it was ridiculed, as it would invade upon a net surfer's privacy and would not be economically viable. Finally, this suggestion was dropped by the IT Ministry in its final draft. The Union Cabinet approved the bill on May 13, 2000 and on May 17, 2000, both the houses of the Indian Parliament passed the Information Technology Bill. The Bill received the assent of the President on 9th June 2000 and came to be known as the Information Technology Act, 2000. The Act came into force on 17th October 2000.

With the passage of time, as technology developed further and new methods of committing crime using Internet & computers surfaced, the need was felt to amend the IT Act, 2000 to insert new kinds of cyber offences and plug in other loopholes that posed hurdles in the effective enforcement of the IT Act, 2000.



This led to the passage of the Information Technology (Amendment) Act, 2008 which was made effective from 27 October 2009. The IT (Amendment) Act, 2008 has brought marked changes in the IT Act, 2000 on several counts.

### **13.8 CONTRACT PROCEDURES IN CYBER LAW**

According to the Indian Contract Act, 1872, a contract needs a proposal and an acceptance of the proposal which transforms into a promise. Further, a consideration supports the promise and becomes an agreement. Also, an agreement enforceable by law is a contract.

- ◆ Essential Elements Of a Contract in cyber law
- ◆ Offer.
- ◆ Acceptance.
- ◆ Consideration.
- ◆ Capacity.
- ◆ Legality.

The Information Technology Act, 2000 (IT Act) governs the legal aspects of e-contracts in India. The IT Act recognizes e-contracts as legally binding, provided they meet the essentials of a valid contract under the Indian Contract Act, 1872.

Cyberlaw includes in its ambit the e-contracts executed via the opening of the website, various economic interactions, it also includes the Punitive provisions for the cyber crimes etc. Cyberspace is a virtual medium.

The contracting process is a series of steps an organization follows to select a contractor or vendor for a specific project or service. Contracting makes sure that the company selects a capable and qualified vendor or contractor and that the agreement's terms are clear, legally binding, and mutually beneficial.

### **13.9 DIGITAL SIGNATURE :**

Digital Signatures provide a viable solution for creating legally enforceable electronic records, closing the gap in going fully paperless by completely eliminating the need to print documents for signing. Digital signatures enable the replacement of slow and expensive paper-based approval processes with fast, low-cost, and fully digital ones. The purpose of a digital signature is the same as that of a handwritten signature. Instead of using pen and paper, a digital signature uses digital keys (public-key cryptography). Like the pen and paper method, a digital signature attaches the identity of the signer to the document and records a binding commitment to the document. However, unlike a handwritten signature, it is considered impossible to forge a digital signature the way a written signature might be. In addition, the digital signature assures that any changes made to the data that has been signed cannot go undetected.

Digital signatures are easily transportable, cannot be imitated by someone else and can be automatically time-stamped. A digital signature can be used with any kind of message, whether it is encrypted or plaintext. Thus Digital Signatures provide the following three features:-

- Authentication - Digital signatures are used to authenticate the source of messages. The ownership of a digital signature key is bound to a specific user and thus a valid signature shows that the message was sent by that user.
- Integrity - In many scenarios, the sender and receiver of a message need assurance that the message has not been altered during transmission. Digital Signatures provide this feature by using cryptographic message digest functions.
- Non Repudiation – Digital signatures ensure that the sender who has signed the information cannot at a later time deny having signed it.

A handwritten signature scanned and digitally attached with a document does not qualify as a Digital Signature. An ink signature can be easily replicated from one document to another by copying the image manually or electronically. Digital Signatures cryptographically bind an electronic identity to an electronic document and the digital signature cannot be copied to another document.

### **13.10 DIGITAL SIGNATURE UNDER IT ACT , 2000**

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. Section 3 deals with the conditions subject to which an electronic record may be authenticated by means of affixing digital signature which is created in two definite steps. First, the electronic record is converted into a message digest by using a mathematical function known as 'Hash function' which digitally freezes the electronic record thus ensuring the integrity of the content of the intended communication contained in the electronic record. Any tampering with the contents of the electronic record will immediately invalidate the digital signature.

Secondly, the identity of the person affixing the digital signature is authenticated through the use of a private key which attaches itself to the message digest and which can be verified by anybody who has the public key corresponding to such private key. This will enable anybody to verify whether the electronic record is retained intact or has been tampered with since it was so fixed with the digital signature. It will also enable a person who has a public key to identify the originator of the message.

'Hash function' 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 to derive or reconstruct the original

electronic record from the hash result produced by the algorithm; that two electronic records can produce the same hash result using the algorithm.

Digital signatures are a means to ensure validity of electronic transactions however who guarantees about the authenticity that such signatures are indeed valid or not false. In order that the keys be secure the parties must have a high degree of confidence in the public and private keys issued.

Digital Signature is not like our handwritten signature. It is a jumble of letters and digits. It looks something like this.

### **13.11 ELECTRONIC SIGNATURE :**

Electronic signature has also been dealt with under Section 3A of the IT Act, 2000. A subscriber can authenticate any electronic record by such electronic signature or electronic authentication technique which is considered reliable and may be specified in the Second Schedule. Any electronic signature or electronic authentication technique will be considered reliable if- (a) the signature creation data or the authentication data are, within the context in which they are used, linked to the signatory or , as the case may be, the authenticator and of no other person; (b) the signature creation data or the authentication data were, at the time of signing, under the control of the signatory or, as the case may be, the authenticator and of no other person; (c) any alteration to the electronic signature made after affixing such signature is detectable; (d) any alteration to the information made after its authentication by electronic signature is detectable; and (e) it fulfills such other conditions which may be prescribed. An electronic signature will be deemed to be a secure electronic signature if- (i) the signature creation data, at the time of affixing signature, was under the exclusive control of signatory and no other person; and (ii) the signature creation data was stored and affixed in such exclusive manner as may be prescribed. (Sec.15)

An Amendment to the IT Act in 2008 introduced the term electronic signatures. The implication of this Amendment is that it has helped to broaden the scope of the IT Act to include new techniques as and when technology becomes available for signing electronic records apart from Digital Signatures.

### **13.12 CYBER CRIMES / CYBER FRAUDS AND SAFTEY :**

The Internet has become a basic fact of everyday life for millions of people worldwide, from e – mail to online shopping. Ever faster and more accessible connections available on a wider range of platforms, such as mobile phones or person to person portable devices, have spurred new e-commerce opportunities. Online shopping and banking are increasingly widespread and over the next 10 years, the Net is expected to become as common as gas or electricity. The invention of the computers has opened new avenues for the fraudsters. It is an evil having its origin in the growing dependence on computers in modern life.

Fraud is the intentional deception of a person or group for the purpose of stealing property or money. Internet fraud includes any scheme using Web sites, chat rooms, and email to offer nonexistent goods and services to consumers or to communicate false information to consumers. Customers then pay for the fraudulent goods over the Internet with their credit cards. Internet fraud involves a wide variety of schemes limited only by the imagination and creativity of a seller intent on deceiving a buyer. A few general characteristics one can find in all cyber scams. Most scams are done by e-mail. They entice users to give them critical information like usernames, passwords, credit card information, or other types of account information.

Cyber fraud has the potential of hindering the economic and social development of any nation. This is because among other dire consequences, foreign investment is seriously discouraged. Cyber fraud can also destroy our good and morally sound culture. This is because the youth will no longer work but resort to that means to earn their living.

### **13.12.1 DEFINITION OF CYBER CRIME :**

At the Tenth United Nations Congress on the Prevention of Crime and Treatment of Offenders, in a workshop devoted to the issues of crimes related to computer networks, cybercrime was broken into two categories and defined thus: a) Cybercrime in a narrow sense (computer crime): Any illegal behavior directed by means of electronic operations that targets the security of computer systems and the data processed by them. b). Cybercrime in a broader sense (computer-related crime): Any illegal behavior committed by means of, or in relation to, a computer system or network, including such crimes as illegal possession [and] offering or distributing information by means of a computer system or network.

The OECD Recommendations of 1986 included a working definition as a basis for the study: Computer-related crime is considered as any illegal, unethical or unauthorized behaviour relating to the automatic procedures .

### **13.12.2 CYBER CRIMES IN INDIA :**

According to Norton Cybercrime Report 2012, 66% of Indian online adults have been a victim of cyber fraud in their lifetime. In the past 12 months, 56% of online adults in India have experienced cyber fraud.

As per the report, at least 1,15,000 people fall prey to cyber fraud every day, while 80 per minute and more than one per second leading to a rise in the average direct financial cost per victim to around Rs10,500.

According to the survey, the cybercriminals have now shifted their focus to the increasingly popular social platforms. One in three adults online Indians (32%) have been either social or mobile cybercrime victims.

While most internet users delete suspicious emails and are careful with their personal details online. However, 25% don't use complex passwords or change their passwords frequently

and 38% do not check for the padlock symbol in the browser before entering sensitive personal information.

Online adults are also unaware of the evolution of most common forms of cybercrime. In fact, 68% of adults do not know that malware can operate in a discreet fashion, making it hard to know if a computer has been compromised, and one third (35%) are not certain that their computer is currently clean and free of viruses.

### **13.13 PREVENTIVE MEASURES AND SAFETY :**

The first line of defence to prevent online consumers from becoming online victims is good education. Tips on the major forms of Internet fraud and how to combat them have been developed by public authorities, enforcement agencies, and the private sector on various platforms such as government websites, brochures, posters, videos, reports, etc. The International Consumer Protection and Enforcement Network (ICPEN), an informal network of enforcement authorities from OECD and other countries, has launched Fraud Prevention Month, an awareness campaign taking place on a designated month every year.

The private sector also offers a number of technical tools to provide consumers with real-time protection against cyber fraud. For example, business has developed means to counter spam messages, which are a significant source of fraud, through authentication, filters, and listings. Likewise, anti-phishing systems have been put in place allowing Internet users to report phishing sites and block them.

#### **➤ Preventive measures by corporates to protect their businesses –**

- Setup an e-security program for your business.
- Ensure your security program facilitates confidentiality, integrity and availability.
- Identify the sources of threats to your data from both internal and external sources.

Examples: disgruntled employees - leaving bugs behind in your system, hackers looking to steal confidential information.

- The security program that you create for your business must have provisions to maintenance and upgrades of your systems.
- Administrators have access to all files and data. Therefore, one must be mindful of who is guarding the guards.
- Roles for security should be defined, documented, and implemented for both your company and external contractors.
- Establish a security awareness program for all users. Content should be communicated in non-technical terms. This could include briefings, posters, clauses in employee contracts, security awareness days etc.

- Implement security training for technical staff that is focused on the security controls for their particular technical areas.
- Maintain logs of all possible activities that may occur on your system. System records must note who was using the system, when, for how long, deletions etc.
- User accounts should not be shared. User authorization should be mandatory. Employees should only be able to see information that they are authorized to see.
- Employee user accounts must be disabled or removed when no longer needed. Example: in case an employee leaves the company.
- Ensure network security from external sources by installing firewalls and intrusion detection systems.
- Allow remote access to employees only through secure communication channels like SSL or VPN. □
- Install antivirus software on all desktops and servers. Buy Anti-Virus software solutions that allow real time upgrading of systems with antivirus patches.
- Create a data backup and disaster recovery plan in case of unforeseen natural calamities.
- Ensure back-up procedures are in place and tested.
- Ensure back-up procedures include all the critical as well as back office data such as finance, payroll etc.
- Incident response is the ability to identify, evaluate, raise and address negative computer related security events.
- In case of an incident, do not panic, and continue to save logs.
- Incident response - Take a backup of the affected system and notify the authorities.

The draft National Cyber Security Policy of India has been prepared by CERTIn. The policy is intended to cater to a broad spectrum of ICT users and providers including Government and non-Government entities. Besides this CERT-In in coordination with MHA, NIC and other stakeholders prepared and circulated Computer security guidelines and procedures for implementation across all Central Government Ministries/Departments.

### **13.14 REGULATORY AUTHORITIES :**

#### **1) Department of Electronics and Information Technology :**

The functions of the Department of Electronics and Information Technology, Ministry of Communications & Information Technology, Government of India are as follows –

- Policy matters relating to Information Technology, Electronics and Internet.
- Initiatives for development of Hardware / Software industry including knowledge based enterprises, measures for promoting Information Technology exports and competitiveness of the industry.
- Promotion of Information Technology and Information Technology enabled services and Internet.
- Assistance to other departments in the promotion of E-Governance, E-Infrastructure, E-Medicine, E-Commerce, etc.
- Promotion of Information Technology education and Information Technology-based education.
- Matters relating to Cyber Laws, administration of the Information Technology Act. 2000 (21 of 2000) and other Information Technology related laws.
- Matters relating to promotion and manufacturing of Semiconductor Devices in the country.
- Interaction in Information Technology related matters with International agencies and bodies.
- Initiative on bridging the Digital Divide, Matters relating to Media Lab Asia.
- Promotion of Standardization, Testing and Quality in Information Technology and standardization of procedure for Information Technology application and Tasks.
- Electronics Export and Computer Software Promotion Council (ESC). □ National Informatics Centre (NIC).
- All matters relating to personnel under the control of the Department.

## **2) Controller of Certifying Authorities (CCA) :**

The IT Act provides for the Controller of Certifying Authorities (CCA) to license and regulate the working of Certifying Authorities. The Certifying Authorities (CAs) issue digital signature certificates for electronic authentication of users. The CCA certifies the public keys of CAs using its own private key, which enables users in the cyberspace to verify that a given certificate is issued by a licensed CA. For this purpose it operates, the Root Certifying Authority of India (RCAI).

## **3) Cyber Appellate Tribunal :**

Cyber Appellate Tribunal has been established under the IT Act under the aegis of Controller of Certifying Authorities (CCA). A Cyber Appellate Tribunal consists of one Presiding Officer who is qualified to be a Judge of a High Court or is or has been a member of the Indian Legal Service and is holding or has held a post in

Grade I of that service for at least three years supported by other official under him/her.

The Cyber Appellate Tribunal has, for the purposes of discharging its functions under the IT Act, the same powers as are vested in a civil court under the Code of Civil Procedure, 1908. However, is not bound by the procedure laid down by the Code of Civil Procedure, 1908 but is guided by the principles of natural justice and, subject to the other provisions of this Act and of any rules. The Cyber Appellate Tribunal has powers to regulate its own procedure including the place at which it has its sittings.

Every proceeding before the Cyber Appellate Tribunal shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228, and for the purposes of section 196 of the Indian Penal Code and the Cyber Appellate Tribunal shall be deemed to be a civil court for the purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973.

The composition of the Cyber Appellate Tribunal is provided for under section 49 of the Information Technology Act, 2000. Initially the Tribunal consisted of only one person who was referred to as the Presiding Officer who was to be appointed by way of notification by the Central Government. Thereafter the Act was amended in the year 2008 by which section 49 which provides for the composition of the Cyber Appellate Tribunal has been changed. As per the amended section the Tribunal shall consist of a Chairperson and such number of other Members as the Central Government may by notification in the Official Gazette appoint. The selection of the Chairperson and Members of the Tribunal is made by the Central Government in consultation with the Chief Justice of India. The Presiding Officer of the Tribunal is now known as the Chairperson.

#### **4) Indian Computer Emergency Response Team (ICERT) :**

The mission of ICERT is to enhance the security of India's Communications and Information Infrastructure through proactive action and effective collaboration. Its constituency is the Indian Cyber-community.

The purpose of the ICERT is, to become the nation's most trusted referral agency of the Indian Community for responding to computer security incidents as and when they occur; the ICERT will also assist members of the Indian Community in implementing proactive measures to reduce the risks of computer security incidents. It provides technical advice to system administrators and users to respond to computer security incidents. It also identifies trends in intruder activity, works with other similar institutions and organisations to resolve major security issues and disseminates information to the Indian cyber community.

It functions under the Department of Information Technology, Ministry of Communications & Information Technology, and Government of India.



### **13.15 SUMMARY :**

The growth of Electronic Commerce has propelled the need for vibrant and effective regulatory mechanisms which would further strengthen the legal infrastructure, so crucial to the success of Electronic Commerce. All these regulatory mechanisms and legal infrastructures come within the domain of Cyber law.

Cyber law is important because it touches almost all aspects of transactions and activities on and involving the internet, World Wide Web and cyberspace. Every action and reaction in cyberspace has some legal and cyber legal perspectives.

#### **Cyber law encompasses laws relating to –**

- Cyber crimes
- Electronic and digital signatures
- Intellectual property
- Data protection and privacy

In today's techno-savvy environment, the world is becoming more and more digitally sophisticated and so are the crimes. Internet was initially developed as a research and information sharing tool and was in an unregulated manner. As the time passed by it became more transactional with e-business, e-commerce, e-governance and e-procurement etc. All legal issues related to internet crime are dealt with through cyber laws. As the number of internet users is on the rise, the need for cyber laws and their application has also gathered great momentum. According to Norton Cybercrime Report 2012, 66% of Indian online adults have been a victim of cyber fraud in their lifetime. In the past 12 months, 56% of online adults in India have experienced cyber fraud. The first line of defence to prevent online consumers from becoming online victims is good education. Tips on the major forms of Internet fraud and how to combat them have been developed by public authorities, enforcement agencies, and the private sector on various platforms such as government websites, brochures, posters, videos, reports, etc. The International Consumer Protection and Enforcement Network (ICPEN), an informal network of enforcement authorities from OECD and other countries, has launched Fraud Prevention Month, an awareness campaign taking place on a designated month every year.

### **13.16 TECHNICAL TERMS :**

#### **1) Cyber :**

"Cyber" is a prefix used to describe a person, thing, or idea as part of the computer and information age. Taken from kybernetes, Greek word for "steersman" or "governor," it was first used in cybernetics, a word coined by Norbert Wiener and his colleagues.

#### **2) Cyber Crime :**

Cybercrime in a narrow sense (computer crime): Any illegal behavior directed by

means of electronic operations that targets the security of computer systems and the data processed by them.

### 3)"Cyber cafe":

Any facility from where access to the Internet is offered by any person in the ordinary course of business to the members of the public. (Sec.2(1)(na) of IT Act, 2000)

### 4) CCA : Controller of Certifying Authorities

## 13.17 SELF ASSESSMENT QUESTIONS :

- 1) What is cybercrime?
- 2) Explain the need of cyber laws
- 3) What are the various types of cyber crimes?
- 4) What is an I.P address?
- 5) How do you report a cyber crime?
- 6) Briefly explain the laws related to cybercrimes in India ?

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