

BUSINESS LAW

B.B.A. Second Year

SEMESTER – IV

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B.B.A. 2nd Year Semester – IV

BUSINESS LAW

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Director

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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

B.B.A -SEMESTER – IV
402BBA21- BUSINESS LAW

Unit-I:

Law of Contract – Definition, Essentials of valid contract, Kinds of contract, Offer, Acceptance, consideration, Capacity of Parties to contract, Free Consent, Discharge of Contract, Breach of Contracts, and remedies

Unit-II

Companies Act definition of company, kinds of company, Memorandum of Association, Articles of association, prospectus, meetings and resolutions

Unit-III

Factories act 1948 definition of factory provisions of health, safety, welfare

Unit-IV

Sale of Goods Act – Meaning and definition, Essentials of sale contract, sale and agreement to sale, conditions and warranties, unpaid seller, Rules of transfer of property.

Unit-V:

The essential Commodity Act. The Consumer Protection Act, 1986. District forum, state commission, national commission, Consumer councils.

References:

1. Indian Contract Act – by Bare Act, Government of India.
2. N.D. Kapoor Mercantile Law, Sultan Chand & Company, New Delhi.
3. Avatar Singh Mercantile Law, Vikas Publication.
4. Balchandani: Business Laws.
5. S.D. Geet and M.S. Patil: Business Laws
6. S.S. Gulshan: Business Laws. 7. N.M. Wechlakar: Business Laws.

P. K. D.

MODEL QUESTION PAPER

(402BBA21)

B. B. A. Degree Examination

Second Year – Fourth Semester

Paper – IV : BUSINESS LAW

Time : Three hours

Maximum Marks : 70

Section – A

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

1. Acceptance.
2. Free consent.
3. Prospectus.
4. AOA.
5. Welfare.
6. Unpaid seller.
7. State commission.
8. Rules of transfer of property.

SECTION – B

(5 x 10 = 50 Marks)

Answer ALL the following questions.

9. (a) Define Law of Contract. Explain Essentials of Law of Contract.

Or

- (b) Explain various kinds of contract.

10. (a) Explain various clauses of memorandum of Association.

Or

- (b) Define company. Explain various kinds of company.

11. (a) Discuss about factories Act, 1948.

Or

(b) Explain various factory provisions.

12. (a) What is sale of goods Act? Explain essentials of sale contract.

Or

(b) Discuss about conditions and warranties.

13. (a) Explain Essentials of commodity act.

Or

(b) Discuss about consumer protection Act, 1986.

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	4	Capacity of Parties	4.1	4.5
	5	Free Consent	5.1	5.6
	6	Discharge of Contracts	6.1	6.11
	7	Breach of Contract – Remedies for Breach of Contract	7.1	7.9
Unit - 2	8	Company Act	8.1	8.8
	9	Memorandum of association – Its alteration	9.1	9.7
	10	Articles of Association	10.1	10.10
	11	Prospectus	11.1	11.9
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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.

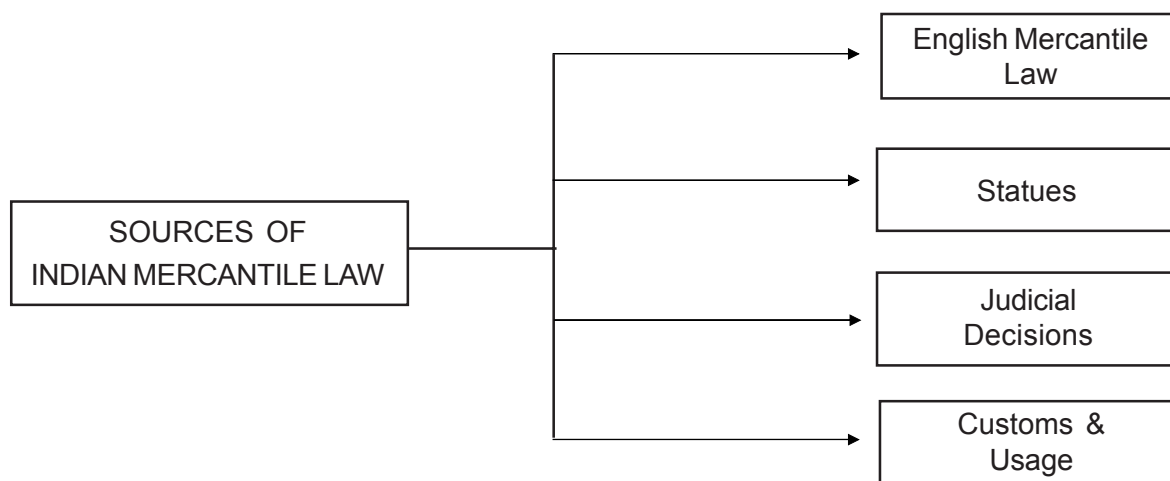
The Indian Contract Act came into force from 1st September, 1872. It has been amended several times. The notable amendments have been in 1886, 1891, 1899, 1930, 1932 and 1997. The Act has been mainly enacted to ensure that the obligations prescribed by agreements and the reasonable expectations created 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.

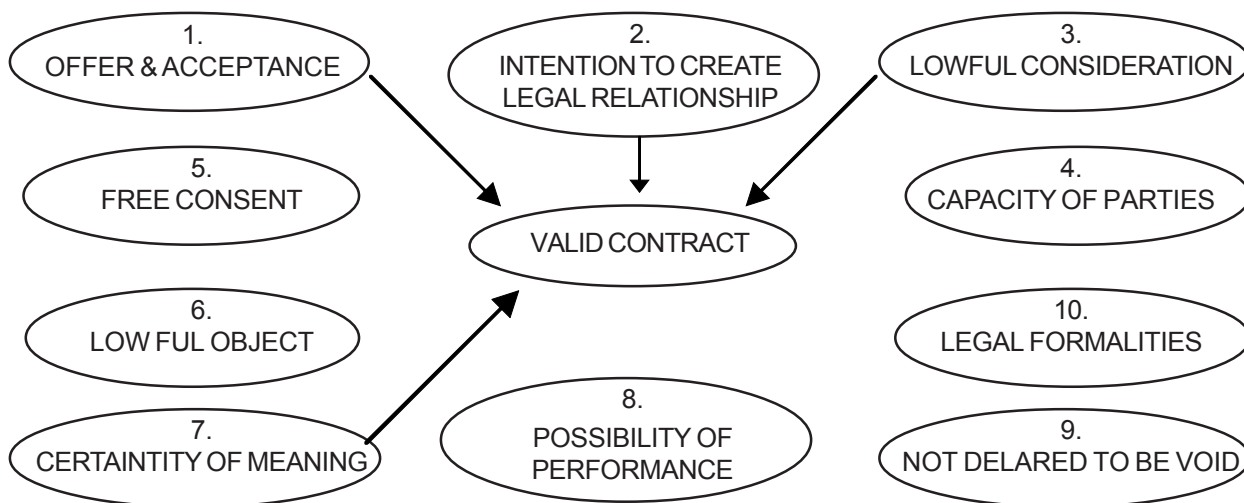
For Example : If 'A' says to 'B' that he is willing to sell him his car for a sum of Rs. 70,000/-, it is an offer from 'A'. If 'B' gives his assent to this offer, it will be said that he has accepted the offer and an agreement will come into existence.

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 destitute 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.

- Dr. D. NAGESWARA RAO

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 obtained 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 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 childrens 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.

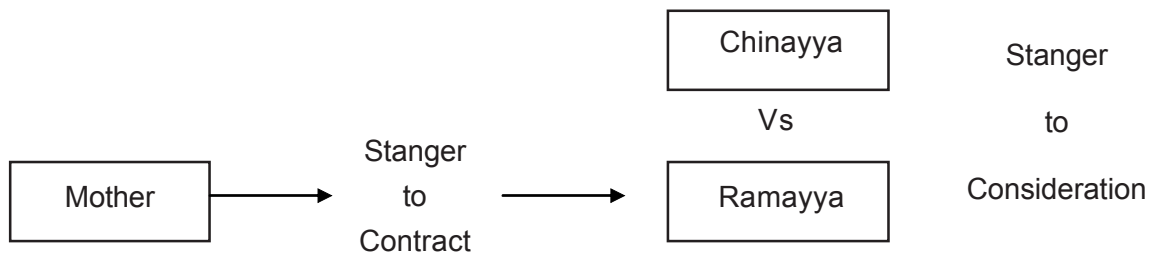
7. It must be something which the promisor is not already bound to do :

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 saneness. 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 known 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

DISCHARGE OF CONTRACTS

6.0 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 :

- 6.1 Introduction
- 6.2 Modes of discharge
- 6.3 Discharge by Agreement
- 6.4 Discharge by operation of law.
- 6.5 Discharge by Breach
- 6.6 Discharge by performance
- 6.7 Discharge by impossibility of performance
- 6.8 Discharge by lapse of time.
- 6.9 Summary
- 6.10 Self Assessment Questions
- 6.11 Reference Books

6.1 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:

6.2 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

6.3 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.

6.4 Discharge by operation of law :

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

6.4.1 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.

6.4.2 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.

6.4.3 Insolvency :

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

6.4.4 Merger :

This has been explained in the previous point

6.5 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.

6.5.1 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.

6.5.2 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.

6.5.3 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 1st 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.

6.5.4 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 12th April to employ the plaintiff as his courier and to accompany him upon a tour. The employment was to commence on 1st June. On 11th 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 1st 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.

6.5.5 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.

6.6 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.

6.6.1 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.

6.6.2 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 he 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.

6.8 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.

6.9 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.

6.10 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 ?

6.11 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
R.C. Chawla |
| 6. Business Law | | |

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LESSON - 7

BREACH OF CONTRACT - REMEDIES FOR BREACH OF CONTRACT

7.0 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 :

- 7.1 Introduction
- 7.2 Suit for Rescission
- 7.3 Suit for damages
- 7.4 Suit upon Quantum Meruit
- 7.5 Suit for specific performance
- 7.6 Suit for Injunction
- 7.7 Summary
- 7.8 Self Assessment Questions
- 7.9 Reference Books

7.1 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.

7.2 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.

7.3. 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 to 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 15th 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.

7.4 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.

7.4.1 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.

7.5 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.

7.6 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.

7.7 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.

7.8 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 ?

7.9 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 - 8

COMPANY ACT

8.0 OBJECTIVES

After studying this chapter, you should be able to introduction

- * define the term Company
- * explain the different kinds of Companies.
- * explain the advantages and disadvantages of a company
- * differentiate between a Public Company and a Private Company.
- * state the privileges of a Private Company,
- * explain the meaning of certain key terms.

Structure

8.1 Introduction

8.2 Company - Its meaning

8.3 The following chart gives the classification of companies into various categories

8.4 Distinction between a public company and a private company

8.5 Key terms

8.6 Self Assessment Questions

8.7 References books

8.1 INTRODUCTION

Joint Stock Companies represent the third stage in the evolution of forms of business organisation. Unlike sole proprietorship and partnership firms, a company enjoys a separate legal status. The ownership is here divorced from the management. The shareholders contribute towards the finances of the company but all of them do not and cannot participate in the management of the company. The company is managed by a Board of Directors elected by share holders.

Companies in our country are governed by the provision of the Companies Act - 1956. The Act came into effect from 15th April 1956. The Act came into effect from 15th April 1956. The Companies Act has been amended several times. Some of the important amendments have been in 1960, 1966, 1969, 1974, 1977, 1985, 1988, 2000 and 2001.

8.2 COMPANY - ITS MEANING

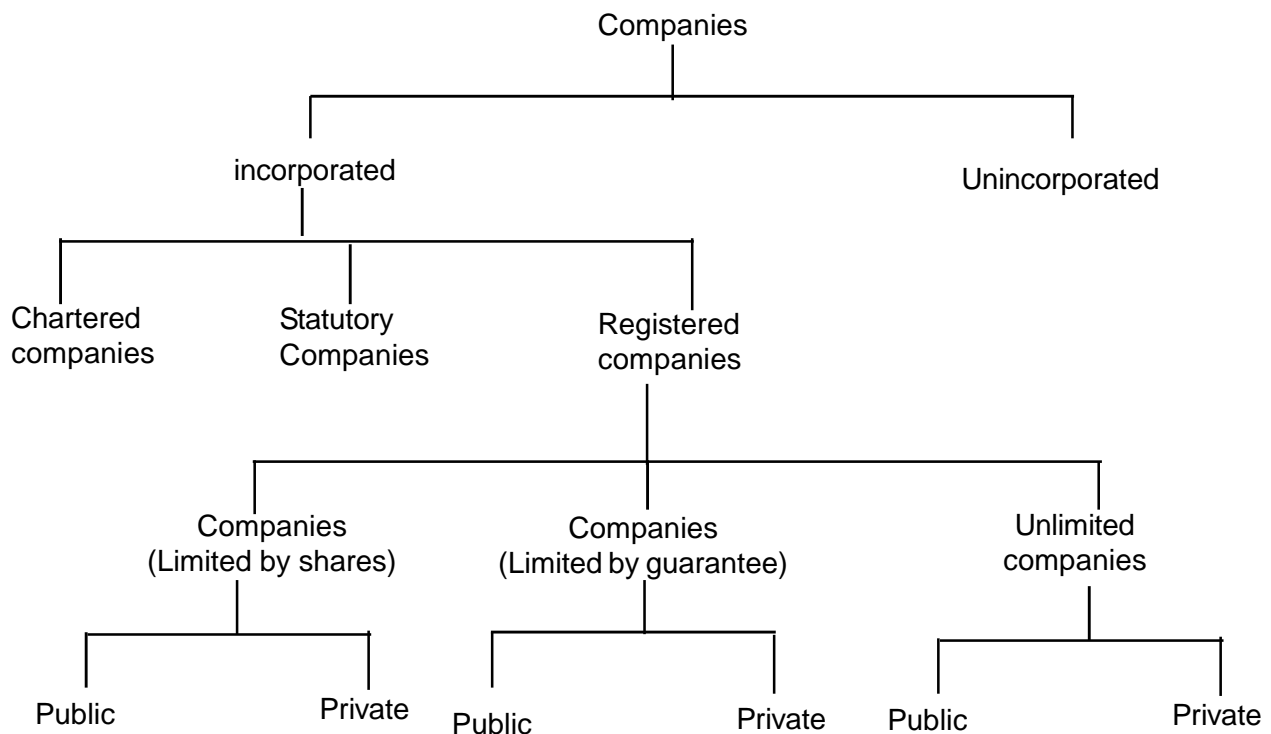
“A company is an association of many persons who contribute money or moneys worth to a common stock and employ it for a common purpose. The common stock so contributed is denoted in money and is the capital of the company. The persons who contribute to it or to whom it belongs are its members. The proportion of capital to which each member is entitled in his share”. - **Justice Lindley**

“A person, artificial, invisible, intangible and existing only in the eyes of the Law. Being a mere creature of Law, it possesses only those properties which the charter of its creation confers upon it, either expressly or an incidental to its very existence”. - **Former Chief justice Marstal of U.S.A.**

“A company formed and registered under this Act or an existing company”. - **Sec 3 (1) (1) of the Companies Act**

In common parlance company means an association of persons formed for some common object such as the economic gain of its members. In Law, any association of persons for any common object can be registered as a company. The object need not be the economic gain of its members e.g. a company can be formed for purposes such as charity, research, advancement of knowledge etc.

8.3 THE FOLLOWING CHART GIVES THE CLASSIFICATION OF COMPANIES INTO VARIOUS CATEGORIES



Chartered companies:

‘The Crown’ in the exercise of the royal prerogative has power to create a corporation by the grant of a charter to persons assenting to be incorporated. Examples of this type of companies are Bank of England, East India company. Charters are mainly issued to non trading corporations. After the country attained independence, these type of companies do not exist in India.

Statutory companies:

A company may be incorporated by means of a special Act of the parliament or any state Legislature. Such companies are called Statutory Companies. Such companies are generally formed to carry out some special public undertaking, for example railway, water works, gas, electric generations etc. Instances of statutory companies in India are Reserve Bank of India, the Life Insurance Corporation of India, the Food Corporation of India, Unit Trust of India, State Trading Corporation etc.

Statutory companies are governed by the Acts creating them. They are not required to have any memorandum or articles of association.

Registered companies:

Companies registered under the companies Act 1956, or the earlier companies Act are called Registered Companies. Such companies come into existence when they are registered under the companies Act and a certificate of incorporation is granted to them by the Registrar. Section 12 (2) provides that company registered under the Act may be

- (a) a company limited by shares
- (b) a company limited by guarantee
- (c) an unlimited company

(a) Companies Limited by Shares: The vast majority of registered companies are companies limited by shares. They are so numerous that the word 'company' has come to mean a Company Limited by Shares. Such companies must have share capital whereas companies limited by guarantee and unlimited companies may or may not have a share capital. The liability can be enforced during existence of the company as well as during the winding up.

(b) Companies Limited by guarantee: A company Limited by guarantee may or may not have a share capital. If it has a share capital, the liability of the members is two fold, (a) Liability to pay the share amount (b) The amount guaranteed

A guarantee company may not be suitable for ordinary business purposes. Clubs, trade associations, research associations and societies for promoting various objects are the examples of guarantee companies. Every company Limited by guarantee must have its memorandum and articles of association. Where a company limited by guarantee has no share capital, the memorandum and articles must be in the form set in Table C in Schedule I. If such a company has a share capital, the memorandum and articles must be in the form set out in Table D in schedule I.

(c) Unlimited Companies: A company not having any limit on the liability of its members is termed as unlimited company. In such a company the liability of each member extends to the whole amount of the company's debts and liabilities, but he will be entitled to claim contribution from other members. An unlimited company can get itself re-registered as limited liability company under Section 32 of the Act.

Holding Company and Subsidiary Company: A company which controls another company is known as the 'holding company' and the company so controlled is termed as 'subsidiary company'.

Section 4 of the Companies Act 1956 provides that a holding company is one, if it

- (I) controls the composition of board of directors of another company or
- (II) holds more than half of the nominal value of equity share capital of another company, or
- (III) is a subsidiary of any company which is in turn a subsidiary of another company.

The following illustration will make the definition of holding and subsidiary company clear.

A company (say X) is a subsidiary of another company 'Y' and 'Y' is 'X' s holding company if

1. 'Y' is a member of X and controls the composition of X's Board of Directors; or
2. Y holds more than half of X's equity share capital (or)
3. 'X' is a subsidiary of a third company 'Z' which is itself a subsidiary of 'Y'

Private and Public Company:

Private Company: Its means a company which by its articles

- a. restricts the right to transfer its shares
- b. limits the number of its members to fifty
- c. prohibits any invitation to the public to subscribe for any shares or debentures of the company. A private limited company is required to add the words 'private limited' at the end of its name.

Public Company: A public company means a company which is not a private company.

Advantages and Disadvantages of a Company:

The company form of business organisation offers the following benefits:

(1) Financial strength: A public limited company can accumulate huge financial resources. Its capital is divided into shares of small denomination so that people with limited mean can be attracted to buy them. There is no limit on the number of members.

(2) Economies of scale: With continuous expansion and large financial resources at its command, a joint stock company can fully obtain the economies of large scale operations.

(3) Limited liability: The personal assets of a member are safe and he knows well in advance the extent of his liability. This encourages people to invest money in the shares and debentures of a company.

(4) Efficient Management: A company can employ specialists in different areas of business. Centralisation of management helps in ensuring unity of action and continuity of policy.

(5) Stability: A joint stock company enjoys perpetual existence. Changes in its ownership and management do not affect the continuity of business.

(6) Transferability of Interest: Shares of a public limited company are freely transferable. Promotion of investment habit facilitates capital formation and industrial development of the country.

(7) Diffused Risk: In a company the risk of loss is spread over a large number of share holders. Ownership is also diffused.

(8) Tax reciept: A company is required to pay income tax at a flat rate. At higher levels of income, the tax liability is comparatively low. Several tax incentives are available for export promotion, development of backward areas etc.

(9) Good will: Due to strict statutory control and wide publicity of affaris, a joint stock company enjoys reputation and prestige in the society.

Disadvantages of Company:

(1) Legal formalities: Formation of a company is a difficult, time consumed and expensive process. Several legal formalities, a large number of documents have to be prepared and filed with the Registrar.

(2) Lack of personal interest: A company is managed by directors and paid officials who cannot be expected to take personal interest in business. There is no direct link between effort and reward. There is lack of personal touch with customers and employees.

(3) Corrupt management: There is scope for fraudulent management in a company. The frequent securities scams are glaring examples of how corrupt officials can exploit a company for selfish gains.

(4) Delay in decisions: There appears a lack of flexibility and prompt decisions in a joint stock company. All important decisions require the convening of meetings and passing of resolutions. As a result decisions may be delayed. Due to red tapism and bureaucratic procedures, there is little scope for individual initiative.

(5) Unhealthy speculation: The shares of a public company are dealt on stock exchange. Directors and officials are tempted to manipulate share prices to make easy personal gains.

(6) Conflict of Interest: There are chances of conflicts between the various interest groups i.e. equity share holders, preference share holders etc. continuous conflict may affect the efficiency of management and the moral of employee.

(7) Oligarchy: Company management is the worst example of oligarchy i.e. rule by a few. Share holders of a company are scattered and disunited. They do not take much interest in company meetings.

8.4 DISTINCTION BETWEEN A PUBLIC COMPANY AND A PRIVATE COMPANY

(1) Minimum number of members: The minimum number of persons required to form a public company is seven, whereas in a private company it is only two.

(2) Maximum number of members: There is no limit on the maximum number of members of a company, but a private company cannot have more than fifty members excluding past and present employees.

(3) Restriction on Name: The name of public company must end with the word 'Limited'. But a private company must add the words 'Private Limited' at the end of its name.

(4) Commencement of Business: A private company can commence its business as soon as it is incorporated. But a public company shall not commence its business immediately unless it has been granted the certificate of commencement of business.

(5) Invitation to Public: A public company by issuing a prospectus may invite public to subscribe to its shares whereas a private company cannot extend such invitation to the public.

(6) Transferability of Shares: There is no restriction on the transfer of shares in the case of a public company whereas a private company by its articles must restrict the right of members to transfer the shares.

(7) Issue of Share Warrants: A public company can issue share warrants but such a right is denied to a private company.

(8) Further issue of Capital: A public company proposing further issue of shares must offer them to the existing members. A private company is free to allot new issue to outsiders.

(9) Number of Directors: A public company must have at least three directors whereas a private company may have two directors.

(10) Statutory Meeting: A public company must hold a statutory meeting and file with Registrar a statutory report. But a private company has no such obligations.

(11) Quorum: If the articles of a company do not otherwise provide the Quorum is five members personally present in the case of public company. The Quorum in the case of private companies is two members personally present.

(12) Restrictions on the appointment of Directors: A director of a public company shall file with the register consent to act as such. He shall sign the memorandum and enter into a contract for qualification shares. He cannot vote or take part in the discussion on a contract in which he is interested. Two thirds of the directors of a public company must retire by rotation. These restrictions do not apply to a private company.

(13) Managerial Remuneration: Total managerial remuneration in the case of a public company cannot exceed 11% of net profits, but in the case of inadequacy of profits a minimum of Rs. 50,000 can be paid. These restrictions do not apply to a private company.

Privileges of Private Company:

The special exemptions and privilege enjoyed by a private company are as follows:

- (1) A private company can be formed only by two members
- (2) It needs to have two directors.
- (3) It can commence its business immediately after incorporation i.e. it is not necessary to obtain the certificate of commencement of business.
- (4) There is no restriction on the allotment of shares of a Private Limited Company.
- (5) A private company is not required to issue or file a prospectus or statement in lieu of prospectus with Registrar of Companies.
- (6) I can appoint the first directors without any public notification.
- (7) It can grant loans to its directors without the permission of the Central Government.
- (8) The directors of a private company need not retire by rotation.
- (9) There are no restrictions on the number and appointment of directors.
- (10) Only two persons can constitute the Quorum for the meetings of a private company.
- (11) It can issue deferred shares.
- (12) It may provide financial assistance for purchase of its own shares.

Government Companies: Sec-617 of the Companies Act defines a 'Government Company' as a company in which not less than fifty one percent of the paidup share capital is held by the Central Government, or by any State Government or Governments, or partly by the Central Government and partly by one or more State Governments. Shares held by municipal and other local authorities or

public corporations are not to be taken into consideration. For example, State Trading Corporation of India Limited and Minerals and Metal Trading Corporation of India Ltd. are Government companies.

Certain special provisions have been laid down in the Act regarding Government Companies.

- (1) The auditor of a Government company shall be appointed or re-appointed by the Central Government on the advice of the Controller and Auditor General of India.
- (2) The auditor will submit a copy of a report to the Controller and Auditor General of India who may comment upon or supplement the audit report in such manner as he may think fit.
- (3) Where the Central Government is a member of the Government Company it shall cause an annual report on the working and affairs of the company to be prepared and laid before both houses of Parliament along with the audit report and the comments if any of the Controller and Auditor General of India.

Foreign Company: It means a company incorporated outside India and having a place of business in India. A Foreign Company may be a private company or public company. A company will be regarded as an Indian company when it is incorporated in India by promoters of foreign nationality.

The Companies (Amendment) Act 1974, provides that where not less than 50% of the share capital is held by Indian citizens and or companies incorporated in India it shall have to comply with such of the provisions of the Act as may be prescribed as if it were a company incorporated in India.

One-man Companies or Family Companies: A private company can be formed with two members and a public company with seven. A man may take only one other person with him to constitute the minimum number required in a private company or six other so as to constitute the required seven in a public company. He may keep with himself a substantial number of shares so as to have controlling power over the company. Such a company may be regarded as one-man company. Sometimes, a company may be formed by a person by involving other family members such a company can be regarded as a 'Family Company'. Even in such cases the company will be regarded to have a separate entity as distinct from the majority shareholders. (Saloman Vs Saloman & Co. Ltd.).

Multinational Companies: Multinational corporations refers to an organisation which is having its headquarters in one country and have business operations in other countries. This means, this type of organisation will have business across many countries. Some suggest that a multinational organisation should be at least operating in six countries with minimum of 20% of its business in those countries. For our purpose we will consider a company with business in more than one country as a multinational company. For example, Sandoz India Limited, Hindustan Lever, Ranbaxy etc can be called as Multinational Organisations.

8.5 KEY TERMS

1. Company: An association of persons formed and registered under the Companies Act.

2. Government Company: A company of which not less than 51% of the paid up share capital is held by the Central government or by the State Government or by any two or more of them together.

3. Holding & Subsidiary Company: A company which controls another company is known as holding company and the company so controlled is termed as subsidiary company.

8.6 SELF ASSESSMENT QUESTIONS :

1. Define a joint stock company, List the different types of joint stock companies.
2. Narrate advantages and disadvantages of a joint stock company.
3. Discuss the exemptions and privileges enjoyed by a private company.
4. What is a joint stock company? Distinguish between a public limited company and a private limited company.
5. Write short notes on
 - a) Government company
 - b) Holding & subsidiary company
 - c) Foreign company
 - d) Multinational companies.

8.7 REFERENCE BOOKS

Commercial and Industrial Law	-	Sen Mitra
Mercantile and Industrial Law	-	R.C. Chawla and K.C. Garg
Elements of Mercantile Law	-	N.D. Kapoor

- Dr. M. VIJAYA LAKSHMI

Lesson - 9

MEMORANDUM OF ASSOCIATION - ITS ALTERATION

9.0 OBJECTIVES

The first step in the formation of a company is to prepare Memorandum of Association. This lesson is intended to discuss the content of this document and also the procedure which should be followed to alter its contents under Companies Act - 1956.

Structure

- 9.1 Introduction
- 9.2 Definition
- 9.3 Purpose of Memorandum
- 9.4 Printing, Stamping and Signing of Memorandum
- 9.5 Form of Memorandum
- 9.6 Contents of Memorandum
- 9.7 Detail description of different clauses of Memorandum
- 9.8 Alteration of Memorandum
- 9.9 Summary
- 9.10 Self - Assessment Questions
- 9.11 Reference Books

9.1 INTRODUCTION

The first step in the formation of company is to prepare memorandum of association. The Memorandum of association of a company is a fundamental document of the company. It contains the fundamental conditions upon which alone the company is allowed to be incorporated. Guinness Vs Land Corporation of Ireland (1882).

9.2 DEFINITION [Sec - 2 (28)]

'Memorandum' means 'the memorandum' of association, as originally framed or altered from time to time in pursuance of any previous companies law or of this act'.

Memorandum is the charter of the company. It lays down the area of operation of the company. It also regulates the external affairs of the company in relation to outsiders. Its purpose is to enable shareholders and those who deal with the company to know what its permitted range of operations.

9.3 PURPOSE OF MEMORANDUM

The purpose of Memorandum can be listed as follows:

1. The prospective shareholders know the field in, or the purpose for, which their money is going to be used by the company and what risk they are undertaking in making the investment.
2. The outsiders dealing with the company know with certainty as to what are the objects of the company and whether their contracts with the company are within the objects of the company. [Cotman Vs Broughan (1918)].

9.4 PRINTING, STAMPING AND SIGNING OF MEMORANDUM [Sec - 15]

The Memorandum of Association of a company shall be (a) printed (b). divided into paragraphs, numbered consecutively, (c) stamped in accordance with the stamp laws prevalent in the state where the registered office of the company is to be situated (d) signed by seven subscribers (two in case of private company).

Each subscriber shall sign and add his address, description and occupation, if any, in the presence of atleast one witness who shall attest the signature.

9.5 FORM OF MEMORANDUM [Sec - 14]

The Memorandum of Association of a company shall be in such one of the forms in Table B,C,D and E in Schedule I of the Companies Act.

Table B relates to Memorandum of Association of a company 'limited by shares'.

Table C relates to Memorandum and Articles of association of a company 'limited by guarantee' and not having a share capital.

Table D relates to Memorandum and Articles of association of a company 'limited by guarantee' and having a share capital.

Table E relates to Memorandum and Articles of association of an 'unlimited company'.

9.6 CONTENTS OF MEMORANDUM (Sec - 13)

The Memorandum of every company shall contain the following clauses.

9.6.1 Name Clause: The name of the company with 'Limited' as its last word in the case of a public company, and 'private Limited' as its last words in the case of a private company.

9.6.2 Sitaution Clause: The state in which the registered office of the company is to be situated.

In the case of companies other than trading corporations with objects not confined to one state, the states to whose territories the objects extend.

9.6.3 Objects Clause: The objects of the company which shall be classified as:

(a) The main objects of the company to be pursued by the company on its incorporation. (b) The objects incidental or ancillary to the attainment of the main objects.

(c) The other objects of the company not included in clause (a) above.

9.6.4 Liability clause: The declaration that the liability of members is limited, in the case of a company limited by shares or limited by guarantee. The memorandum of a company limited by guarantee shall also state that each member undertakes to contribute to the assets of the company, such amount, not exceeding a specified amount as any be required in the event of it being wound up while he is a member or within one year after he ceases to be a member for payment of the debts and liabilities of the company.

9.6.5 Capital Clause: In the case of company limited by shares the amount of the share capital with which the company is to be registered, divided into shares of fixed amount. In the cas eof a company limited by guarantee, it states the liability of each member to contribute specified amount to the assets of the company in the event of winding up, for payment of the liabilities of the company.

In addition to the above clauses which are required by law to be included in the memorandum, other clauses may also be included in it where this is considered desirable. It shall conclude with an 'Association Clause'.

9.6.6 Association Clause: In this clause the persons subscribing to the memorandum declare their desire to form a company and agree to take the shares indicated opposite to their respective names. No subscriber shall take less than one share.

9.7 DETAIL DESCRIPTION OF DIFFERENT CLAUSES OF MEMORANDUM

We have already seen the different clauses of memorandum. Now we will go through the rules of the law regarding those clauses.

1. The Name Clause: The first clause of the memorandum shall state the name of the proposed company.

1.1 Rules regarding name: A company may, subject to the following rules, select any suitable name.

1. Undesirable name to be avoided: A company cannot be registered by a name which, in the opinion of the central government is undesirable [Sec 20(1)]

a. Too similar to the name of another company. The name should not create an impression that company is carrying on the business of some other existing company.

Huntley & Palmer Vs Reading Biscuit Co (1842)

b. Misleading, i.e. suggesting that the company is connected with a particular business or that it is an association of a particular type when this is not the case.

c. Injunction if identical name adopted: If a company gets registered with a name which resembles the name of an existing company, the other company can apply to the court for an injunction to restrain the new company from adopting the identical name.

Ewing Vs Butter Cup Margarine Co. Ltd. (1917): 'E' carried on business under the name of the Butter. Cup Dairy Company as a wholesale and retail provision merchant. The defendant company was incorporated with the main object of manufacturing and selling margarine in wholesale under the name Butter Cup Margarine Company Limited. E sought an injunction restraining the use of the name which the defendant company had adopted for its incorporation on the ground that it was contended to deceive the public into thinking that the two businesses were one or were closely connected. The court of appeal granted the injunction.

3. 'Limited' or 'private limited' as the last word or words of the name. Omission of the word limited makes the name incorrect. If the company makes a contract without the use of the word 'limited', the officers of the company who make the contract would be deemed to be personally liable.

Atkins & Co Ltd Vs Wardle (1889): A, B and C directors of the South Shield Salt Water Baths Company Ltd. acting on behalf of the company accepted a bill of exchange as 'directors of South Shield Salt Water Baths Co', Held, having omitted the word 'Ltd.', from the company's name the directors who signed the bill were personally liable.

The omission to use the word 'Limited' as part of the name of a company must have been deliberate and not merely accidental.

Dermatine Co. Ltd. Ashworth (1905): A bill of exchange drawn upon a limited company in its proper name was duly accepted by two directors of the company. The rubber stamp by which the words of acceptance were impressed on the bill. The stamp was longer than the paper of the bill and hence the word 'Limited' was missed. Held, the company was liable to pay and the directors were not personally liable.

4. Prohibition of use of certain names: The Emblems and Names Prevention and Improper Use Act 1950 prohibits, except with the previous permission of the Central Government, the use of or registration of a company or firm with any name or emblem specified in the schedule to the Act. Eg: The name, emblem or official seal of the U.N.O, W.H.O, the name and pictorial representation of Mahatma Gandhi and Prime Minister of India etc.

2. The Situation Clause: Every company shall have a registered office from the day on which it begins to carry on business. All communications and notices are to be addressed to that registered office [Sec 146(1)]. Notice of the situation of the registered office and every change shall be given to the Registrar within thirty days after the date of incorporation of the company or after the date of change [Sec 146(2)]. In default every officer who is in default shall be punishable with fine which may extend to Rs. 50/- for every day during which the default continues [Sec 146(4)].

3. The objects clause: The objects of a company shall be clearly set forth in the Memorandum. The objects clause defines and confines scope of the company's powers and once registered, it can only be altered as provided by the act.

Lord Cran worth L. C. observed in *Eastern countries Rly Co Vs. Hawkes (1855)* that "the legal personality of a company exists only for the particular purposes of incorporation as defined in the objects clause".

The statement of objects in a memorandum is intended to serve a double purpose. In the first place it gives protection to the subscribers who learn from it the purpose to which their money can be applied. In the second place, it gives protection to persons who deal with the company and who can infer from it the extent of the companies powers.

The powers specified in the Memorandum must not be constructed strictly. The company may do anything which is fairly incidental to these powers.

Evans Vs Brunner Mond & Co. (1921): A company engaged in manufacture of chemicals, proposed to devote a substantial sum of money to the encouragement of scientific education. It was proved that this act would ultimately benefit the company; but a shareholder objected on the ground that it was beyond the powers of the company. Held, the proposal was fairly incidental to the Companies objects.

After the Companies (Amendment) Act 1965, the objects clause in the Memorandum of every company has to state,

1. Main objects of the company to be pursued by the company on its incorporation.
2. Other objects: of the company not included in the above clause.
3. The objects incidental or ancillary to the attainment of the main objects.

For Eg: A steel manufacturing company would have:

1. Main object to be pursued on incorporation - Manufacturing of steel.
2. Incidental/ancillary objects - Acquisition of iron ore mines, borrowing, creation of security etc.
3. Other objects to be pursued later - manufacture of alloys.

5. The capital clause: A company having a share capital shall state the amount of the share capital with which the company is to be registered and the division thereof into shares of a fixed amount in the Memorandum. The capital with which a company is registered is called authorised capital. A company can not issue more shares than authorised by the memorandum. The shares issued by a public company can only be equity shares or preference shares. A private company which is not a subsidiary of a public company may issue shares of any kind [Sec - 90].

6. The Liability clause: The memorandum of a company limited by shares or by guarantee shall also state that the liability of its members is limited [Sec - 13(2)].

7. The Association Clause: In this clause it is to be stated by the subscribers to the memorandum that they are willing to form a joint stock company to carry out the objects set out in the memorandum. Every subscriber to the memorandum must take atleast one share each. He should write the number of shares to be taken by him against his name. They must sign the memorandum in the presence of atleast one witness.

9.8 ALTERATION OF MEMORANDUM

For the purpose of alteration the provisions of the memorandum can be divided into two categories.

1. Conditions: These are the provisions which must be included in the memorandum (6 clauses). These conditions can not be altered except in the cases, in the mode, and to the extent for which express provision is made in Companies Act [Sec 16(1)].

2. Other Provisions: Such provisions including those relating to the appointment of managing directors or managers may be altered by a special resolution [Sec - 16(3)].

(1) Alteration of Name Clause: A company can change its name at any time in the course of its business by a special resolution and with the approval of the Company Law Board [Sec - 21]. If a company is registered with a name which is identical with or closely resembles the name of the existing company, it may change its name by ordinary resolution and with the previous approval of Company Law Board [Sec - 22]. The Company Law Board can also direct a company to change its name. When the Company Law Board is directed, to change its name, the company must change its name within 3 months. If the name is not changed, the company law board may apply to the court to have the name removed from the register of companies.

No approval of the Central Government is required in case of addition or deletion of the word 'private' when a public company is converted into a private company or vice-versa.

When the name is validly changed, it must be notified to the registrar. The registrar shall enter the name in the register and shall issue a fresh Certificate of Incorporation. The registrar shall also make the necessary alteration in the Memorandum of Association of the company. The change of name shall be complete and effective only on the issue of fresh Certificate of Incorporation [Sec - 23(1)]. Change of name does not affect the rights and obligations of the company.

(2) Alteration of situation clause: This may be (a) change of registered office from one place to another place in the same city or town or village. A company can change its registered office from one locality to another locality in the same city or town. For this, the Board of Directors should pass a special resolution [Sec -146]. The notice of change should be given to the Registrar within 30 days of the change. A public notice must also be given regarding the change of registered office.

b. Change of registered office from one state to another state: Extraordinary general meeting must be convened and a special resolution must be passed approving the change of registered office. A copy of the special resolution must be filed with the registrar within 30 days from the date of passing the resolution. The conformation of the Central Government should be obtained. A copy of the conformation order obtained from the Central Government together with a printed copy of the altered memorandum must be filed with the registrar of both the states within 3 months of the order. The registrar of the state from which the registered office is transferred send all the documents relating to the company in his office to the registrar of the other state. Notice of the new address is to be given informing the public about the change of registered office.

(3) Alteration of objects clause [Sec 17(1)]: The objects of a company may be altered by special resolution, so as to enable the company (a) to carry on its business more economically or efficiently, governments stock investment company (1892).

A company was formed to invest its funds in the securities of British and Foreign Governments, local authorities and public undertakings. It wanted to alter its memorandum so as to acquire power to invest in the debentures of commercial and industrial companies and to create a security in favour of debenture-stock holders. Held, the company could alter the memorandum.

(b) to obtain its main purpose by new means.

(c) to enlarge or change the local area of its operation.

Indian Mechanical Gold Extracting Company (1891): The memorandum of a company requires it to confine its business to the 'Empire of India'. It wanted to change its memorandum so as to enlarge the area of its operation. Held, it could do so provided it dropped the word 'Indian' from its name.

(d) to carry on some business which under existing circumstances may conveniently or advantageously be combined with the objects specified in the memorandum.

Mutual Property Insurance Company Ltd. (1934): A company which has the power to carry on any kind of insurance business except life insurance wanted to add life insurance to its objects. Held, the company could do so provided it included the words 'and life' in its name.

The Company Law Board generally allow any kind of alteration of the financial position of the company is sound and the alteration is not objected by the shareholders and creditors.

(e) to sell or dispose of the whole or any part of the undertaking.

(f) to amalgamate with any other company.

(4) Procedure

1. A special resolution shall be passed to alter the objects clause [Sec - 17(1)].
2. The alteration shall be confirmed by the Company Law Board on petition [Sec - 17(2)].

3. Notice must be given to all persons whose interests will be affected by the change [Sec - 17(2)].
4. Notice must be given to the registrar of companies so that he can appear before the Company Law Board and state the objections and suggestions, if any [Sec - 17(4)]
5. After the board has confirmed the alterations, a certified copy of the boards order together with a printed copy of the memorandum as altered shall be filed with the registrar within three months from the date of order.

(5) Change in liability clause: A company limited by shares or guarantee can not change its memorandum so as to impose any additional liability on the members or to compel them to buy additional shares of the company unless all the members agree in writing to such change either before or after the change [Sec - 38].

(6) Change in Capital Clause: [Sec - 94] of the Act provides that a company if so authorised by the articles alter its share capital. A copy of the resolution should be filed with registrar of companies within 30 days of passing of the resolution. The Registrar of companies shall record the notice and make an alteration as may be necessary in the Memorandum and Articles.

9.9 SUMMARY

Memorandum is the charter of the company. through the memorandum the prospective, shareholders and outsiders dealing with the company can know how best their funds are used by the company. This should be printed and divided into paragraphs, numbered consecutively. Each paragraph is known as a clause. In alteration of these clauses, the company must follow the provisions of the company law.

9.10 SELF - ASSESSMENT QUESTIONS

1. What is meant by memorandum of association? What are the clauses in the memorandum? How to alter the clauses in the memorandum of association under companies act - 1956.
2. What is the procedure for changing the registered office of the company and also explain the grounds on which registered office from one state to another permissible.
3. What is Memorandum of Association? What are its contents? When and how may it be altered?

9.11 REFERENCE BOOKS

- | | | |
|---------------------------------|---|-------------------------------|
| 1) Sen Mitra | - | Commercial and Industrial Law |
| 2) Gulshan. S.S. & Kapoor. G.K. | - | A. Hand Book of Business Law |
| 3) M.P. Vijay Kumar | - | Business and Corporate Laws. |

- Dr. CH. SURAVINDA

Lesson - 10

ARTICLES OF ASSOCIATION

10.0 OBJECTIVES

Before incorporation of a company, the promoters have to submit certain documents of the Registrar of Companies. Among those documents Articles of Association is the second one. This lesson is intended to see the contents of the articles and the procedure for their change.

Structure

- 10.1 Introduction**
- 10.2 Definition**
- 10.3 Contents of the Articles**
- 10.4 Companies which must have their own articles**
- 10.5 Form of Articles**
- 10.6 Form and Signature**
- 10.7 Alteration of Articles**
- 10.8 Procedure for Alteration**
- 10.9 Limitations of Alteration**
- 10.10 Difference between Memorandum & Articles of Association**
- 10.11 Doctrine of ultravires**
- 10.12 Effect of ultravires transactions**
- 10.13 Doctrine of constructive notice**
- 10.14 Doctrine of Indore Management**
- 10.15 Exceptions to Doctrine of Indore Management**
- 10.16 Summary**
- 10.17 Self Assessment Questions**
- 10.18 Reference Books**

10.1 INTRODUCTION

The Articles of association are the rules, regulations and bye-laws for the internal management of the affairs of a company.

10.2 DEFINITION [SEC 2 (2)]

“Articles means the articles of association of a company as originally framed or as altered from time to time in pursuance of any previous companies law or of this act.”

The Articles of Association are the rules regulations and bye-laws for the internal management of the affairs of the company. they are framed with the object of carrying out the objects as set out in the Memorandum of Association. The articles should not contain anything which is inconsistent with either the provisions of the Memorandum of Association or of the Companies Act.

10.3 CONTENTS OF ARTICLES

Articles usually contain provisions relating to the following matters.

1. Share capital, rights of shareholders.
2. Lien on shares
3. Calls on shares
4. Transfer of shares
5. Transmission of shares
6. Forfeiture of shares
7. Conversion of shares into stock
8. Share warrants
9. Alteration of capital
10. General meetings and proceedings
11. Voting rights of members, voting and proxy.
12. Directors, their appointment, remuneration, qualifications, powers and proceedings of Board of Directors.
13. Managers
14. Secretary
15. Dividends and reserves
16. Accounts, audit and borrowing powers
17. Capitalisation of profits
18. Winding-up.

In framing the articles of company care must be taken to see that regulations framed do not get beyond the powers of the company itself as contemplated by the Memorandum of Association. They should not also violate any of the provisions of the companies act. For ex: according to [Sec 205], dividend can not be paid by a company except out of profits. Any provision in the articles, contrary to this provision of the companies act is void.

Peveril Gold Mines Ltd. (1898)

The articles of the company provided that no petition for a winding up could be presented unless

- a) two directors consented in writing
- b) a resolution to wind-up was passed at a general meeting and
- c) the petitioner held one-fifty of the issued share capital.

None of these conditions were fulfilled. Held; the restrictions were invalid and a petition could be presented. These restrictions violated the provision of Sec 224 of the English Companies Act of 1948. [Sec 439 of the Companies Act 1956 corresponds to this section].

10.4 COMPANIES WHICH MUST HAVE THEIR OWN ARTICLES (SEC 26)

The following companies shall have their own Articles, namely,

- a. Unlimited company
- b. Companies limited by guarantee
- c. Private companies limited by shares.

The articles shall be signed by the subscribers of the memorandum and registered along with the memorandum.

10.5 FORM OF ARTICLES

The following table shows the form of articles of different types of companies.

Type of Company	Form of Articles
Company limited by shares [sec28]	(a) Adopt talbe A of Schedule 1 is full (b) Own articles to the exclusion of table A (c) Own articles and adopt table A is part
Company limited by guarantee and not having share capital (Sec 29)	Own articles in a form as in Table C
Company limited by gurantee and having share capital (Sec 29)	Own Articles in a form as in Table D
Company with unlimited liability (Sec 29)	Own Articles in a form as in Table E

10.6 FORM AND SIGNATURE (SEC 30)

Articles shall be printed divided into paragraphs and signed by each subscriber to the Memorandum, stating his name, address, description and occupation, if any, in teh presence of atleast one witness who shall the signature and likewise add his address, description and occupation, if any.

10.7 ALTERATION OF ARTICLES

Companies have been given very wide powers to alter their Articles [Sec 31]. It is a statutory power and any provision in the Articles making the Articles unalterable is regarded as bad in law. If for example, the Articles of a company contain any restriction that the company should not alter its Articles, it will be contrary to the companies Act and therefore inoperative.

10.8 PROCEDURE FOR ALERTION

A company may, by passing a special resolution, alter, regulations contained in its Articles any time. A copy of every special resolution altering the Articles shall be filed with the registrar within thirty days of its passing and attached to every copy of the Articles issued thereafter [Secs 40 and 192 (1) (2)].

10.9 LIMITATIONS TO ALTERATION

10.9.1 Must not be inconsistent with the Act:

The Alteration of the Articles must not be inconsistent with or go beyond, the provisions of the company's Act [Sec 31 (1)]. For example, the Articles can not be alatered so as to give power to the company to purchase its own shares.

Madhav Ramchandra kamath Vs Canara Banking corporation Limited

A company passed a resolution expelling as member and authorising the directions to register the transfer of his shares without an intimation of transfer. Held; the resolution was invalid as being against the Act.

10.9.2 Must not conflict with the Memorandum:

The alteration of the Articles must not conflict with the provisions of the Memorandum (Sec 31 (1)). In case of conflict between the Articles and the Memorandum, The memorandum shall prevail.

10.9.3 Must not sanction anything illegal:

The alteration must not purpose to sanction anything which is illegal. But if it is legal and it is not clearly prohibited by the memorandum, it may be held to be valid even where it alters the whole structure of the company.

Andrews Vs Gass Meter Company Ltd (1897)

The Memorandum of a company provided that the nominal capital of the company was £ 60000 dividend into 600 shares of 100 each. The memorandum and the Articles did not contain any express provision as to issue of preference shares. The company by a special resolution, altered its Articles, so as to give itself power to issue preference shares and then issued them. Held, the issue was valid.

10.9.4 Must be for the benefit of the company:

The alteration must be for the benefit of the company.

Shuttle work Vs Cox Bros & Co Ltd (1927)

The Articles of a company provided that I and four others should be permanent directors of the company unless they were disqualified by any of the six specific events. I failed to account for the company's money on twenty two occasssions within twelve months. The Articles were accordingly altered and a seventh event disqualifying a director was added. The event added was that if a director was so requested in writing by all the other directors he should resign. I was so requested to resign. Held, the alteration was bonafide for the benefit of the company as a whole and was valid.

10.9.6 Alteration should not defraud the minority shareholders:

Brown Vs British abrasive wheel company Ltd: (1919)

A company was in financial difficulties and the majority of the shareholders were willing to provide more capital if the remaining shareholders, amounting to about two percent of the whole would sell them their shares. The majority then passed a special resolution altering the Articles so as to enable nine-tenths of the shareholders. Held, the alteration of the Articles could be restrained as it was designed to allow the majority to do compulsorily what they could not do by agreement and it was not for the benefit of the company as a whole.

10.9.7 Must not increase liability of Members:

The alteration must not in any way increase the liability of the existing members to contribute to the share capital of, or otherwise pay money to the company unless they agree in writing before or after the alteration is made (Sec - 38).

10.9.8 Approval of central government when a public company is converted into a private company:

The Alteration in the Articles which has the effect of converting a public company into a private company can be made only if it is approved by the central government [Sec - 31(1)]

10.9.9 Must not cause breach of contract:

The alteration should not cause a breach of contract with an outsider.

British Murac Syndicate Ltd Vs Alperton Rubber Company Ltd (1915):

Company A entered into a contract with company B whereby it was agreed that so long as A held 5000 of company B's shares, company A should have the right to nominate two of the directors. It was also agreed that a clause in the Articles providing for this right of nomination should not be altered by company B. Company B disapproved the nominees of company A and a notice was given of a meeting at which it was proposed to pass a resolution altering the Articles and depriving company A of the right to nominate, Held, the court could issue an injunction restraining company B from altering the Articles.

10.9.10 No power to the court to amend Articles:

The court has no power to amend or rectify the Articles even where there is a mistake or drafting error which the court would rectify in the case of any other contract the court can only declare some clause to be ultra vires.

10.9.11 Alteration may be with retrospective effect:

The Articles may be altered with retrospective effect.

10.10 DIFFERENCE BETWEEN MEMORANDUM & ARTICLES OF ASSOCIATION

Memorandum of Associations	Articles of Association
1. It is a primary document.	1. It is a secondary document
2. It is subordinate to the Act.	2. It is subordinate to Memorandum and the Act.
3. It is the character of the company and defines the fundamental conditions and objects.	3. It contains the rules and regulations.
4. For alteration the Central Government and court approval is required.	4. For alteration, the approval of the members is required.
5. It defines the relation between the company and outsiders.	5. It defines the relation between the company and members (Internal Management)
6. Acts which are ultravires the Memorandum cannot be ratified by the members.	6. Acts ultravires the Articles can be ratified by the members.
7. Every company must have its own memorandum	7. A public company limited by shares need not have articles of its own. In such a case, Table A applies.

10.11 DOCTRINE OF ULTRAVIRES

Ultra means 'beyond', vires means 'powers'

Ultravires a company means an act done beyond the legal power and authority of the company. An act ultravires the companies Act is illegal and void. An act ultravires the company (memorandum) is void.

An act ultravires the Directors, but intravire the company can be ratified by the shareholders by a resolution in a general meeting. An act ultravires the articles can be ratified by a special resolution at a general meeting.

Ashburg Railway Carriage & Iron Co. Ltd Vs Riche.

A Railway company was formed with the object of making and selling railway wagons and carriages. The company entered into a contract with Riche to finance the construction of a railway line in Belgium. The company later repudiated the contract as one being ultra vires. Riche brought an action for damages for breach of contract. The House of Lords held that the contract was ultravires and therefore null and void.

Lakshmana swamy Mudaliar Vs Life Insurance Corporation of India:

Directors of a company were authorised to make payments towards any charitable purpose or for any object useful for general public. The Directors paid a Rs. 2,00,000 to the trust formed for the purpose of promoting technical and business knowledge. The supreme court held the payment as ultravires.

The purpose of Doctrine of ultravires is to protect the shareholders and to safeguard the interest of the creditors.

10.12 EFFECT OF ULTRAVIRES TRANSACTIONS

The impact of doctrine of ultravires is that a company can neither be sued on an ultravires transaction, nor can it sue. Since the memorandum is a 'public document' it is open to public inspection. When one deals with a company, he is deemed to know about the powers of the company. In spite of this, a person enters into a transaction which is ultravires the company, then he cannot enforce it against the company.

10.12.1 Injunction:

Whenever an ultra-vires Act has been or is about to be undertaken, any member of the company can get an injunction to restrain the company from proceeding with it.

London Country Council Vs Attorney General:

The council had power to run trams. It ran omnibuses to feed trams. Held, that the running of omnibuses was ultra vires and the council was restrained from running omnibuses.

10.12.2 Personal liability of Directors / Agents:

Any member of a company can maintain an action against the Directors of the company to compel them to restore to the company the funds of the company that have been employed by them in an ultravires transaction.

10.12.3 Property acquired under ultra-vires acts:

If a company's money has been spent ultravires in purchasing some property, the company's right over that property must be held secure since the amount though wrongly acquired, represents the company's capital.

10.12.4 Ultravires contracts:

Contracts ultravire the company are void and cannot become intravires the company for reason of estoppel or lapse of time or ratification. The company may however alter the objects clause for the future, but such alteration will not validate the past ultravires acts done.

10.12.5 Ultravires torts (Civil wrongs):

The company is not liable for civil wrong done by Directors / Agent in the course of ultravires transaction. The company would be liable for torts only if:

- (a) The action is within the scope of memorandum of association.
- (b) The act was committed within the course of employment.

10.12.5.b. Exceptions:

- (a) If an act is ultravires the Directors of the company but intravires the company the shareholders may ratify it.
- (b) If an act is ultravires the Articles of the company, the Articles may be altered to include the act within the powers of the company.
- (c) If an act is intravires the company but is irregularly done, the shareholders may ratify it.
- (d) The company can sue a person who borrows money from the company under a contract which is ultravires, for the recovery of the money.
- (e) If an act is ultravires the company the rights arising independently thereon are not affected. Further, the rights over the property acquired by ultravires expenditure are protected.
- (f) If a company has purchased some property from a third party under ultravires contract or has taken an ultravires loan, the third party has the right to follow its property or money if it exists in specie. He may also obtain an injunction from the court restraining the company from parting with that property or money. But he must act before the identity of the property is lost or the money is spent.
- (g) If a company takes an ultravires loan and uses it to pay off intravires debts, the lender who has lent money under ultravires contract is substituted in the place of the creditor who has been paid off and he can recover the money.
- (h) If the company has taken an ultravires loan through misrepresentation of fact by the Directors, the lender has the right to make the Directors, personally liable on the ground of breach of implied warranty of authority.
- (i) If a Director of a company makes an ultravires payment, the amount, the company can compel him to refund the amount. The Director however has the right to be indemnified by the person receiving the money provided he knew the transaction to be ultravires the company.

10.13 DOCTRINE OF CONSTRUCTIVE NOTICE

The memorandum of Association and Articles of Association of every company are registered with registrar of companies. The office of the registrar is a public office and consequently they are public

documents open and accessible to all. Any person dealing with the company is presumed to have read the memorandum and Articles irrespective of whether he actually reads it or not. This kind of presumed notice is called as 'Doctrine of constructive notice'. The legal effect of its doctrine is that if a person deals with the company and the transaction is inconsistent with the provisions of memorandum and Articles, he cannot plead ignorance of the provision of these documents.

Kotla Venkataswamy Vs Ram Murthy

The Articles required that all deeds should be signed by the managing Director, the secretary and a working Director on behalf of the company. The plaintiff accepted the deed of mortgage signed by the secretary and a working Director. Held that the plaintiff could not claim under this deed.

This doctrine is not a positive one but a negative doctrine. It operates in the company's favour and against the person who failed the enquiry.

10.14 DOCTRINE OF INDOOR MANAGEMENT

This doctrine is an exception to the doctrine of constructive notice.

According to this doctrine, persons dealing with the company are presumed to have read the registered documents and to see that the proposed dealing is not inconsistent therewith, but they are not bound to do more; they need not enquire into the regularity of internal proceedings as required by memorandum and Articles. They can presume that all this is being done regularly.

The doctrine has its origin in the case of Royal British Bank Vs Turquand.

The Directors were authorised by the Articles to borrow such sums of money, by obtaining approval of the shareholders by way of a resolution in a general meeting. The Directors gave a bond to 'T' without authority of such a resolution. Held, that 'T' could sue the company on the strength of the bond, as he was entitled to assume that necessary resolution has been passed. Hence this doctrine is also referred to as the rule in Turquand's case.

10.15 EXCEPTIONS TO THE DOCTRINE IN INDOOR MANAGEMENT

10.15.1 Knowledge of irregularity:

Where a person dealing with the company has notice of the irregularity as regards internal management, he cannot claim benefit under the rule of indoor management. Thus a director of a company cannot normally claim the benefit of this rule, because he is also acting for the company in the transaction.

Howard Vs Patent Ivory Co.

The Directors of the company, under the Articles, had no power to borrow more than 1000 pounds without the resolution of the company in the general meeting. Without such a resolution, the Directors borrowed 2500 pounds from themselves and took debentures. It was held that the Directors had the notice of internal irregularity and hence the company was liable to them only to the extent of 1000 pounds.

Devi Ditta Mal Vs Standard Band of India:

A transfer of shares in a company was approved by two Directors. One of these Directors was not validly appointed. The other was disqualified by reason of being the transferee himself. These facts were not known to the transferor. Held the transfer was ineffective.

10.15.2 Negligence:

Where a person dealing with the company could discover the irregularity i.e. transactions which are unusual or not in ordinary course of business, if he had made proper enquiries then he cannot claim protection under this rule. Likewise, a person who deals with the company may be put upon enquiry by reason of unusual magnitude of the transactions having regard to the position of the agent who is acting for the company.

Underwood Vs Bank of Liverpool:

The Articles of a company provided that the business of the company was to be managed by the Directors. The Director and the principal shareholder of the company advised the Bank to credit the cheques in favour of the company into his own account. The bank accordingly credited the cheque in favour of the company into his own account. An action was brought against the bank by the company on behalf of the debenture holders. The Bank defended that it has acted on the Directors instructions and that as a Bank it was not necessary to see whether the internal proceedings for the Director's communication was appropriate or not. The court held that considering the peculiar nature of instruction, the bank should have in the ordinary course suspected irregularity. The court held the bank liable to compensate the company for cheques credited to directors personal account.

10.15.3 Forgery:

The rule cannot be applied to forgery which must be regarded as nullity. In the case of forgeries, the acts done in the name of the company are void ab initio. A company can never be held bound by forgeries committed by its officers.

Ruben Vs Great Fingall Consolidated Co.

The plaintiff was the transferee of a share certificate issued under the seal of the defendant company. The certificate was issued by the company's secretary who had affixed the seal of the company and forged the signatures of two Directors. The certificate was held to be void.

10.15.4 Void acts:

Where the acts done in the name of the company are void ab initio, the doctrine of indoor management does not apply.

10.15.5 Lack of authority:

If an officer of a company makes a contract with a third party and if the act of the officer falls outside his ordinary authority, the company is not bound.

Credit Bank Cassel Vs Schenkers Ltd:

A Branch manager of the company drew a bill of exchange and also endorsed bills on behalf of the company although he had no authority for these acts from the company. Held, the company was not bound.

Anand Biharilal Vs Binshaw & Co.

The plaintiff accepted a transfer of the company's property from its accountant since such transaction is apparently beyond the scope of an Accountant's authority, it was held void.

10.15.6 No Knowledge of Articles:

The protection under the rule of Indoor Management, would be available only if the person had knowledge of the Articles. So, if a person had knowledge of the Articles. He cannot claim protection under the rule of indoor management.

10.16 SUMMARY

The Articles of Association are the rules, regulations and bye-laws for the internal management of the affairs of a company. Companies have been given very wide powers to alter their Articles. But it must not be inconsistent with the Act. It must not conflict with the memorandum. An act beyond the legal power and authority of company is known as doctrine of ultravires.

10.17 SELF ASSESSMENT QUESTIONS

1. Distinguish between Memorandum of Association and Articles of Association
2. Write notes on
 - a. Constructive notice of memorandum and Articles of Association
 - b. Doctrine of Indoor Management
3. Doctrine of Ultra-vires. Discuss.

10.18 REFERENCE BOOKS

- | | | |
|--------------------------------|---|-------------------------------|
| 1. Sen Mitra | - | Commercial and Industrial Law |
| 2. Gulshan, S.S & Kapoor, G.K. | - | A Handbook of Business Law |
| 3. M.P. Vijay Kumar | - | Business and Corporate Laws |

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Lesson –11

PROSPECTUS

11.0 OBJECTIVES

In order to finance its activities a company need capital. This is raised by a public company by the issue of a prospectus. This lesson is intended to discuss the contents and significance of a prospectus.

Structure

- 11.1 Introduction**
- 11.2 Definition**
- 11.3 Features**
- 11.4 Requirements as to issue of prospectus**
- 11.5 Penalty for non-registration of prospectus**
- 11.6 Objects of registration of prospectus**
- 11.7 Contents of prospectus**
- 11.8 Mis-statements in prospectus and their consequences**
- 11.9 Civil liability**
- 11.10 Remedies against the company**
- 11.11 Minimum subscription**
- 11.12 Summary**
- 11.13 Self – Assessment Questions**
- 11.14 Reference Books**

11.1 INTRODUCTION

In order to finance its activities a company need capital. This is raised by a public company by the issue of prospectus inviting deposits from the public. The prospectus is the basis on which the prospective investors form their opinion and take decisions as the worth and prospects of the company. Any document inviting deposits from the public for the subscription of shares or debentures of a company is a prospectus.

11.2 DEFINITION [Sec - 2 (36)]

It means any document described or issued as a prospectus and includes any notice, circular, advertisement or other document inviting deposits from the public or inviting offers from the public for the subscription or purchase of any shares in or debentures of a body corporation.

11.3 FEATURES

Depending upon the above definition the features of a prospectus can be listed as follows.

1. It is a document in writing. An oral invitation is not a prospectus.
2. It must be for the subscription or purchase of any shares in or debentures of a body corporate.

3. It is an invitation to the public. An offer is not to be treated as invitation to public if
 - it is directed to a specific person or a group of persons.
 - It is not calculated to result in the shares or debentures becoming available to others.
4. Whether shares are issued to the public is a matter of fact and depends on the circumstances of the case, the test is not who receives the offer or invitation but who can accept it.

Pramanath Sanyal Vs Kali Kumar Dutt:

An advertisement in the newspaper stating some shares are still available for sale, according to the terms of the prospectus, which may be obtained on application was held to be a prospectus.

5. A single private communication does not satisfy the word "issue".

Nath Vs Lynde:

In this case several copies of a document marked "strictly confidential" and containing particulars of a proposed issue of shares were sent accompanied by application form by the Managing Director of the company to a co-director who passed it to a relation. Thus the document was passed on privately through a small circle of friends of the Director. It was held that there had been no issue to the public.

A circular issued by a company to the shareholders of other companies to acquire shares in these companies and issue its own shares in exchange of those shares does not amount to prospectus as there is no public issue.

6. Public is a general word and includes a section of the public Sec 67(1). It is not necessary that prospectus should be issued by a company. It may be issued on behalf of the company by its agents like an issuing house.

11.4 REQUIREMENT AS TO ISSUE OF PROSPECTUS

11.4.1 Dating and signature of prospectus [Sec -55]:

A prospectus issued by or in relation to an intended company must be dated and that date is taken as the date of publication of the prospectus. In case the prospectus is issued by an intended company it has to be signed by the proposed directors of company. In case of existing company the prospectus has to be signed by every person who is named there as director of the company.

11.4.2 Registration of prospectus [Sec - 60]:

A prospectus must not be issued by or on behalf of a company unless a copy thereof has been delivered to the registrar for registration. The copy must be accompanied with the following documents.

- Consent of the experts to the issued [Sec - 60(1) (a)]
- A copy of every contract appointing or fixing the remuneration of a Managing Director or Manager [Sec - 60 (1) (b & c)]
- A copy of every material contract entered with third parties.
- The consent in writing of a person if any named in the prospectus as the auditor. Legal adviser banker or broker of the company to act in that capacity [Sec -60(3)].

The prospectus must be issued within 90 days of the day on which a copy thereof is delivered for registration.

11.5 PENALTY FOR NON-REGISTRATION OF PROSPECTUS [Sec - 60(5)]

If a prospectus is issued without a copy thereof being delivered to the registrar for registration shall be punishable with a fine which may extend to Rs. 5,000/-

11.6 OBJECTS OF REGISTRATION OF PROSPECTUS

1. To keep an authenticated report of the terms and conditions of issue of shares and debentures.
2. To pinpoint the responsibility of the persons issuing the prospectus for statements made by them in the prospectus.

11.7 CONTENTS OF PROSPECTUS [Sec - 56]

Prospectus is the window through which an investor can look into the soundness of a company's venture. The investor must, therefore be given a complete picture of the company's intended activities and its position. This is done through prospectus which must secure the fullest disclosure of all material and essential particulars.

Sec -56 lays down that every prospectus issued shall:

1. State the matters specified in part I of Schedule II. Those are
 - (a) Main objects of the company and particulars of signatories to the memorandum.
 - (b) Number and classes of shares.
 - (c) Number of redeemable preference shares intended to be issued with the date of redemption.
 - (d) Qualification shares
 - (e) Particulars about Directors and Managing Directors.
 - (f) Minimum subscription
 - (g) The time of the opening of subscription list.
 - (h) The amount payable on application and allotment on each share.
 - (i) Particulars of any option to subscribe for shares.
 - (j) Shares issued for consideration other than cash
 - (k) Premium on shares
 - (l) The name of underwriter
 - (m) The particulars of vendors of property
 - (n) Underwriting commission
 - (o) Preliminary expenses
 - (p) Amount of benefit given to promoters
 - (q) Particulars of contracts
 - (r) Particulars of auditors
 - (s) Nature of interest of every director or promoter
 - (t) Voting and dividend rights
 - (u) Length of time of business
 - (v) Capitalisation of profits and surplus from revaluation of assets.

- (w) Inspection of balance sheet and P&L a/c. reasonable time and place at which copies of all balance sheets and P&L a/cs may be inspected.
- 2. Set out the report specified in part II of schedule II. Those are:
 - a. Report by the auditor
 - b. Report by the accountants

11.8 MIS-STATEMENTS IN PROSPECTUS AND THEIR CONSEQUENCES

A prospectus is a document which holds out to the public as to what a company is what its prospectus are. It invites deposits from the public to subscribe to the share capital and debentures of the company. It is therefore all material facts should be disclosed. Misstatement and non-disclosure of material facts in a prospectus are fatal to the contract for the purchase of shares and debentures. As such the greatest care is necessary in its preparation.

A prospectus as a whole must not give a misleading impression even though on analysing the statement separately a true sense could be made out.

Clark Vs Urquart (1930):

A prospectus issued by a company stated that the value of the company's assets was a certain sum. It however did not had that this sum was the estimated cost of replacing them. Held, the statement was ambiguous and misleading as anyone who read the prospectus would understand the value of the assets to mean the amount which might be realised if the company's business was sold as a going concern.

Greenwood Vs Leather shoot wheels Co (1900):

A company formed to manufacture leather tyred wheels for troleys issued a prospectus stating in large type orders have already been received from 'House of Commons' to be followed by large orders later. In fact, all orders received were trial orders and no customer had yet expressed any intention to buy on a large scale. Held, the prospectus was misleading.

If there is any misstatement of a material fact in a prospectus the persons responsible for such are both civil or criminally liable.

11.9 CIVIL LIABILITY

A person who has been induced to subscribe for shares on the faith of a statement in a prospectus i.e. untrue has remedies against the company and the directors, promoters and experts.

11.10 REMEDIES AGAINST THE COMPANY

If there is a mis-statement in a prospectus and if it has induced any share holder to purchase shares i) he can rescind the contract and ii) claim damages from the company.

11.10.1 Rescission of the contract:

Any person who takes shares on the faith of statement of fact contained in a prospectus can apply to the court for the rescission of the contract. He may however apply for the rescission within a reasonable line and before the company goes into liquidation. But he will Shiromani sugar Mills Ltd Vs Debi

Prasad (1950) Have to surrender to the company the shares allotted to him. His name is then removed from the register of members and he gets back the money paid by him to the company along with interest. The contract can be rescinded if the following conditions are satisfied.

11.10.1.1 The statement must be material representation of fact:

City of Edinburgh Brewer Co Ltd Vs Gribsons Trustee (1869)

A prospectus issued by a company stated that a large number of gentlemen in the trade and others have become shareholders. In fact, out of 55 shareholders 10 to 12 were connected with the trade. Held, there was no sufficient material representation to entitle a shareholder who had taken shares on the faith of the prospectus to have his name deleted from the registrar.

11.10.1.2 It must have induced the shareholder to take the shares:

Jennings Vs Broughton (1833):

A subscriber for share in a mining company offered by a prospectus which is accurately described the capacity of the company's mine. He inspected the mine himself. Held, he was not entitled to rescind the contract to take shares as he has inspected the mine himself and must have therefore relied on his own observations and not on the contents.

11.10.1.3 It must be untrue:

A statement included in a prospectus is deemed to be untrue if it is a misleading in the form and context in which it is included Sec - 65(00)

Rex Vs Lord Kylsant (1923):

A prospectus was issued by a company stating that the company had paid a dividend every year between 1921 and 1927 (years of depression). Thus giving the impression of a financially stable company however the company had in each of those years incurred considerable financial losses in trading a/c and was able to pay dividend only out of reserves accumulated in previous years. This fact was suppressed. Held, the prospectus was false in material particulars. In that it conveyed a false impression. A statement could be false not only because of what was said but also because of what was concealed, omitted or implied.

11.10.1.4 The shareholders must have relied on the statement in the prospectus in applying for shares. If a person purchase the shares in the open market the prospectus ceases to be operative. He cannot therefore sue for rescission on the ground of untrue statement in the prospectus.

Peek Vs Gurney (1873):

A company issued a prospectus containing false statements. 'A' relying on the prospectus applied for and allotted shares. Later he sold these shares to P. The company was wound up and had to pay nearly £ 1,00,000 as a contributory P sought an indemnity for his loss from the directors at the time of the issue of prospectus. Held, the directors were not laible to P.

11.10.1.5 The omission of a material fact must be misleading before rescission is granted.

Cales Vs White city greyhaund Association Ltd (1929):

A prospectus described land as eminently suitable for greyhaund racing. However before any building such channels or stands for the public could be constructed, local authorities approval was necessary. As a result of a town planning resolution the local authority refused approval. Held, the description of land was misleading and rescission was granted.

11.10.1.6 The proceeding for rescission must be started as soon as the allottee comes to know of a misleading statement in the prospectus on the faith of which he has subscribed for shares and before the company goes into liquidation.

11.10.1.7 Notice not enough:

Where an allottee elects to rescind a contract on the ground of fraudulent misrepresentation, a mere notice to the company to this effect is not enough. He must take effective steps for the rectification of register of members and removal of his name there from.

First National Reinsurance company Vs Green field (1921):

11.10.1.8 Loss of right of rescission:

The right to rescind a contract induced by misrepresentation is lost in following cases.

11.10.1.8.1 Affirmation:

Where a shareholder after discovering that he has a right to rescind treats the contract as subsisting, he cannot afterwards rescind it.

For Ex: He loses the right to rescind.

1. where he attempts to resell
2. executed a transfer
3. pays calls or received dividend
4. attends and votes at a general body meeting of a company in person or by proxy.

Unreasonable delay:

The shareholder must rescind the contract promptly i.e. within reasonable time. Where there is an unreasonable delay by a shareholder after his coming to know of the circumstances entitling him to apply for rescission, he loses the right to rescind.

Christen Ville Rubber Estates Ltd (1911):

A shareholder was allotted shares in a company on the faith of a prospectus containing some false statements he can put in enquiries in June but he took no steps to make investigation until November. Held, the delay prevented him from rescinding the contract.

Impossibility:

Where rescission becomes impossible because the parties cannot be relegated to their original position, where the winding up of the company has commenced and the rights of the creditors started.

11.10.9 Damages for deceit:

Any person induced by a fraudulent statement in a prospectus to take shares is entitled to sue the company for damages. He can both retain the shares and get damages against the company.

The persons who are liable to pay compensation for any loss or damage to subscribers for any shares or debentures on the faith of a prospectus containing untrue statements are

1. The directors at the time of the issue of the prospectus.
2. Persons who have authorised themselves to be named as directors in the prospectus
3. Promoters
4. Persons who have authorised the issue of prospectus. Their liability may be as follows:
 - Liability for damages for mis-statement in prospectus (Sec -62)
 - Criminal liability

Every person authorising the issue of a prospectus containing false or untrue statements is punishable with imprisonment upto 2 years or with a fine upto Rs. 5,000/- or both [Sec -63(1)]

Sec -68 of the act lays down that a person who induce others by making false or misleading statement to enter into an agreement for the acquisition of shares for securing profits from the yield of share is punishable with an imprisonment for a term extending upto 5 years or a fine of Rs. 10,000/- or both.

11.10.10 Statement in Lieu of prospectus [Sec - 70]:

Where a public company does not inviting public to subscribe for its shares, but arranges to get money from private sources, it need not issue a prospectus to the public. In such a case the promoters are required to prepare a draft prospectus known as statement in lieu of prospectus, which should contain the information required to be disclosed by the schedule III of the act.

It should be dated and signed by every person who is named there in as director or proposed director. It will constitute the basis of the contract between the company and shareholders. It must disclose all material facts relating to the company.

Where a shareholder has applied for shares on the basis of a prospectus which is altered in material particulars before the allotment of the shares, he is entitled to revoke his application for shares.

Raja Gopal Iyer Vs The South Indian Works Ltd (1942):

The plaintiff applied for shares in a company on the basis of a prospectus which contained the names of directors before the shares were allotted, some directors had retired. Held the plaintiff could revoke his application.

11.10.11. Deemed Prospectus [Sec -64]:

It is also known as prospectus by implication. A public company offer its shares or debentures to be public by issue of prospectus. Any document, circular, notice, advertisement containing the offer for sale of share or debentures is known as prospectus.

11.11 MINIMUM SUBSCRIPTION

Minimum subscription is the amount stated in a prospectus as the minimum amount which, in the opinion of the Board of Directors, shall be raised by the issue of share capital in order to provide for the matters specified below.

- (a) The purchase price of any property purchased or to be purchased.
- (b) The preliminary expenses payable by the company.
- (c) The repayment of any money borrowed by the company in respect of any one of the following.
- (d) Working capital
- (e) Any other expenditure.

No allotment of shares can be made unless the amount stated in the prospectus as the minimum subscription has been subscribed, and the sum payable on application for the amount so stated has been paid to and received by the company.

11.11.1 Underwriting commission and Brokerage [Sec -76]:

11.11.1.1 Underwriting Commission:

A public company which invites the public to subscribe for its shares or debentures must ensure that the whole issue is taken up. As such, it is willing to pay any one a certain commission on all shares or debentures offered to the public if he guarantees that if any of these are not taken up by the public, he will take them up. The commission so paid is known as under writers commission for the risks this expose themselves to in placing the shares or debentures before the public.

Sec -76 deals with the power of a company to pay underwriting commission. According to it a company can pay commission to any person if the following conditions were fulfilled.

1. The payment of commission shall be authorised by the Articles of Association.
2. It should not exceed 5% of the issue price of the shares.
The commission may be paid both out of capital or out of profits.
3. The rate of commission paid or agreed to be paid should be indicated in prospectus.
4. The number of shares or debentures which the under writers agreed shall also be disclosed in prospectus.
5. A copy of the contract for the payment of commission shall be delivered to the registrar.

If default is made in complying with the above provisions the company and every officer of the company who is in default shall be punishable with fine which may extend to Rs. 500/-

11.11.2 Brokerage:

Sec 76(3) permits a company to pay such brokerage which is lawful for the company to pay. This means that a company can pay only such brokerage as has been recognised by law i.e. persons who deal in shares and whose business includes the procuring of subscription for shares. They are professional men such as stock-brokers, bankers and the like who exhibit prospectus and send them to their customers and by whose mediation the customers are induced to subscribe.

Brokerage must be payable to a broker for services as a broker and not to a person who had casually induced others to subscribe for shares or debentures.

Andereae Vs Zinc Mines of Great Britain Ltd. Supra:

A company agreed to pay A, a lady, ten percent commission on any capital of the company as a result of an introduction by her. She was not carrying on any business as a broker. Held, she could not recover the agreed sum. She was in no sense a broker. She did not carry on business as a broker, and it was a mere accident that she came into the company's office and was consulted in this matter.

11.12 SUMMARY

In order to raise finance the public companies have to issue prospectus to the public. Any invitation to subscribe in the shares and debentures of the company is known as prospectus. A copy of prospectus should be registered with the registrar before issue to the public. It must disclose all material facts. Mis-statement and non-disclosure of material facts in a prospectus is an offence. Where a public company does not inviting public to subscribe for its shares have to prepare a draft prospectus known as statement in lieu of prospectus.

11.13 SELF - ASSESSMENT QUESTIONS

1. What is a prospectus? What are its contents? Who are liable for mis-statements in a prospectus?
2. Write about
 - a) Statement in lieu of prospectus
 - b) Underwriting commission
 - c) Brokerage

11.14 REFERENCE BOOKS

- | | | |
|-------------------------------|---|-------------------------------|
| 1. Sen Mitra | - | Commercial and Industrial Law |
| 2. Gulshan S.S. & Kapoor G.K. | - | A Handbook of Business Law |
| 3. M.P. Vijay Kumar | - | Business & Corporate Laws |

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Lesson - 12

MEETINGS

12.0 OBJECTIVES

This lesson is intended to discuss about various types of Meetings.

Structure

- 12.1 Introduction**
- 12.2 Statutory Meetings**
- 12.3 Annual general Meeting**
- 12.4 Extraordinary General Meeting**
- 12.5 Summary**
- 12.6 Self Assessment Questions**
- 12.7 Reference Books**

12.1 INTRODUCTION

Every company limited by shares or guarantee have to conduct certain meetings according to the Provisions of Company's Act. Depending upon the nature and pupose the meeting called may be of diferent types. They are usually:

1. Statutory Meeting [Sec -165]
2. Annual General Meeting
 - called by Company [Sec -166]
 - called by NCLT [Sec -167]
3. Extraordinary General Meeting [Sec -169]
 - called by company
 - called by NCLT
 - called by Members

Now we wil see the procedure of conducting these meetings and their objects according to the Act.

12.2 STATUTORY MEETING [Sec -165]

Every company limited by shares and every company limited by guarantee and having share capital is required to hold a meeting of the members of the company immediately after its incorporation. Actuall it is the first meeting of the members.

A statutory meeting is to be held once in the life time of the public limited company wiht share capital within a period of not less than month and not later than 6 months from the date of commencement of business.

All the members of the company shall be sent a report called 'Statutory Report' atleast 21 days before the date of meeting. The notice must say it is intended to be a statutory meeting.

Private companies, government companies and a company limited by guarantee and not having share capital are not required to hold a statutory meeting.

12.2.1 Contents of the statutory Report:

The following matters must be included in the statutory Report

1. (a) Shares allotted:

It should reveal the total number of shares allotted, distinguishing

- shares allotted as fully or partly paid-up otherwise than in cash and
- in case of partly paid-up shares,

The extent to which they are so paid-up

- in either case the consideration for which they have been allotted.

(b) Cash received - The total amount of cash received on account of shares allotted.

(c) Summary of receipts and payments - An abstract of the receipts and payment of the company made up to a date within 7 days of the date of the report.

(d) Directors and Auditors - The names address and occupations of the Directors of the company and the charges if any, which have occurred since the date of incorporation of the company.

(e) Contracts - The particulars of any contract or the modification or the proposed contract which is to be submitted at the meeting for approval.

(f) Underwriting contract - The extent, if any, to which each underwriting contract has not been carried out and the reasons thereof.

(g) Arrears of calls - Call money due from each Director and from the Manager.

(h) Commission and Brokerage - Particulars of commission or brokerage paid/payable in connection with the issue of shares / debentures to any Director / Manager.

The statutory report shall be certified as correct by not less than 2 Directors, one of whom shall be a Managing Director, where there is one.

2.2 Audit certificate:

The auditors of the company shall certify as correct the following contents:

- a. Total shares allotted by the company.
- b. Cash received by the company in respect of all shares allotted.
- c. Summary of receipts and payments.

After this the statutory report shall be delivered to the Registrar of companies for registration.

2.3 Procedure at the Meeting:

A list showing the names, addresses and occupations of the members of the company, and the number of shares held by them, has to be produced at the commencement of statutory meeting and has to remain accessible to any member during the continuance of the meeting.

In any general meeting a member who intends to discuss any matter shall give previous notice to the company of his intention to discuss. Statutory meeting is an exception to this rule. The members present at the meeting may discuss any matter relating to the formation of the company or arising out of the statutory report, whether previous notice has been given or not. But no resolution can be passed for which notice has not been given as required by the Act.

2.4 Default:

If any default arises in holding the meeting or filing the statutory report, every Director or any other officer of the company who is in default shall be punishable with a fine which may extend to Rs. 5,000/-. Further default in holding the meeting or filing the report is one of the grounds for winding up of the company.

12.3 ANNUAL GENERAL MEETING [Sec -166]:

Every company shall, in each calendar year, hold in addition to any other meeting, a general meeting termed as an Annual General Meeting. The notice calling the meeting shall specify it as an Annual General Meeting.

According to [Sec 171] a Annual General Meeting may be called by giving not less than 21 days notice in writing. The period is calculated from the date of receipt of the notice by the members. It excludes -

- the day of service of the notice
- the day on which meeting is to be held.

Notice is deemed to have been received by the members at the expiration of 48 hours after the letter containing it is posted.

A meeting may be called by a shorter notice, if it is agreed by all the members entitled to vote thereon. The consent for a shorter notice may be obtained either before or after the meeting.

3.1 Venue:

Every Annual General Meeting shall be held at the Registered office of the company or at some other place within the city, town or village in which the registered office of the company is situated and on a day which is not a public holiday and during the business hours.

3.2 Business to be transacted [Sec -173]

In the case of an Annual General Meeting the business to be transacted may be of ordinary business or special business.

3.1.a. Ordinary business: [Sec -173]

In the case of an Annual General Meeting, the following is deemed as ordinary business:-

- Consideration and adoption of annual accounts and the reports of the Board of Directors and auditors.
- Declaration of dividend
- Appointment of Directors in place of those retiring.
- Appointment of Auditors and fixing of their remuneration.

3.1.b. Special Business [Sec -173]

In the case of an Annual General Meeting, any business other than the ordinary business, and in the case of any other meeting all business is deemed special.

It is to be noted that it is not the business, but it is the meeting which may make a business special. Some illustrations are given below.

- Appointment of a director other than a retiring director in an Annual General Meeting is a special business.
- An auditor is appointed in an extra-ordinary general meeting (i.e. due to casual vacancy caused by resignation), then it becomes a special business.
- Dividend may be declared in an extra-ordinary meeting, in which case it is a special business.

In case of a special business, the notice convening the meeting shall contain an explanatory statement giving the prescribed particulars.

3.2 Meeting time:

The following are the provisions of the Act regarding the time, when an Annual General Meeting should be held:

- An Annual General Meeting must be held each year (calendar year),
- The gap between two Annual General Meetings shall not exceed 15 months,
- As per Sec 210, the time gap between the end of the financial year and the date of Annual General Meeting shall not exceed 6 months. Ex: The financial year of a company ends on 31st March. each year. The Annual General Meeting to adopt the accounts of the year ending 31-3-03 was held on 29-9-03. The last date for holding the meeting would be 30-9-03.
- A company may hold its first Annual General Meeting within 18 months from the date of its incorporation.
- It shall not be necessary for a company to hold a Annual General Meeting in the year of its incorporation or in the following year, if it holds an Annual General Meeting within 18 months from the date of its incorporation.
- The registrar of companies may, for any special reason, grant extension of time to hold an Annual General Meeting by a period not exceeding three months except in case of the first Annual General Meeting.

3.3 Default [Sec -168]:

If any default is committed by the company in holding the Annual General Meeting in accordance with sec 166, then the company and every officer of the company who is in default shall be punishable with a fine which may extend to Rs. 50,000/-. In the case of continuing default, a further fine which may extend to Rs. 2500 per day during the continuance of default will be imposed.

3.4 Other points regarding an Annual Meeting:

The following are the provisions of Company's Act regarding the Annual Meeting:

- The Central Government may exempt any class of companies from the provisions of Sec 166.

- If any day is declared by the Central Government to be a public holiday after the issue of notice convening such a meeting, it shall not be deemed to be a public holiday in relation to the meeting.
- A public company or a private company which is a subsidiary of public company may by its articles fix the time for its Annual Meeting or by a resolution passed in one Annual Meeting fix the time for its subsequent Annual Meeting.
- The purpose of Annual Generation Meeting is not only adoption of accounts. Even if the accounts are not ready the Annual General Meeting shall be held within the prescribed period and transact other businesses other than accounts, and a suitable day may be fixed when the accounts are likely to be ready. However it should be noted that such an adjourned meeting should also take place within the statutory limit laid down under 166 read with 210 of the Act.
- Two Annual Meeting can be held on the same day. There should be separate notices for each such meeting and shall be held at different time.
- Where all members of a company were also members of BOD, a meeting of Board could well be treated as a general meeting of company (PV. Damodara Reddy Vs Indian National Agencies Ltd).

12.4 EXTRA ORDINARY GENERAL MEETING [Sec -169]:

Any General meeting of a company other than the statutory meeting or the Annual General Meeting is the EGM of the company. An EGM is called for transacting some urgent or special business which cannot be postponed till the next AGM.

The EGM may be convened by the Board on its own, by the Board on the requisition of the members, by the requisitionists themselves on the failure of the Board to call the meeting or by the National Company Law Tribunal

4.a. EGM by the Board on its own:

An EGM may be convened by the Directors if some business of special importance requires an approval from the members.

4.b. EGM on the requisition of members:

The Board of Directors of a company shall, on the requisition of such number of members of the company, forth with proceed duly to call an extraordinary general meeting of the company. The requisition shall be set out the matters for the consideration of which the meeting is to be called, shall be signed by the requisitionists, and shall be deposited at the Registered office of the company.

4.c. Number of members Entitled to Requisition:

The rules regarding the number of members entitled to requisition of the EGM are as follows:

- In case of the company having share capital, members holding 1/10th of paid up share capital of the company and having a right to vote on the date of deposit of requisition on the matter to be discussed at the meeting.
- In case of a company not having share capital, members holding 1/10th of voting power on the date of deposit of requisition on the matter to be discussed at the meeting.

4.3 Power of National Company Law Tribunal: to order calling of meeting [Sec -186]

If for any reason it is impracticable for the company to call an EGM of the company, the NCLT may either.

- of its own motion or
- on the application of any Director of the company or
- on the application of any member, entitled to vote at the meeting.
- order a meeting of the company to be called, held and conducted in such manner as the NCLT thinks fit.

4.a Notice [Sec -171]

21 clear days notice shall be given for calling a general meeting. A notice shorter than 21 days can be given in case of AGM with the concurrence of all the members entitled to vote at the meeting. In case of any meeting other than AGM, concurrence of at least 95% of members having share capital with voting rights or 95% of voting power is required to give a notice less than 21 days.

4.b. Contents of the Notice:

Notice shall specify the place, day and an hour of the meeting and shall contain a statement of business to be transacted at the meeting, It may be noted that -

- A notice for a special business shall contain an Explanatory statement.
- If any item to be transacted at the General Meeting requires a special resolution then the intention to propose the resolution as a special resolution shall be stated in the notice.
- Companies having a share capital shall state with reasonable prominence in the notice that a member entitled to attend and vote is entitled to appoint a proxy to attend and vote instead of himself and the proxy need not be a member.

The notice shall be served in the manner presented in Sec 53 viz, either personally or by ordinary post at the registered address in India.

4.c. Business at a Meeting [Sec -173]

All business in the Meeting is of special nature.

Quorum [Sec -174]

Quorum refers to the minimum number of members required to transact a business in a meeting. The Articles can fix the quorum required for a meeting. According to Company's Act, if the company is public company the quorum required is 5 members. (personally present, excluding proxies). If the company is a private company the quorum required is 2 members (personally present, excluding proxies).

12.5 SUMMARY

Every company has to conduct certain meetings according to the provisions of Company's Act. They are different types depending upon the purpose and nature i.e. statutory meeting, which is conducted once in the life time of the company. Annual General Meeting, conducted every year, extra ordinary meeting conducted in special situations.

12.6 SELF - ASSESSMENT QUESTIONS

1. What are the different kinds of meetings under Companies Act -1956? Explain in detail.

12.7 REFERENCE BOOKS

- | | |
|----------------------------------|---------------------------------|
| 1. Sen Mitra | - Commercial and Industrial Law |
| 2. Gulshan, S.S. & Kapoor, G. K. | - A Handbook of Business Law |
| 3. M.P. Vijay Kumar | - Business & Corporate Laws |

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Lesson - 13

RESOLUTIONS

13.0 OBJECTIVES

In the previous lesson you learned about the statutory provisions regarding the conduct of meetings. This lesson is intended to discuss about the provisions regarding resolutions

Structure

- 13.1 Introduction
- 13.2 Circulation of Member's Resolution
- 13.3 Members eligible for moving Resolution
- 13.4 Conditions
- 13.5 Resolution
- 13.6 Resolution requiring special notice
- 13.7 Passing of resolution by postal ballot
- 13.8 Minutes
- 13.9 Registration of resolutions and agreements
- 13.10 Summary
- 13.11 Self - Assessment Questions
- 13.12 Reference Books

13.1 INTRODUCTION

A company or its Board of Directors can move any matter with the members through a resolution. Now we will discuss the provisions regarding resolution.

13.2 CIRCULATION OF MEMBER'S RESOLUTION: [Sec -188]

A company shall on the receipt of the writte, requisition by such required members and at the expense of the requisitionists -

- a. given to the members of the company who are entitled to received notice of the next Annual General Meeting, notice of any resolution which may be properly moved and is intended to be moved at that meeting.
- b. Circulate to the members entitled to have notice of any general meeting, any statement of not more than 1000 words with respect to the matter referred to in any proposed resolution or any business to be dealt with at that meeting.

13.3 MEMBERS ELIGIBLE FOR MOVING RESOLUTION:

The members eligible for moving the above resolution are -

- a. such number of members as represent not less than 1/20th (5%) of the total voting power of all the members at the date of resolution, having a right to vote on the resolution /business to which the requisition relates, or

b. Not less than 100 members having voting rights and holding shares in the company on which there has been paid - up an aggregate sum of not less than Rs. 1 lakh in all.

The notice of such resolution or the statement that is required to be circulated shall be sent in the same manner as the notice of the Annual General Meeting is sent. The notice or statement is sent at the expense of requisitionists unless otherwise resolved by the company.

13.4 CONDITIONS

The following conditions shall be satisfied

- (a) Copy of the requisition duly signed by the requisitionists is deposited at the registered office of the company-
- in the case of requisition requiring notice of resolution not less than 6 weeks before the meeting.
 - in the case of any other requisition it is deposited not less than 2 weeks before the meeting.
- (b) A sum of reasonably sufficient to meet the expenses is deposited along with the requisition.

However, if after the requisition is deposited with the registered office, An Annual General Meeting is called for at a date 6 weeks or less after the copy has been deposited then the requisition is deemed to have been properly deposited thereof notwithstanding that it does not satisfy the limit prescribed under this section.

The company is not bound to circulate in the following circumstances:

(a) If the NCLT makes an order on an application made by the company or any other person who claims to be aggrieved and is satisfied that the power under this section is abused to secure needless publicity for defamatory matter.

b/. A banking company is not bound to circulate if in the opinion of the Board of Directors the circulation will injure the interest of the company.

13.5 RESOLUTION [Sec -189]

Resolutions are of two types

1. Ordinary resolution
2. Special resolution

13.5.1 Ordinary resolution:

A resolution shall be an ordinary resolution when, at a General Meeting of which the notice required under this Act has been duly given, the votes cast in favour of the resolution exceed the votes, if any, cast against the resolution (> 50%) i.e. A resolution passed by a single majority of those present in person or any proxy, where proxies are allowed and voting upon the resolution. The emphasis is on the members present and voting at the meeting. The members not participating are not taken into account.

Few matters which require ordinary resolution are given below:

- (a) To authorise an issue of shares at discount
- (b) To increase the share capital if authorised by the articles

- (c) To appoint auditors
- (d) To appoint directors
- (e) To adopt annual accounts
- (f) To declare dividend

5.2 Special resolution:

A resolution shall be a special resolution when -

- (a) The notice calling the General Meeting specifies the intention to propose the resolution as a special resolution.
- (b) The notice has been duly given of the General Meeting
- (c) The votes cast in favour of the resolution are not less than 3 times the number of votes, if any, cast against the resolution ($\geq 75\%$) i.e. even when the votes cast in favour is exactly three times the votes against the resolution, the resolution can be said to be a special resolution. Hence the casting vote of chairman is applicable only to ordinary resolution.
- (d) The notice shall also annex an explanatory statement as required u/s 173, in which the shareholders are informed of the material facts concerning the resolution and the nature of the interest therein of the directors.

A special resolution is required for transacting business only where it is specially so required by the Act or said in the Articles. All other business can be transacted by an ordinary resolution. A copy of special resolutions should be filed with Registrar of Company [Sec -192].

(e) A special resolution is required for the following: For example:

- To alter the objects clause and the situation clause in the memorandum
- To commence any new line of business
- To change the name of the company
- To delete the word ' Limited' or 'Private Limited' from the name of the company
- To amend the Articles
- To issue further shares without pre-emptive rights to non-members or to convert loans or debentures into shares.
- To determine that any portion of the share capital not already called up shall not be called up except in the event of , and for the purpose of winding up of the company.
- To reduce the share capital.
- Approval of variation of rights of special classes of shares.
- To keep registers and returns at any place other than within city, town or village in which the registered office is situated.
- To request the government to investigate the affairs of the company and to appoint inspectors for the purpose.
- To fix remuneration of Directors, where the Articles require such resolution.
- To sanction remuneration to Directors other than managing or whole time Directors on percentage of profit basis in certain instances.
- To consent to a Director or his relative or partner or firm or private company holding an office or

place of profit, except that of Managing Director, Manager Banker, or Trustee for debenture holders of the company.

- To make the liability of the Director or Manager unlimited when so authorised by Articles.
 - To appoint auditors in the case of a company in which the central auditor any state Government or public financial institution together hold 25% or more of its subscribed capital.
 - To appoint sole selling Agent or sole buying Agent in the case of companies having paid - up share capital of Rs 50 lakhs or more.
 - To alter the constitution of the company registered under part IX;
 - To lend, extend guarantee, provide security or to invest in securities in excess of 372 A limits.
- f. Special resolution cannot be amended in variance with the Explanatory statement annexed to the notice of the meeting unless from the point of view of the shareholders the amendment in any case only seeks to modify or make less onerous something in the resolution itself.
- g. An amendment to an ordinary Resolution may be proposed and adopted at a meeting even where the notice sets out the exact terms of the proposed resolution.
- h. A resolution whether special or ordinary, which has not been passed after giving sufficient notice or is otherwise irregular may be ratified or validated by a subsequently passed valid resolution. But there can be ratification or validation of a resolution only where the resolution originally passed was bonafide.
- i. Where a resolution has been not validly passed but has been acted upon it is to be regarded as effective and the company and its members cannot set up its invalidity against its creditors.

13.6 RESOLUTION REQUIRING SPECIAL NOTICE [Sec -190]

It is a notice given by a member to the company. The following four resolutions under the Act require resolution with special notice.

- a) To remove a Director before the expiry of tenure.
- b) To appoint a Director in place of the Director so removed.
- c) To move a resolution that the retiring auditor shall not be reappointed.
- d) To appoint as auditor a person other than a retiring auditor

The Article of a company may provide additional situations where special notice is required.

The notice of intention to move a resolution, shall be given by the members to the company not less than 14 days before the meeting at which it is to be moved.

The company on receipt of notice of the intention to move the resolution should give its members notice of the resolution.

Where it is not practicable, the company may either, advertise in a newspaper having good circulation or in any other mode allowed by the Articles, not less than 7 days before the meeting. The notice shall be given 14 days before the date of original meeting and not before the date of original meeting and not before the adjourned meeting.

Here the student have to note that a special notice and special resolution are entirely different, There is just one situation where special notice and special resolution are necessary. viz., appointment of

an auditor other than the retiring auditor of a company in which not less than 25% of subscribed capital is held by Central Government, State Government, public financial institutions etc. u/s 224 A.

13.7 PASSING OF RESOLUTIONS BY POSTAL BALLOT [Sec -192 A]

Postal ballot is a means for ascertaining the views of the members considering that many members may not be able to attend the general meeting and vote at the meetings even on very important subjects (business) which affect their interest 'postal ballot' includes voting by share holders by postal or electronic mode instead voting by being present personally for transacting business in a general meeting of the company.

A company shall send notice and draft resolution by registered post to all shareholders explaining the reasons and requesting them to communicate within 30 days from the date of posting of letter.

If a resolution is assented to by a requisite majority of shareholders by means of postal ballot, it shall be deemed to have been duly passed at a general meeting convened in that behalf.

13.7.1 Notified resolutions requiring postal ballot:

- a) Alteration of objects clause,
- b) Alteration of Articles of Association,
- c) Buy Back of shares,
- d) Issue of Equity shares with differential, voting rights,
- e) Change of registered office,
- f) Sale of undertaking,
- g) Election of Director,
- h) Variation in the rights attached to a class of shares or debentures.

13.7.2 Procedure to be followed for conducting business through postal ballot:

- a) The Board of Directors shall appoint one scrutiniser who is not in employment of the company, may be a retired judge or any person of repute who in the opinion of the board can conduct the postal ballot voting process in a fair and transparent manner.
- b) The scrutiniser shall be in position for 35 days (excluding holidays) from the date of issue of notice for Annual General Meeting. He is to submit his final report on or before the said period.
- c) The scrutiniser shall be willing to be appointed and he shall be available at the registered office of the company for the purpose of ascertaining the requisite majority.
- d) The scrutiniser shall maintain a register to record the consent or otherwise received, including electronic media, mentioning the particulars of name, address, folio number, number of shares, nominal value of shares, whether the shares have voting, differential voting or non-voting rights and the scrutiniser shall also maintain record for postal ballot which are received in defaced or mutilated form.
- e) The postal ballot and other papers relating to postal ballot will be under safe custody of the scrutiniser till the chairman considers approves and signs the minutes of the meeting therefore, the scrutiniser shall return the ballot papers and other related papers / registers to the company so as to preserve such ballot papers and other related papers / registers safely till the resolution is given effect to.

- f) Consent or otherwise relating to issue maintained in the notice for Annual General Meeting received after 35 days from the date of issue will be strictly treated as if the reply from the members has not been received.
- g) If default is made in following this procedure, a fine of Rs 50,000/- will be levied for each default.

The companies (passing the resolution by postal ballot) Rules, 2001 read with section 192 A shall apply to notices calling meetings of the shareholders approved by the Board of Directors after 15th June 2001.

The voting right on postal ballot shall be in proportion to the shareholders share of the paid up equity share capital of the company.

13.8 MINUTES: [Sec -193]

Minutes represents a record of business transacted at a meeting. Every company is required to record the proceedings of every general meeting and of every meeting of the Board of Directors or of every committee of the Board.

It shall be recorded within 30 days from the conclusion of every such meeting in a book kept for that purpose with pages consecutively numbered.

13.8.1 Procedure:

Every page of the minutes book shall be initiated or signed and the last page of the record of the proceedings shall be dated and signed, in the case of -

- A Board Meeting by the chairman of the same meeting or in the event of his death or insanity, by a Director duly authorised by the Board for the purpose.

13.8.2 Contents:

- a) Pasting or otherwise shall make no attachment to the minutes book.
- b) The minutes book shall contain a fair and correct summary of the proceedings.
- c) Appointment of officers made at a meeting should be included.
- d) Minutes of meeting of the Board / Committee shall also contain the names of the Directors present and also those dissenting from or not concurring to the resolution.
- e) The chairman need not include any matter in the minutes if he is of the opinion that it is defamatory of any person or is irrelevant or immaterial or is detrimental to the interests of the company.

The minutes book must be bound and must be hand written. However, DCA has stated that loose leaf minutes books are agreeable provided the company takes appropriate safeguards and they are bound into books at reasonable intervals of say 6 months.

If there is something recorded at an earlier meeting which is not acceptable at a later meeting, the proper procedure is to pass a subsequent minute rescinding the old one.

The minutes book shall be kept at the registered office of the company.

Minutes of meetings kept in accordance with the provisions of Section -193 shall be conclusive evidence of the proceedings recorded therein. It does not require further proof of the facts stated therein.

13.8.3 Additional points:

- A Director, who is present at a meeting at which the minutes of a prior Board Meeting is confirmed is not thereby made responsible for what was done at the prior meeting.
- A member has the right to inspect the books containing the minutes of General Meeting during the business hours at the registered office of the company at free cost.
- On payment of the prescribed fee, he is entitled to be furnished with a copy of any such minutes within 7 days after his request.
- If any default is made by the company the above matter, the NCLT has the power to order so.

13.9 REGISTRATION OF RESOLUTIONS AND AGREEMENTS [Sec -192]

The following resolutions and agreements are required to be registered with the Registrar of Companies.

- a) Special resolution
- b) Resolutions which have been agreed to by all the members of the company but which, in the absence of such an agreement would have to be passed as special resolutions.
- c) Any resolution of Board of Directors or agreement executed by a company relating to appointment, reappointment, renewal of appointment or variation of the terms of appointment of the Managing Director.
- d) Resolutions or agreements which have been approved by all the members of a class of shareholders, but which have otherwise required to be passed by some particular majority or otherwise in some particular manner. And all the resolutions or agreement which effectively bind all the members of any class of shareholders though not agreed by all of them.
- e) Resolutions passed by a company giving powers to Board of Directors -
 - to sell, lease or otherwise dispose of the whole or substantially the whole of the undertaking.
 - to borrow money beyond a certain limit or
 - to contribute to charities beyond Rs 50,000 or 5% of company's average net profits for the last 3 years whichever is greater.
- f) Resolutions approving the appointment of a sole-selling agent.
- g) Resolutions requiring a company to be wound - up voluntarily.
- h) Copies of the terms and conditions of a sole selling agent (SSA) appointed under Section 294 or Section 294 AA.

13.10 SUMMARY

Resolutions are of two types.

1. Ordinary resolutions 2. Special resolutions, resolutions may be passed by postal ballot.

Some resolutions should be registered with Registrar.

13.11 SELF - ASSESSMENT QUESTIONS

1. What are the different types of resolutions which may be passed in the meetings of shareholders?
2. Discuss the following -
 - a) Postal ballot
 - b) Minutes

13.12 REFERENCE BOOKS

- | | | |
|----------------------------------|---|-------------------------------|
| 1. Sen Mitra | - | Commercial and Industrial Law |
| 2. Gulshan, S.S. & Kapoor, G. K. | - | A Hand Book of Business Law. |
| 3. M.P. Vijay Kumar | - | Business & Corporate Laws |

- Dr. CH. SURAVINDA

Lesson - 14

FACTORIES ACT-1948

14.0 OBJECTIVES :

After completion of this lesson, we should be able to understand :

- objectives and scope of the Act.
- Definitions
- Administration of the Act.
- Measures in regard to Health
- Measures in regard to Safety
- Measures in regard to Welfare

STRUCTURE :

- 14.1 Introduction**
- 14.2 Objectives & Scope**
- 14.3 Definitions**
- 14.4 Administration**
- 14.5 Measures in regard to Health.**
- 14.6 Measures in regard to Safety**
- 14.7 Measures in regard to Welfare**
- 14.8 Summary**
- 14.9 Technical terms**
- 14.10 Self – Assessment Questions**
- 14.11 Reference Books.**

14.1. INTRODUCTION :

The industrial labour ever since the industrial revolution has been often exploited. Their conditions were so depleted that it was considered indispensable to protect them against industrial and occupational hazards.

In 1881, First Factories Act was passed in India. This Act provided for health and safety measures and primarily protected child labour in factories. The Factories Act, 1881, which was found inadequate to meet the growing industrial complex was replaced by Acts of 1889 and 1911.

In order to remove its inherent weakness and to keep pace with changing needs of working class the Act has been amended several times. The Factories Act, 1934 replaced all the previous legislation in regard to factories and thoroughly overhauled the Act of 1911 in the light of the recommendations of the Royal Commission of Labour. The experience of the working of the Act of 1934 had increasingly revealed the need for wholesale revision with a view to extend its protective provisions to the larger number of smaller industrial establishments. An entirely new Act to consolidate and amend the law relating to labour in factories was, therefore, passed by the Constituent Assembly on 28th August 1948, which came into force on 1st April, 1949.

The Factories Act, 1948 is a comprehensive piece of legislation covering all aspects regarding the factories, namely ; approval, licensing and registration of factories, the inspecting authorities health, safety, welfare, working hours, employment of adult and young children, annual leave and penalties.

14.2. OBJECTIVES AND SCOPE OF THE ACT :

The main objective of Factories Act are :

- (i) to regulate working conditions in factories.
- (ii) to ensure that basic minimum requirements for safety. Health and welfare of factory workers are provided.

The Object of Act is to protect human beings from being subject to unduly long hours of bodily strain or manual labour. It also provides that employees should work in healthy and sanitary conditions so far as the manufacturing process with allow and that precautions should be taken for their safety and for the prevention of accidents. In order to obtain the information necessary to ensure that its objects are carried out the local governments are empowered to appoint inspectors to call for returns and to see that the prescribed registers are duly kept.

The object of passing the Factories Act was to consolidate and amend the law regulating labour in factories. The act was enacted primarily to protect workers employed in factories against industrial and occupational hazards. The Factories Act tries to secure for the workers employment in conditions conducive to their health and safety. The Supreme Court of India declared that the Factories Act is a social enactment of achieve social reform.

Scope of the Act : The Act extends to the whole of India. The provisions of the Act are applicable to all factories including factories belonging to Central or any State Government unless otherwise excluded and the benefits of this Act are available to persons who may be covered with in the meaning of the term 'worker' as defined in the Act.

14.3 DEFINITIONS :

1. ' Adult ' means 'a person who has completed his eighteenth year' .

2. 'Adolescent' means 'a person who has completed his fifteenth year of age but has not completed his 18th year'. That is to say, a person who is neither an adult nor a child.
3. 'Child' means 'a person who has not completed his fifteenth year of age'.
 - 3.a** Competent person. The term 'competent person' or an institution recognised as such by the Chief Inspector for the purposes of carrying out tests, examinations and inspections required to be done in a factory under the provisions of this Act having regard to-
 - (i) the qualifications and experience of the person and facilities available at his disposal;
 - (ii) the qualifications and experience of the person employed in such institution and facilities available therein, with regard to the conduct of such tests, examinations and inspections, and more than one person or institution, can be recognised as a competent person in relation to a factory. [inserted by the Factories (Amendment) Act, 1987].
4. 'Young person' means 'a person who is either a child or an adolescent, i.e., a person who is under the age of 18 years'
5. 'Calendar Year' means 'the period of twelve months beginning with the first day of January in any year'.
6. 'Day' means 'a period of twenty four hours beginning at midnight, i.e. 24 hours from midnight to midnight.
7. 'Week' means 'a period of seven days beginning at midnight on Saturday'. However, the Chief Inspector of Factories may approve of in writing any night other than Saturday night for a particular area.
8. 'Power' means 'electrical energy or any form of energy which is mechanically transmitted and is not generated by human or animal agency'.
9. 'Prime Mover' is 'an appliance which generates or otherwise provides power'.
10. Machinery includes prime movers, transmission machinery and all other appliances where by power is generated, transformed, transmitted or applied.
11. 'Manufacturing Process' means any process for :-
 - (i) making, altering, repairing, ornamenting, finishing, packing, oiling, washing, cleaning, breaking up demolishing, or otherwise treating or adopting any article or substance with a view to its use, sale, transport, delivery or disposal; or
 - (ii) pumping oil, water or sewage or any other substance ; or
 - (iii) generating, transforming power, or transmitting power; or
 - (iv) composing types for printing, printing by letter-press, lithography, or

photogravure, or other similar process or book binding; or

(v) constructing, reconstructing, repairing, refitting, finishing or breaking up ships or vessels: or

(vi) preserving or storing any article in cold storage.

12. 'Worker' means " a person employed directly or by or through any agency (including a contractor) without the knowledge of the principle employer, Whether for remuneration or not in any manufacturing process or in cleaning any part of the machinery or premises used for a manufacturing process, or in any other kind of work incidental to or connected with the manufacturing process or the subject of the manufacturing process but does not include any member of the armed forces of the Union."

A person is regarded as a worker within the meaning of Section 2(1) of the Act, provided the following four conditions are fulfilled

- 1) The person must be employed by the owner or occupier of the factory.
- 2) The person must be employed in the establishment either directly or by or through an agency (including a contractor, or without the knowledge of the principal employer]
- 3) The person must be employed in the factory for wages or without wages.
- 4) The person must be employed in any manufacturing process or in cleaning any part of the machinery, premises used for manufacturing process or in any other kind of work incidental to or connected with the manufacturing process or the subject of the manufacturing process.

But the term worker does not include any member of the armed forces of the Union.

13. Factory : According to Section 2 (m) factory means any premises including the precincts thereof -

- i) Where on ten or more workers are working or were working on anyday of the preceding twelve months, and in any part of which a manufacturing process being carried on with the aid of power or is ordinarily so carried on or
- ii) Where in twenty or more workers are working or were working on anyday of the preceding 12 months and in any part of which a manufacturing process in being carried on without the aid of power or is ordinarily so carried on.

Factory does not include a mine, a mobile unit belong to the armed forces 1of the Union, a railway running shed or a hotel, restaurant, or eating place.

For computing the number of workers for the purposes of this clause all the workers in different groups and relays in a day shall be taken into account.

14.4: ADMINISTRATION [THE INSPECTING STAFF] :

The State Government, has the power, under the Factories Act, to appoint the below mentioned persons as inspecting staff of the factory.

- 1) Chief Inspector
- 2) Additional Chief Inspector
- 3) Joint Chief Inspector
- 4) Deputy Chief Inspector
- 5) Inspector
- 6) Certifying Surgeons

14.4.1: Chief Inspector: The State Govt. may by notification in the Official Gazette appoint any person as a chief Inspector. He shall enjoy all the powers of an inspector in addition to the specific powers conferred by the Act upon a Chief Inspector. The Chief Inspector is fully competent to lodge a complaint by an Inspector. A person cannot be appointed a Chief Inspector or having been so appointed shall not continue to hold office as soon as he becomes directly or indirectly interested in a factory or in any process or business carried on therein or in any patent or machinery connected there with. Every Chief Inspector is deemed to be a public servant within the meaning of Indian Penal Code.

14.4.2: Additional Chief Inspector, Joint Chief Inspector & Deputy Chief Inspector: According to the Factories (amendment) Act, 1976, the State Government is authorised to appoint as may Additional Chief Inspectors, Joint Chief Inspector, and the Deputy Chief Inspector, as it thinks fit to assist the Chief Inspector. Their appointment must be notified in the Official Gazette. Every Additional Chief Inspector, Joint Chief Inspector and Deputy Chief Inspector shall, in addition to the powers of a chief Inspector, specified in the notification by which he is appointed, exercise the powers of an Inspector through out the state. Every Additional Chief Inspector, Joint Chief Inspector and Deputy Chief Inspector shall be deemed to be a public servant within the meaning of the Indian Penal Code.

14.4.3: Inspector: The State Govt. may by notification in the Official Gazette, appoint inspectors for the purposes of this Act. Only such persons who possess the prescribed qualifications may be appointed inspectors. The State Government may assign to the Inspector such local limits as it think fit. The State Government has direction in assigning local areas to an inspector It may or may not do it. The transfer of an inspector to an area in one form of assigning that area to him, such assignment need not be by a notification in the Official Gazette [State of Mysore V.R.D Campbell (1962) 2. Cri L. J. 703] .A person cannot be appointed to act as an Inspector if he is directly or indirectly interested in a factory or in any process or business carried or there in or in any patent or machinery connected there with. Every District Magistrate shall be an Inspector for his district. The act of a District Magistrate as an inspector is an executive act and not a judicial act [Gajadhar Lakshmiram Vs Emperor AIR 1948 Nag 277] .

Every Inspector like a Chief Inspector shall be deemed to be a public servant within the meaning of Indian Penal Code.

Powers of Inspectors : According to Section 9 of the Act, an Inspector has the following powers within the local limits for which he is appointed :

- a) He may enter any place which is used or he has reason to believe is used as a factory. He may be accompanied by such assistants who are in the service of the Govt. or any other local or public authority or with an expert.
- b) Make examination of the premises, plant, machinery article or substance.
- c) Inquire into any accident or dangerous occurrence whether resulting in bodily injury, disability or not, and take on the spot or otherwise statements of any person which he may consider necessary for such inquiry.
- d) Require the production of any prescribed register or any document relating to the factory. An inspector has no power to demand production of registers outside the factory premises and therefore non-compliance with such a demand does not render the proprietor liable to punishment under section 92. [State V. Pitambar Savjibhai AIR 1953 Sav. 174 (D.B)]
- e) Seize, or take copies of any register, record or other document or any portion thereof, as he may consider necessary in respect of any offence under this Act, which has reason to believe, has been committed.
- f) Direct the occupier that any premises or any part thereof, or anything lying therein, shall be left undisturbed (whether generally or in particular respects) for so long as is necessary for the purposes of any examination.
- g) Take measurements and photographs and make such recordings as he considers necessary for the purpose of any examination taking with him any necessary instrument or equipment.
- h) In case of any article or substance found in any premises, being an article or substance which appears to him as having caused or is likely to cause danger to the health or safety of the workers, direct it to be dismantled or subject it to any process or test (but not so as to damage or destroy it unless the same is , in the circumstances necessary, for carrying out the purposes of this Act), and take possession of any such article or substance or a part thereof, and detain it for so long as is necessary for such examination.
- i) Exercise such other powers as may be prescribed. NO person shall be compelled by an inspector to answer any question or give any evidence tending to incriminate himself.

Penalty for obstructing inspectors (Sec.95) :

Whoever wilfully obstructs an inspector :

- 1) in the exercise of any power conferred on him by or under the Act, or.
- 2) fails to produce on demand by an inspector any registers or other documents in his custody's, or

- 3) Conceals or prevents any worker in a factory from appearing before, or being examined by an inspector.

Shall be punishable with imprisonment for the term which may extend to 6 months, or fine which may extend to Rs. 10,000/- or with both.

Restriction on disclosure of information [Sec.118] : It is a statutory duty of an Inspector not to disclose any information relating to a factory which he obtains in the course of his duties whether he is in service or out of service.

14.4.4: Certifying Surgeons :

Section 10 lays down that the State Government is empowered to appoint qualified medical practitioners to be certifying surgeons for the purposes of this Act. They will be appointed within such local limits or such factory or class of factories as the State Government may think fit. A certifying surgeon is authorised to nominate any qualified medical practitioner to exercise any of his powers under the Act for specific period. But no person shall be appointed a certifying surgeon if he is, or becomes the occupier of factory or is or becomes directly or indirectly interested therein, or is otherwise in the employment of the factory [Sec 10 (3)]. However, the State Govt. may by order in writing and subject to such conditions as may be specified in the order, exempt any person or class of persons from the provisions of Sec 10 (3) in respect of any factory or class or description of factories.

Duties : The certifying surgeon shall carry out such duties as may be prescribed in connection with.

- a) the examination and certification of young persons under this Act.
- b) the examination of persons engaged in factories in such dangerous occupations or processes as may be prescribed.
- c) the exercising the medical supervision for any factory in respect of-
 1. illness that has occurred due to the nature of manufacturing process.
 2. injury that is likely to be caused to the health of workers by reason of the adoption of any new manufacturing process,
 3. injury that is likely to occur to the health of young persons.

14.5 MEASURES IN REGARD TO HEALTH :

The efficient working process requires the sound health of the persons engaged therein. Unless the workers are physically and mentally healthy they cannot perform their duties effectively, properly and smoothly. The environment of the factory where workers are working must be clean and free from infection, insanitation, dust and fume, artificial humidification, overcrowding and other conditions injurious to the health of the workers.

Section 11 to 20 contained in the Factories Act, 1948, deal with the health of workers in a factory. The basic purpose of these provisions is to ensure that working conditions in the factories

under which the work is carried out, do not effect the health of workers adversely. These provisions have been incorporated to protect the health of workers. These provisions are in keeping with the object of the Act, as also with article 42 of the Indian Constitution which requires that the State should make provision for securing just and human conditions of work. These provisions are as under.

1. Cleanliness
2. Disposal of wastes and effluents
3. Ventilation and temperature
4. Dust and fume
5. Artificial humidification
6. Overcrowding
7. Lighting
8. Drinking water
9. Latrines and Urinals
10. Spittoons

14.5.1 Cleanliness (Sec-11): Every factory shall be kept clean and free from affluent arising from drainage or dust. The floor of every work room shall be cleaned at least once in every week by washing or using disinfectant effective means of drainage shall be provided where a floor is liable to be come wet during manufacturing process.

14.5.2 Disposal of Wastes and Effluents (Sec-12): Effective arrangements shall be made for the treatment of wastes and effluent arising from the manufacturing process. The State Govt. may make rules prescribing the arrangements in this regard.

14.5.3 Ventilation and Temperature (Sec - 13): Effective and suitable provision shall be made for securing and maintaining good ventilation. So every work room should be provided with adequate ventilation by circulation of fresh air and temperature should be maintained at reasonable level to prevent injury to health of the workers. The State Government may prescribe a standard adequate ventilation and reasonable temperature. It may direct that a thermometer be maintained and kept in a specified place.

14.5.4 Dust and Fumes (Sec- 14): Effective measures should betaken to remove the dust, fume or impurity formed in any manufacturing process by applying an exhaust appliances. Dust andFume arise usually in textile, jute, cotton, giving manufacturing processes.

14.5.5. Artificial Humidification(Sec - 15): The State Govt. may prescribe the standards of humidification in those factories where the humidity of the air is to be increased artificially. The Govt. may also makes rules. The methods used for artificial humidification shall be properly purified before it is so used.

14.5.6 Over Crowding (Sec- 16) : There should not be over crowding in any room of the factory which causes injury to the health of the workers. There shall be at least 350 cubic feet (for the factories in existence before the commencement of the Factories Act) and 500 cubic feet (for the factories built after the commencement of the factories Act) of space for every worker. The feet above the level of the floor of the room should not be taken into account while calculating the space.

14.5.7 Lighting (Sec - 17) : Sufficient and suitable lighting, natural or artificial or both must be provided in every part of the factory where workers are working or passing. Effective arrangements must be made for the prevention of glare and the formation of shadows which may cause eye strain or the risk of accident to any worker.

14.5.8 Drinking water (Sec- 18) : Effective arrangements shall be made to provide and maintain drinking water distribution at convenient places for all workers. Arrangement of cooling water during hot weather shall be made where the number of workers employed in a factory is more than 250.

14.5.9. Latrines and urinals (Sec – 19) : Separate closed door latrines and urinals both for male and female workers shall be provided. They shall be conveniently situated and accessible for workers at all times and they shall be maintained clean with adequate lighting and ventilation, sweepers shall be employed for keeping clean latrines, urinals and washing places and cleaning must be done once in every 7 days with detergents or disinfections.

14.5.10 Spittoons (Sec - 20) : Sufficient number of spittoons should be provided in convenient places and should be maintained cleanly. No person is allowed to spit in the premises except in spittoons. If any one spits act side the spittoon, he shall be punishable with a fine not exceeding Rs.5/-.

14.6. MEASURES IN REGARD TO SAFETY :

Safety is a basic and primary requirement in a factory. Unless the life of workers is secure, smooth and proper working cannot be ensured in any factory.

Sections 21 to 41 of the Act contain the provisions relating to the safety of the workers. The basic purpose of these provisions is to provide security to the workers while they are on work in a factory against accidents & hazardous jobs resulting in injury to the workers. These provisions are absolute in character and it is the duty of the occupier of every factory to comply with them. They are summarised as under :

- 1) Fencing of Machinery
- 2) Work on or near machinery in motion
- 3) Employment of young persons on dangerous machines
- 4) Striking gear and devices for cutting of power
- 5) Self acting machines
- 6) Casing of new machinery
- 7) Prohibition of employment of women and children near cotton openers.
- 8) Hoists and lifts

- 9) Lifting machines, chains etc.
- 10) Revolving machinery
- 11) Pressure plant
- 12) Floors, stairs and w
- 13) Pits, sumps, openings in floors etc.
- 14) Excessive weighs
- 15) Protection of eyes
- 16) Precautions against dangerous fumes
- 17) Precautions regarding the use of portable electronic light
- 18) Precautions against explosive or inflammable gas etc.
- 19) Precautions in case of fire
- 20) Power to require specifications of detective parts or tests of stability.
- 21) Safety of building and machinery
- 22) Maintenance of building
- 23) Safety officers
- 24) Safety and occupational surveys.
- 25) Power to make rules.

14.6.1. Fencing of machinery (Sec - 21): In every factory every dangerous part of machinery should be securely fenced to protect the workers from accidents. The State Government may prescribe some more precautions as it consider necessary in case of any particular machinery or part of it.

14.6.2 Work on near machinery in motion (Sec - 22) : Of any examination of any machinery is to be made while it is in motion, it should be made only by a specially trained adult male worker wearing light fitting clothing. No woman or young person should be allowed to clean or lubricate or adjust the machinery in motion if there is any risk of injury from any moving part.

14.6.3 Employment of young persons on dangerous machines (Sec - 23) : Young persons should not be allowed to work on any machine without –

1. the instructions regarding dangers and precautions to be observed, and
2. giving sufficient training and
3. the supervision of an experienced and trained person. The State Govt. may prescribe the machines on which the persons ought not to work.

14.6.4 Striking gear and devices for cutting of power (Sec - 24) : Suitable or other efficient mechanical appliance should be provided and maintained and used to more driving belts. Similarly, suitable devices for cutting off power in emergencies should be provided and maintained in every work room.

14.6.5 Self acting machines (Sec - 25): Any traversing part of self acting machine and no material carried there on should be allowed to run on its out ward or inward traverse with a distance of 18 inches from any fixed structure which is not part of the machinery.

14.6.6. Casing of new machinery (Sec - 26) : All machinery driven by power and installed after the commencement of the Factories Act should be completely encased or otherwise effectively guarded as to prevent danger, A person should be punishable with imprisonment upto 3 months or with fine upto Rs. 500/- or with both, when he sells or lets any machinery not complying with the provisions of Section-26.

14.6.7. Prohibition of employment of women and children near cotton openers [Sec-27] : Women or children should not be employed in any part of a factory for pressing cotton in which a cotton opener is at work. However, they may be employed where the feed end of cotton opener is in a room separated from the delivery end.

14.6.8 Hoists and Lifts [Sec -28] : Hoists and Lifts should be of good mechanical construction and sufficiently protected by enclosures fitted with gates. They should be properly maintained and thoroughly examined by competent persons atleast once in every 6 months. A register shall be kept to record the particulars of examination.

14.6.9. Lifting Machines, Chains etc. [Sec - 29]: Cranes and other lifting machinery shall be of good construction and properly maintained. They shall be thoroughly examined by a competent person atleast once in every 12 months. A register shall be kept to record the particulars of examination effective measures shall be taken to see that the above mentioned machinery shall be does not approach within 20 feet of that place where any person is employed or working.

14.6.10 Revolving Machinery [Sec - 30] : Effective measures shall be taken to ensure the safe working peripheral speed of ever revolving vessel cage, fly wheel or similar appliances driven by power and is not exceeded. The maximum peripheral speed of such machinery must be indicated by a notice by the side of it.

14.6.11 Pressure Plant [Sec - 31]: Effective measures shall be taken to ensure that the safe, working pressure of any part of the plant or machinery is not exceeded when it is operated above atmospheric pressure. The State Government may make rules regarding the examination and testing of any such plant or machinery and also providing for additional safety measures.

14.6.12 Floors, Stairs, and Ways [Sec – 32]: All floors, stairs, steps, passages and gang ways shall be of sound construction and properly maintained to avoid accidents.

14.6.13 Pits, Sumps, Openings in Floors etc [Sec - 33] : Every sump tank, pit or fixed vessel in the ground or in a floor shall be properly covered or fenced.

14.6.14 Excessive Weight [Sec - 34] : No person shall be employed to lift, carry or move any heavy load which may likely to cause him injury,

14.6.15 Protection of Eyes [Sec - 35] : Screens or suitable goggles must be provided for the protection of workers eyes when there is risk of injury to the eyes from the particles or fragments thrown off in the course of process or by exposure to excessive light.

14.6.16 Precautions against Dangerous Fumes [Sec - 36] : No person shall enter or be permitted to enter any tank, pipe or other confined space in , which dangerous fumes are likely to be present. Similarly, no person shall be permitted to enter any boiler, furnace tank or other confined space unless it is made sufficiently cool by appropriate method.

14.6.17 Precautions regarding the use of portable electronic light [Sec. 36-A] : No portable electronic light or any other electric appliance of voltage exceeding 24 volts / shall be permitted inside any chamber tank, pit, pipe or other confined space. If any inflammable ' gas, fume is likely to be present there no lamp or light other than flame - proof shall be permitted to be used.

14.6.18 Precautions against explosive or inflammable gas etc [Sec 37] : Where any manufacturing process produces gas, fume or vapour which is likely to explode on ignition, all practicable measures shall be taken to prevent any such explosion. And if a plant or machinery contains explosive or inflammable material under more than atmospheric pressure, that part shall not be opened unless special measures prescribed for that are taken.

14.6.19 Precaution in case of fire [Sec-38] : Every factory shall be provided with such means and ways of escape in case of fire. A free passage, way giving access to means of escape shall be maintained in every room of the factory. Similarly, the workers shall be given adequate training and familiar with the means of escape in case their number is more than 20 and employed above and the ground floor or where explosive materials are used to stored.

14.6.20 Power to require specifications of defective parts or tests of stability (Sec - 39) : The Inspector may demand the occupier or manager of the factory to furnish drawings, specifications and to carry out the tests in the specified manner, when he feels that any building or part of building, or plant or machinery in a factory is dangerous to human life or safety.

14.6.21 Safety of Building and Machinery(Sec – 40): If any building or part of a building or plant or machinery in a factory is dangerous to human life or safety, the Inspector may serve an order, specifying the measures to be carried out before a specified date on the occupier or manager or both. The inspector may also prohibit the use of any such building, Machinery etc., Until it has been properly repaired or altered.

14.6. 22 Maintenance of Building (Sec - 40-A) : The Inspector may serve a written order specifying the measures to be taken on the occupier or manager or both, when it appears that any building or part of a building is not properly maintained and likely to lead determinate to the health and welfare of the workers.

14.6.23 Safety Officers (Sec- 40-B) : The State Government by notification in the Official Gazette, insist the occupier to employ such number of safety officers as may be notified. It also prescribe the duties, qualifications and conditions of service of such officers. Safety officers are employed where the number of workers is more than 1000 or the manufacturing process involves any risk of danger to the safety and health of the workers.

14.6.24 Safety and Occupational Health Surveys (Sec – 91A): Section 91A inserted by Factories (Amendment) Act, 1976 provides for safety and occupational health surveys. The Chief Inspector, or Director General of Factory Advice Service and Labour Institutes, or the Director General of Health Services to the Government of India, or such other officer as may be authorised in this behalf by the State Government or the Chief Inspector or the Director General of Factor Advice

Service and Labour Institutes or the Director General of Health Services may, at any time during the normal working hours of a factory, or at any other time as in found by him to be necessary, after giving notice in writing to the occupier or manager of the factory or any other person who for the time being purports to be in charge of the factory, undertake safety and Occupational Health Surveys. Such occupier or manager or other person shall afford all facilities for such survey, including facilities for such survey, including facilities for the examination and testing of plant and machinery and collection of samples and other data relevant to the survey.

For the purpose of facilitating such surveys every worker, shall if so required by the person conducting the survey present himself to undergo such medical examination as may be considered necessary by such person and furnish all information in his possession and relevant to the survey.

Any time spent by a worker for undergoing medical examination or furnishing such information shall for the purpose of calculation wages and extra wages for overtime work, be deemed to be time during which such worker worked in the factory. For the purposes of this section, the report if any, submitted to the State Government by the person conducting survey shall be deemed to be a report submitted by in Inspector under this Act.

14.6.25 Power to make rules [Sec- 41] : The State government has the power to make rules to supplement the provisions relating to safety contained in Factories Act. The rules will tend to provide further devices and measures for securing the safety of persons employed in any factory.

14.7 MEASURES REGARDING WELFARE OF WORKERS :

The need for adoption of welfare measures as a means to increase the workers productive efficiency, to keep up their morale, and for the maintenance of industrial peace has been realised by all sections of the society. The main objective of these provisions is to provide basic welfare amenities to the workers, while working in the factories. Provisions relating to welfare of the factory workers have been made in Sections 42-50 in Chapter -V of the Factories Act, 1948. which are as under -

1. Washing facilities
2. Facilities for storing and drying clothing
3. Facilities for sitting
4. First - aid appliances
5. Canteens
6. Shelters, restrooms and lunch rooms
7. Creches
8. Welfare Officers

14.7.1. Washing Facilities (Sec - 42): Separate adequate and suitable facilities shall be provided and maintained for the use of male and female workers. All such facilities be conveniently accessible and kept clean.

4.7.2. Facilities for storing and drying clothing [Sec - 43] : The Sate government may make rules requiring any factory or class of factories the provision of suitable place for the workers to keep their clothing not worn during the working hours and for the drying of wet clothing.

14.7.3 Facilities for fitting [Sec - 44] : Suitable sitting arrangements shall be provided so that the standing workers can sit when ever they get opportunity for rest incourse of their work. If the workers are rule to work efficiently in a sitting position. The Chief Inspector may require the occupier of the factory to provide such seating arrangements.

14.7.4 First - aid appliances [Sec - 45] : First aid boxes or cupboards with prescribed contents must be provided and maintained in every factory. They must be readily accessible during all working hours. There must be one such box or cupboard for every 150 workers. An Ambulance room with necessary equipment and medical staff must be provided and maintained in every factory where the number of workers employed is more than 500.

14.7.5 Canteens [Sec - 46] : A canteen shall be provided and maintained by the occupier of the factory where the number of workers employed is more than 250, Such canteen shall provide food stuffs to the workers shall run as per the rules of the State Govt.

14.8.5 Shelters, restrooms and lunch rooms (Sec 47) : Shelters, restrooms and lunch room with drinking water facility shall be provided and maintained in every factory where more than 150 workers are ordinarily employed. If canteen is - maintained, it shall be regarded as the lunch room. The shelters, rest rooms or lunch rooms shall be sufficiently ventilated and lighted and maintained cleanly.

14.7.7 Crèches [Sec – 48] : Where more than 30 women workers are employed in a factory, a suitable room, or rooms must be provided and maintained for the use of children below 9 years age of such women, such rooms shall be maintained cleanly and shall be under the care of trained woman. The shall be adequately lighted and ventilated. The State Government make many rules for additional facilities such as free milk, or refreshment for the children and facility for washing and changing their clothing etc.

14.8.8 Welfare Officers [Sec - 49] : The occupier of the factory shall employ the prescribed number of welfare officers where 500 or more are ordinarily employed. The State Govt. may prescribe the duties, qualifications and conditions of service of such officers.

14.8 SUMMARY :

The International Labour Conference has adopted several recommendations relating to factory legislation in general. The First Labour Legislation in India was the Indian Factories Act – 1881, which provided the some health, safety and welfare measures to the employes who are working the factory. The present Factories Act was enacted in India in 1948, and it was forced on 1-4- 1949 and this Act is applicable entire India including Jammu and Kashmir.

14.9. TECHNICAL TERMS :

1. Factory : building where things are manufactured.
2. Occupier ; A person who has ultimate control over the affairs of the factory.

14.10 SELF – ASSESSMENT QUESTIONS :

1. State briefly the different provisions of the Factories Act n 948 for the welfare of the workers in a factory.

2. Discuss the provisions of the Factories Act -1948 with regard to health, safety and welfare of workers.
3. State the provisions of the Factories Act, 1948 with regard to safety and welfare of the workers.
4. What are the legal provisions relating to safety and welfare of workers under Factories Act – 1948
5. Define Factories Act? Explain its objectives and administration.

14.11. REFERENCE BOOKS :

1. K.C. Garg and Others : *Mercantile Law*, Kalyani Publishers, New Delhi, 2005

Dr. D. NAGESWARA RAO

LESSON -15**SALE OF GOODS ACT - 1930**

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

Structure :

- 15.1. Introduction
- 15.2. Contract of sale
- 15.3. Essentials of a contract of sale
- 15.4. Distinction between sale and agreement to sell
- 15.5. Sale Distinguished from other Transactions.
- 15.6. Goods
- 15.7. Classification of goods
- 15.8. Effects of Destruction of subject matter
- 15.9. Price
- 15.10. Modes of fixing the price
- 15.11. Summary
- 15.12. Self Assessment Questions
- 15.13. Reference Books

15.1. 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.

15.2. 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.

15.3. 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.

15.4 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.

15.5. 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 failure to pay any of the instalments of rent. The difference between a contract of sale and hire purchase agreement are as follows.

Sale	Hire purchase agreement
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.

Sale	Bailment
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 :

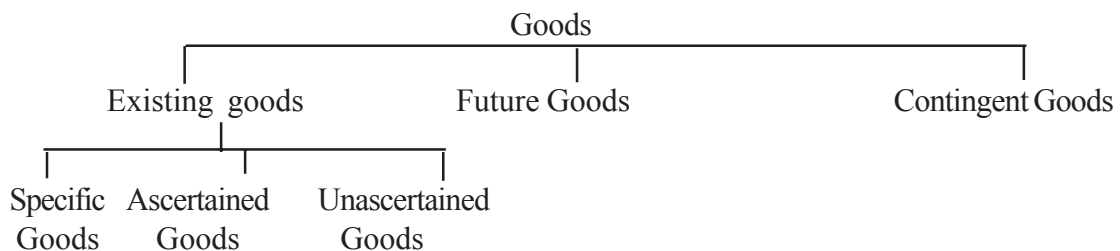
A contract of sale involves the delivery of goods whereas a contract for work and materials involves exercise of skill and labour by one party in respect of materials supplied by another the delivery of goods being subsidiary or incidental to the contract.

15.6. 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.

15.7. 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.

15.8. 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.

15.9. 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.

15.10. 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.

15.11. 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.

15.12. 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.

15.13. 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 |

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LESSON – 16

CONDITIONS AND WARRANTIES

Objectives :

After reading this lesson, student will be able to understand :

- Condition, Kinds of conditions;
- Warranty, Kinds of Warranty;
- Difference between Condition and Warranty,
- Unpaid seller under the Sale of Goods Act,
- Rights and Duties of unpaid seller,
- Transfer of Property, Legal Principles regarding Transfer of Goods.

Structure of the Lesson :

- 16.1 Introduction
- 16.2 Condition
 - 16.2.1 Kinds of conditions
- 16.3 Warranty
 - 16.3.1 Kinds of Warranty
- 16.4 Difference between Condition and Warranty
- 16.5 Unpaid seller under the Sale of Goods Act
 - 16.5.1 Cases
- 16.6 Transfer of Property
 - 16.6.1 Types of Goods under the Act
 - 16.6.2 Legal Principles regarding Transfer of Goods
 - 16.6.3 Cases pertaining to Transfer of Property
- 16.7 Summary
- 16.8 Key words
- 16.9 Self Assessment Questions
- 16.10 Suggested Readings

16.1 INTRODUCTION :

Certain provisions need to be fulfilled as demanded in the contract of sale or any other contract. The condition is a fundamental precondition on the basis of which the whole contract is based upon, on the other hand, warranty is the written guarantee wherein the seller commits to repair or replace the product in case of any fault in the product. Section 11 to 17 of the Sale of Goods Act enlightens the provisions relating to Conditions and Warranties.

Section 12 of the Act draws a demarcation between a condition and a warranty. The determination of condition or warranty depends upon the interpretation of the stipulation. The interpretation should be based on its function rather than the form of the word used.

16.2 CONDITION :

In the context of the Sale of Goods Act, 1930, a condition is a foundation of the entire contract and integral part for performing the contract. The breach of the conditions gives the right to the aggrieved party to treat the contract as repudiated. In other words, if the seller fails to fulfil a condition, the buyer has the option to repudiate the contract or refuse to accept the goods. If the buyer has already paid, he can recover the prices and also claim the damages for the breach of the contract.

For example, Sohan wants to purchase a horse from Ravi, which can run at a speed of 50 km per hour. Ravi shows a horse and says that this horse is well suited for you. Sohan buys the horse. Later on, he finds that the horse can run only at a speed of 30 km/hour. This is the breach of condition as the requirement of the buyer is not fulfilled. The conditions can be further classified as follows.

16.2.1 Kinds of conditions :

Expressed Condition :

The dictionary meaning of the term is defined as a statement in a legal agreement that says something must be done or exist in the contract. The conditions which are imperative to the functioning of the contract and are inserted into the contract at the will of both the parties are said to be expressed conditions.

Implied Condition :

There are several implied conditions which are assumed by the parties in different kinds of contracts of sale. Say for example the assumption during sale by description or sale by sample. Implied conditions are described in Section 14 to 17 of the Sale of Goods Act, 1930. Unless otherwise agreed, these implied conditions are assumed by the parties as if it is incorporated in the contract itself. Let's study these conditions briefly:

- **Implied condition as to title :**

In every contract of sale, the basic yet essential implied conditions on the part of the seller are that-

1. Firstly, he has the title to sell the goods.
2. Secondly, in case of an agreement to sell, he will have the right to sell the goods at the time of performing the contract.

Consequently, if the seller has no title to sell the given goods, the buyer may refuse or reject those goods. He is also entitled to recover the full price paid by him.

In *Rowland v. Divall* (1923), the party bought a second-hand motor car from the former and paid for the same. After six months, he was deprived of it as the seller had no title to sell the car. It was held that the aggrieved party is entitled to recover the money.

- **Implied condition as to the description :**

Moving to Section 15 of the Act, In the contract of sale, there is an implied condition that the goods should be in conformity with the description. The buyer has the option to either accept or reject the goods which do not conform with the description of the good. Say for example: Where Ram buys a new car which he thinks to be new from “B” and the car is not new. Ram’ can reject the car.

Referring to Section 16(2) of the given Act, goods must be of merchantable quality. In other words, the goods are of such quality that would be accepted by a reasonable person. For eg: A purchased sugar sack from B which was damaged by ants. The condition of merchantability is broken here and it is unfit for use. It must be noted from this section that the buyer has the right to examine the goods before accepting it. But a mere opportunity without an actual examination would not suffice to deprive the buyer of his rights. If however, the examination does not reveal the defect but within a reasonable time period the goods are found to be defective, He may repudiate the contract even if he approves the goods.

The implied conditions especially in case of eatables must be wholesome and sound and reasonably fit for the purpose for which they are purchased. For eg: Amit purchases milk that contains typhoid germs and because of its consumption he dies. His wife can claim damages.

- **Implied condition as to sale by sample :**

In the light of Section 17 of the Act, in a contract of sale by sample, there may be following implied conditions :

1. That the actual products would correspond with the sample with respect to the quality, size, colour etc.
2. That the buyer gets a reasonable opportunity to compare the goods with the sample.
3. Further, the goods are free from any defect rendering them unmerchantable.

For example, A company sold certain shoes made of a special kind of sole by sample sale for the French Army. Later when the bulk was delivered it was found that they were not made from the same sole. The buyer was entitled to the refund of the price and damages.

- **Implied condition as to Sale by sample as well as a description :**

Referring to Section 15 of the Sale of Goods Act, 1930, in a sale by sample as well as description, the goods supplied must be in accordance with both the sample as well as the description. In **Nichol v. Godis(1854)**, there was a sale of foreign refined rape-oil. The delivered oil was the same as the sample but it was having a mixture of other oil too. It was held in this case that the seller was liable to refund the amount paid.

16.3 WARRANTY :

Warranty is the additional stipulation and a written guarantee that is collateral to the main purpose of the contract. The effect of a breach of a warranty is that the aggrieved party cannot repudiate the whole contract however, can claim for the damages. Unlike in the case of breach of condition, in the breach of warranty, the buyer cannot treat the goods as repudiated.

16.3.1 Kinds of Warranty :

Expressed Warranty :

The warranties which are generally agreed by both the parties and are inserted in the contract, it is said to be expressed warranties.

Implied Warranty :

Implied warranties are those warranties which the parties assumed to have been incorporated in the contract of sale despite the fact that the parties have not specifically included them in the contract. Subject to the contract, the following are the implied warranties in the contract of sale :

- **Warranty as to undisturbed possession :**

Section 14(2) of the given Act provides that there is an implied warranty that the buyer shall enjoy the uninterrupted possession of goods. As a matter of fact, if the buyer having got possession of the goods, is later disturbed at any point, he can sue the seller for the breach of warranty.

For eg: 'X' purchased a second-hand bike from 'Y'. Unknown to the fact that the bike was a stolen one, he used the bike. Later, he was compelled to return the same. X is entitled to sue Y for the breach of warranty.

- **Warranty as to freedom from Encumbrances :**

In Section 14(3), there is an implied warranty that the goods shall be free from any charge or encumbrances that are in favour of any third party not known to the buyer. But if it is proved that the buyer is known to the fact at the time of entering into the contract, he will not be entitled to any claim.

For eg: A pledges his goods with C for a loan of Rs. 20000 and promises him to give the possession. Later on, A sells those goods to B. B is entitled to claim the damages if he suffers any.

- **Implied warranty to disclose Dangerous nature of the goods sold :**

If the goods sold are inherently dangerous or likely to be dangerous and the buyer is not aware of the fact, it is the duty of the seller to warn the buyer for the probable danger. If there would be a breach of this warranty, the seller will be liable.

For eg: A purchases a horse from B if the horse is violent and then It is the duty of the seller to inform A about the probable danger. While riding the horse, A was inflicted with serious injuries. A is entitled to claim damages from B.

16.4 DIFFERENCE BETWEEN CONDITION AND WARRANTY :

Basis For Comparison	Condition	Warranty
Meaning	It is a stipulation which forms the very basis of the contract.	It is additional stipulation complementary to the main purpose of the contract.
Provision	Section 12(2) of the Sale of Goods Act, 1930 defines Condition.	Section 12(3) of the Sale of Goods Act, 1930 defines Condition.
Purpose	Condition is basic for the formulation of the contract.	It is a written guarantee for assuring the party.
Result of Breach of Contract	The whole contract may be treated as repudiated.	Only damages can be claimed in case of a breach.
Remedies available to the aggrieved party	Repudiation, as well as damages, can be claimed.	Only damages can be claimed.

16.5 UNPAID SELLER UNDER THE SALE OF GOODS ACT :

Unpaid seller is the person who sold the goods but has not received the full payment for the same. Here the unpaid seller receives half of payment and half is remaining he is also unpaid seller. Under the Sale of Goods Act, 1930, an unpaid seller is a seller who has not been paid full price of the goods sold or if he has received a bill of exchange or other negotiable instrument as conditional payment, the condition for the same has not been fulfilled. An unpaid seller is defined under section 45(1) of the Sale of Goods Act, 1930.

Rights of unpaid seller :

The rights of an unpaid seller are given under the Sale of Goods Act on the basis of position of the goods delivered and the performance of the seller. The rights of an unpaid seller are as follows:-

1. Right to lien :

The seller has the right to lien the goods until the fulfilment of the price of the goods. The right to lien means to retain the goods or possession of the goods. The right to lien of an unpaid seller is given under section 47 of the Sale of Goods Act 1930.

According to this section, an unpaid seller can retain the possession of the goods until the payment in following cases :

- When goods are sold without any stipulation as to credit.
- When goods are sold on credit but the term of credit expires.
- When the buyer becomes insolvent.

According to the section 49 of the Sale of Goods Act 1930, an unpaid seller loses his right to lien in the following cases :

- When he delivers the goods to the carrier or other bailee for the transmission to the buyer without reserving the right to disposal of the goods.
- When the buyer lawfully obtains the possession of the goods.
- When the seller waives the right to lien.

2. Right to stoppage transit :

This right is the extension of the right to lien. An unpaid seller has the right to stop the goods during transit and retain until the payment. And if in any case the buyer becomes insolvent, an unpaid seller can retain the goods.

3. Right to re-sale :

An unpaid seller has the right to re-sale the goods after retaining the goods under circumstances :

- Where the goods are perishable.
- Where he gave notice of his intention to re-sale the goods and the buyer has not pay the price within the reasonable time.
- Where he has expressly reserved the right to re-sale in case of default.

4. Right to sue :

An unpaid seller has a right to sue the buyer for the price of goods. He can also sue for the damages to the buyer for refusing to accept the goods.

Duties of an unpaid seller :

1. Duty to deliver the goods as per the contract :

It is the duty of an unpaid seller to deliver the goods as according to the condition mentioned in the contract. If the goods are not delivered as per the contract, he is not entitled to get full price of the goods.

2. Duty to wait for another installment :

If there is a condition as per the contract to pay in installments, the seller has a duty to wait till the expiry of the period of installment. Without wait or before the

expiry of the period of installment he can not exercise the right to lien or re-sale the goods and he is not entitled to sue for price.

3. Duty to exercise the right to lien only when the goods are in his possession :

An unpaid seller cannot exercise the right to lien over the goods which are not in his possession. And is entitled to pass the title of the goods to the buyer on the full payment.

4. Duty to inform the buyer on the dishonor of cheque or other negotiable instrument :

On the dishonor of the cheque or other negotiable instrument an unpaid seller has a duty to inform the buyer for the same within the reasonable time, so he can do arrangements for another cheque or negotiable instrument or arrange any other way of payment. The provision of the dishonor of the cheque is given under section 138 of the Negotiable Instruments Act.

5. Duty to give notice of his intention of re-sale to the buyer :

An unpaid seller has a duty to give notice of his intention to re-sale the goods before reselling the same. And he is entitled to re-sale the goods only when the buyer is unable to give full price of the goods.

6. Duty to give reasonable time before sue :

He has a duty to give reasonable time and notice to the buyer for arrange the price of the goods before sue. And has a duty to wait for the reply or response of the buyer too.

7. Duty to give notice for stoppage of transit :

An unpaid seller has a duty to give notice to the carrier or the Bailee who is in the possession of the goods within a reasonable time. Here the term reasonable time means that there is sufficient time to communicate or understand the circumstances before the delivery of the goods. After the stoppage of the goods, the carrier or other Bailee re-delivers the goods to the seller as his directions. It is also the duty of an unpaid seller to bear the expenses of re-delivery of the goods.

8. Duty to ensure that the goods supplied are as per the conditions and warranties :

If the goods are not same to the quantity and quality as per the contract he is not entitled to claim his right to lien or sue for damages.

16.5.1 Cases :

• Ram Saran Das Raja Ram And Anr. vs Lala Ram Chander on 5 May, 1967 :

Where, however, the unpaid seller, who has exercised his right of lien or stoppage in transit. Where, however, the unpaid seller, who has exercised his right of lien or stoppage in transit, gives notice to buyer of his intention to sell, the unpaid seller may, if the buyer does not within a reasonable time pay or tender the price, resell the goods within a reasonable time

and recovery from the original buyer damages for any loss occasioned by his breach of contract, but the buyer is not entitled to any profit which may occur on the re-sale. In case of re-sale, pursuant to the exercise of the right of lien or stoppage in transit, the buyer acquires a good title thereto as against the original buyer notwithstanding want of notice of the resale to the latter.

• **Suchetan Exports P.Ltd vs Gupta Coal India Limited & Ors on 2 August, 2011 :**

Unpaid Seller” as defined in Section 45(1)(a) of the aforesaid Act, and would be entitled only to recovery of cost of the goods supplied. It was further stipulated that the seller would thereupon transfer the rights in respect of the goods to the buyer by endorsing in favor of the buyer a set of negotiable documents and hand over the same to the latter.

• **M.P.V. Sundararama Iyer And ... vs V.V.C.R. Murugesu Mudaliar on 11 April, 1956 :**

The seller being entitled to delivery at any time during the delivery month, he must notify the buyer when he is prepared to give delivery and if there is non compliance with this notice he has the right to resell, thus treating the contract as terminated. This condition contemplates that the seller shall notify the buyer when he requires him to take delivery and the buyer must accept delivery at any time during the month. Since the buyer must take delivery in accordance with the seller's requirements, application by, him for delivery is not contemplated. Elsewhere, the contract provides that the buyer must pay for the goods against delivery and therefore on receipt of notice from the seller he must be ready to pay the price and to take delivery in accordance with the requirements in the notice. Since these things must be done when notified by the seller, application for delivery is unnecessary and is not contemplated in the contract.

16.6 TRANSFER OF PROPERTY :

The term passing of goods or property means that there is a transfer of ownership which is governed by the principles of the Sale of Goods Act, 1930. In order to understand the rights, duties and liabilities of both the seller and the buyer it is very important to understand the concept of passing of property. It is a settled principle of law that along with the ownership of the goods or property, the risk is also transferred from the seller to the buyer. This article will be dealing with the various principles and provisions pertaining to Passing of property in the light of the Sale of Goods Act, 1930.

16.6.1 Types of Goods under the Act :

There are three types of goods under the umbrella of the Sale of Goods Act, 1930 and they are as follows :

1. Existing Goods
2. Future Goods
3. Contingent Goods

Existing Goods :

As per Section 6 of the Sale of Goods Act, 1930, those goods which are present (in existence) at the time of formation of a contract are known as existing goods. The existing goods can be further classified as :

Specific Goods :

As per Section 2(14) of the Sale of Goods Act, 1930, specific goods are those goods which are specifically identified and ascertained by the buyer which he intends to buy at the time when the contract of sale is formulated.

For example, Deepak wants to sell his old guitar. He put an advertisement in the local newspaper with its picture, make and other details. Rahul agrees to buy the guitar and thereby formed a contract with Deepak. The guitar is a 'Specific Good' in this case.

Ascertained Good :

Ascertained goods are not defined under the Sale of Goods Act, 1930 and many jurists have considered specific Goods and ascertained Goods as alike. However, ascertained goods can be called those goods which are specifically selected from a large set of goods.

For example, Deepak went to buy oranges in a wholesale market. He specifically selected 300 oranges from a larger set of unspecified oranges. These 300 oranges will be ascertained goods.

Unascertained Good :

Unascertained goods are those goods which are not specifically identified by the buyer at the time when the contract for sale is formulated.

For example, Deepak from his 300 oranges wants to sell 100 oranges; however he doesn't specify which oranges he wants to sell. This is called a sale of unascertained goods.

Future Goods :

As per Section 2(6) of the Sale of Goods Act, 1930, future goods have been characterised as those goods which at the time of formation of the contract will either be "manufactured, produced or acquired by the buyer". There will not be an actual sale in the sale of future goods, it will always be an "agreement to sell".

For example, Deepak has an orange grove with oranges in it. He agrees to sell 500 oranges to a buyer once the oranges are ready for market. This is a sale which will happen in the future. However, the goods have already been identified along with the agreement to sell. Such goods are known as future goods.

Contingent Goods :

Contingent goods are a subtype of future goods. In contingent goods, the sale happens in the future. The sale will always come with some contingency clause in it. For example, if Deepak sells his oranges from his orange grove when the trees are yet to produce oranges,

then the oranges are contingent good. This sale of contingent goods will be dependent on a condition that the trees will produce oranges, which may or may not happen.

16.6.2 Legal Principles regarding Transfer of Goods :

There are four principles regarding the transfer of goods under the umbrella of The Sale of Goods Act, 1930, which the article will be talking about and they're as follows:

Transfer of property in sale of Specific or Ascertained Goods :

Section 19 to section 22 of The Sale of Goods Act, 1930 are a few sections which govern the transfer of goods in a case where the goods are specific and ascertained in nature : Property when intended to pass (Section 19).

Section 19 of The Sale of Goods Act, 1930, is divided into further subsections and they're as follows :

1. Where a contract for sale of ascertained or specific goods exists, a specified time is fixed as per the convenience and consensus of both the parties at which the property is intended to be transferred from the seller to the buyer.
2. One has to pay attention to the circumstances and conduct of both the parties to the contract in order to understand the true intention of the contracting parties. Also, the terms of the contract should be given equal importance in the existing case.
3. Except if an alternate intention shows up, the principles laid under the Section 20 to 24 of the Act will help in finding out the intention of the contracting parties in respect with the time at which the goods are about to get transferred from the seller to the buyer.

Specific goods in a Deliverable state (Section 20) :

Section 20 of The Sale of Goods Act, 1930 relates to specific goods in a deliverable state, and it states :

In a contract for the sale of specific goods, which is unconditional in nature, the goods are transferred from the seller to the buyer at the time of formation of the contract. However, the only precondition required for the transfer of property is the fact that the goods must be existing in a deliverable state. The delay in the payment or delivery of goods or both is not something which holds importance.

Example :

A goes to a big electronic shop in order to buy a television set. He selects a big plasma Television set and asks the shopkeeper to deliver the television at his house which is at the other end of the town. The shopkeeper agrees to it. With this, "A" will become the owner of the television, and the Television set will become his property.

Specific goods to be put into a deliverable state (Section 21) :

Section 21 of The Sale of Goods Act, 1930: certain goods to be put in a deliverable state :

Where there is an existence of a contract for the sale of specific goods, the property concerned in the transaction will only be passed to the buyer, if the seller performs the necessary acts and omissions in order to put the goods in a deliverable state. Also, it is mandatory for the seller to notify the buyer regarding the alterations.

Example :

A goes to a mall to buy a smart television from an electronics store. He selects a big fancy smart TV from the electronic section and asks for its home delivery. The manager agrees to deliver it to A's home. However, at the time where he selects the smart TV, it doesn't have an operating system installed. The manager promises to install the operating system and on the next day, he informs "A" that his smart TV is now installed with the operating system and is ready for its delivery. Further, he asked for his permission to make the delivery.

In order to summarize the example, the goods will only be transferred to "A" if the manager has installed the operating system making the smart TV ready for its use.

Specific goods are in a deliverable state but the seller has to do something to ascertain the price (Section 22)

Section 22 of The Sale of Goods Act, 1930 :

Specific goods are in a deliverable state but the seller has to do something to ascertain the price :

Where there is a contract for the sale of specific goods in a deliverable state, the seller is undoubtedly bound to weigh, measure, test or do the necessary demonstration or anything which is required in reference with the sale of those particular goods. He'll be doing this to ascertain the appropriate value of the goods. The property in the goods will not pass until such demonstration or particulars are done and the buyer has acknowledged it thereof.

Example :

Rishabh sells a wooden bed to Deepak and agrees to assemble it in Deepak's bedroom as it was a part of the agreement. Rishabh delivers the wooden bed and makes a call to him informing Deepak that he will assemble the wooden bed the next day. That night the wooden bed gets stolen from Deepak's premises. In this case, Deepak will not be liable for the loss since the wooden bed was not passed to him. According to the terms of the contract, the wooden bed would be in a deliverable state only after it is assembled.

Transfer of property in sale of Unascertained Goods :

Section 23 of The Sale of Goods Act, 1930 govern the transfer of goods in a case where the goods are unascertained in nature :

Sale of unascertained goods and appropriation (Section 23) :

Section 23 of The Sale of Goods Act, 1930, is divided into further subsections and they're as follows :

Section 23(1) Sale of unascertained goods by description :

In a contract, for the sale of unascertained goods by description, if goods of a specific description are appropriated either by the seller with the consent of buyer or by the buyer with the consent of the seller, then the goods are passed to the buyer. The consent can be expressed or implied and can be given before or after the appropriation is made.

Section 23(2) Delivery to the carrier :

The seller has unconditionally appropriated the property if he delivers the property to the buyer/ carrier/ bailee for the reason of transmission to the buyer, however, he doesn't reserve the disposal rights to the property, then it can be said that he has appropriated the contract.

Goods sent on "sale or return" :

When goods are disposed on the basis of "sale or return" by the seller, the ownership of the goods aren't transferred to the buyer unless the buyer gives assent to the goods. However, if these goods are held by its buyer without giving an approval then they're taken as goods whose ownership is yet to be transferred. In that case, they're treated as goods which belong to the seller and not the buyer.

Goods sent on approval or "on sale or return" (Section 24) :

Section 24: In a case where the goods are delivered to the buyer either on approval or on "sale or return" or on other comparable terms then :

- (a) The goods therein will only pass to the buyer if the buyer either portrays his consent or acknowledges to the seller or does any act by which the transaction would be adopted.
- (b) The goods therein will only pass to the buyer if the buyer doesn't express his consent or acknowledgement to the seller that he intends to reject the goods, however, holds the goods without giving a notice to the buyer then on the expiration of time frame for the return of the goods or if time hasn't been fixed, then on the completion of a reasonable time, the property will be passed to the buyer.

Example :

"A" the seller of a precious necklace gives it to "B" the buyer on "Sale or return" basis. B after observing the necklace finds it very beautiful and put forth his consent on buying the necklace. In this case, the goods will be transferred to the buyer. However, if the buyer doesn't wish to give the acknowledgement for the product then the goods shall be duly returned back to B.

In case of right to disposal :

The intention behind reserving the right of disposal of the goods is to make sure that the value of the product is paid before the property is transferred to the buyer. However, under the prepared value system, the ownership follows the possession. That is to say, the

seller transfers the possession of the goods but retains the ownership until the buyer pays the appropriate amount.

Reservation of Right to Disposal (Section 25) :

Section 25 of Sale of Goods Act, 1930 deals with the conditional appropriation of goods and is bifurcated into the following subsections :

Section 25(1) :

As per the terms and conditions of the contract the seller of goods reserves the right of disposal of the goods in a situation where the sale of specific goods is concerned. Despite the delivery of the goods, the goods will not get transferred from the seller to the buyer unless the subsequent terms of the contract aren't appropriated or fulfilled.

For example, A sends certain goods by rickshaw to B and instructs the rickshaw driver not to deliver the goods until B pays him the price which was set between them as per the agreement. The rickshaw reaches the destination in time. However, the buyer "B" refuses to pay the amount as he had no money with him at the moment. Here the rickshaw driver can refuse to deliver the goods and the seller can rightly exercise his right to disposal.

Section 25(3) :

A few perspectives pertaining to the transfer of property during a sale of goods or property are encapsulated in Sales of Goods Act, 1930. The liabilities of the buyer and seller are determined in consonance with the provisions enshrined from section 18 to 25 of The Sale of Goods Act. The concept of possession of goods differs from passing of the goods as the latter in essence means transfer of ownership from the seller to the buyer while the former is confined to the custody of goods.

16.6.3 Cases pertaining to Transfer of Property :

Badri Prasad Vs. State of Madhya Pradesh :

In the case of Badri Prasad Vs. State of Madhya Pradesh, the appellant entered into a contract in respect of certain forests in Madhya Pradesh. He was entitled to chop teak trees with girth over 12-inch. After the passing of the Abolition of Proprietary Rights (Estates, Mahals, Alienated Lands) Act, the appellant was prohibited from cutting trees in the exercise of his rights under the contract.

He filed a suit claiming specific performance of the contract on the grounds :

- (1) The forest and trees did not vest in the State under the Act;
- (2) Even if they vested, the standing timber, having been sold to the appellant, did not vest in the State;
- (3) In any event, a new contract was completed on 5 February 1955, and the appellant was entitled to its specific performance.

The court held : The forest and trees vested in the State under the Act. The plaintiff

was entitled to cut teak trees of more than 12-inch girth. However, it had to be ascertained which trees would be falling in that Description. Till this was ascertained, they will not be ascertained goods as per Section 9 of the Sale of Goods Act.

Multanuak Chempalal Vs. C.P Shah & Co. :

In the case of Multanuak Chempalal Vs. C.P Shah & Co., Section 26 of the Sale of Goods Act 1930 was discussed and it was held that the risk passes only after the property in the agreement has been passed. Thus, the parties can enter into a contract which provides for the passing of risk before the passing of property.

Hoogly Chinsurah Municipality vs Spence Ltd :

In the case of Hoogly Chinsurah Municipality vs Spence Ltd, the Hoogly Chinsurah Municipality contracted with Spence Ltd to buy a tractor on the condition that if the municipality is not satisfied then it will reject the tractor. The municipality took possession of the tractor, used it for a month and a half and then rejected it. The suit was filed upon the unwillingness of Spence Ltd to accept it. The Court while dismissing the appeal held that, the municipality had not only used the tractor but also extinguished a reasonable time. Hence the property in the tractor had passed to the municipality and they could not reject it now.

16.7 SUMMARY :

Certain provisions need to be fulfilled as demanded in the contract of sale or any other contract. The condition is a fundamental precondition on the basis of which the whole contract is based upon, on the other hand, warranty is the written guarantee wherein the seller commits to repair or replace the product in case of any fault in the product. Section 11 to 17 of the Sale of Goods Act enlightens the provisions relating to Conditions and Warranties.

In the context of the Sale of Goods Act, 1930, a condition is a foundation of the entire contract and integral part for performing the contract. The breach of the conditions gives the right to the aggrieved party to treat the contract as repudiated.

Warranty is the additional stipulation and a written guarantee that is collateral to the main purpose of the contract. The effect of a breach of a warranty is that the aggrieved party cannot repudiate the whole contract however, can claim for the damages. Unlike in the case of breach of condition, in the breach of warranty, the buyer cannot treat the goods as repudiated.

Unpaid seller is the person who sold the goods but has not received the full payment for the same. Here the unpaid seller receives half of payment and half is remaining he is also unpaid seller. Under the Sale of Goods Act, 1930, an unpaid seller is a seller who has not been paid full price of the goods sold or if he has received a bill of exchange or other negotiable instrument as conditional payment, the condition for the same has not been fulfilled. An unpaid seller is defined under section 45(1) of the Sale of Goods Act, 1930.

The term passing of goods or property means that there is a transfer of ownership which is governed by the principles of the Sale of Goods Act, 1930. In order to understand

the rights, duties and liabilities of both the seller and the buyer it is very important to understand the concept of passing of property. It is a settled principle of law that along with the ownership of the goods or property, the risk is also transferred from the seller to the buyer. This article will be dealing with the various principles and provisions pertaining to Passing of property in the light of the Sale of Goods Act, 1930.

16.8 KEY WORDS :

Contract :

A written or spoken agreement, especially one concerning employment, sales, or tenancy, that is intended to be enforceable by law.

Unpaid Seller :

A person who has sold goods to another person but has not been paid for the goods or been paid partially

Transfer of Goods :

Trade involves the transfer of goods or services from one person or entity to another, often in exchange for money. Economists refer to a system or network that allows trade as a market.

Ownership :

The state or fact of legal possession and control over property, which may be any asset, tangible or intangible

Warranty :

A promise made by a seller or lessor about the characteristics or quality of property, goods, or services.

Expressed Condition :

A statement in a legal agreement that says something must be done or exist in the contract.

Existing Goods :

Those goods which are present (in existence) at the time of formation of a contract are known as existing goods.

Ascertained goods :

Goods can be called those goods which are specifically selected from a large set of goods.

16.9 SELF ASSESSMENT QUESTIONS :

- 1) Define Condition and Types in detail
- 2) Define Warranty and Types in detail

- 3) Difference between Condition and Warranty
- 4) Expound Unpaid seller under the Sale of Goods Act
- 5) Explicate Transfer of Property
- 6) Elucidate Legal Principles regarding Transfer of Goods

16.10 SUGGESTED READINGS :

1. J. Jaysankar, Business Laws, Margham Publication. Chenna
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, SChand Publications.
6. Business Law, Seven Hills Publishers, Hyderabad.
7. KC Garg. Business Law, Kalyani Publishers.

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Lesson - 17

THE CONSUMER PROTECTION ACT 1986

17.0 OBJECTIVES :

After studying this chapter, you should be able to -

- Introduction
- Consumer rights
- The objectives and functions of Consumer Protection Councils.
- Understand the meaning of certain important terms associated with the Consumers Protection Act.
- Important questions.

STRUCTURE :

17.1 Introduction

17.2 Consumer Rights

17.3 Consumer Protection Councils

17.4 Key Terms

17.5 Self - Assessment Questions

17.6 Reference Books.

17.1 INTRODUCTION :

India is a vast country where a majority of consumer are poor, helpless and disorganised. Further the market in India is generally a seller market and it is very easy to dupe the innocent consumers. It is now realised that a common consumer is neither knowledgeable nor well informed. He needs support and protection from unscrupulous seller. A common consumer is not in a position to approach Civil Court. Quick, cheap and speedy justice to his complaints is required. The biggest help in this direction has come from the government. The Central Government enacted a law in the year 1986 for the protection of consumers known as "The Consumer Protection Act 1986".

When the Consumer Protection Act (COPRA) was legislated in 1986 it was hailed as the Magna Carta consumers. For, it not only recognised consumer rights but also established a redress system, unique in the world.

17.2 CONSUMER RIGHTS :

The Consumer Protection Act is no doubt a revolutionary piece of legislation which can grown into an important tool for development. The act seeks to provide for better protection of the

interests of consumers. For this purpose, it makes provision for the establishment of consumer councils and other authorities for the settlement of consumer disputes. The Consumer Protection Act recognises six consumer rights. These rights are :-

- a) The right to be protected against marketing of goods which are hazardous of life and property.
- b) The right to be informed about the quality, quantity, potency, purity, standard and price of goods to protect the consumer against unfair trade practices.
- c) The right to be assured, wherever possible access to a variety of goods at competitive prices.
- d) The right to be heard and to be assured that consumers interests will receive due consideration at appropriate forums.
- e) The right to seek redressal against unfair trade practices or unscrupulous exploitation of consumers
- f) The right to consumer education.

The Act provides a more accessible and speedily legal avenue for consumer - no fees, no lawyers, judgment to be delivered in 90 days. A redressal machinery is provided for in the Act for the enforcement of the rights of the consumer.

Extent, commencement and application : The Consumer Protection Act extends to the whole of India except the state of Jammu and Kashmir. The Act received the presidents assent on 24-12-86. However, all the provisions of the Act except those relating to establishment, composition and jurisdiction of the consumer disputes redressal agencies came into force on 15-4-87. This act shall apply to all goods and services. It covers all sectors whether private, public or Co- operative. The provisions of the Act are compensatory in nature.

Amendment : The Consumer Protection Act was last amended in the year 1993. These amendments were quite drastic and comprehensive in nature. The Amendment Act of 1993 gave more teeth to the consumer counts and widened their scope. The main highlights of the amended Consumer Protection Act are-

1. Restrictive trade practices brought within the ambit of the Act.
2. Class action suits allowed
3. Goods bought by self-employed persons for earning their livelihood not covered under definition of 'commercial use '.
4. Housing construction specifically brought within Act.
5. Complaints can also be made about deficiency in goods or services which have been agreed to be bought or availed of.
6. Monetary jurisdiction of consumer courts increased.

How to file a complaint : Procedures for filing complaints and seeking redressal are simple and speedy. There is no fee for filing a complaint before the District Forum, the State Commission or the National Commission.

- The complainant or his authorised agent can present the complaint in person.
- The complaint can be sent by post to the appropriate Forum / Commission.
- A complaint should contain the following information -
 - a) The name, description and the address of the complainant.
 - b) The name, description and address of the opposite party or parties, as far as they can be ascertained.
 - c) The facts relating to complaint and when and where it arose.
 - d) Documents, if any, in support of the allegations contained in the complaint.
 - e) The relief which the complainant is seeking
 - f) The complaint should be signed by the complainant or his authorised agent.

Relief available in consumers : Depending on the nature of relief sought by the consumer and facts, the redressal forums may give orders for one or more of the following relief's,

- a) Removal of defects from the goods.
- b) Replacement of the goods.
- c) Refund of the price paid or
- d) Award of compensation for the loss or injury suffered.

17.3 CONSUMER PROTECTION COUNCILS :

The interests of consumers are sought to be promoted and protected under the Act by establishment of consumer protection councils at the central and state levels. These councils are advisory bodies.

Central Consumer Protection Council : Section 4 provides that the central government may by notification establish a council to be known as the central consumer protection council which shall consist of the following members viz.

- a) The Minister In - charge of consumer affairs who shall be its Chairman.
- b) Such number of other official or non - official members representing such interests as may be prescribed.

Section 6 states the objects of the central council as being promotion and protection of the rights of the consumers. These rights are -

- a) The right to be protected against the marketing of goods which are hazardous to life and property.
- b) The right to be informed about the quality, quantity, potency, purity, standard and price of goods so as to protect the consumer against unfair trade practices.
- c) The right to be assured, wherever possible, access to a variety of goods at competitive price-
- d) The right to be heard and to be assured that consumers interests will receive due consideration of appropriate forums.
- e) The right to seek redressal against unfair trade practices or unscrupulous exploitation of consumers, and
- f) The right to consumer education.

State Consumer Protection Council :

Section 7 provides for the establishment of state consumer protection councils by any state government to be known as consumer protection council for the state. The state council shall consist of a Minister In -charge of consumer affairs in the State Government who shall be its Chairman and such number of other official or non - official members representing such interests as may be prescribed by the State Government.

Where to file a complaint ? : In the case of the goods and services and compensation asked for, is less than rupee five lakhs, then the complaint can be filed in the District Forum which has been notified by the State Government for the District where the cause of action has arisen or where the opposite party resides.

In the cost of the goods or services and compensation for is more than rupees five lakhs but less than rupees twenty lakhs, the complaint can be filed before the state commission notified by the state government or the union territory concerned. If the cost of goods or services and compensation asked for, exceeds rupees twenty lakhs, the complaint can be filed before the National Commission at New Delhi.

17.4 KEY WORDS :

1. Complaint : any allegation in writing made by a complainant that –

- a) an unfair trade practice or a restrictive trade practice has been adopted by any trader.
- b) the goods bought by him or agreed to be bought by him suffer from one or more defects
- c) the services hired or availed of or agreed to be hired or availed of by him suffer from deficiency in any respect.

2. Defect : It means, any fault, imperfection or short coming 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 as is claimed by the trader in any manner what so ever in relation to any goods. Sec 2 (1) (f)

3. Person :

The term 'Person' includes.

- a) a firm whether registered or not.
- b) a Hindu undivided family.
- c) a Co-operative society.
- d) every other association of persons whether registered under the Societies Registration Act 1860 or not (Sec 2(1) (m)).

4. Service : It means, service of any description which is made available to potential users and includes 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, but does not includes the rendering of any service free of charge or under a contract of personal service (sec 2(1) (o)).

5. Trader: Trader in relation to any goods for sale and includes the manufactures thereof and where such goods are sold or distributed in package form, includes the packer thereof [Sec(1)(q)].

6. Restrictive Trade Practices : Restrictive Trade Practices means, any trade practice which requires a consumer to buy, hire or avail of any goods, or as the case may be services as a condition precedent for buying, hiring or availing of other goods or services.

7. Unfair Trade Practices : Un fair trade practice means, a trade practice which for the purpose of promoting the sale, use or supply of any goods or for the provision of any service, adopts any unfair method or unfair or deceptive practice.

17.5 SELF – ASSESSMENT QUESTIONS :

1. Explain the provisions of the Consumer protection Act regarding establishment, objectives and meetings of the Central and State Consumer dispute redressal agencies established under the Consumer Protection Act 1986.
2. Write short notes on the following as per the provisions of the Consumer Protection Act :
 - a) Consumer
 - b) Restrive Trade practices.
 - c) Complainant
 - d) Penalties.

17.6 REFERENCE BOOKS :

1. Gulshan S.S & Kappoor GK : A Hand Book of Business Law.
2. R.C. Chawla & K.C. Garg : Industrial Law.

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Lesson - 18

REDRESSAL MACHINERY UNDER THE CONSUMER PROTECTION ACT 1986

18.0 OBJECTIVES :

After studying this chapter you should be able to understand :

- introduction
- the objectives and functions of Consumer Protection Councils - District Forum.
- State Commission.
- National Commission... etc.,

STRUCTURE :

- 18.1 Introduction.**
- 18.2 District Forum.**
- 18.3 State Commission**
- 18.4 National Commission**
- 18.5 Key Terms**
- 18.6 Self – Assessment Questions.**
- 18.7 Reference Books.**

18.1 INTRODUCTION :

The Consumer Protection Act is designed to give relief to the consumer who is not in a position to go to the regular courts to fight his cases because of the high cost of litigation and that he should be given a forum where justice is cheap and quick. To meet this objective the Act provides for a three tier Quasi - Judicial redressal machinery at the District, State and National levels for redressal of consumer disputes and grievances.

These Quasi judicial bodies will observe the principles of natural justice and have been empowered to give relief's of a specific nature and to award, wherever appropriate compensation to consumers. Penalties for non - compliance of the orders given by the Quasi -judicial bodies have also been provided.

18.2 DISTRICT FORUM :

Section 9 of the Act inter alia provides for the establishment of a District Forum by the State Government in each district of the State by notification. The State Government may establish more than one District Forum in a district if it deems fit to do so.

Section 10 (1) provides that each District Judge Forum shall consist of -

- a) a person who is, or who has been or is qualified to be, a District Judge who shall be its President.
- b) two other members who shall be persons of ability, integrity and standing and have adequate knowledge or experience of or have shown capacity in dealing with problems relating to economics, law commerce, accountancy, industry, public affairs or administration, one of whom shall be woman.

Every appointment to District Forum shall be made by the State Government on the recommendation of a Selection Committee consisting of the President of the State Commission, the Secretary law department of the State and the Secretary incharge of Consumer Affairs in the State.

Every member of the District Forum shall hold office, for a term of five years or up to the age of 65 years which ever is earlier and shall not be eligible for re - appointment.

A member may resign his office in writing under his hand addressed to the State Government and on such resignation being accepted, his office shall become vacant and may be filled by the appointment of a person possessing any of the qualifications mentioned above in relation to the category of the member who has resigned.

The salary or honorarium and other allowances payable to and the other terms and conditions of service of the members of District Forum shall be such as may be prescribed by the State Government.

Jurisdiction of the District Forum :

Section II provides for the Jurisdiction of the District Forum under two criteria,

- Pecuniary
- Territorial

Pecuniary Limits :

According to Sec II (2) the District Forum can entertain complaints where the value of goods or services and the compensation, if any claimed is less than rupees five lakhs.

Territorial Limits:

Under Sec II (2) the a complaint shall be instituted in a District Forum within the local limits of whose jurisdiction-

- a) the opposite party or each of the opposite parties, where there are more than one, at the time of the institution of the complaint, actually and voluntarily resides or carries on business or has a branch office or personally works for gain, or
- b) any of the opposite parties, where there are more than one, at the time of the institution of the complaint, actually and voluntarily resides or carries on business or has a branch office or personally work for gain, provided that in such case either the permission of

the District Forum is given, or the opposite parties who do not reside or carry on business or have a branch office, or personally work for gain, as the case may be, acquire in such institution,

- c) The cause of action, wholly or in part arises.

18.3 STATE COMMISSION :

The Act provides for the establishment of the State Consumer Disputes Redressal Commission by State Government in the State by notification.

Section 16(1) provides that each state commission shall consist of -

- a) a person who is or has been a judge of a High Court appointed by the State Government who shall be its President.
- b) two other members who shall be persons of ability integrity and standing and have adequate knowledge or experience of, or have shown capacity in dealing with, problems relating to economics, law, commerce, accountancy, industry, public affairs or administration one of whom shall be a woman.

The provision to their clause states that every appointment made under this clause shall be made by the State Government on the recommendation of a Selection Committee consisting of the president of the State Commission Secretary - Law Department of the State and Secretary in charge of consumer Affairs in the State.

Under Section 16(2) the State Government has the power to decide on the salary or honorarium and other allowances payable to the members of the State Commission and the other terms and conditions of service.

Every member of the State Commission shall hold office for a term of five years or up to the age of sixty seven years, whichever is earlier and shall not be eligible for reappointment.

Jurisdiction : Section 17 of the Act provides that the State Commission shall have jurisdiction to entertain.

- a) complaints where the value of the goods and services and compensation if any, claimed exceeds rupees five lakhs but does not exceed rupees twenty lakhs.
- b) appeals against the orders of any District Forum within the State and
- c) to call for the records and pass appropriate orders in any consumer dispute, which is pending before or has been decided by any District Forum within the state, where appears to the State Commission that such District Forum has exercised an jurisdiction not vested in it by law, or has failed to exercise a jurisdiction not vested or has acted to exercise of its jurisdiction illegally or with material irregularity.

18.4 NATIONAL COMMISSION :

Section 9 provides for establishment of the National Consumer Disputes Redressal Commission by the Central Government by notification in the official gazette.

Section 20 (1) Provides that the National Commission shall consists of -

- a) a person who is or has been a judge of the Supreme Court, to be appointed by the Central Government (in consultation with the Chief Justice of India) who shall be its President.
- b) four other members who shall be persons of ability, integrity and standing and have adequate knowledge or experience of, or have shown capacity in dealing with, problems, relating to economics, law, commerce, accountancy, industry, public affairs or administration, one of whom shall be a woman.

Every appointment made under their clause by the Central Government shall be made on the recommendation of a Selection Committee consisting of a judge of the Supreme Court to be nominated by the Chief Justice of India, the Secretary in the department of Legal Affairs and the Secretary incharge of Consumer Affairs in the Government of India.

Section 20 (2) gives power to the Central Government to fix the salary honorarium and other allowances payable to the members as well as the other terms and conditions of their service. Every member of the Rational Commission shall hold office for a term of five year or upto seventh years of age, which ever is earlier and shall not be eligible for reappointment.

Jurisdiction :

Section 21 provides that the National Commission shall have jurisdiction -

- a) to entertain complaints where value of the goods or services and the compensation if any, claimed exceeds rupees twenty lakhs.
- b) 7° entertain appeals against the orders of any State Commission, and
- c) to call for the records and pass appropriate orders in any consumer dispute which is pending before, or has been decided by the state commission where it appear to the National Commission that such State Commission has exercised a jurisdiction not vested in it by law, or has failed to exercise a jurisdiction so vested, or has acted in the exercise of its jurisdiction illegally or with material irregularity.

Complaints before the District Forum and State Commission :

Section 12 provides that a complaint in relation to any goods sold or delivered or agreed to be sold or delivered or any service provided or agreed to be provided may be filled with the District forum by -

- a) the consumer to whom such goods are sold or delivered or agreed to be sold or delivered or such service provided or agreed to be provided
- b) any recognised consumer association, whether the consumer to whom the goods sold or delivered or agreed to be sold or delivered or service provided or agreed to be provided, is a member of such association or not, or
- c) one or more consumers, where there are numerous consumers having the same interest with the permission of the District Forum, on behalf of, or for the benefit of all consumers so interested, or.

d) The Central or the State Government.

The explanation thereto provides that a 'recognised consumer association means any voluntary consumer association registered under the Companies Act 1956 or any other law for the time being in force.

Limitation period for filing of complaint:

Section 24 A of the Consumer Protection Act provides that the District Forum, the State Commission or the National Commission shall not admit a complaint unless it is filed within two years from the date on which the cause of action has arisen.

However, where the complainant satisfies the Forum Commission as the case may be that he had sufficient cause for not filing the complaint within two years, such complaint may be entertained by it after recording the reasons for condoning the delay.

18.5 KEY WORDS :

1. Consumer dispute :

Sec (1) (e) it means a dispute where the person against whom a complaint has been made, denies, or disputes the allegations contained in the complaint.

2. District Forum :

Sec (2) (1) (h), It means a Consumer Disputes Redressal Forum established under Sec.9.

3. State Commission :

Sec 2 (1) (d) it means a Consumer Disputes Redressal Commission established under Sec.9.

4. National Commission :

Sec (2) (k) it means the National Consumer Disputes Redressal Commission established under of Sec .9.

18.6 SELF – ASSESSMENT QUESTIONS :

1. What is the jurisdiction of the various Forums Commission for the purpose of the Consumer Protection Act 1986 ?
2. Explain the provisions of the Consumer Protection Act regarding establishment, objectives of the Central and State Consumer Protection Councils.

18.7 REFERENCE BOOKS :

1. Elements of Mercantile Laws : N.D.Kapoor.
2. Industrial Laws : R.C. Chawla & K.C. Garg.

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