

BBA
SEMESTER - 3
BBAMDC304
BUSINESS LAW



Message for the Students

Dr. Babasaheb Ambedkar Open (University is the only state Open University, established by the Government of Gujarat by the Act No. 14 of 1994 passed by the Gujarat State Legislature; in the memory of the creator of Indian Constitution and Bharat Ratna Dr. Babasaheb Ambedkar. We Stand at the seventh position in terms of establishment of the Open Universities in the country. The University provides as many as 54 courses including various Certificate, Diploma, UG, PG as well as Doctoral to strengthen Higher Education across the state.



On the occasion of the birth anniversary of Babasaheb Ambedkar, the Gujarat government secured a quiet place with the latest convenience for University, and created a building with all the modern amenities named 'Jyotirmay' Parisar. The Board of Management of the University has greatly contributed to the making of the University and will continue to this by all the means.

Education is the perceived capital investment. Education can contribute more to improving the quality of the people. Here I remember the educational philosophy laid down by Shri Swami Vivekananda:

“We want the education by which the character is formed, strength of mind is Increased, the intellect is expand and by which one can stand on one’s own feet”.

In order to provide students with qualitative, skill and life oriented education at their threshold. Dr. Babaasaheb Ambedkar Open University is dedicated to this very manifestation of education. The university is incessantly working to provide higher education to the wider mass across the state of Gujarat and prepare them to face day to day challenges and lead their lives with all the capacity for the upliftment of the society in general and the nation in particular.

The university following the core motto ‘४ाध्ंय्ाऱः परमम् ० तपः’ does believe in offering enriched curriculum to the student. The university has come up with lucid material for the better understanding of the students in their concerned subject. With this, the university has widened scope for those students who

are not able to continue with their education in regular/conventional mode. In every subject a dedicated term for Self Learning Material comprising of Programme advisory committee members, content writers and content and language reviewers has been formed to cater the needs of the students.

Matching with the pace of the digital world, the university has its own digital platform Omkar-e to provide education through ICT. Very soon, the University going to offer new online Certificate and Diploma programme on various subjects like Yoga, Naturopathy, and Indian Classical Dance etc. would be available as elective also.

With all these efforts, Dr. Babasaheb Ambedkar Open University is in the process of being core centre of Knowledge and Education and we invite you to join hands to this pious *Yajna* and bring the dreams of Dr. Babasaheb Ambedkar of Harmonious Society come true.



Prof. Ami Upadhyay
Vice Chancellor,
Dr. Babasaheb Ambedkar Open University,
Ahmedabad.

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BUSINESS LAW

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Publisher's Name:	Dr. Ajaysinh Jadeja, Registrar, Dr. Babasaheb Ambedkar Open University, 'JyotirmayParisar', opp. Shri Balaji Temple,Chharodi, Ahmedabad, 382481, Gujarat, India.
Edition:	2025-26 (First Edition)
ISBN:	978-93-5598-994-9

ISBN: 978-93-5598-994-9



1.1 Introduction to Law**1.2 Definitions of Law****1.3 Object of law****1.4 Need for the knowledge of law****1.5 Sources of mercantile law****1.6 Preamble to the Constitution of India (with explanation of all the terms used in the preamble)****1.7 Fundamental rights (briefly)****1.8 Fundamental duties (briefly)****1.9 Hierarchy of the judiciary and courts in India****❖ Exercise**

1.1 Introduction to Law

This chapter intends to acquaint students with the very basic fundamentals of law. The first part of the chapter discusses the introduction to Law, its objectives, purpose and sources. It is important for the students to understand the importance of law in their daily routine life and the society as a whole.

The purpose of law is to produce either of two things: (a) an idealistic society or (b) a practical society more tolerable than what has been labelled by some philosophers as the state of nature, in which there are no formal ties between mankind, and no civil or statutory law. The importance of law is such that it is difficult or impossible for a society to exist without law.

The force of law is a major requirement for maintaining social order and preventing chaos in society. It is difficult to imagine the existence of a

community without law. Lawmakers, courts and other officials of the law help to preserve a harmonious society.

The second half of the chapter discusses the preamble to the Constitution of India explaining each of the terms used in the preamble. The chapter also discusses the fundamental rights and duties of every citizen of India and the hierarchy of the judiciary system in India. It is to refresh and remind the students of the very basics and the Genesis of the law in India and that of their rights and duties as citizens of India.

Introduction to Law

Defining the term ‘law’ is not an easy task because the term changes from time to time and different scholars define the term variously. Definition of the term may vary due to the different types of purposes sought to be achieved. Definitions given to the term law are as many as legal theories.

The word ‘Law’ has been derived from the Teutonic word ‘Lag, which means ‘definite’. On this basis Law can be defined as a definite rule of conduct and human relations. It also means a uniform rule of conduct which is applicable equally to all the people of the State. Law prescribes and regulates general conditions of human activity in the state.

Law has been defined differently from different point of views. It has been called “**Dharma**” in Hindu jurisprudence and “**Hukum**” in Islamic system. Romans called it “**jus**” and in Germany and France, it is called as “**Recht and Droit**” respectively [N.V. PARANJAPE; 2001: 133].

The mandatory rules of conduct were intended to enforce justice and prescribe duty or obligation, and derived to a large extent from personalized or formal promulgation by a ruler or legislature. These laws entail the power and authority of the promulgator and the sanctions associated with non-compliance or refusal to obey. The law derives its legitimacy, in the last resort, from universally accepted principles, such as the essential rectitude of the rules, or the sovereign power of a parliament to promulgate them.

The system of rules which a particular country or community recognizes as regulating the actions of its members and which it may enforce by the imposition of penalties. The law is a system of rules that a society or government develops to face crime, commercial agreements and social relations. You can also use the law to refer to the people who work in this system. In other words, the principles and regulations established in a community by some authority and applicable to its people, either in the form of legislation or custom and policies recognized and applied by judicial decision.

Commercial law or Mercantile law is the law that regulates the commercial activities of the economy. It is a very broad term and all the laws that regulate commercial transactions in India are covered in their scope. The prerequisite of such a transaction is a valid agreement between the parties to the contract. It can be express or implicit.

The Commercial Law in India was developed with the enactment of the Contracts Act of India, 1872. Prior to this, all commercial transactions were governed by the personal laws of the contracting party. For example, the Hindu Law, the Mohammedan Law, etc. The first attempt to codify the Commercial Law in India was made by the British in 1872 by the promulgation of the Law of Contracts of India. Since then, numerous laws have been enacted in India to regulate commercial transactions, such as the Companies Act, the Negotiable Instruments Law, etc.

1.2 Definition of Law

"A rule laid down for the guidance of an intelligent being by an intelligent being having power over him."

"A body of rules fixed and enforced by a sovereign political authority."

John Austin (English jurist born 1790)

"A Law is a general rule of external behaviour enforced by a sovereign political authority." –**Holland**

"A system of rules, a union of primary and secondary rules"- **Hart**

"Law is the cement of society and also an essential medium of change. Knowledge of law increases ones understanding of public affairs. Its study promotes accuracy of expression, facility in argument and skill in interpreting the written word, as well as some understanding of social values".- **Glanville Williams**

Justice Aderemi a Nigerian jurist explains that "It is a form of discipline. It is a combination of justice and fair-play. It is a phenomenon that is ever present in every aspect of human life. It is certain and ascertainable ..."

Lon Fuller (born 1902) avoided a full-blown definition of law. To Fuller, for law to be properly accorded as law, it must possess the following characteristics *inter alia*:

- a. It must have generality
- b. It must be clear
- c. It must be contradictory
- d. It must be properly promulgated (pass through appropriate legislative process)
- e. It must not be retroactive

The three most general and important features of the law are that it is normative, institutionalized and coercive. It is normative in that it serves, and is meant to serve, as a guide for human behaviour. It is institutionalized in that its application and modification are to a large extent performed or regulated by institutions. And it is coercive in that obedience to it, and its application are internally guaranteed, ultimately by the use of force.

Joseph Raz.

Law functions as an integral part of the society and so occupies a core place in the society. It generally performs four functions. The first is that it plays the role of protecting us from evil that is those people who wish to do us bad without any good intention. Secondly, law helps in regulating relationships amongst humans, and other institutions in the society in a bid to promote the common good. Another obvious role of the law in the society is the resolving of disputes over limited resources; this majorly being a part of the functions of the judiciary, to

adjudicate upon disputes amongst persons and institutions. Finally, the law in the society encourages people to do the right things even though there have been arguments as to the stricken division between law and morality.

Examining the several definitions at first, Law would appear not to be just a body of static rules to be obeyed by all citizens who are subject to its sanctions, rather it is a dynamic process by which rules are constantly being adopted and changed to fit the complex situations of a developing society. Divided into different categories: constitutional, case, statute laws; executive orders, regulations of administrative agencies and local ordinances.

1.3 Object of law

The law serves many purposes and functions in society. Four principal purposes and functions are **establishing standards, maintaining order, resolving disputes, and protecting liberties and rights.**

1. **Establishing Standards:** The law is a guidepost for minimally acceptable behaviour in society. Some activities, for instance, are crimes because society (through a legislative body) has determined that it will not tolerate certain behaviours that injure or damage persons or their property. For example, under a typical state law, it is a crime to cause physical injury to another person without justification—doing so generally constitutes the crime of assault.
2. **Maintaining Order:** This is an offshoot of establishing standards. Some appearance of order is necessary in a civil society and is therefore reflected in the law. The law when enforced provides order consistent with society's guidelines.
3. **Resolving Disputes:** Disputes are unavoidable in a society made of persons with different needs, wants, values, and views. The law provides a formal means for resolving disputes through the court system. There is a central court system and each state and district has its own separate court system. There are also other bodies and systems at institutional levels, villages and taluka levels for solving disputes.

4. **Protecting Liberties and Rights:** The constitutions and statutes of India and its constituent states provide for various liberties and rights. A purpose and function of the law is to protect these various liberties and rights from violations or unreasonable intrusions by persons, organizations, or government. For example, subject to certain exceptions Constitution prohibits the government from making a law that prohibits the freedom of speech. Someone who believes that his free speech rights have been prohibited by the government may pursue a remedy by bringing a case in the courts.

You have probably realized that laws may serve more than one principal function and there are obviously more principal functions than the four that we have identified.

1.4 Need for the knowledge of law

In common parlance law means a set of rules and regulations which is accepted by the society and followed by the society over the time. In simple words, it is the omnipresent rules of the society. It is interconnected for the proper functioning of the society, and without such rules and regulations the society cannot survive.

‘Ignorantia Juris not excusat’ is a familiar maxim. This means **ignorance of law is no excuse**. Although it is not possible for a layman to learn every branch of law, yet it is to the advantage of each member of the community to know something of rules and regulations by which he is governed and as such he must acquaint himself with the general principles of the law of the country.

Knowledge of laws or legal awareness are essential for every active individual in society. The law is something that cannot be ignored and is an integral part of a society. Therefore, the reasons for needing knowledge of the laws are,

1. **Act as a guide:** The law acts as a guide for society. A guide tells us what to do and what not to do, and the reason for its importance is that if the society

or the group of people could do what they wanted, it would end in chaos and conflicts.

2. **Creates a sense of responsibility:** Another benefit of having a law is that with laws it is easier to make people responsible for their actions, thoughts and behaviour. It would create certain obligations in people's minds, thus ensuring that they act responsibly and reasonably.
3. **Create a binding duty:** With the help of the laws, it is possible to enforce or inculcate the importance of duty towards each individual, which in turn creates an obligation for people not to act in a way that is not acceptable within the country.
4. **Information:** Another requirement for knowledge of the laws is that it provides information both to society and to people. Although it is not so important for an individual to know everything about the laws, but the basic things can help him live without worries.
5. **Acts as a language:** Knowledge of the law also acts as a language within the country. Although we are all separated through spoken language and culture, laws are common in most countries, especially laws related to fundamental rights, therefore, can help a person trapped in a difficult situation to find the way.
6. **Reduce crimes in society:** If society, the business house or people know the effect and the results of the crime they commit, they can think twice before committing it. Patients will also be aware of the crime that has affected them and they will know the measures and how to overcome them.
7. **Guarantees a secure environment:** Last but not least, knowledge of the laws guarantees a safe and healthy environment for the citizens of the country. If the set of rules and regulations, that is, the laws are followed strictly and correctly, then the country will become one of the safest places

for all people, it would create a certain sense of security in the minds of people and that it can only be achieved if it is legal, conscience is present.

1.5 Sources of mercantile law

The bulk of the Indian Mercantile Law is based on, and follows, the English Mercantile Law. In the absence of any specific law, usage or custom on a particular point arising before a Court, rules of the English Law, law of justice, equity and good conscience are applied. The Courts in India are, however, selective in the application of the English Law.

1. English mercantile law

English law is the most important source of Indian business law. Many rules of English law have been incorporated into Indian law through statutes and judicial decisions. The sources of English law are:

a) Common Law

This law is known as a judge made law. It is based on customs and practices handed down from generation to generation. It is the oldest unwritten law. The English courts developed these for centuries.

b) Equity

Equity is also an unwritten law. It is based on concepts of justice developed by judges whose decisions become precedents. It grew as a system of law complementary to the common law and covered the deficiencies of the common law. Its rules were applied in cases where the rules of the common law were considered harsh and oppressive.

c) Statute Law

The law of the Statute is one, which is established in the laws of Parliament. Therefore, it acts as the most superior and powerful source of law. Override any rule of common law or Equity.

d) Jurisprudence

This is also an important source of English mercantile law. It is based on the decisions of the judges. It is based on the principle that what has been decided in the previous case is binding in a similar future case as well, unless there is a change in the circumstances of the case.

2. Statute Law

A bill passed by parliament and signed by the President becomes a "Statute" or a Law. Most Indian laws are incorporated into the various laws passed by central and state legislators. The Law of contracts with India, 1872, the Law of sale of goods, 1930, the Law of companies, 1956, are some of the examples of the law.

3. Judicial decisions

Court decisions are also called case laws. They refer to them as precedents and are binding for all courts with jurisdiction lower than that of the court that issued the judgment. Courts in deciding cases involving similar points in the law also follow them.

4. Customs and usage

Customs and use play an important role in the regulation of commercial transactions. A well-recognized custom or use may even nullify statutory law. Most of the customs and commercial uses have already been codified and have been granted legal sanctions in India. Some of them have been ratified by the decisions of the competent courts.

1.6. Preamble to the Constitution of India

“WE, THE PEOPLE OF INDIA having solemnly resolved to constitute India into a SOVEREIGN SOCIALIST SECULAR DEMOCRATIC REPUBLIC and to secure to all its citizens:

JUSTICE, social, economic and political;

LIBERTY of thought, expression, belief, faith and worship;

EQUALITY of status and of opportunity; and to promote among them all

FRATERNITY assuring the dignity of the individual and the unity and integrity of the Nation;

IN OUR CONSTITUENT ASSEMBLY this 26th day of November, 1949, do HEREBY ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION.”

Brief history of the Indian Constitution

In 1946, the British decided to examine the possibility of granting independence to India. As a result, a British cabinet mission was dispatched to India to (1) hold discussions with the representatives of British India and the Indian States in order to agree on the framework for writing a constitution, and (2), set up a constituent body and an executive council. Following this mission and the ensuing negotiations, a Constituent Assembly was indirectly elected by the provincial legislatures comprising 278 representatives and 15 women. Parties represented in the CA were the Congress Party which had a majority, Muslim League, Scheduled Caste Federation, the Indian Communist Party and the Union Party. The CA met for the first time in December 1946 and by November 1949 the draft constitution was approved. The constitution went into effect in January 1950 and the CA was transformed into a Provisional Parliament.

The Constitution which is still in force has been amended over 90 times making it one of the most frequently amended constitutions in the world. It is also known to be one of the longest and most detailed in the world with 395 articles and 10 appendixes called schedules. Extensively modelled on western legal and constitutional practice, its key features include:

- The establishment of a federal system with residual powers in a central government
- A list of fundamental rights
- A Westminster style parliamentary system of government

Key timelines in the 1948 constitutional process

1946	Britain decides on to grant independence to India and cabinet mission is dispatched to India to discuss modalities for transfer of power
14 August 1947	Proposal for creation of committees is tabled
29 August 1947	Drafting committee is established
6 December 1947	Constituent Assembly formally convenes for the first time, following elections, to start the process of writing a constitution.

4 November 1947	Draft is finalized and submitted
1948 – 1949	Constituent Assembly meets in sessions open to the public
26 November 1949	Constituent Assembly adopts final draft making it official
26 January 1950	Entry into force of the new constitution

Importance of Preamble to the Constitution of India

The preamble to the Constitution of India is a brief introductory statement that sets out the guiding purpose, principles and philosophy of the constitution. Preamble gives idea about the following: (1) the source of the constitution, (2) nature of Indian state (3) a statement of its objectives and (4) the date of its adoption.

Source of the Constitution

We the people of India.

The phrase “We the people of India” emphasizes that the constitution is made by and for the Indian people and not given to them by any outside power. It also emphasizes the concept of popular sovereignty as laid down by Rousseau: All the power emanates from the people and the political system will be accountable and responsible to the people.

Nature of Indian state

1. Sovereign
2. Socialist
3. Secular
4. Democratic
5. Republic

Objectives of Indian State

1. Justice: Social, Economic and Political.
2. Equality: of status and opportunity.
3. Liberty: of thought, expression, belief, faith and worship
4. Fraternity (Brotherhood: assuring the dignity of the individual and the unity and integrity of the nation.

Date of its adoption

Date of adoption of the Constitution is 26th November, 1949. But most of the articles in Constitution came into force on January 26th, 1950. Those articles which came into existence on 26th November 1949 is given by Article 394.

Article 394 states that this article (394) and articles 5, 6, 7, 8, 9, 60, 324, 366, 367, 379, 380, 388, 391, 392 and 393 shall come into force at once, and the remaining provisions of this Constitution shall come into force on the twenty-sixth day of January, 1950, which day is referred to in this Constitution as the commencement of this Constitution.

26 January was selected for this purpose because it was this day in 1930 when the Declaration of Indian Independence (Purna Swaraj) was proclaimed by the Indian National Congress.

Terms Used in Preamble

1. Sovereign: -

This word implies that India is neither a dependency nor a domain of any other nation, but an independent state. There is no authority over him, and he is free to carry out his own affairs (both internal and external). Being a sovereign state, India can acquire a foreign territory or cede a part of its territory in favour of a foreign state.

2. Socialist: -

Even before the term was added by the 42nd Amendment in 1976, the Constitution had a socialist content in the form of certain Governing Principles of State Policy.

Notably, the Indian brand of socialism is a "democratic socialism" and not a "communist socialism" (also known as "state socialism") that implies the nationalization of all means of production and distribution and the abolition of private property. Democratic socialism, on the other hand, has faith in a "mixed economy" where the public and private sectors coexist side by side. "As the Supreme Court says," democratic socialism aims to end poverty, ignorance, the disease and the inequality of opportunities. Indian socialism is a mixture of Marxism and Gandhism, which leans strongly towards Gandhian socialism. "

3. Secular: -

The term "secular" was also added by the 42nd Constitutional Amendment of 1976. However, as the Supreme Court said in 1974, although the words "secular state" are not mentioned in the Constitution, there can be no doubt that the creators of the Constitution they wanted to establish such a state and, consequently, articles 25 to 28 (which guarantee the fundamental rights to freedom of religion) have been included in the constitution.

The Indian Constitution incorporates the positive concept of secularism, that is, all religions in our country (regardless of their strength) have the same status and support of the state.

4. Democratic: -

A democratic policy, as stipulated in the Preamble, is based on the doctrine of popular sovereignty, that is, the possession of supreme power by the people.

The Constitution of India establishes a representative parliamentary democracy under which the executive is accountable to the legislature for all its policies and actions. The universal adult franchise, periodic elections, the rule of law, the independence of the judiciary and the absence of discrimination for certain reasons are the manifestations of the democratic character of Indian politics.

The term "democratic" is used in the Preamble in a broader sense that encompasses not only political democracy, but also social and economic democracy.

5. Republic: -

A democratic policy can be classified into two categories: monarchy and republic. In a monarchy, the head of state (usually king or queen) enjoys a hereditary position, that is, enters the position by succession, for example, Great Britain. In a republic, on the other hand, the head of state is always directly or indirectly elected for a fixed period.

Therefore, the term "republic" in our Preamble indicates that India has an elected head called president. It is chosen indirectly for a fixed period of five years.

6. Justice: -

The term "justice" in the Preamble encompasses three distinct social, economic and political forms, guaranteed by various provisions of Fundamental Rights and the Guiding Principles. Social justice denotes the equal treatment of all citizens without any social distinction based on caste, colour, race, religion, sex, etc. It means the absence of privileges that extend to any particular section of society, and the improvement in the conditions of backward classes (SC, ST and OBC) and women.

7. Freedom: -

The term "freedom" means the absence of restrictions on the activities of individuals and, at the same time, provides opportunities for the development of individual personalities.

The Preamble guarantees to all the citizens of India the freedom of thought, expression, belief, faith and worship, through their Fundamental Rights, enforceable before the courts, in case of violation.

Freedom as detailed in the Preamble is very essential for the successful functioning of the Indian democratic system. However, freedom does not mean 'license' to do what one wants, and it must be enjoyed within the limitations mentioned in the Constitution itself. In short, the freedom conceived by the Preamble or fundamental rights is not absolute but qualifies.

8. Equality: -

The term "equality" means the absence of special privileges for any section of society and the provision of adequate opportunities for all persons without any discrimination.

The Preamble guarantees all citizens of India equal status and opportunity. This provision covers three dimensions of equality: civic, political and economic.

9. Fraternity: -

Fraternity means a sense of brotherhood. The constitution promotes this cutting of fraternity by the system of unique citizenship. In addition, the fundamental duties (articles 51-A) say that it is the duty of every citizen of India to promote the harmony and spirit of brotherhood common among all the people of India that goes beyond religious, linguistic, regional or sectional diversities.

1.7 Fundamental Rights

Fundamental rights are defined as the basic human rights of all citizens. These rights, defined in Part III of the Constitution, apply regardless of race, place of birth, religion, caste, creed or sex.

Fundamental rights can be called the heart of our Constitution. These are the basic rights that are universally recognized as fundamental for human existence and indispensable for human development. It guarantees civil liberties so that all Indians can lead their lives in peace and harmony as citizens of India. They include the individual rights common to most liberal democracies, such as equality before the law, freedom of speech and expression, freedom of association and peaceful assembly, freedom of religion and the right to constitutional remedies for the protection of civil rights.

1. Right to equality (Article 14 – Article 18):

It implies equality before the law and equal protection of the laws within the territory of India. No man is above the law of the land. Every person is subject to the ordinary law and amenable to the jurisdiction of the ordinary tribunals. Any discrimination is prohibited and equality of opportunity in matters of public employment under the state is ensured. There is no distinction between officials and private citizen. The right to equality is the first fundamental right that puts an end to untouchability. This right represents the principle of equality before the law, as well as social equality and supports the non-discrimination of people on any basis. This right also establishes that every Indian citizen is equal before the law and prohibits discrimination based solely on religion, race, caste, sex, place of birth or any other reason.

For Example: contains in its preamble the following statement: 'We hold these truths to be self-evident, that all men are created equal...' This statement suggests that, in the eyes of those who wrote the document, every citizen of the newly formed India was to be treated the same as every other citizen around them. This means that, theoretically, they all should have had equal access to employment, equal opportunities to purchase and own land, equal treatment in society, and so on.

But right to equality does not mean absolute equality or universal application. Some exceptions are allowed by the Indian Constitution and these limitations are as follows:

- The President or the Governor of a state shall not be answerable to any court for the power exercised or act done by him.
- No criminal proceeding shall be instituted against the President or the Governor during term of office
- Exemption from taxes to certain classes of property
- Imposition of taxes upon different trades and professions
- Making special provisions for women and child
- Making special provisions for advancement of any socially, economically and educationally backward classes like SCs and STs including special employment opportunities, this is called protective discrimination.

2. Right to freedom (Article 19 – Article 22)

This right is the most significant and important for the citizens. This right confers some positive rights to promote the ideal of liberty. Article-19 is the most important which guarantees six freedom to all citizens.

These are – 19 (1) All citizens shall have the right-

- (a) To freedom of speech and expression;
- (b) To assemble peacefully and without arms;
- (c) To form associations or unions;
- (d) To move freely throughout the territory of India;
- (e) To reside and settle in any part of the territory of India; and
- (g) To practice any profession, or to carry on any occupation, trade or business

Article 20 and 21 guarantee the right to life, dignity and status. Under Article 20, no person accused of any offence shall be compelled to be a witness against himself. Similarly, under Article 21, no person shall be deprived of his life or personal liberty except according to the procedure established by law. Article 22 provides some safeguards against arbitrary arrest and detention.

Like the Right to Equality, Right to Freedom is not absolute. The state can impose reasonable restrictions upon these rights incorporated in Article-19 to

maintain a balance between individual liberty and social control. When a proclamation of emergency is made under Article 352, provisions of Article-19 itself remain suspended (Art. 358)

3. Right against exploitation (Article 23 – Article 24)

These rights help prevent the exploitation of the weakest section in different sectors by the state, organizations and individuals. Forced labour, work without work, trafficking in persons, child labour and other illegal and ethically unjust acts are prohibited by this fundamental right. The Law of the bonded labour system (abolition) of 1976 was enacted by the Indian parliament in support of this basic right.

For Example: As per labour laws more than 8 hours of work is illegal. If the employer asks to work for more than 8 hours and employee voluntarily works then latter is eligible for overtime wages.

4. Right to freedom of religion (Article 25- Article 28)

Indian Constitution has adopted secular ideology and declared India as a secular state, which observes an attitude of neutrality and impartiality towards all religion. There is no state religion in India. The state will neither establish a religion of its own nor confer any special patronage upon any particular religion. India is a secular country and the right to freedom of religion for all its citizens guarantees that all States treat all religions in a neutral manner. Every Indian citizen has religious freedom and can follow any religion of their choice. The right to freedom of religion also promotes the right to preach, practice and propagate any religion of their choice and guarantees freedom of conscience to all Indian citizens, subject to public order, morality and health. Every religious group has been given the freedom to manage religious affairs, own and acquire movable and immovable property and administer such property in accordance with law. Right to religion is also subject to certain limitations. The state has the right and duty to intervene if any religious activity creates public disorder, immorality and so on.

For Example: Indian government never forces any citizen to follow any particular religion or he/she should not follow a particular religion.

5. Cultural and educational rights (Article 29 – Article 30)

Cultural and educational rights include the right to education and help preserve various minority assets and protect them from discrimination. This fundamental right safeguards minorities and prohibits discrimination against any citizen for admission to educational institutions based on religion, caste or language, subject to reservations in the state. This fundamental right also allows minorities to establish and administer educational institutions to preserve their heritage. Clause (2) of Article 29 provides that no citizen may be denied admission to State and State aided educational institutions on the grounds only of religion, race, caste or language.

This right has also some limitations. The State can regulate its affairs in the interest of efficiency of instruction, discipline, morality and public order.

6. Right to constitutional remedies (Article 32)

A right without remedy is a meaningless formality. Indian Constitution enumerates various rights to its citizen and in order to make these rights effective, it includes some means or remedies in the form of the Right to Constitutional Remedies under Article 32.

The right to constitutional remedies allows Indian citizens to approach the Supreme Court of India to protect their fundamental rights. The SC has the right to protect the fundamental rights of citizens, even against private entities, and can also grant compensation to the affected people. The Supreme Court of India is seen as a designated protector of these rights by the Constitution.

Thus, the Constitution of India has made the judiciary as “the protector and guarantor of Fundamental Rights”. On the other hand, this Constitutional right is the “heart and soul” of the Constitution as it can only make Fundamental Rights effective.

However, the right to move the court for protection of Fundamental Rights may be suspended during an emergency except those rights provided by Article 20 and Article 21.

Restriction on Fundamental Rights

Though the Constitution of India guarantees all these Fundamental rights for the citizen, yet there are some limitation and exceptions of these rights also. A citizen cannot enjoy Fundamental Rights absolutely or at will. Within some Constitutional limitation citizen can enjoy their Rights. The Constitution of India imposes some reasonable restrictions upon enjoyment of these Rights so, that public order, morality and health remain intact. The Constitution always aims at restoration of collective interest along with individual interest. For example; right to religion is subject to restrictions imposed by the state in the interest of public order, morality and health so, that the freedom of religion may not be abused to commit crimes or anti-social activities. Similarly, Rights guaranteed by article-19 does not mean absolute liberty. Absolute individual rights cannot be guaranteed by any modern state. Therefore, our Constitution also empowered the state to impose reasonable restrictions as may be necessary in the larger interest of the community. our Constitution always attempts “to strike a balance between individual liberty and social control.” and to establish a welfare state where collective interest got prominence over individual interest .Freedom of speech and expression (Art.19-1-A) is also subject to reasonable restrictions imposed by the state relating to defamation, contempt of court, decency or morality, security of the state, friendly relations with foreign states , incitement to an offence, public order, maintenance of the sovereignty and integrity of India . Freedom of assembly (Art.19-1-B) is also subject to reasonable restrictions imposed by the state that the assembly must be peaceful and without arms in the interest of public order. Freedom of press which is included in the wider freedom of expression is also subject to reasonable limitations and the state can impose restriction upon freedom of press in the larger interest of the state or for the prevention of contempt of court, defamation or incitement to an offence.

1.8 Fundamental duties

Simply the responsibility to do a job is known as duty. Duty is the positive or negative work that a man or a woman has to do voluntarily or involuntarily. The

fundamental duties are those duties that are very essential for each citizen for their own progress, for the progress of society and for the welfare of the nation. The fundamental duties are intended to serve as a constant reminder to all citizens that, although the constitution conferred upon it certain fundamental rights, citizens must also observe certain basic rules of democratic behaviour and democratic conducts

1. To abide by constitution: The very first duty of every citizen of the country is to comply with the Constitution and respect its ideals and institutions, the National Flag and the National Anthem.
2. To Cherish and follow the noble ideals: Another fundamental duty of every citizen of the nation is treasure and follows the noble ideals that inspired our national struggle for freedom.
3. To uphold and protect sovereignty: The very next fundamental duty of the citizens is to defend and protect the sovereignty, unity and integrity of the country.
4. To defend the country: Defend the country and provide national service when requested is the fundamental duty of the citizens of the country.
5. To promote harmony and the spirit of brotherhood: Promote the harmony and spirit of common fraternity among all the peoples of India that transcend religious, linguistic and regional diversity or of caste; renounce derogatory practices against the dignity of women.
6. To value and preserve the rich heritage of our composite culture.
7. To develop the scientific temper, humanism and the spirit of inquiry and reform.
8. To safeguard public property and to abjure violence: Safeguard public property and abjure violence.

9. To strive towards excellence in all spheres of individual: Strive for excellence in all spheres of individual and collective activity so that the nation constantly rises to higher levels of commitment and achievement is another basic duty of the citizens of the country.
10. To protect and improve the natural environment: To protect and improve the natural environment, including forests, lakes, rivers and wildlife, and to have compassion for living creatures;
11. Parent or guardian should provide opportunity for education to his children: Whoever is a parent or guardian, they have to provide the education opportunities to their children or guardianship, as the case may be, between the ages of six and fourteen.

1.9 Hierarchy of the judiciary and courts in India

The feature Indian judiciary system is its hierarchical structure of courts. There are different levels of judiciary system in India empowered with distinct type of courts. The courts are structured with very strong judiciary and hierarchical system as per the powers bestowed upon them. **This system is strong enough to make limitation of court with its jurisdiction and exercise of the power.** The Supreme Court of India is placed at the top of the hierarchical position followed by High Courts in the regional level and lower courts at micro level with the assignment of power and exercising of the same for the people of India.

The following flowchart will help understand the hierarchy of courts in India.



The judiciary is one of the three wings of government. Administer justice through the judicial system. But how can ordinary people get justice if they do not know where to present their case? That is why we have a hierarchy of courts to guide people to present their claim in the correct court. It is essential to present a case in the correct court. Only then will the case be processed further. The hierarchy of the court in India begins with the Supreme Court, followed by the High Courts, District Courts and other judicial bodies.

Supreme Court of India

In India, the first-order court is the Supreme Court. It is in New Delhi and is part of the President of the Supreme Court and 30 other judges. It has very broad powers in the form of original, appellate and advisory jurisdiction. Citizens can present their case directly before the Supreme Court for violation of their fundamental rights. This is part of the original jurisdiction of the Supreme Courts.

As part of the appellate jurisdiction, the Supreme Court receives appeals from the High Courts and other courts and tribunals. The entertaining cases are both civil and criminal.

However, it also takes writ petitions in cases of serious human rights violations or any petition filed under Article 32 which is the right to constitutional remedies or if a case involves a serious issue that needs immediate resolution.

The proceedings of the Supreme Court are conducted in English only.

The President of India can also refer certain problems to the Supreme Court for advice. This forms the jurisdiction of advice. In addition, the law declared by the Supreme Court is binding on all courts located in India.

High courts

Followed by the Supreme Court, each Indian State has its own High Court. The Superior Courts are usually located in the capital of the State. But some states such as West Bengal, Karnataka, Tamil Nadu, Uttar Pradesh and others have higher court benches.

There are 24 High Courts at the State level. Article 141 of the Constitution of India mandates that they are bound by the judgements and orders of the Supreme Court of India by precedence. These courts have jurisdiction over a state, a union territory or a group of states and union territories. Below the High Courts are a hierarchy of subordinate courts such as the civil courts, family courts, criminal courts and various other district courts. High courts are instituted as constitutional courts under Part VI, Chapter V, Article 214 of the Indian Constitution.

The High Courts are the principal civil courts of original jurisdiction in the state along with District Courts which are subordinate to the High courts. However, High courts exercise their original civil and criminal jurisdiction only if the courts subordinate to the high court in the state are not competent (not authorized by law) to try such matters for lack of pecuniary, territorial jurisdiction. High courts may also enjoy original jurisdiction in certain matters if so designated specifically in a state or Federal law. e.g.: Company law cases are instituted only in a high court.

However, primarily the work of most High Courts consists of Appeals from lower courts and writ petitions in terms of Article 226 of the Constitution of India. Writ Jurisdiction is also original jurisdiction of High Court. The precise territorial jurisdiction of each High Court varies

Judges in a high court are appointed by the President after consultation with the Chief Justice of India, Chief Justice of High Court and the governor of the state. The number of judges in a court is decided by dividing the average institution of main cases during the last five years by the national average, or the

average rate of disposal of main cases per judge per year in that High Court, whichever is higher.

The Calcutta High Court is the oldest High Court in the country, established on 2 July 1862, whereas the Allahabad High Court is the largest, having a sanctioned strength of judges at 160.

District courts

The District Courts of India are established by the State governments of India for every district or for one or more districts together taking into account the number of cases, population distribution in the district. They administer justice in India at a district level. These courts are under administrative control of the High Court of the State to which the district concerned belongs. The decisions of District court are subject to the appellate jurisdiction of the concerned High court.

The district court is presided over by one District Judge appointed by the state Government. In addition to the district judge there may be number of Additional District Judges and Assistant District Judges depending on the workload. The Additional District Judge and the court presided have equivalent jurisdiction as the District Judge and his district court. The district judge is also called "Metropolitan session judge" when he is presiding over a district court in a city which is designated "Metropolitan area" by the state Government. The district court has appellate jurisdiction over all subordinate courts situated in the district on both civil and criminal matters. Subordinate courts, on the civil side (in ascending order) are, Junior Civil Judge Court, Principal Junior Civil Judge Court, Senior Civil Judge Court (also called sub-court). Subordinate courts, on the criminal side (in ascending order) are, Second Class Judicial Magistrate Court, First Class Judicial Magistrate Court, Chief Judicial Magistrate Court. In addition, 'Family Courts' are established to deal with matrimonial disputes alone. The principal judge of family court is equivalent to District Judge.

Subordinate courts

Subordinate courts are also known as village courts, Lok Adalat (people's court) or Nyaya panchayat (justice of the villages), compose a system of alternative

dispute resolution. They were recognized through the 1888 Madras Village Court Act, then developed (after 1935) in various provinces and (after 1947) Indian states. The model from the Gujarat State (with a judge and two assessors) was used from the 1970s onwards. In 1984 the Law Commission recommended to create Nyaya Panchayats in rural areas with laymen ("having educational attainments"). The 2008 Gram Nyayalayas Act had foreseen 5,000 mobile courts in the country for judging petty civil (property cases) and criminal (up to 2 years of prison) cases. However, the Act has not been enforced properly, with only 151 functional Gram Nyayalayas in the country (as of May 2012) against a target of 5000 such courts. The major reasons behind the non-enforcement includes financial constraints, reluctance of lawyers, police and other government officials.

❖ Exercise

Descriptive Questions

1. What is law? Define the objectives and purpose of law.
2. Define mercantile law and explain in detail the different sources of mercantile law.
3. Write the preamble to the Constitution of India and explain its importance.
4. Define in detail the various terms used in the Preamble to the Constitution of India.
5. Discuss the Fundamental Rights assured to every citizen of India.
6. As a citizen of India, what are the various fundamental obligations or duties he or she would require to carry out?
7. Explain in detail the hierarchy of the judiciary system in India.

Short Notes

1. Need for the knowledge of law for common man.
2. Define the various objectives of law.
3. Preamble to the Constitution of India. (Only text)
4. Define and explain the terms - Secular, Democratic, Republic, Sovereign
5. Define and explain the terms - Justice, Freedom, Equality and Fraternity.
6. Right to equality and freedom.

7. Fundamental duties
8. the Supreme Court of India
9. The High Courts.
10. District or sessions courts.

MCQs

1. The law that regulates the commercial activities of the economy is called_____?
 - a. Civil law
 - b. Criminal law
 - c. Mercantile law
 - d. Traffic law
2. Which of the following is an object of law?
 - a. Establishing standards
 - b. Protecting liberties and rights
 - c. Resolving disputes
 - d. All the Above
3. What does the popular maxim 'Ignorantia Juris not excusat' mean?
 - a. Ignorance of law is no excuse
 - b. Law must do justice
 - c. Every society must have law
 - d. All of the above
4. For which of the following reasons does a citizen need the knowledge of law?
 - a. To creates a sense of responsibility
 - b. To Create a binding duty
 - c. To Act as a guide
 - d. All of the above
5. When a law is passed and created through the parliament what source of law is it?
 - a. Customs and usage
 - b. Statute law
 - c. Judicial decisions
 - d. None of the above

6. This term _____ in the constitution means that India is neither a dependency nor a domain of any other nation
- a.Sovereign b.Secular
c.Democratic d.Republic
7. This term _____ in the constitution means that all religions in the country (regardless of their strength) have the same status and support of the state?
- a.Sovereign b.Democratic
c.Secular d.Republic
8. Which fundamental right prohibits discrimination based solely on religion, race, caste, sex, place of birth or any other reason?
- a. Right to equality
b. Right to freedom
c. Right against exploitation
d. Right to constitutional remedies
9. Which of the following is a fundamental duty of every citizen of India?
- a. To abide by constitution
b. To uphold and protect sovereignty
c. To defend the country
d. All of the above
10. The decisions of which of the court cannot be challenged, except by the President of India?
- a.High court b.Supreme court
c.District court d.Gram panchayat

MCQ Answer key

1	2	3	4	5	6	7	8	9	10
c	d	a	d	b	a	c	a	d	b

UNIT-2

INDIAN CONTRACT LAW – 1

- 2.1 Introduction, Object, definition and features of contract law**
- 2.2 Essential elements of a contract**
- 2.3 Classification of Contracts.**
- 2.4 Offer and legal rules as to an offer, Acceptance and legal rules as to acceptance.**
- 2.5 Acceptance**
- 2.6 Consideration and legal rules as to consideration. Exceptions to the rule "No Consideration No Contract".**
- 2.7 Capacity to contract: contracts with a minor, contract with people of unsound mind, and contracts with people disqualified by law**
- 2.8 Quasi-contracts.**

❖ Exercise

2.1 Introduction, Object, definition and features of contract law

On a daily basis we enter into lots of transactions who, from buying toothpaste to paying bills in hotels. To satisfy our daily wants and desires we enter into agreements which may be oral or written, expressed or implied which all results in contracts.

The Indian Contract Act, 1872 is an act which specifies and deals with the principles of the Law of Contract. This Act was enacted on 25th April, 1872 and subsequently came into force on the first day of September 1872. It is important to note here that ever since the enactment of this act in 1872, it has never been amended and thus the law that was made back in 1872 still stands good.

It extends to the whole of India except to the State of Jammu and Kashmir. The Act was passed by British India and is based on the principles of English Common Law.

This Act describes different stages in the formation of a contract, its performance, essential elements, breach of contract and remedies for the breach of contract. The Act deals with a number of limiting principles subject to which the parties to the contract may create certain rights or duties for themselves.

Object of the law of contract

The law of contract is that branch of law which determines the circumstances in which promises made by the parties to a contract shall be legally binding on them. Its rules define remedies that are available in a court of law against the person who fails to perform his contract, and the conditions under which the remedies are available. It is the most important branch of business Law. It affects all of us in one way or the other. It is, however, is of particular importance to people engaged in trade, commerce and industry.

The law contract introduces definiteness in business transactions. Sir William Anson observes in this connection that the law contract is intended to ensure that what a man has been led to expect shall come to pass, and that what he has been promised shall be performed. In simple words, it may be said that the purpose of the law of contract is to ensure the realisation of reasonable expectations of the parties who enter into a contract.

1. **Legal bind:** One of the primary purpose or objectives of law contract is to bind people by the law when they get into any transactions. It determines the circumstances in which promises made by the parties to a contract shall be legally binding on them.
2. **Provides Legal Remedies:** The law of contract provides legal remedies as and when needed by the parties to get into contracts. Every commercial transaction by its very nature is a legal contract and is legally binding onto the parties to it. In case of any breach or violation of the promises made by

either of the parties the law can intervene and provide legal solution to the parties if sought so by any of the parties to the contract through the court.

3. **Universal application:** The law of contract is one of the most important branches of business Law and it affects all of us in one way or the other though it is of particular importance to people engaged in trade, commerce and industry. When any person gets into any transaction with another person they are by default involving this branch of law in it. When one buys a packet of biscuits from a provision store or when a person boards a bus or when one buys or sells in the property. This branch of law is involved.
4. **Definiteness:** The law of contract does not define how a contract should be done but it lists down a few dos and don'ts about every transaction which brings about a definiteness in transactions whether related to business or otherwise.
5. **Social and economic justice:** In our society law serves as a medium of change and as a harbinger of social justice. A great part of law is designed principally to bring about all and the citizens individually and collectively. The law of contracts tries to bring about uniformity in the transaction and the dealings of the people within the society.

Definition of contract.

A contract is an agreement made between two or more parties which the law will enforce. Section 2 defines contract as “an agreement enforceable by law”.

Sir William Anson defines a contract as "a legally binding agreement between two or more persons by which rights are acquired by one or more to act or forbearance (abstaining from doing something) on the part of the others.

Pollock defines it is "every agreement and promise enforceable at law is a contract."

According to **Salmond**, a contract is "an agreement creating and defining obligations between the parties."

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

American Law defines contract in the following manner -A contract is a promise or a set of promises for the breach of which the law gives a remedy, or the performance of which the law in some way recognizes as a duty.

Features of the law of contracts.

- (1) **The act is not exhaustive:** The Indian contract act does not provide to be complete and exhaustive code. It deals with the general principles of contract and with some special contracts only. The law of contract differs from other branches of law in an important respect. The law contract does not define precisely to the parties as to, how a contract is to be done. It rather demarcates certain dos and don'ts or which can be defined as limiting factors, within which the parties to a contract are supposed to create a contract. As long as the parties to a contract do not infringe these set of prohibitions, they are free to create any contract and terms of contract as they feel free. This means that the parties to the contract create the laws for themselves. They can make what rules they like in respect of the subject matter of the agreement, and the law will give effect to their decisions.
- (2) **The law off contract is not the whole of agreement nor the whole law obligations:** There are several agreements which do not give rise to legal obligations. They are, therefore, not contracts. Similarly, there are certain obligations which do not necessarily spring from an agreement. For example, civil wrong, quasi-contracts judgements of courts etc. Salmond has rightly observed that the law contract is "not the whole law of agreements, or the whole law obligations. It is the law of those agreements

which create obligations, and those obligations which have their sources in agreements." It excludes from its purview all those obligations which are not contractual in nature and agreements which are social in nature.

- (3) **Law of contract creates Jus in Personam, As distinguished from Jus in Rem:** Jus in Rem means a right against or in respect of a thing. Jus in Personam means a right against court in respect of a specific person. A Jus in rem is available against the world at large; Jus in Personam is available only against a particular person.

- (4) **Agreement and its enforceability:** If we analyse the definitions of a contract, we find that a contract essentially consists of two elements (1) and agreements, and (2) its enforceability by law. An agreement is defined as "every promise and every set of promises, forming consideration for each other." "When the person to whom a proposal is made, signifies his assent there to, the proposal is it to be accepted. A proposal when expected, becomes a promise." This, in other words, means, that an agreement is an accepted proposal. To form an agreement, there must be a proposal or offer by one party and its acceptance by the other.

To sum up: **Agreement = Offer + Acceptance**

- (5) **Consensus ad idem:** The essence of an agreement is the meeting of the minds of the parties in full and final agreement; there must, in fact, be *consensus ad idem*. That order could be an agreement between two parties, that must be consensus ad idem. This means that the parties to the agreement must have agreed about the subject matter of the agreement in the same sense, and at the same time. Unless there is consensus ad idem, there can be no contract.
- (6) **Obligations:** An agreement to become a contract, must give rise to a legal obligation or duty. The term obligation is defined as a legal tie which imposes upon a definite person or persons. The necessity of doing or abstaining from doing a definite act or acts. It may relate to social or legal matters. An agreement which gives rise to a social obligation is not a contract. The rise to a legal obligation in order to become a contract.
- (7) **Agreement is a very wide term:** An agreement may be a social agreement or a legal agreement. If A invites B to a dinner and B accepts the invitation, it is a social agreement. A social agreement does not give rise to

contractual obligations and is not enforceable in a court of law. It is only those agreements which are enforceable in a court of law, which are contracts.

To conclude: **Contract = Agreement + Enforceability by law.**

2.2 Essential elements of a contract

According to section 10 of the contract act, all agreements are contracts if they are made by the *free consent* of *parties competent* to contract, for a *lawful consideration*, with a *lawful object* and are not expressly *declared to be void*. Hence as already discussed earlier the law contract is not an exhaustive code and it does not define how a contract should be made but rather defines a few limiting principles or as we can say some dos and don'ts regarding the contract. If an agreement abides by all the essential elements, it is possible for a person to create any contract and terms therein and the law will enforce them. Following are the essential elements of a valid contract.

- (1) **Offer and Acceptance:** There must be an offer and the said offer must have been accepted, which means there must be a minimum of two parties to an agreement, that is, one party making the offer and the other accepting it. The terms of an offer must be definite and unambiguous and the acceptance of the offer must be absolute and unconditional. The acceptance must also be according to the mode prescribed and must be communicated to the offeror. A partial or a conditional acceptance is no acceptance. Likewise in an offer wherein the meaning of which is either ambiguous or vague can not constitute an offer.
- (2) **Legal Relationship:** When a transaction or agreement happens between two parties, there needs to be an intention on the side of both the parties to enter into a legal relationship. Legal relationship means nothing else but an intention where the parties are willing to accept legal solutions through the process of law in case of disputes. Every commercial transaction by default creates legal relationship irrespective of the parties to the contract mentioning it in words written or spoken. Agreements of social and

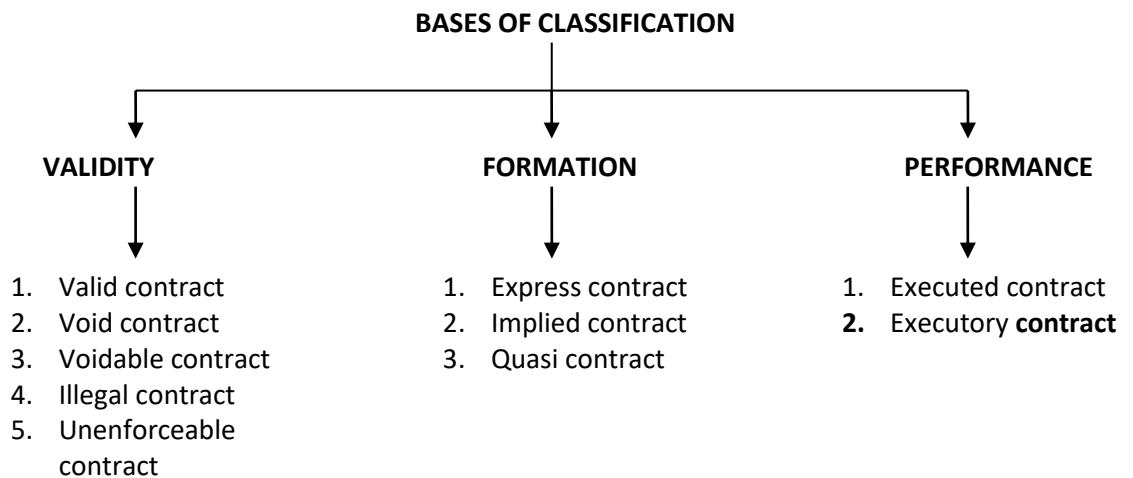
domestic nature do not create legal relationship and as such they are not contracts.

- (3) **Lawful Consideration:** Consideration specifically means "something in return". Every contract creates a right and obligation on the part of the parties to a contract. Wherein the right of one becomes the obligation of the other. A contract without consideration is no contract. This means that every party to a contract must give something and get something in return. Consideration can be present, past or future, the respective of its proportion and it can also be an act of abstinence, that is a promise to not do something. But it must be real and lawful.
- (4) **Capacity of Parties:** according to law a contract can only be done between parties who are capable to contract. Any person who does not possess the capacity to contract cannot create a legal contract and a legal relationship with any other person. As such every citizen of India is considered capable to contract except three people (a) a minor – a person who has not attained 18 years of age; (b) a person of unsound mind - any person with permanent or temporary unsoundness of mind is not considered capable to contract; and (c) people disqualified by law - a person disqualified by law to which he is subject to. If a party to a contract bears any one of these flaws in capacity, the contract is not enforceable by law.
- (5) **Free and Genuine Consent:** When two or more persons agree upon something in the same sense and at the same time there is said to be consent between. The parties to the contract have to be of the same mind on all the material terms of the contract. Consents between parties are generally considered to be free and genuine by law as long as they are not given under five circumstances, that is coercion, undue influence, fraud, misrepresentation and mistake.
- (6) **Lawful Object:** An agreement of which the object or consideration is unlawful is void. Object means the purpose or design of the contract. Implies the intentions with which the parties to an agreement come together. Any

object to a contract which is illegal, immoral or opposed to any public policy cannot be considered a valid object and hence cannot result into a valid contract.

- (7) **Agreement Not Declared Void:** The agreement must not have been expressly declared void by any law in force in the country. All agreements may not be enforceable at law, only those agreements which fulfil the essentials laid down in section 10 of the Contract Act can be enforced. An agreement that suffers from a flaw pertaining to any one of the essential elements of a contract like consideration, capacity of the party, object of contract etc. Are considered void and not enforceable by law and hence not contracts.
- (8) **Certainty and Possibility of Performance:** The agreement must be certain and not vague or indefinite. If it is vague and it is not possible to ascertain its meaning, it cannot be enforced. An agreement to perform an impossible act or over an agreement based on an uncertain event cannot mature into a contract.
- (9) **Legal Formalities:** An oral contract is as valid as written one and in the eyes of law both are treated equally. It is however, in the interests of the parties that the contract should be writing as it is easier to prove in the court of law in case of disputes. This means that a contract whether oral or written is equally enforceable by law. The law necessitates certain contracts to fulfil certain legal formalities for example in case of contracts of sale, mortgage, lease, negotiable instruments etc. The law requires them to be in writing. In case of purchase and sale of immovable properties the law requires the contracts to be registered. Certain contracts like registered marriages also require witnesses when the contract is being signed and the process is required to be carried out at the marriage registrar's office. Hence, such contracts where the law has defined certain legal formalities to be carried out have to be fulfilled for the contract to be valid.

2.3 Classification of Contracts



CLASSIFICATION ACCORDING TO VALIDITY

According to validity contract may be:

1. Valid contract
2. Void contract
3. Voidable contract
4. Illegal contract
5. Unenforceable contract

1. Valid contract: All contracts enforceable by law are valid contracts. According to sec 10, “All agreement(s) are contract if they are made by the free consent of parties competent to contract, for a lawful consideration and with a lawful object and are not hereby expressly declared to be void.” Thus, only a valid contract can create legal obligation.

2. Void contract: A void contract is a null contract. One that the law no longer enforces. According to Section 2(f), “A contract which ceases to be enforceable by law becomes void when it ceases to be enforceable.” An agreement which was legal and enforceable when it was entered into may subsequently become void due to –

- ❖ Impossibility of performance, and
- ❖ Change of law

For Example: Mr X agrees to make five paintings for an art gallery. After making two paintings Mr X dies in an accident. Here the contract becomes void due to the impossibility of performance of the contract.

3. Voidable contract: According to section 2(i), “An agreement which is enforceable by law at the option of one or more parties thereto, but not at the option of other or the others, is a voidable contract.” Voidable contract is so called because it is one which can convert to a valid or a void contract at the disposal of the party who is given the option by the law. If the party wishes to validate the contract it will stand so and then it cannot be reversed and if the party wishes to withdraw, that is make the contract void it can tend not become a valid contract but as long as this decision to make the contract valid or void is not taken by the party it remains voidable.

4. Illegal contract: Illegal Contracts Are Those Which Are Forbidden by Law and hence all illegal contracts are void. Because of the illegality present in the contract, they cannot be enforced by any court of law. In fact, any contract with his partially illegal or even if an associated contract is illegal to whole contract gets tainted by the legality. Contracts which are opposed to public policy or immoral are also illegal. For example, contracts to commit a crime are illegal contracts.

6. Unenforceable contract: An unenforceable contract, which, though perfectly valid in all respects, lacks some technical requirements, needed to make it enforceable such as non-registration, want of proper stamp, lack of signature, etc. Such contract can be enforceable in future if these defects are cured. And an enforceable contract differs from an illegal contract is it is not tainted by illegality and not against the law like an illegal contract, but it is one which is not enforceable by the law and hence the parties to an unenforceable contract may not be able to seek legal remedy in case of a dispute.

CLASSIFICATION ACCORDING TO FORMATION

According to formation, contract can be

1. Express contract
2. Implied contract
3. Quasi contract

1. Express Contract: According to section 9, a contract is said to be 'express' when it is entered into by words spoken or written. An express contract is one which is expressed in words. The words may be spoken or written, both will result into a valid contract. This means that when a proposal is made in words and the acceptance for the same is also done in words (spoken or written) the contract is said to be an express contract.

2. Implied contract: An implied contract is something which is not expressed in words. Though it is a valid contract it is something that arises out of the actions and conduct of the parties. For example: Mr A takes a public bus of a particular route. Here when the bus stops at the bus stop it is making an implied offer and when Mr A boards the bus, he is making an implied acceptance, hence resulting into an implied contract.

3. Quasi contract: An obligation of one party to another imposed by law independently of an agreement between the parties. A Quasi contract is created by law. Quasi contract does not fulfil all the requirements for the formation of a contract and in the strict sense, is not a contract at all. Thus, in quasi contract, the law implies a promise imposing obligations on one party and conferring rights in favour of other even when there is no privity of contract between the parties. For e.g. The municipality acquires a strip of land from Mr A to broaden the road and the municipality would pay Mr A, a monetary compensation equivalent to market rates. Mr A is not willing to enter into this contract. Here if this matter goes to the court the Court will hold its decision in favour of the municipality due to larger public interest and will enforce Mr A to accept the contract. Such a contract is known as a quasi contract.

CLASSIFICATION ACCORDING TO PERFORMANCE

Contract according to performance may be –

1. Executed contract
2. Executory contract

1. Executed contract: An executed contract is one where both the parties have performed their obligations under contract. In other words, it is a completed contract. Where one or more parties to the contract have completed their share of obligation and receive consideration.

2. Executory contract: An executory contract is one where any one or both the parties have yet to perform their obligations. For e.g., A agrees to deliver a car to B at Rs.5000 and if A has not delivered the car nor B has paid, the contract is said to be executory contract.

2.4 Offer and legal rules as to an offer, Acceptance and legal rules as to acceptance

It is clear from the previous discussion that a proposal or a promise backed by legal consideration is an agreement and if the agreement is legally enforceable it becomes a contract. It is therefore clear that the starting point of every contract is a proposal or a promise. An offer is nothing else but a proposal made by one person to another. A person is said to have made a proposal, when he "signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence." [Sec. 2 (a)]. The one who makes the offer is known as an offeror and the one to whom the offer is made is known as an offeree. When the offeree accepts the offer, it becomes an acceptor or promisee. Thus, there are two constituents to an offer. One, the **willingness** to do or abstain from doing an act and second, there must be an intention to obtain the **assent** of the other party.

2.4.1 Types of Offers

Offers can be classified into the following categories:

1. **General offer:** It is an offer made to public at large with or without any time limit. In Terms of Section 8 of the Act, anyone performing the conditions of the offer can be considered to have accepted the offer. Until the general offer is retracted or withdrawn, it can be accepted by anyone at any time as it is a continuing offer. **For example:** "A" makes a declaration in a newspaper that he will pay Rs. 20,000 to the person who finds his lost dog. Here the offer is made to the world at large and anybody is qualified to accept.
2. **Special / specific offer:** Where an offer is made to a particular and specified person, it is a specific offer. Only that person can accept such a specific offer, as it is special and exclusive to the person only. **For example:** when A makes a job offer to B, the offer can be accepted by B alone and no one else this is a specific offer.
3. **Cross offer:** As per section 2(b), when a person to whom an offer is made signifies his assent, the proposal is said to be accepted to stop us, assent can be only to a "proposal". If there is no proposal, the question of its acceptance cannot arise. For example: If A makes a proposal to B to sell some goods at a specified price. B without knowing the proposal of A, makes a proposal to purchase the same goods at a price specified in the proposal of A. This is not considered as an acceptance by B. As both the parties A and B are making offers and there is no acceptance. These are mere cross offers and cannot result into a binding contract.
4. **Counter offer:** When a person receives an offer from an offeror, the offeree instead of accepting it straight away, imposes conditions which have the effect of modifying or varying the offer, he said to have made a counter offer. Counter offer amounts to the rejection of the original offer and hence cannot result into a binding contract.
5. **Standing or continuing or open offer:** An offer which is made to public at large and if it is kept open for acceptance for a certain period of time, it is known as standing or continuing or open offer. **For example:** When

someone or an organisation invites tenders for the supply of materials and goods. It is a classic example of standing offer.

6. **Express offer:** When the offeror expressly communicates the offer, it is said to be an express offer. The express communication of the offer may be made by words spoken or written.
7. **Implied offer:** An offer that can be understood by the conduct of the parties or circumstances of the case is called an implied offer. **For example:** when a bus transport company runs its bus on a particular route and stops at a particular pickup point or bus stop to pick up passengers, the stopping of the bus at the bus stop itself is an implied offer and likewise when a passenger boards the bus it is an implied acceptance.

2.4.2 Legal rules as to an offer

1. **Offer must be such as in law is capable of being accepted and giving rise to legal, relationship:** A social invitation, even if it is accepted, does not create legal relations because it is not so intended. An offer, therefore, must be such as would result in a valid contract when it is accepted.
2. **Terms of-offer must be definite, unambiguous and certain and not loose and vague:** If the terms of an offer are vague or indefinite, its acceptance cannot create any contractual relationship. For example: A offers B a job and promises him to pay a handsome salary, here the proportion of salary cannot be determined from the word handsome and hence it is not an offer. Or for example: A says to B "I wish to buy your car" B owns three different cars. The offer is not definite.
3. **An offer may be distinguished from: (a) A declaration** of intention and an announcement A declaration by person that he intends to do something gives no right of action to another. Such a declaration only means that an offer will be made or invited in future and not that an offer is made now. An advertisement for a concert or an auction sale does not amount to an offer to hold such concert or auction sale. A father wrote to his would-be son-in-law that his daughter would have a share of what he left. Held, it was merely a statement of intention. Likewise, an announcement of a beauty competition

by a Beauty Parlour or a scholarship examination by some College Is not an offer. **(b) An invitation** to make an offer or do business. Display of goods by a shopkeeper in his window, with prices marked on them, is not an offer but merely an invitation to the public to make an offer to buy the goods at the marked prices. Likewise, quotations, catalogues, advertisements in a newspaper for sale of an article, or circulars sent to potential customers do not constitute an offer. They are instead an invitation to the public to make an offer. A person, in case the prices of the goods are marked, cannot force the seller to sell the goods at those prices. He can, at the most, ask the seller to sell the goods to him, in which case he would be making an offer to the seller and it is up to the seller to accept the offer or not.

4. **Offer must be communicated:** An offer, to be complete, must be communicated to the person to whom it is made. Unless an offer is communicated to the offeree by the offeror or by his duly authorised agent, there can be no acceptance of it. An acceptance of an offer, in Ignorance of the offer, is no acceptance and does not confer any bind on the acceptor. **For example:** Mr. X offered a reward to anyone who returned his lost dog. Mr. Y brought the dog to Mr. X without having heard of the offer. The court held that, Mr. Y was not entitled to the reward as the offer was never communicated to him.
5. **Offer must be made with a view to obtaining the assent:** The offer to do or not to do something must be made with a view to obtaining the assent of the other party addressed and not merely with a view to disclosing the intention of making an offer.
6. **Offer may be express or implied:** An offer made by words, spoken or written is termed as an 'express offer'. 'Implied offer' means an offer made by conduct, an offer may also be implied from the conduct of the parties or the circumstances of the case. This is known as an implied offer. When one person allows the other to perform certain acts under such circumstances that nobody would accept them without consideration it will amount to an offer by conduct and the permission of the party, who is benefitted by such

performances, will amount to his acceptance. **Example:** A bus company runs a bus on a particular route. This is an implied offer by the bus company to take any person on the route who is prepared to pay the prescribed fare. The acceptance of the offer is complete as soon as a passenger gets into the bus.

7. **Offer should not contain a term the non-compliance of which may be assumed to amount to acceptance:** Thus, a man cannot say that if acceptance is not communicated by a certain time, the offer would be considered as accepted. **For Example:** A writes to B, "I will sell you my horse for Rs. 5,0000 and if you do not reply, I shall assume you have accepted the offer," there is no contract if B does not reply. B is under no obligation to speak. However, if B is in possession of A's horse at the time the offer is made and he continues to use the horse thereafter, B's silence and his continued use of horse amount to acceptance on his part of the terms of A's offer, only in this situation will silence amount to acceptance and never otherwise.
8. **A statement of price is not an offer:** A mere statement of price cannot be interpreted as an offer to sell. For Example: Ram sent an e-mail to Rahim, asking him to questions "will you sell me your shop?" And "please e-mail the lowest possible price for the shop". Rahim replied with an e-mail saying "the lowest price for the shop is Rs. 50 lakhs". Here though Rahim is quoting a price he is nowhere showing his willingness to sell the shop. Hence it can't be considered an offer.
9. **The offer may contain any number of conditions:** The offeror is free to include any terms and conditions in his offer. The terms and conditions should be communicated to the offeree before or at the time of making the offer. Any terms and conditions made after the formation of a contract, shall not be binding to the offeree.
10. **Tenders:** A tender (in response to an invitation to offer) is an offer and may be either a definite offer to supply specified goods or services; or a standing

offer. When tenders are invited for the supply of specified goods or services, each tender submitted is an offer. The party inviting tenders may accept any tender he or she chooses and thus bring about a binding contract. **For Example:** A invites tenders for the supply of 1, 00,000 bricks. X Y, and Z submit the tenders. A accepts Xs tender. There is a binding contract between A and X. Tender can be a **standing offer**, where goods or services are required over a certain period, a trader may invite tenders as a standing offer, which is a continuing offer. The -Acceptance of a standing offer has the effect that as and when the goods or services are required, an order is placed with the person who submitted the tender and each time a distinct contract is made.

- 11. Special terms in a contract:** Where any special terms are to be included in a contract, these must be duly brought to the notice of the offeree at the time when the proposal is made. If it is not done and if the contract is subsequently entered into, the offeree will not be bound by them. Also, these terms should be presented in such a manner that a reasonable man can become aware of them before he enters into a contract.

Examples.

- (a) A hotel put up a notice in a bed room, exempting the proprietor from liability for loss of client's goods. Held, the notice was not effective as it came to the knowledge of the client only when the contract to take a room had already been entered into [Oley v. Marlborough Court Ltd., (1949) K.B. 5321.
- (b) A transport company accepts goods of G for being carried without any conditions. Subsequently it issues a circular to the consignors limiting its liability for the goods damaged lost in transit. G is not bound by this condition since it is not communicated to him prior to the date of contract.

Certain conditions are attached to transactions like purchase of a ticket for a journey or deposit of luggage in a cloak room. Wherever on the face of a ticket the words "For conditions see back" are printed, the person concerned is as a matter of law held to be bound by the conditions subject to which the

ticket is issued whether he takes care to read them or not. The fact that he did not or could not read do" not alter the legal position.

If conditions are printed on the back of a ticket, but there are no words at all on the face of it to draw the attention of the person concerned to those conditions, he is not bound by them. However, if the conditions are contained in a voucher or receipt for payment of money which is normally not supposed to contain the conditions of the-contract, they do not bind the person receiving the voucher or receipt.

Ordinarily, the acceptance of a document containing the contract Implies acceptance, of all the terms contained in the document. Exceptions are, however, made in the following cases: (1) When there is a misrepresentation or fraud. (2) When the notice of the terms is insufficient.

2.5. Acceptance

The acceptance is the assent given by the offeree to an offer made to him. A contract emerges from the acceptance of an offer. Acceptance is the act of assenting by the offeree to an offer. In other words, it is the manifestation by the offeree of his willingness to be bound by the terms of the offer. It is "to an offer what a lighted match is to a train of gunpowder. It produces something which cannot be recalled or undone". This means when the offeree signifies his assent, to the offeror, the offer is said to be accepted. An offer when accepted becomes a promise (Sec. 2 (b)].

The analysis of this legal definition shows that an acceptance is the consent given to the offer and a binding contract between the offeror and the offeree come into existence on the acceptance of offer.

Acceptance may be express or. implied. It is express when it is communicated by words spoken or written or by doing some required act. It is implied when it is to be gathered from the surrounding circumstances or the conduct of the parties.

Examples: At an auction sale, Mr. Alan is the highest bidder. The auctioneer accepts the offer by striking the hammer on the table. This is an implied acceptance.

Who can accept

Acceptance of **particular offer**. When an offer made to a particular person, it can be accepted by him alone. If it is accepted by any other person, there is no valid acceptance. The rule of law is clear that if you propose to make a contract with A, B cannot substitute himself for A without your consent.

Acceptance of **general offer**. When an offer is made to world at large, any persons to whom the offer is made can accept it. **For example:** Mr. Vishnu issued a pamphlet offering a reward of Rs. 5000 to anybody who would trace and bring back his nephew. Mr Sudama traced the boy and brought him back to Mr Vishnu. Mr Sudama who traced the boy, was entitled to the reward, as the pamphlet was an offer made by Mr Vishnu to the public at large.

2.5.1 Legal Rules as to Acceptance

The acceptance of an offer is the very essence of a contract. To be legally effective, it must satisfy the following conditions

- 1. It must be absolute and unqualified:** Acceptance must conform with the offer. An acceptance, in order to be binding, must be absolute and unqualified [Sec. 7 (1)] in respect of all terms of the offer, whether material or immaterial, major or minor. If the parties are not **ad idem** on all matters concerning the offer and acceptance, there is no contract'. Acceptance must correspond with all the terms of the offer. **Conditional acceptance is no acceptance. Partial acceptance is no acceptance.** If there is a variation in the terms of the acceptance, it is not an acceptance, but a counter-offer, which the proposer may or may not accept. A counter-offer destroys the original offer. For Example: A offers to sell his house for a sum of Rs. 20,0000 B sends his acceptance to purchase it for a sum of Rs. 19,0000. There is no acceptance. It will be taken as a new offer from B, which may not be accepted by A.
- 2. It must be communicated to the offerer:** A valid contract arises only if the acceptance is communicated to the offerer or his authorised agent. If the acceptance is communicated to any other person, it will not create any legal

relationship. However, if the offer is made by an agent on behalf of his principal, then the acceptance can be communicated either to the principal or his agent. **For example:** The manager of a railway company received a draft agreement. The manager wrote the word “approved” and put the draft in the drawer of his table. By some oversight the document remained in the drawer and was never communicated. There was no contract as the acceptance had not been communicated.

3. It must be according to the mode prescribed or usual and reasonable

mode: If the acceptance is not according to the mode prescribed, or some usual and reasonable mode (where no mode is prescribed) the offeror may intimate to the offeree within a reasonable time that the acceptance is not according to the mode prescribed and may insist that the offer must be accepted in the prescribed mode only. If he does not inform the offeree, he is deemed to have accepted the acceptance [See. 7 (2)]. **For Example:** A makes an offer to B and says: "If you accept the offer, reply by email." B sends the reply by post. It will be a valid acceptance only if A informs B that the acceptance is not according to the mode prescribed.

4. It cannot be implied from silence: The offeror cannot frame his offer in such a way as to make the silence or inaction of the offeree to operate as an acceptance. In other words, the offeror can prescribe the mode of acceptance but not the mode of rejection. The acceptance of an offer cannot be implied from the silence of the offeree or his failure to answer, unless the offeree has by his previous conduct indicated that his silence means that he accepts.

5. It must be given within a reasonable time: If any time-limit is specified, the acceptance must be, given within that time. If no time limit is specified, it must be given within a reasonable time. The reasonable time may be decided by the court and it may differ from case to case at the discretion of the court. **For Example:** a company offers its shares for public and determines a particular date within which the applications for the shares should be received by the company. If any person applies for the shares after the due date is gone, the company has the right to reject that person's

application on the grounds that it was not received within the prescribed time period.

6. **It cannot precede an offer:** There can be no acceptance of an uncommunicated offer. Acceptance cannot precede an offer. A person who has no knowledge of an offer cannot be said to have accepted it merely because he happened to act just by chance in the manner prescribed by the offer.
7. **It must show an intention on the part of the acceptor to fulfil terms of the promise. If no such intention is present, the acceptance is not valid:** Acceptance, in order to be valid, must be made under circumstances which would show that the acceptor is able and willing to fulfil the promise. Acceptance must show an intention on the part of the acceptor to fulfil the promise. If no such intention is present, the acceptance is not valid.
8. **It must be given by the party or parties to whom the offer is made:** If the proposal is made through an agent; it is sufficient if the acceptance is communicated to him. **For Example:** If A sends the offer to B through his agent C and B gives his acceptance to C, the acceptance is complete resulting into a valid contract. It is immaterial whether C communicates the acceptance of B to his principal A or not.
9. **It must be given before the offer is withdrawn:** The acceptance to an offer must be given before the offer was withdrawn. When an offeror has made an offer, he holds the right to withdraw the offer at any time prior to the acceptance. As we've discussed earlier once the acceptance is done the offer turns into a contract, but the offeror can withdraw the offer before the acceptance. Hence, it is important for the offeree to give the acceptance before the lapse of time of the offer (in case where an offer is time bound) or the offer is withdrawn. **For example:** Mr Sunny offers to sell his car to Mr Bobby for a price of Rs. 2 lakhs and asks Mr Bobby to reply within a period of five days. Mr Bobby intended to buy the car for the price, but was taking his time to reply. Before Mr Bobby accepts the offer and before the time limit of five days finishes, Mr Sunny calls up Mr Bobby and withdraws his

offer to sell the car. In this case there is no contract as the offer was withdrawn before the acceptance was done. Hence it is necessary that the acceptance is to be done before the offer is withdrawn.

10. Acceptance subject to contract: Where an offeree accepts an offer "subject to contract" or "subject to formal contract" or "subject to contract to be approved by solicitors", the matter remains in the negotiation stage and the parties do not intend to be bound until a formal contract is prepared and signed by them. For Example: C and D signed an Agreement for the purchase of a house by D "subject to a proper contract" to be prepared by C's solicitors. A document was prepared by (C's solicitors and approved by D's solicitors, but D refused to sign the document. Held, there was no contract as the agreement was only conditional.

11. Agreement to agree in future: If the parties have not agreed upon the terms of their contract but have made an agreement to agree in future, there is no contract. Lord Wensleydale observed that "an agreement to be finally settled must comprise all the terms which the parties intend to introduce into the agreement. An agreement to enter into an agreement upon terms to be settled afterwards between the parties is a contradiction in terms. For Examples: An actress was engaged by a theatrical company for a certain period. One of the terms of the agreement was that if the play was shown in London, she would be engaged at a salary to be mutually agreed upon. There is no contract, Since the salary terms of the agreement were to be agreed in the future.

2.6 Consideration and legal rules as to consideration. Exceptions to the rule "No Consideration No Contract".

Consideration is one of the essential and most important factors of valid contract. It is made compulsory to have consideration to formulate a valid contract. In the law, it is used in the sense of "**quid-pro-quo**" i.e., **something in return**. This something becomes a base or the essence for a contract. A contract is always created for mutual benefits of the parties to it. Consideration enables the parties to avail such benefits. This something, that is why, must be present into every contract. It is primarily a price at which, the promise of the other is bought for a

reciprocal promise. This consideration with a view to satisfy the contract must move from either of the parties to the other. It is the price paid by promisee for the obligation of the promisor. **For Example:** If Mr. A promises to deliver a car to Mr. B for Rs.250000. Car is the consideration for the promise of Mr. B to pay Rs.250000 and that amount is the consideration for the promise of Mr. A to hand over the car to Mr. B.

Sec.2 (d) of the Indian Contract, Act defines consideration as, “When at the desire of the promisor or any other person, has done or abstained from doing or does or abstains from doing or promises to do or to abstain from doing something, such act or abstains or promise is called consideration for the promise.

According to justice Lush, “In the sense of law, consideration consists in some rights, advantages, interest or benefit accruing to one party and some loss, detriment or responsibility given, suffered and undertaken by the other. It must result into some benefit to the plaintiff or loss to the dependant.

The presence and movement of consideration is necessary in every contract by the law. A contract without consideration will not be enforceable by law. A contract without consideration is better known as "Nudum Pactum" i.e., a contract which does not offer any remedy under the law. A gratuitous act or a promise without consideration is not looked upon by law as a valid contract. Hence a doctrine is laid down that, "No Consideration No Contract". A valid contract must have consideration moved from either of the parties to the other.

2.6.1 Essential elements for Legal rules as to consideration:

For any consideration to be a valid consideration necessarily need to follow the following legal rules for essential elements required by law for consideration.

- 1. Consideration must proceed at the desire of the Promisor:** Very much like all the other terms on a contract even consideration is something that is decided and will move at the desire of the promisor or offeror. An act done at the desire of a third party is not a consideration. Voluntary acts also would

not constitute good consideration in the eyes of law. If A rushes to B's help whose house is on fire, there is no consideration here. It is a voluntary act of A. But if A goes to B's help at B's request who promises, to give a reward for the help then there is consideration. It is not necessary that the promisor himself should be benefited by consideration. It is sufficient if the act or forbearance constituting consideration was done or given at the promisor's request. Thus, acts done or services rendered voluntarily, or at the desire of third party, will not amount to valid consideration so as to support a contract.

2. **Consideration may move from the promisee or any other person:** In English Law consideration must move from the promisee. Under the Indian Contract Act, consideration may proceed from the promisee or any person. Thus, consideration furnished by a third party will also be valid if it has been done at the desire of the promisor. But it does not follow that the third party can sue on the agreement. According to the law, in the background of India circumstances, so long as consideration is present and moved at the desire of the promisor, it is immaterial who has finished it. **For example:** Mr Robin wants to gift his son a motorcycle on passing his HSC examination. Since the son is already 18 years of age he decided to buy a motorcycle in his son's name. The parties to the contract here would be the motorcycle company and Mr Robin's son and Mr Robin though is the one who paid for the motorcycle would be a stranger to the contract. This means that consideration can move from the promisor or any other person. Though a stranger to a contract can provide for consideration but cannot sue in the court of law.
3. **Consideration may be a promise to do something or abstain from doing something:** Consideration can be a promise to do something and also a promise to not do something or abstain from doing something (or forbearance). According to the Indian law forbearance (a promise to not do something) is a valid consideration. **For example:** a famous cricketer signs a contract with an advertising agency to do television ads for the agency for a period of one year. The agency would pay a sum of Rs. 1 crore to the cricketer for this contract. The agency offers another one crore to the

cricketer for the same contract provided he commits not to advertise for any other agency for one year. Here the contract has two obligations on the part of the cricketer first to shoot ads for the ad agency and second to not shoot ads for any other agency. The first commitment is an act to do something and the second commitment is an act of forbearance (promise to not do something).

4. **It may be past, present or future:** The words of Sec.2(d) are. “Has done or abstained from doing (past) or does or abstains from doing (present) or promises to do or to abstain from doing (future).” This clearly means that consideration may not necessarily be present. When a consideration is moved for something which has been done earlier or when a consideration is moved for a promise to be fulfilled later on, all these are valid consideration.

Past consideration: Where the promisor had received the consideration before the date of the promise, the consideration is termed as “Past consideration.”

Example: A teaches the child of B at B’s request. After six months B agrees to pay A a sum of Rs.600/- for his teaching. For B’s promise the services of A will be taken as past consideration.

Present consideration: When the promisor receives consideration simultaneously with his promise, the consideration is termed as Present Consideration.

Example: A purchased goods from a shopkeeper of the worth of Rs.100/- A pays money to the shopkeeper. Consideration will be taken as “Present”.

Future consideration: Where the promisor has received consideration in future for his promise, the consideration is said to be “future”.

Example: A promises to sell his house to B for a sum of Rs. 15,000/- after a week. B also promises to pay A Rs. 15,000/-. Consideration is future for both the parties.

5. **It need not be adequate:** Adequacy of consideration is not a concern of the law, which means the law is concerned with the presence of consideration and not its proportion. Inadequacy of consideration will not invalidate a contract. It is open to the parties to fix their own price. For example if A

voluntarily agreed to sell his car for Rs. 500/- to B, it will be a valid contract despite the inadequacy of the consideration. It is to be noted here that though inadequacy of consideration will not invalidate a contract but may be taken into account by the court in determining the question whether the consent of the promisor was freely given.

6. **Consideration must be real and not illusory:** If a person is already bound to do some act or abstinence under his legal or contractual obligation, that act or abstinence would not form a consideration for a fresh promise. That means as it is the duty of the person to fulfil the obligation, he cannot expect another promise from the other party to satisfy his legal or contractual obligation. **For example:** if a person has been summoned by a court to appear in the court as a witness to a case. It is every citizen's constitutional duty to be present in the court without any remuneration or returns. If any person puts up a condition like this that he would appear in the court only if compensation was given in such a condition would be considered illusory.
7. **It must be lawful:** Consideration must be lawful. To be enforceable consideration must be lawful consideration. If it is unlawful, there shall not be any enforcement. When consideration is unlawful it is either **illegal or immoral or opposed to public policy** or is of such a nature to contravene one or more provisions of any law in the country or if permitted it involves a moral turpitude, in such cases, the consideration as well the contract cannot be enforceable.

2.6.2 Exceptions to the rule "No Consideration No Contract" for Nudum Pactum

We have learnt that an agreement without consideration is void. In fact, one of the most important elements of a valid contract is consideration and it must be present for a contract to be enforceable. A contract without consideration is void ab initio and no right shall be conferred over either of the parties under the contract. That is why the doctrine "No Consideration No Contract" is always applicable in each case. Under the Roman law and agreement without

consideration is called "Nudum Pactum" (a naked agreement) and was not enforceable under law and not binding upon the parties. Though it is applicable to each case and contract this law is also subject to certain exceptions under section 25 and 185.

1. **On account of natural love and affection:** A written and a registered agreement made between parties out of natural love and affection does not require consideration. Such an agreement is enforceable even without consideration. It is important that the parties should be of near relations like husband and wife to get this exception. Some of the other such relations can be farther – son, father – daughter, mother – son, mother – daughter. Though these are some of the defined relations by the court there must be a proof of natural love and affection between the parties. The court cannot presume such a state because it is indicated by the section that nearness of relations does not necessarily prove natural love and affection between the parties. **For example:** Mr A, out of his natural love and affection, promises to give his wife, Rs. 10,000 every month. This promise is put into writing and is registered. It will be valid contract without consideration.
2. **Promised to compensate for voluntary service:** A promise to compensate wholly or in part for past voluntary services rendered by someone to the promisor does not require consideration for being enforced. However, the past services must have been rendered voluntarily to the promise. Further the promisor must have been in existence at that time and he should have intended to compensate. However, to enforce such a promise following conditions must be satisfied:
 - a. the act or the service or abstinence must have been made a voluntarily by the promisee.
 - b. The promisor, now promises to compensate the act.
 - c. The act done must have been a legal obligation of the promisor.
 - d. The promisor must have been in existence when the act was carried out.
 - e. The act must have been a lawful one.

3. **Promise to pay a time barred debt:** Where there is a promise in writing to pay a debt, which was barred by limitation, is valid without consideration. A promise to pay a time barred debt can enforceable by the creditor even though no fresh consideration is provided by him for such a promise. According to Indian Law of limitation, a debt becomes a time barred debt when it remains unpaid or unclaimed, wholly or part, for successive period of 3to 6 years or can be even longer depending on the state laws. This period is known as the statute of limitations. On the expiry of the time period such debts become legally irrecoverable and the contract between the parties comes to an end and creditors shall not have any remedy. To enforce such a promise, however, the following conditions must be satisfied.
- a. The debt must have been actually a time-barred debt.
 - b. The debtor must provide the promise to pay.
 - c. The debt must be a lawful one.
4. **Completed gift:** the rule "No Consideration No Contract" does not apply to completed gifts. According to explanation of section 25, nothing shall affect the validity, as between the donor and donee of any gift actually made. In such a case the person providing the gift cannot recover it form the promisee on the ground of want of consideration. However, this exception is not applicable to the gift, which is yet to be executed. Thus, a **promise to gift cannot be enforceable**.
5. **Creation of Agency:** Creation of agency does not require presence of consideration from either side. According to Sec. (185) the relation between principal and agent is as such in which the principal is bound by acts done by the agent. But agent is not bound in that way. So, principal provides the consideration, the agent does not. Thus, creation of agency is an exception.

2.7 Capacity to contract: contracts with a minor, contract with people of unsound mind, and contracts with people disqualified by law

Capacity to contract means competence of a party to bind and to be bound by legal consequences of any transaction made by them. Section 10 of the Contract

Act requires that an agreement to be enforceable by law must be made by the parties competent to contract. Section 11 of the contract Act provides that “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 by status from contracting by any law to which he is subject.” In other words, every person who (a) has attained the age of majority that is 18 years in India (b) is of sound mind and (c) is not otherwise disqualified by status from contracting by the law, is considered competent to contract

2.7.1 Minors:

In terms of the Indian majority act, 1875, every domiciled Indian attains majority on the completion of 18 years of age. However, where a Guardian is appointed by a court to protect the property of a minor and the court takes charge of the property before the person attains 18 years of age, then he or she would attain majority on completion of 21 years. The law here does not intend to limit the freedom of the minor, but rather protect its interest. The main reason for such a view is that a minor is considered incapable of performing his or her part of the contract imposing a legal obligation. The law understands that minors are inexperienced for any commercial transaction and so they are susceptible to pressure from other persons who are more experienced. They may make a contract, harmful to their own interest. It's observed by the law that, for the minors *court is servant, jury is counsellor and the law is guardian*. Therefore, legal position of a minor is very different from other persons.

2.7.1.1 Legal Rules as to Minority or Legal Position of a Minor:

- 1. Agreements with or by minors are void ab initio:** Agreements with or by minors are by the law to be absolutely void i.e., void ab initio (right from the beginning). They are destitute or having any legal effect since their inception. As a result, no right shall be afforded to either of the parties under such agreement. This rule was empathetically laid down in the case of *Mohiri Bibi V/s Dharmodas Ghose* in which Mr. D. a minor

mortgaged his property to a money lender to secure a loan of Rs.20000 out of which Rs.8000 was paid by the money lender, later on Mr. D, on the plea of his minority, instituted a case to set aside the mortgage valid, even though a part payment was made. So, mortgage was set aside and the property was handed over to Mr. D. Further the request of money lender to get back Rs.12000 was not accepted since any agreement with minor is void-ab initio and not treated as a contract at all.

2. **A minor can be beneficiary:** The incapacity of minor, although prevents him to make a contract, does not prove him to be a beneficiary, again holding the fact that the law is protected and not restrictive. That means may not prefer to shoulder responsibility but is completely allowed to take benefits of a contract. So, he can enter into a contract only for the benefits of it. Thus, he can be a payee an endorsee or beneficiary under a trust. These contracts include agreements which provide for the teaching, instruction or employment of a minor. It is to be noted that only his property is liable for liabilities arising out of such contracts. In no case he will be personally liable.
3. **No ratification:** Ratification by the minor to his agreement are not allowed by the law. Ratification means approving later. So, if a minor later on approves (after becoming a major) his deeds or acts made during minority. Such ratification shall have on effect. Ratification always has retrospective effect i.e., effect from the time when the act was approved or was initiated. In other words, a minor on his attainment of majority cannot validate any agreement which was entered into when he was a minor, is the agreement is considered void. Similarly, a minor cannot sign a fresh promissory note on his attaining majority in lieu of a promissory note executed for a loan transaction when he was a minor for a fresh agreement without consideration.
4. **He can plead minority:** A minor has been specifically protected by the law. He can always plead minority in the sense that minority can very well be an excuse for him to be escape from any responsibility. Even

though he, by misrepresenting his age can enter into a contract as major, at the time of fulfilment of obligation he can prove himself to be minor, he can legally escape from responsibility, even if it amounts to some harm or loss to be caused to a 3rd party.

5. **No application of restitution:** In the case of minor doctrine of restitution does not apply. According to this act under any contract, when it is prematurely restricted for any reason, a party, who has received some benefit under the contract from the other party, must restore it back to the party from whom it has been received. This rule is not applicable to a minor and as such he is not liable to restore back any such benefit.
6. **No Estoppels:** A minor is not bound by his mis-representations. If a minor procures a loan or enters into any other agreement by representing that he is of full age. He cannot be prevented from pleading his minority in his defence. He will not be held liable under the contract. But this does not mean that the minors are allowed to cheat and to enjoy the fruits of their fraud. According to S.33 of the Specific Relief Act, 1963 Court will order, on equitable considerations for restitution if the minor is still in possession of the money or things purchased out of it. The minor shall have no liability if the money or things cannot be traced out in his hands.
7. **Minor as Agent:** A minor can be appointed as an agent. He can represent his principal in dealings with other parties. Since minor does not incur any personal liability, he cannot be held responsible for his any act of negligence or fault. Therefore, the principal will be responsible to the third parties for the acts of his minor agent. He cannot hold the minor agent personally liable for any wrongful acts. Thus, the principal runs a great risk.
8. **He cannot be a partner:** Partnership is a contract so every party to the partnership must have contractual capacity. A minor does not have that capacity, as such cannot be a partner. However, he can be entered into of

partnership, with the consent of all other partners, for the benefits of the partnership.

9. Minor as a member of a company: A minor cannot be a member of a company since he is incompetent to enter into a contract. A minor may be allotted shares. His name may remain on a company's register of members, but during minority he incurs no liability. On attaining majority and becoming aware of the presence of his name in the register of members, the major has the option to repudiate his shares within a reasonable time. Where he does not do so he may safely be taken to have accepted his position. His liability as a share-holder then commences.

10. Minor's Liability for Necessaries: The Indian Contract, Act had provided a valuable exception to all the legal rules applicable to a position of minor. The law suggests that when a contract is made with or by a minor is legally bound to support, the supplier shall have surety of his payment even though such agreement is void ab initio. The noted act is that even in such a case a minor is not personally liable but his property or estate is. As such whenever necessities are supplied to a minor, the supplier can get his payment from the property of the minor.

2.7.2 Contracts with and by people of unsound mind

The next important requirement by the way of capacity to contract is "sound mind". A person will be considered to be of sound mind if he at the time of entering into a contract is capable of understanding it and forming a rational judgement as to its effect upon his interest. A person who is of unsound mind but occasionally of sound mind can enter into a contract when he is in sound mind though for temporary periods. For example, a person who is in lunatic asylum during intervals of sound mind can enter into a contract. Similarly, a person who is generally of sound mind, but occasionally of unsound mind cannot enter into a contract when he is of unsound mind.

Persons who cannot make a valid contract due to unsoundness of mind may arise from lunacy, idiocy or drunkenness or intoxication of mind:

1. **Lunacy:** Lunacy is of a temporary nature. A person is said to be a lunatic when he is deranged of his mental ability and capacity for some period due to some inherent defect or due to some external shock.
2. **Idiocy:** Idiocy is always a permanent nature. When a person has lost his mental powers permanently, he is said to be an idiot. This period of idiocy does not have any interval.
3. **State of drunkenness or intoxication:** Due to the effect of some liquor or some medicine a person's mind may be in the state of drunkenness or intoxication. He is delirious for some time. This period exists, generally only for a very short time. For such time any such contract shall be put an end and is void. However, such a person, in order to escape from the responsibility must prove such state of his mind.

2.7.3 Contracts with and by Persons of Particular Status or Disqualified by Law

Apart from minors and persons of unsound mind, there are others also who are not capable of entering into a contract either wholly or partially. It refers to the statutory disqualification imposed on certain persons in respect to their capacity to contract. Contracts with and by such persons are void. They are given some special status by respective laws to which they are subject and as such are considered incompetent to contract such parties may be as follows:

1. **Alien Enemy:** An alien enemy, during war cannot enter into a contract with an Indian subject unless he is permitted by the Central government to do so and he cannot sue in Indian courts. An alien enemy is any person who is a citizen of a country which India has declared as enemy country. This usually happens only in warlike situations or similar emergencies. For example: Mr A a citizen of India as a regular and official business which is real brother Mr B settled in and citizen of Pakistan. If at any point of time India declares Pakistan as an enemy country, Mr B becomes an alien enemy Mr A. This remains still the two countries undergo turbulent relations and once the relations of the two countries get normal regular business between Mr A and Mr B can carry on.

2. **Foreign sovereigns:** Foreign sovereigns and accredited representatives of foreign states, i.e., Ambassadors. High Commissioners. enjoy a special privilege in that they cannot be sued in Indian courts, unless they voluntarily submit to the jurisdiction of Indian courts. Though they can enter into contracts through agents residing in India. In such cases the agent becomes personally liable for the due performance of the contracts. **For example:** Mr D who was a diplomat and was on the staff of a foreign embassy, rented a house belonging to Mr Z. Mr Z sued him for arrears of rent. It was held in the. That no action could be brought against him as he was protected by diplomatic privileges.
3. **Corporation:** Statutory corporations or municipal bodies cannot enter into certain contracts. The memorandum or articles of association to which they are created either under a special act or under the companies act 1956, restricts them to enter into contracts on matters which are beyond the statutory powers or ultra-vires. A corporation is an artificial person recognised by law. It exists only in the eyes of law and can enter into a contract only through its agents. A contract entered into by a corporation will be valid only if it is within the powers conferred by its memorandum and articles of association. As such they are qualified only to make particular nature of contract and not all.
4. **Insolvents:** An insolvent cannot enter into a contract as his property vests with the official receiver or official assignee. According to Indian insolvency Act, when a person is adjudged insolvent he cannot enter into a valid contract during period of insolvency, as all rights pertaining to property of insolvent, then vests in the capacity of official receiver or assignee appointed by the court, he can make a contract on behalf of the insolvent. Although contracts of personal nature are kept out of the realm of this provision.
5. **Convicts:** While undergoing sentence a convict is incapable of entering into a contract. This inability comes to an end on the expiration of the sentence or if he has been “pardoned”. According to I.P.C. any person during the period of imprisonment cannot enter into a valid contract. However, if for such

period he is on “Ticket of leave” or “Parole”, he can make a valid transaction. The noted fact is that the perspective of law of limitation is not applicable to a culprit during the period of punishment.

2.8 Quasi-contracts

Law of quasi-contracts is also known as the law of restitution. Strictly speaking a quasi-contract is not a contract at all. A contract is intentionally entered into. But law on the other hand creates a quasi-contract. Under certain circumstances, a person may receive a benefit to which the law regards another person as better entitled, or for which the law considers he should pay to the other person even though there is no contract between the parties. Such relationship is termed as quasi-contracts. This is because although there is no contract or agreement between the parties, they are put in the same position as if there were a contract in between. These relationships are termed as quasi-contracts or constructive contracts. Certain relations resembling those created by contracts are called quasi-contracts. A quasi-contract rests on the ground of equity that a person shall not be allowed to enrich himself unjustly at the expense of another. Quasi-contracts are based on principles of equity, justice and good conscience and must contain the following features (a) a right is generally a right to money, though not always to a liquidated sum of money. (b) it does not arise from any agreement of the parties concerned, but is imposed by the law and (c) it is a right which is available not against all the world, but against a particular person or persons only, so that in this respect it resembles a contractual right. The Indian contract act recognizes such types of contracts and sections 68 to 72 deal with such contracts. They are as follows:

1. **Supply of necessities (sec.68):** If a person incapable of entering into a contract or anyone whom he is legally bound to support, is supplied by another with necessities suited to his condition in life, the person who has furnished such supplies is entitled to be reimbursed from the property of such incapable person.
 - a. Only the property of the person is liable and not the person personally.
 - b. Secondly no claims for supplies of luxury articles can be madeE.g. A supplies B a lunatic with necessities suitable his condition in life. A is entitled to be reimbursed from B's property. If B has no property, then A cannot make any claims.

2. **Payments by an interested person (sec.69):** A person who interested in the payment of money which another is bound by law to pay and who therefore pays it, is entitled to be reimbursed by the other. However certain essential requirements should be fulfilled as under the payment made should be bonafide for the protection of one's interest the payment should not be a voluntary one. The payment must be such as the other party was bound by law to pay.
3. **Obligation to pay for non-gratuitous acts (sec.70):** Where a person lawfully does anything for another person, or delivers anything to him not intending to do so gratuitously and such other person enjoys the benefits thereof, the latter is bound to pay compensation to the former in respect of, or to restore, the thing is so done or delivered. **For example:** Mr K a government servant was compulsorily retired by the government. He filed a writ petition and obtained an injunction against the order. He was reinstated and was paid salary, but was given no work. In the meantime, government went on appeal to the higher court. The appeal was decided in favour of the government and Mr K was directed to return the salary paid to him during the period of reinstatement.
4. **Responsibility of finder of goods (sec.71):** According to this section of the law a person who finds the goods belonging to another and takes them into his custody is subject to the same responsibility as if he were a Bailee. He is bound to take as much care of the goods as a man of ordinary prudence would under similar circumstances, take care of his own goods of the same bulk, quality and value. He must also take all necessary measures to trace its owner. If he does not, he will be guilty of wrongful conversion of the property. Till the owner is found out, the property in goods will vest in the finder and he can retain the goods as his own against the world at large. The finder can sell the goods in the following cases:
 - a. When the thing found is in danger of perishing.
 - b. When the owner cannot, with reasonable diligence, be found out.
 - c. When the owner is found, but he refuses to pay the lawful charge of the finder and

- d. When the lawful charges of the finder, into respect of the maintenance of the thing found, amount to two-thirds of the value of the thing found.
5. **Mistake or Coercion (sec.72):** A person to whom money has been paid, or anything delivered, by mistake or under coercion, must repay or return it to the person who paid it by mistake or under coercion. The word coercion is not necessarily governed by section 15 of the act, rather the word is interpreted to mean and include oppression, extortion or such other means. Every kind of payment of money or delivery of goods for every type of "mistake" is recoverable. **For example:** Mr. A pays some money to Mr. B by mistake. It is really due to Mr. C. Mr. B must refund the money to Mr. A. Mr. B, however, cannot recover the amount from Mr. C, as there is no privity of contract between Mr. B and Mr. C.

❖ Exercise

Descriptive Questions

1. What is a contract? Explain the essential elements of a valid contract.
2. Defined in detail the various features of law of contracts
3. Define offer and explain its essential elements.
4. Define acceptance and explain the legal rules as to acceptance.
5. Explain briefly the various types of contracts on the basis of validity, formation and performance.
6. What is considerations? Explain in detail the different elements of consideration.
7. Define in detail the various exceptions to the rule "No Consideration No Contract".
8. Define the legal position of a minor in terms of contracts done with and by a minor.
9. Explain in detail the different people disqualified by law from contracting.
10. What are quasi-contracts? Explain the different types of quasi-contracts formed under the law.

Short Notes

1. Define the different types of four???
2. Types of contracts based on validity
3. Objects of contract
4. Tender
5. Nudum Pactum
6. Contracts with people of unsound mind
7. Alien Enemy
8. Time-barred debt

Multiple Choice Questions

1. A _____ is a proposal by one party to another to enter into a legally binding agreement with him.
 - a. Offer
 - b. Acceptance
 1. Agreement
 - d. Contract
2. Which of the following necessarily needs to be absolute and unconditional?
 - a. Contract
 - b. Offer
 - c. Acceptance
 - d. Agreement
3. Which of the following according to the contract act represents the phrase “quid-pro-quo”?
 - a. Acceptance
 - b. Offer
 - c. Free consent
 - d. Consideration
4. An agreement can be called ‘Nudum Pactum’ when it is...
 - a. Without Free Consent
 - b. Without Consideration
 - c. With a minor
 - d. Valid
5. Contracts can be classified on the basis of ...
 - a. Validity
 - b. Formation
 - c. Performance
 - d. All of the above.

6. According to the 'the Contract Act', contracts with the following people are void.
- a. People of unsound mind b. Minors
c. People disqualified by status d. All of the above.
7. A Price tag on the goods displayed on the shelves of a showroom is by law
- a. A proposal b. Invitation to offer
c. Acceptance d. None of the above.
8. Which of the following is not a legal rule as to acceptance?
- a. It must be absolute and unqualified.
b. It need not be communicated to the offeror.
c. It must be according to the mode prescribed.
d. It must be given within a reasonable time.
9. Lunatics, idiots and drunkards are not considered capable to contract due to.
- a. Status b. Mental soundness.
c. Age d. All the above.
10. Consideration to a contract can be.
- a. Past b. Present.
c. Future d. All the above.
11. It is a contract created by the law and not by the mutual consent of the parties.
- a. Quasi-contracts b. contingent contracts
c. government contracts d. void contracts

MCQ Answer key

1.	2.	3.	4.	5.	6.	7.	8.	9.	10.	11.
a	c	d	b	d	d	b	b	b	d	a

3.1 Free consent**3.1.1 Coercion (Sec. 15)****3.1.2 Undue influence (Sec. 16)****3.1.3 Difference between Coercion and Undue Influence****3.1.4 Fraud (Sec. 17)****3.1.5 Misrepresentation (Sec. 18)****3.1.6 Distinction between Fraud and Misrepresentation****3.1.7 Mistake (Sec. 19)****3.2 Legality of object****3.2.1 When Consideration or Object is Unlawful (Sec. 23)****3.2.2 Unlawful and Illegal Agreements****3.2.3 Effects of illegality****3.3 Void agreements****3.4 Contingent contracts Explanation****3.4.1. Rules regarding contingent contract****3.5 Performance of contracts****3.5.1 Types of Performance****3.5.2 Requisites of Valid Tender****3.5.3 Who Must Perform the Contract****3.6 Discharge of contracts****3.6.1. Methods to Discharge the Contract****3.7 Remedies for breach of contract****❖ Exercise**

3.1 Free Consent

It is essential for the creation of a contract that the parties are *ad idem*, that is, they agree the same in the same sense at the same time and that their consent is free and real (Sec. 10) also says that "all agreements are contracts if they, are made by the free consent of the parties".

Consent: It means acquiescence or act of assent to an offer. "It is said that two or more people give their consent when they agree in the same way" (Sec.13)

Free consent: Consent is said to be free when it is not caused by-

- (1) Coercion as defined in Sec. 15, or
- (2) Undue influence as defined in Sec. 16, or
- (3) Fraud as defined in Sec. 17, or
- (4) Misrepresentation as defined in Sec. 18, or
- (5) Mistake, subject to the provisions of Secs. 20, 21 and 22 (Sec. 14).

When there is no consent, there is no contract. Salmond describes it as error in consensus. If there is no *consensus ad idem*, there is no contract. One such circumstance which interferes with consensus *ad idem* is mistake. **For Example:** An illiterate woman executed a deed of gift in favour of her nephew under the impression that she was executing a deed authorising her nephew to manage her-lands. The evidence showed that the woman never intended to execute such a deed of gift, nor was the deed ever read or explained to her. Held, the deed was void and inoperative [Bala Debi v. S. Majumdar, A-I.R (1656) Cal. 5751. In the above case the consent of the woman is altogether absent. Had she known the true position, she would not have signed the document. A deed executed by a person in such circumstances is a mere nullity.

Free consent refers to two parties agreeing to a contract, including all its terms and conditions, of their own free will. This means that none of the parties was coerced, cheated or forced into the contract.

The mere existence of consent would not be enough to make an agreement enforceable. It is also necessary that the consent does not contain any force of pressure. Free consent is one of the essential elements of the valid contract. The parties to the contract may agree the same in the same sense, and together with it;

The consent received must be free from any compulsion or pressure. The lack of free consent would render the contract voidable at the option of the non-guilty party. **For Example:** A is forced to sign a promissory note at the point of pistol, A knows what he is signing but his consent is not free. The contract in this case is voidable at A's option. The consent, in the above example, is not altogether missing, it is there, but it is not free. Salmond calls it as error in causa, i.e., error in the inducing cause. Such an error results from coercion, undue influence, fraud, or misrepresentation.

3.1.1 Coercion (Sec. 15)

A Contract caused by coercion is voidable at the option of the party whose consent was caused as such - Sec. 19. The aggrieved party may have the established contract as it does or may refuse to carry it out and take the defence of coercion if the other party has the right to apply it. The path of the aggrieved party, if he so wishes, is governed by the other party.

Coercion is the commission or threat of committing any act prohibited, or the illegal detention or threat to stop any property, to the detriment of any person, with the intention of having any person sign an agreement.

Fundamentals of coercion

1. Commit or threaten to commit forbidden act:

Example: A threatens to shoot B if he (B) does not release him (A) from a debt which A owes to B. B releases A under the threat. The release has been brought about by coercion.

Example: A threatens to kill B if he does not lend Rs. 1,000 to C. B agrees to lend the amount to C. The agreement is entered into under coercion.

2. Stop illegally or threaten to detain property:

Example: A young lady, whose husband had died, was forced to adopt a child by relatives of her husband who prevented the body of the husband to be taken for cremation until the lady consented, the pressure was applied by them. The lady had to consent but later on filed a suit to set aside an adoption. It was observed that although no direct physical pressure was applied over the lady but the acts of prevention of removal of one's body for cremation and to force oneself to adopt a child, both are prohibited under I.P.C. so the adoption was set aside. [Rangnayakkma Vs. Algal settee].

3. The threat can be against a third party:

Example: For e.g., secretary of state of Rajasthan held out a threatens to attach the property of Bansraj for the settlement of Land Revenue from son of Bansraj, under the threat he paid the revenues although later on he filed a suit to recover the amount under the ground of coercion. It was observed that the secretary of state should proceed to the son of Bansraj and not Bansraj himself. That threat was completely invalid and amounted to coercion and the amount was recovered. (Bansraj Vs. Secretary of State Rajasthan].

4. Threat to commit suicide amounts to coercion:

Example: A person held out a threat to commit suicide to his wife and son unless they (wife and son), make a deed of their property into favour of his brother. They did not have any alternative but to agree to the pressure of suicide. They later on filed a suit to set aside the deed under the ground of coercion it was observed that suicide, and attempt a suicide or threaten to commit suicide are punishable under I.P.C. and so amounted to coercions and the deed was set aside. (Chikham Amiraju Vs. Shesamma).

3.1.2 Undue influence (Sec. 16)

It is said that a contract is induced by undue influence when the relations that subsist between the parties are such that one party is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.

A person is deemed to be in a position to obtain an undue advantage over the other, where

- (1) He holds an apparent authority over the other. E.g. Master and servant, Doctor & patient etc.
- (2) He stands in fiduciary relation (relation of trust and confidence) over the other. E.g. Parent & child, Solicitor and Client, Trustee and beneficiary etc.
- (3) He makes a contract with an enfeebled person whose mental capacity is, temporarily or permanently lost due to some illness of age, e.g.: Medical attendant and patient.

When one person is in such a position, he may be able to control the mind of the other and may attempt to obtain an undue advantage of his control. In undue

influence, a person's mind is controlled and as a result, it is, sometimes, called moral coercion or moral pressure.

When consent to an agreement is obtained by undue influence, the agreement is a voidable contract at the option of the party whose consent was obtained. Any Contract of this type can be excluded completely or if the Party that has the right to avoid it has received some benefit under the terms and conditions, since the Court may appear fair and just (section 19 A.A).

Section 16 lays down that there are certain relations in which the court presumes application of undue influence. Here, rather than the suffering party proving undue influence, it will be the defendant trying to prove that undue influence was not applied. **For example: Parent – Child, Trustee – Beneficiary, Solicitor – Client, Doctor – Patient, Financer – Finanee, Religious Adviser-Disciple and Guardian – Ward.** However, there are certain relations where undue influence is not presumed by the court **for example: creditors – debtors, landlord – tenants, husband – wife.**

Contracts with Pardanshin women: Pardanshin women is one who lives in seclusion having no commission except from behind the parda or screen with any male person except a few privileged relations. She has not much intercourse with the outside world. Law provides special protection to pardanshin women on the grounds of their being ignorant so far as the worldly knowledge goes. A contract with a pardanshin woman is presumed to have been **induced by undue influence** and treated as void. Most of the times they are illiterate and need to depend on others for important and legal decisions, hence the law does not allow them to form contracts or agreements in their better interest. Again, the law here is protective and not restrictive.

3.1.3 Difference between Coercion and Undue Influence:

Having discussed the concept of coercion and undue-influence in detail, let us now understand the between the two:

COERCION	UNDUE INFLUENCE
1. Section: 15	1. Section: 16
2. Definition: Involves the physical force or threat. The aggrieved party is compelled to make the contract against its will.	2. Definition: It involved moral or mental pressure. The aggrieved party believes that he or she

	would make the contract.
3. It involves committing or threatening to commit an act forbidden by Indian Penal Code for detaining or therein to detain property of another person.	3. No such illegal act is committed or a threat is given.
4. It is not necessary that there must be some sort or relationship between the parties.	4. Some sort of relationship between the parties is absolutely necessary.
5. Coercion need not proceed from the promisor nor need it be the directed against the promisor.	5. Undue influence is always exercised between parties to the contract.
6. The contract is voidable at the option of the party whose consent has been obtained by coercion.	6. Where the consent is induced by undue influence, the contract is either voidable or the court may set it aside or enforce it in a modified form.
7. In case of coercion where the contract is rescinded by the aggrieved party, as per Section 64, and benefit received has to be restored back to the other party.	7. The court has the discretion to direct the aggrieved party to return the benefit in whole or in part or not to give any such directions.

3.1.4 Fraud (Sec. 17)

Fraud is a false statement made by one party intentionally to deceive the other party to enter into the contract. According to sec.17 fraud includes any of the following activities committed by one party or his agent intentionally.

- ✓ A promise made without any intension of performing it.
- ✓ The suggestion as a matter of fact which is not true.
- ✓ Any other action undertaken to deceive the other party can be termed as fraudulent activity.
- ✓ The act amounting to fraud may be a suggestion of fact (suggestion false) i.e., the statement being made is without belief to its truth.
- ✓ The act may amount to an active concealment of a fact (suppressio veri) i.e. the party has concealed a fact which was duty bound to disclose.

- ✓ The act or omission is declared fraudulent by the Court or regarded by the Court as a deceit.
- ✓ The act committed must have deceived the other party and the party has suffered the damage on account of it. If the party does not suffer damage on account of the fraudulent act committed by the other party, it shall not amount to fraud.

It is important to note that "fraud" that results in a contract alone is covered by section 17 of this act. If there is a "fraud" but it does not result in a contract, it would not fall within the purview of this.

For example: the director of a company issues a prospectus containing misstatements, knowing well about such misstatements. Any person who had purchased shares on the faith of such misstatement can repudiate the contract on the grounds of fraud.

Example: Mr B discovered an ore mine in the estate of Mr. A. He conceals the information about the mine. Mr A in ignorance agrees to sell the estate to Mr B at a price that is grossly undervalued. The contract would be voidable at the option of Mr A on the grounds of fraud.

Buying goods with the intention of not paying the price is an act of fraud. Not only in Contract Act, but also in other acts have specifically declared certain acts and omissions as fraud. A seller of a property should disclose any material defect in the property, concealing the information would be an act of fraud.

Although a mere silence as to facts is likely to affect the willingness of a person to enter into a contract is no fraud, where there is duty to speak or **where silence is equivalent to speech, then such silence amounts to fraud.** For example, in the case of a fire insurance contract between persons standing in fiduciary relationship, non-disclosure of certain information would amount to fraud as there is a duty to make special disclosure. These are also known as *uberrimae fidei* (meaning, in utmost good faith) contract.

3.1.5 Misrepresentation (Sec. 18)

Misrepresentation means an innocent misstatement of facts about the contract, made by one party to induce the other party to enter into a contract. Misrepresentation is a wrong statement about the fact made simply and not to

deceive the other party. A party makes a statement which is not correct by making such statement there is no intention to deceive the other party is regarded as misrepresentation.

The term "misrepresentation" means a false representation of fact made innocently or non-disclosure of a material fact without any intention to deceive the other party. Section 18 defines the term "misrepresentation" as follows

"Misrepresentation" means and includes-

- ✓ Positive affirmation, in a way not guaranteed by the information of the person who makes it, of what is not true, although he believes it is true;
- ✓ Any breach of the duty that, without intent to deceive, gain an advantage for the person who commits it, or for anyone claiming under his authority, by deceiving another to his detriment or to the detriment of any person claiming under his authority;
- ✓ Causing, even innocently, a party to an agreement, committing an error as to the substance of what is the subject of the agreement.

Effect of Misrepresentation

The party being affected by misrepresentation has got the following rights:

1. He can avoid or revoke the contract; or
2. He can affirm the contract and insist on the misrepresentation to be made good, if it is possible to do so; or
3. He can rely upon the misrepresentation as a defence to an action of the contract.

When the aggrieved party loses his rights?

The aggrieved party shall not be able to exercise any of the above rights in the following cases: -

1. If he comes to know of mis-representation and even then, takes the benefit of the contract or approves the contract; or
2. If the parties cannot be brought back to their original position. Such situation arises where the subject matter of the contract has already been consumed or destroyed.
3. If the contract cannot be rescinded in full, then it cannot be rescinded at all. (Sheffield Nickel Co. v/s Dawin)

4. If the aggrieved party has transferred the rights under the contract to a third party and he has acquired these rights in good faith and for consideration. (Phillips Vs Brooks, 1919, K.B. 243)

3.1.6 Distinction between Fraud and Misrepresentation

FRAUD	MISREPRESENTATION
1. Section: 17	1. Section: 18
2. Intention: In Fraud the party's intention is to deceive the other party and get the benefit from him.	2. Intention: In Misrepresentation the party does not have any intention to deceive. It makes a careless misstatement of facts of only.
3. Rights: Fraud gives two rights to the aggrieved party, a right to action for damages and also to avoid the contract	3. Rights: Misrepresentation gives only one right, i.e. to avoid the contract. It does not allow any damages.
4. Plea: Fraud does not allow the defendant to take the place that the plaintiff had means to discover the truth.	4. Plea: defendant is allowed to take this place in case of misrepresentation.
5. Penalty: The party defrauding the other can be prosecuted for cheating under I.P.C.	5. Penalty: In case of misrepresentation no such action is possible.

3.1.7 Mistake (Sec. 19)

It is said that an error occurred when the parties that try to do something by mistake do something else. The error is "mistaken belief" with respect to something. A mistake is the error which is unintentionally done by both the parties. According to sec.20 an agreement becomes void where both the parties are under mistake as to the subject matter. **For example:** Mr A agrees to sell a certain cargo which is supposed to be on its way in a ship from London to Bombay. But in fact, just before the bargain was struck, the ship carrying the cargo was cast away because of storm in rain and the goods were lost. Neither of the parties was aware of it. The agreement is void.

The mistake has been stipulated in a contract law under sections (20) (21) and (22). The error, although one of the negative elements of free consent, is completely different, has a different foundation and a consequence different from other negative elements. Whenever a contract is caused by mistake, unlike the consequence of fraud, misrepresentation, coercion and undue influence in which a contract is voidable at the option of an aggrieved party, the error also generates the consequences of the contract becoming in a null agreement. As such, each time an error is proven, neither party will have any remedy. It must end as it is void-ab-initio. Such important consequences follow an error.

Yet another issue to remember in a mistake is that it must be of an essential fact. Whether the fact is essential or not would again depend on how a reasonable man would regard it under the given circumstances. A mere wrong opinion as to the value is not an essential fact. Mistakes have been classified under different sections as follows:

1. mistake of law and
 2. mistake of fact
1. **Mistake of law:** When a person commits mistake of law, mistakes of law are again classified as follows:
 - a. **Mistake of the law of the land:** When a person is under some mistake belief regarding various aspects of the law of his own country. It is called a mistake of the law of the land. There is a well- settled rule of constitution that ignorance of the law of the land cannot be an excuse.
 - b. **Mistake of law of a foreign country:** When a person enters in to a contract on the basis of his mistake belief regarding any aspect of the law of a foreign country, such mistake is immerged. A person can be presumed to have knowledge of the law of his own country; however, he cannot be presumed to have the knowledge of the laws of all countries. As such, ignorance of the law can be an excuse to be out of the responsibility of the contract. Such contract becomes void agreement.
 2. **Mistake of fact:** While deciding whether a contract is hit by mistake or not it must be remembered that the "mistake" is not unilateral. Both the parties should be under mistake.

A **unilateral mistake** would not render the contract invalid. **For example:** Mr A agrees to purchase from Mr B 18 carats of gold thinking it to be pure gold, but Mr B was not instrumental for creating such an impression then the contract between Mr A and Mr B should be treated as valid.

A **bilateral mistake** is immerged when both the parties to the contract have entered into it on the basis of common mistake on their parts regarding any thing as to the subject matter and performance of the contract. Bilateral mistake is the real mistake. To immerged as bilateral mistake, following two conditions must be satisfied.

- Mistake must be mutual i.e., both the parties are under mistake impression.
- The mistake must relate to some material facts. Material facts are such facts as are influential to the decision of a party to enter into a contract.

Only then a party could have a remedy under the ground of mistake. Mistake can happen following circumstances:

- Mistake as to existence of subject matter:** If the parties to a contract are under a mistaken belief regarding existence of the subject matter, the contract becomes void agreement.
- Mistake as to the identity of subject matter:** Such mistake is created when both the parties to a contract identifies the subject matter in completely different ways. One party thinks the one way and the other party thinks the other, the parties could be escaped from responsibilities.
- Mistake as to quantity of the Subject matter:** As in different countries, different standards of weight prevail, parties to a contract may have a mistaken belief as to the weight [quantity] of the subject matter, the contract becomes void agreement.
- Mistake as to the quality of the subject matter:** Sometimes one party intends to procure some particular quality of the goods while the other party intends to sell goods of different quality, both the parties may be under a common mistake as to the quality of the goods, the contract becomes void.

- e. **Mistake as to capacity of performance of a contract:** Such mistake arises when thinking that the contract is capable to be performed, however actually to their ignorance, the contract has become incapable to perform, it becomes void agreement. Incapacity of performance may be legal incapacity or physical incapacity.
- f. **Mistake as to the identity of a person:** When a person, by mistake, believes that he contracts with a particular person, although he contracts with a different person and this mistaken identity is so vital as goes to the root of the contract i.e., if the person had the knowledge of true identity of the person contracted with. He would not have entered into the contract at all. Such a mistake shall be allowed to be an excuse.
- g. **Mistake regarding nature of the contract:** If a person enters into a contract on his mistaken belief regarding the nature of the contract, and if the nature is of all most significance, becomes a substance, even though it is a unilateral mistake the person could be escaped from responsibility. As he would not have entered into the contract, had he known the true nature of the contract, it becomes a good defence.

3.2 Legality of Object

A contract should not only be based on the mutual consent of the competent parties but should also have a legal purpose. If the object of an agreement is the performance of an unlawful act, the agreement is not enforceable. Sec.23 clears that the 'object' or 'consideration' of an agreement is not legal in certain cases. The words 'object' and 'consideration' in Sec. 23 are not used in same manner; they have different meanings. The word 'object' means purpose or design. In some cases, the consideration of an agreement may be legal, but the purpose for which the agreement is signed may be illegal. In such cases, the agreement is void. As such, both the object and the consideration of an agreement must be legal, otherwise the agreement will be void.

3.2.1 When Consideration or Object is Unlawful (Sec. 23)

The consideration or object of an agreement is unlawful:

1. **If prohibited by law:** if the object or consideration of an agreement is the performance of an act prohibited by law, the agreement is void. An act is

prohibited by law when it is punishable by the criminal law of the country or when prohibited by special legislation or regulations made by a competent authority under powers derived from the Legislature.

Examples. (a) A promises 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.

(b) A promises B to drop a prosecution which he has instituted against B for robbery, and B promises to restore the value of the things taken. The agreement is void as its object is unlawful.

2. **If it is of such a nature that, if permitted, it would nullify the provisions of any law:** if the object or consideration of an agreement is such that, although not directly prohibited by law, the law is annulled. the agreement is void

Examples. (a) A's estate is sold for income arrears under the provisions of an Act of the Legislature, by which the offender is prohibited from purchasing the estate. B, by understanding with A, becomes the buyer and agrees to transfer the estate to A upon receipt of the price B has paid. The agreement is null since it makes the transaction, in effect, a purchase by the defaulting party, and thus the object of the law would expire.

(b) N agreed to enter the service of a company in consideration of a weekly salary of Rs.130 and a weekly allowance of Rs.60. Both parties knew that the allocation of expenses was a device to evade taxes. Withheld, the agreement was illegal [Napier v. National Business Agency Ltd. (1951)].

3. **If it is fraudulent: an agreement that was made with a fraudulent purpose is void.** Therefore, an agreement of fraud of creditors in order to overcome their rights is void. Examples (a) A, B and C enter into an agreement for the division between them of acquired gains, or to be acquired by them through fraud. The agreement is null, since its purpose is illegal.
- (b) A, being an agent of a landowner, accepts money, without the knowledge of his principal, to obtain a land lease agreement pertaining to his principal. The agreement between A and B is null, since it implies a concealment fraud on the part of A in its capital.

4. If it implies or implies damage to the person or property of another:

'Injury' means 'incorrect'. 'damage' or 'damages'. 'Person' means one's body. 'Property' Includes movable and immovable property. For instance, an agreement which compels a debtor to do manual labour for the creditor as long as the debt is not repaid in full is void.

Examples (a) B borrowed 100 rupees of L and executed a bond with the promise of working for L without paying for a period of two years. In case of default, B had to pay interest (at a very exorbitant rate) and the principal amount at the same time. Sustained, the contract was null since it involved injuries to the person of B [Ram Saroop v. Bansi Mandar, (1915)].

(b) An agreement among some people to buy shares in a company and, therefore, through fraud and deception to induce other people to believe, contrary to that fact, that there is a good faith market for the shares, is void [Gherulal Parakh v. Mahadeo Dass, (1959)].

5. If the Court deems it immoral: an agreement whose consideration or

object is immoral. The definition of the word immoral has been kept limited only to those acts which the court regards as immoral. This shows that what is 'immoral' depends upon the standards of morality prevailing at a particular time and as approved by courts. In most cases the meaning is restricted to sexual immorality. **For example**, an agreement between a husband and his wife for a future separation, is illegal [Sumitra Devi v.. Sulekha Kundu, (1976)] **Examples** (a) A married woman was given money to allow her to obtain a divorce from her husband and then marry the lender. Sustained, the agreement was immoral and the lender could not recover the money [Baiviji v. Nansa Nagar, (1885)].

(b) A agrees to leave her, daughter to B for cohabitation (state of living together as husband and wife without being married). The agreement is illegal, it is immoral.

(c) A. who is a woman of B, promises to exert her influence as such with B in favour of C, and C promises to pay Rs. 1,000 to A. The agreement is void, because it is immoral.

6. **Agreements which are considered by the courts to be opposed to public policy:** The principle of public policy is this: *ex dolo malo non oritur actio*- No court will lend its aid to a man who found his cause of action upon an immoral or an illegal act. No exhaustive list can be prepared of all the agreements opposed to public policy. Anything which goes against the interest of general public will be deemed to be opposed to public policy. The law relating to public policy is not a fixed and immutable matter; rather it is alterable by the passage of time. The general head of public policy covers wide range of topics. Some of these are:
- a) **Trading with the enemy:** Those contracts which tend either, to benefit an enemy country or to disturb the good relations of a country with a friendly country, are against public policy.
 - b) **Shifting Prosecution:** Agreements for shifting prosecution are a well-known class of those contracts which the courts refuse to enforce on this ground. The principle is “that you shall not make a trade of a felony (criminal act)”.
 - c) **Agreements for improper promotion of litigation :** In this connection there are two types of agreements (i) **Maintenance** When a stranger agrees to render assistance by money or otherwise to another person in a suit in which that third person has himself no legal interest, for its prosecution or defence, it is called maintenance; and (ii) **Champerty:** It is a bargain whereby one person promises to assist another in recovering property in consideration of the latter giving the former a share in the property so recovered.
 - d) **Agreements to interfere with course of justice:** An agreement for the purpose or to the effect of using improper influence of any kind with judges or offices of justice is void.
 - e) **Agreements to vary the period of limitation:** Agreements the object of which is to curtail or extend the period of limitation prescribed by the Law of Limitation, are void.
 - f) **Marriage brokerage contracts:** An agreement to procure marriage for reward is void.

- g) **Sale of public offices:** Traffic by way of sale of public offices and appointment obviously tends to the prejudice of public service. Such agreements are void.
- h) **Agreements tending to create interest against duty:** An agreement with public servant which might cast upon the public servant obligations inconsistent with his public duty is void.
- i) **Agreements to create Monopolies:** Agreements having for their object the creation monopolies are void as opposed to public policy.

3.2.2 Unlawful and Illegal Agreements

An unlawful agreement is one which like a void agreement, is not enforceable by law. It is void ab initio and is destitute of legal effects altogether. It affects only the immediate parties and has no further consequences. An illegal agreement, on the other hand, is not only void as between the immediate parties but has this further effect that the collateral transaction to it also becomes tainted with illegality. **Example:** (a) L lends Rs. 5,000 to B to help him to purchase some prohibited goods from T, an alien enemy. If B enters into an agreement with T, the agreement will be illegal and the agreement between B and L shall also become illegal, being collateral to the main transaction which is illegal. L cannot, therefore, recover the amount. He can recover the amount if he did not know of the purpose of the loan.

(b) An agreement to commit a crime or tort, e.g., an agreement to assault A [Allen v. Rescous, (1670)] or an agreement to publish a libel (defamation) is illegal [Apthorp v. Neville & Co., (1907)].

Every illegal agreement is unlawful, but every unlawful agreement is not necessarily illegal. It is sometimes difficult to decide as to whether an act is illegal or unlawful as many of the illegal and the unlawful acts lie on the borderline. It may, however, be observed that illegal acts are those which involve the commission of a crime or contain an element of obvious moral turpitude and where the wicked attribute is reasonably obvious, or are, in some other way, contrary to public policy. A criminal act is one which is both forbidden by law and which is revolting to the moral sentiments of the society. A crime is something more than a mere disobedience to a law. As such illegal agreements

include acts opposed to public morals, e.g., an agreement for illicit cohabitation, or an agreement to defraud the revenue or commit a crime, or an agreement which tends to endanger the public safety. On the other hand, unlawful acts are those which are less rigorous in effect and involve a "non-criminal breach of law". These acts do not affect public morals, nor do they result in the commission of a crime. These are simply disapproved by law on some ground of public policy. These include agreements in restraint of trade, marriage or legal proceedings, etc. therefore in case there is a dispute between the parties to an unlawful agreement, they will be entitled to a legal remedy through the court.

3.2.3 Effects of illegality

Collateral transactions: The collateral transactions to an illegal agreement become tainted with illegality and are treated as illegal even though they would have been lawful by themselves.

No action: No action can be taken for the recovery of money paid or property transferred under an Illegal agreement, and for the breach of an illegal agreement.

In cases of equal guilt in an illegal agreement, the position of the defendant is better than that of the plaintiff. The plaintiff (i.e., the innocent party) may however, sue to recover money paid or property transferred

Whether illegality is severable. A contract may contain several distinct promises or a promise to do several distinct acts of which some are legal and others illegal, or a part of which is legal and a part of which is illegal. if the illegal promise or act is severable from the legal one, the Court will enforce the legal promise or act and rejects the one which is illegal. If the illegal promise or act cannot be separated from the legal one, the whole contract is declared illegal.

Reciprocal promises (Sec. 57). Where persons reciprocally promise, firstly, to do certain things which are legal, and secondly, under specified circumstances, to do certain other things which are illegal, the first set of promises is a contract, but the second is a void agreement.

Alternative promise, one branch being illegal (Sec. 58): In the case of an, alternative promise, one branch of which is legal and the other illegal, the legal branch alone can be enforced.

Agreements void, if consideration and objects unlawful in part (Sec. 24): If there are several objects but there is a single consideration, the agreement is void if any one of the objects is unlawful. Similarly, if there is a single object but there are several considerations, the agreement is void if any one of the considerations is unlawful.

3.3 Void Agreement

It is said that an agreement not enforceable by law is void "[Sec.2 (g)] Therefore, a null agreement does not give rise to any legal consequence and is void ab-initio. Agreement is not an agreement at all from its inception.

An agreement cannot be enforced if it includes illegal considerations or is created by incompetent parties or it violates the basic principles of equity; or is contrary to legal or moral standards are called null agreement.

Void agreements have no legal status at all. An agreement is void if it does not fulfil all the conditions of enforceability. There are few agreements which have been expressly declared void under various sections and they are:

1. Agreement by a Minor:

A person who has not completed 18 years of age is a minor. The law acts as guardian of minors and protects their rights. They do not have the ability to judge what is good and what is bad for them. Consequently, when a minor is accused of obligations and the other contracting party seeks to enforce these obligations against the minor, the agreement is considered void.

For e.g. A, 15 years old boy, made an agreement with B to give him Rs. 1000. This is a void agreement.

2. Agreement with a Person of Unsound Mind

A person who does not have a healthy mind or whose mental powers are not fixed or whose mental condition is not under their own control. Any

agreement on the part of a sick-minded person is absolutely void because he does not have the capacity to judge, what is good and what is bad for him.

For e.g. A mentally disordered man made an agreement with Miss B to marry her, but this is not a valid agreement.

3. Agreements in Restraint of Marriage

Everyone enjoys the freedom to marry and, in accordance with article 26 of the contract law, "any agreement is the restriction of the marriage of any person, who is not a minor, is null." The restriction may be general or partial, but the agreement is void, and therefore, an agreement that agrees not to marry at all, or a certain person or, a class of persons, or for a fixed period, is void.

4. Agreement in Restraint of Trade

The constitution of India guarantees the freedom of commerce for each citizen and, therefore, article 27 declares that "any agreement by which it is restricted to any of exercising a legal profession, trade or business of any kind, is in that sense null. " No person is in livery to deprive himself of the fruit of his work, ability or talent, by any contract he enters.

For E.g. An agreement by which one of the parties agrees to close its business in consideration of the other party's promise to pay a certain amount of money, is void, since an agreement is trade restriction,

5. Wagering Agreements :

An agreement between two persons under which money or money's worth is payable, by one person to another on the happening or non-happening of a future uncertain event is called a wagering event. Such agreements are chance oriented and therefore, completely uncertain. Betting is a wagering agreement, as it relies on an uncertain event and only one of the two parties' benefits from it, as such any one gain would the others loss. Hence it defeats the rule of contract and is considered void. **For e.g.** where A and B mutually agree that if it rains today A will pay B Rs.100 and if it does not rain B will pay A Rs.100. is a wager and a void agreement.

6. Agreement in restraint of legal proceedings:

Any agreement by which any of its parties has restrictions to enforce their rights under a contract, by the usual legal procedures in the ordinary courts, or that limits the time in which they can assert their rights, is null or void.

For E.g. In a contract of fire insurance, it was provided that if a claim is rejected and a suit is not filed within three months after such rejection, all benefits under the policy shall be forfeited. The provision was held valid and binding and the suit filed after three months was dismissed. (Baroda spinning Ltd. vs. Satyanarayan Marine and Fire Ins. Com. Ltd.)

7. Uncertain Agreements:

"Agreements whose meaning is not certain or can be assured are null and void" (Sec-29). Through Sec-29, the law seeks to ensure that the parties to a contract know the precise nature and scope of their mutual rights and obligations under the contract.

For e.g. A agrees to sell to B "a hundred tons of oil." There is nothing whatever to show what kind of oil was intended. The agreement is void for uncertainty.

8. Agreement Contingent on Impossible Events:

"Contingent agreements to do or not do anything if an impossible event occurs are null, whether the event's impossibility is known or not by the parties to the agreement at the time it is made." (Sec. 36)

For e.g. A agrees to pay B Rs.1000 (as a loan) if B will marry A's daughter, C. C was dead at the time of the agreement, the agreement is void.

9. Agreements to do Impossible Act:

"An agreement to do an act impossible in itself is void." Any act that the law or the courts refers to as impossible to perform cannot be contracted. if any persons get into an agreement for such impossible act is void.

For e.g. Mr A agrees to put life into the dead body of Mr B's wife, is a void agreement. A agrees with B to discover treasure by magic. The agreement is void. A agrees with B to run with a speed of 100 kilometres per hour. The agreement is void.

10. Agreements made under a mutual mistake of fact (Sec. 20).

A **mutual** or **bilateral mistake** is immersed when both the parties to the contract have entered into it on the basis of common mistake on their parts regarding any thing as to the subject matter and performance of the contract. Bilateral mistake is the real mistake.

A bilateral mistake is one where both the parties are under mistake and the mistake relates to some material fact about the subject matter. The material fact related to the subject matter could relate to the existence, identity, quantity, quality of the subject matter or the capacity and identity of the performer. Such agreements are expressly declared void.

11. Agreements the consideration or object of which is unlawful (Sec. 23).

A contract should not only be based on the mutual consent of the competent parties but should also have a legal purpose. If the object of an agreement is the performance of an unlawful act, the agreement is not enforceable. Sec.23 clears that the 'object' or 'consideration' of an agreement is not legal in certain cases. The words 'object' and 'consideration' in Sec. 23 are not used in same manner; they have different meanings. The word 'object' means purpose or design. In some cases, the consideration of an agreement may be legal, but the purpose for which the agreement is signed may be illegal. In such cases, the agreement is void. As such, both the object and the consideration of an agreement must be legal, otherwise the agreement will be void.

12. Agreements the consideration or object of which is unlawful in part (Sec~ 24).

An agreement must have a lawful objective and a lawful consideration. If the object or consideration of an agreement is the performance of an unlawful act, the agreement is unenforceable and void (Sec. 23)

13. Agreements made without consideration (Sec. 25)

Consideration is one of the essential and most important factors of a valid contract. It is compulsory to have consideration to formulate a valid

contract. Hence any agreement without consideration is void. The law is only concerned with the presence of consideration and not the proportion.

- 14. In case of reciprocal promises to do things legal and also other things illegal**, the second set of reciprocal promises is a void agreement (Sec. 57). If an agreement involves two sets of promises one which is legal and the other which is illegal, the entire contract is tainted by illegality; unless and until the illegal portion of the contract is separable or removable.

3.4 Contingent Contract

A contract may be absolute or contingent. An absolute contract is the one in which the promise performs his or her duty and obligations without any condition. On other hand contingent contract is the contract in which the conditions are always laid down with regards to the performance. In short contingent contract is the contract which is based on few terms and conditions; it is also known as conditional contract. According to sec.31 of the Indian Contract Act, a contingent contract is a contract to do or not to do something, if some event, collateral to such contract, does or does not happen. E.g. Goods send on approval is a contingent contract.

This is a contingent contract, in accordance with the Contract law; a contingent contract is one whose performance is uncertain. The performance of the contract that is included in this category depends on whether or not certain uncertain events occur. On the other hand, an ordinary or absolute contract is such that the performance is true or absolute in itself and does not depend on the fact or not of an event. A contingent contract is defined as a contract to do or not do something, if any event, guarantee of said contract, happens or not (Sec. 31).

Characteristics of a contingent contract

A contingent contract must have three essential characteristics. Exist:

- (1) Its performance depends upon the happening or non-happening of a futuristic event. This dependence on a probable future event distinguishes a contingent contract from an ordinary contract.
- (2) This event must be uncertain, that means that happening or not happening the future event is not certain, that is, it can happen or not. If the event is one

hundred percent sure to happen, and the contract in that case must be done in any way, that contract is not called a contingent contract.

- (3) The event must be collateral or incidental to the contract.

Contracts of insurance, indemnity and guarantee are the commonest examples of a contingent contract.

3.4.1 Rules regarding contingent contract:

1. Depending on the Happening of an Uncertain Event:

Sometimes the Contingent Contract depends on the uncertain event. Then, if such an uncertain event takes place, the contingent Contract becomes valid and if that uncertain event does not take place, the contingent Contract is null.

Example: According to the Contract formed between A and B, A must sell goods to B, if the ship arrives safely, his Contract is valid and if the ship drowns, his Contract will be void.

Example- A contracts to sell B a piece of land if he (A) wins the legal case involving that piece of land. A loses the case. The contract becomes void.

2. Contingency is the non-occurrence of an event:

Sometimes the contingent contract may depend on the non-occurrence of an uncertain event. Then, if that event does not occur, the Contract is Valid and if that event takes place, the contract is void.

Example: There is a contract between A and B according to which A has pay money to B, if the ship does not return. Here, if the ship returns, the Contract is null and if the ship sinks, then it is valid.

Example- A agrees to sell his house to B if Y dies. This contract cannot be enforced till Y is alive.

3. Depending on the occurrence of an uncertain event in a fixed period:

Sometimes the contingent contract may depend on the occurrence of an uncertain event in a fixed period. If such an event occurs within a fixed period, the contract is Valid. If such an event does not occur within a fixed period, the contract will be void.

Example: According to the contract formed between A and B, A has to sell goods to B, if the ship returns within 10 days. The contingent contract remains valid up to 10 days and if it returns any time but after 10 days the contract will be void.

4. Depending on whether an uncertain event does not occur in a fixed period:

Sometimes the contingent contract may depend on the occurrence of an uncertain event in a fixed period, then if said event occurs within that fixed period, the contract is null and if that event does not take place within the agreed period, then it is valid.

Example: A has to pay money to B if the ship **does not** return within 10 days. If the ship returns within 10 days the contract is void and if it returns after 10 days the contract is valid.

5. Contingency depending on the future conduct of a living person:

Here contract would cease to be enforceable if it is contingent upon the conduct of a living person; when that living person does something to make the event or conduct as impossible of happening.

Example: 'A' agrees to pay 'B' a sum of money if 'A' marries 'C'. 'C' marries 'D'. This act of C turns the event of A marrying C as impossible; it may though still become possible if there is a divorce between C and D.

6. Contingency Depending on an Impossible Event:

Sometimes the Contingent Contract may depend on an impossible event. Such type of contingent contract is null and void. A contract made over an impossible event is expressly declared void by the act. Hence whether the contract is a regular contract or a contingent contract does not matter in any case the contract remains void.

Example: A agrees to pay B a sum of Rs. 10,000 if the sun rises from the West next morning. This is an impossible event and is void irrespective of whether the contract is contingent or not.

3.5 Performance of Contract

'Performance of the contract' means the fulfilment of the obligations of the parties. The parties that make the contract must comply with their obligations in accordance with the terms established in the contract. The execution of the contract is one of the methods to fulfil a contract.

The term "performance of the contract" means that both the promisor and the promisee have fulfilled their respective obligations, which the contract imposed on them. For example, A visits a stationery store to buy a calculator. The merchant delivers the calculator and A pays the price. It is said that the contract was terminated for mutual performance.

3.5.1 Types of Performance

Performance, as an action of performing may be actual or attempted.

1. Actual performance

When a promisor of a contract has fulfilled its obligation in accordance with the terms of the contract, it is said that the promise was actually made. Actual performance results in the approval of the contract and the promisor's responsibility ceases to exist. **For example**, A agrees to deliver 10 bags of cement in the factory of B and B agrees to pay the price on delivery. A delivers the cement on the due date and B makes the payment. This is the real performance.

2. Attempt of performance or "Tender"

When the yield expires, sometimes it is enough if the promisor offers to fulfil his obligation according to the contract. This offer is known as an attempted performance or more commonly as an offer. Therefore, the offer is a performance offer that, of course, complies with the terms of the contract. If the goods are offered by the seller but rejected by the buyer, the seller is pardoned from additional liability, given that the goods are in accordance with the contract in terms of quantity and quality, and can sue the buyer for the term of the contract if he wishes. Sometimes it so happens that the promisor offers to perform his obligation under the contract at the proper time and place, but the promisee does not accept the performance.

This is known as an "attempted performance" or "TENDER" (u/s, 38). A tender is equivalent to performance. This excuses the promisor from further performance and entitles him to sue the promisee for the breach of contract.

3.5.2 Requisites of Valid Tender

1. It must be unconditional:

The performance offer must be unconditional. Unconditional means not enclosing or changing the terms of the contract. The promisor must fulfil the promise as agreed in the terms of the contract; it becomes conditional when it is not in accordance with the terms of the contract. If the promisor offers to perform in accordance with the terms of the contract, it is known as unconditional bidding.

2. It must be made at proper time and place:

The performance offer must be made at the appropriate time, that is, at a stipulated time mentioned in the agreement or during the work hour. An offer after business hours or after the expiration date will not be considered valid.

For e.g. Smith offer to deliver the goods to Warner at 1 am, is not considered as valid tender because it's not business hours.

3. It must be for complete obligation:

There must be compliance with the full obligation and not a part of the total obligation. The offer to realize the partial performance of the contract does not constitute a valid offer. However, a small deviation from the terms of a contract cannot make the offer valid. For. e.g. Ashita entered into contract with Raj for sale of 100 box of chocolates and delivery of the same was to be done of 26th march. Ashita tendered only 50 boxes on the date of performance. Such part delivery does not amount to a valid tender.

4. Must be in legal tender money:

In the case of an offer of money, the exact amount must be offered; it must also be legal tender. Therefore, in the case of an offer of money that is not legal tender, that is, old coins or non-outstanding notes or in

foreign currency, it does not constitute a valid offer of money. The money offer, in the form of foreign currency is not a valid offer unless agreed between the parties.

5. It must be made to promisee or his authorized agent:

The promisee or its duly authorized agent must be fulfilled. Therefore, the offer of performance to the stranger does not constitute a valid offer of performance.

6. A tender may be made to one of several joint promisees:

In case of several joint promises, a tender made to one of them has legal consequences. A performance offer can be made to any of the various joint pledges, but the actual performance has to be made to all of them.

7. Contractual Capacity:

The person making a performance offer must have contractual capacity. Therefore, a person who does not have a contractual capacity cannot make a valid performance offer.

8. In case of tender of goods, reasonable opportunity for inspection of goods:

Tender of goods must give a reasonable opportunity to the promisee for the inspection of the goods. A tender of goods at such time when the other party cannot inspect the goods is not a valid tender.

3.5.3 Who Must Perform the Contract:

The following are the persons who must perform the contract:

1. Promisor himself:

If there is something in the contract proving that it was the intention of the parties that the promise should be made by the promisor himself, such a promise must be made by the promisor, this means contracts that involve the exercise of personal ability and diligence (for example, a contract to sing), or that are based on personal trust between the parties (for example, marriage) must be made by the promisor himself.

Example:

A commits to paint a picture for B. A must fulfil this promise personally.

2. Agent:

When personal skills are not necessary and the work can be done by any person then on behalf of promisor his appointed person i.e. agent can perform it.

Example:

A promises to pay B a sum of money. A can make this promise, either by personally paying the money to B or by having someone else pay B; and, if A dies before the appointed time for payment, his representatives must fulfil the promise or employ some suitable person to do so.

3. Legal Representative:

A contract that involves the use of personal skills or is based on personal considerations comes to an end upon the death of the promisor. But in the event of death of promisor before the performance of contract and the contract which does not require the personal skills or talent of the promisor, their legal representative is bound by the promisee to perform the contract.

Example:

A promises to deliver goods to B on a certain day on payment of Rs.1000. A dies before that day. A's representatives are bound to deliver the goods to B and B is bound to pay Rs.1000 to A's representatives.

4. Third person:

If the promisee accepts the performance of the promise from the third party, there is a discharge of contract. Once the third party performs the contract and it is accepted by the promisee then it is considered to be the end of the matter and promisor is discharged from the obligations.

5. Joint promisor:

When two or more persons have made a joint promise, they are known as joint promisors. Unless a contrary intention appears from the contract, all

joint promisors must jointly fulfil the promise. If any of them dies, his legal representative must, jointly with the surviving promisors, must fulfil the promise. If all of them die, the legal representatives of all of them must fulfil the promise jointly (sec.42) the following are the rules in this regarding:

1. Any one of the joint promisors may be compelled to perform (sec.43 Para 1)

Example: A, B & C jointly promise to pay D Rs.3, 000/- D may compel all or any or either A or B or C to pay him Rs.3, 000.

2. A Joint promisor compelled to perform may claim contribution (sec.43, Para 2)

Example: A, B & C are under joint promise to pay D Rs.300/-. A can be compelled to pay the whole amount to D. Now A can recover Rs.100/- each from B & C.

3. If any one of the joint promisors makes default in the contribution, the remaining joint promisors must bear the loss in equal shares (sec.43, para 3)

Example: B & C are under a joint promise to pay D Rs.3, 000/-. C is unable to pay anything and A is compelled to pay the whole sum. A is entitled to received Rs.1, 500/- from B.

3.6. Discharge of Contract

The discharge of the contract means the termination of contractual obligation relationships between the parties to a contract. It is said that a contract will be terminated when the rights, duties and obligations of the parties under the contract come to an end.

When we say that the contract has been discharged, it means that the rights and liabilities created by law under contract have been terminated.

3.6.1 Methods to Discharge the Contract:

The discharge of a contract implies the termination of contractual obligations. This is because when the parties originally signed the contract, the rights and obligations were established in terms of contractual obligations. Consequently, when those rights and duties are released, it is said that the contract has been

fulfilled or discharged. Once a contract is suspended, the parties are not liable even if the obligations under the contract remain incomplete

A contract may be discharged by many different ways and few of the most important methods are categorized below:

1. By Performance
2. By Agreement/Consent
3. By Lapse of Time
4. By Operation of Law
5. By Breach of Contract
6. By Impossibility of Performance

Now let's discuss each of the method briefly,

1. By Performance:

It is one of the most common and natural way to discharge the contract. When all the parties perform their respective obligations and duties arising from the contract then it is said to be discharged of contract by way of performance. The performance may be justified by the following ways:

- a) **Actual Performance:** Under actual performance the parties involved in the contract performs their duties and obligations practically.
- b) **Attempted Performance:** When the party to a contract makes an attempt to perform the duties and obligations but the other party does not accept or refused to accept the work then it is said to be attempted performance (considered equivalent to performance).

2. By Agreement/Consent:

As it is the contract between the parties which build them and hence the parties may also discharge the contract by fresh agreement and through mutual understandings. Discharge of contract by way of agreement or mutual consent may take place in any of the following ways:

- a) **Alteration:** The alteration of a contract means a change in one or more of the material terms of a contract. If a material alteration in a written contract is made by mutual consent, the original contract is discharged by alteration and the new contract in its altered form

takes its place. A material alteration is one that alters the legal effect of the contract, for example, a change in the amount of money to pay or a change in the interest rate. The intangible alteration, for example, the correction of an administrative error in the figures or the spelling of a name, has no effect on the validity of the contract and does not amount to an alteration in the technical sense.

- b) Remission:** The remission can be defined "as the acceptance of a lower amount than that contracted or a lesser fulfilment of the promise made." acceptance of a lesser sum than what was contracted for, in discharge of the whole of the debt. It is not necessary that there must be some consideration for the remission of the part of the debt.

For E.g. If the betrothed agrees to accept Rs 2,000 in full satisfaction of a claim of Rs 5,000, the pledge is enforceable and the promised cannot in the future file a claim for the recovery of Rs 5,000.

- c) Merger:** When a lower right contract is merged with a higher right contract, the first one is automatically discharged.

For E.g. (i) P holds a property under a lease. He later buys the property. His rights as a lessee merge into his rights as an owner.
(ii) When a part-time lecturer becomes a full-time lecturer, the contract of a part-time lecturer is discharged by merger.

- d) Novation:** "Novation occurs when a new contract is replaced by an existing contract, either between the same parties or between different parties, the consideration being mutually cancelling the previous contract.

If the parties have not changed, the nature of the obligation (that is, the material terms of the contract) must be substantially altered in the new contract, replaced by a mere variation of some of the terms of a contract, while the parties remain the same. , it is not

"novation". When the parties to a contract accept "novation", the original contract is fulfilled and does not need to be carried out.

For E.g. (i) A is in debt to B and B to C. By mutual agreement, the debt of B with C and the loan from B to A are cancelled and C accepts A as its debtor. Novation that involves changing parts.

(ii) A owes B Rs 10,000. A enters into an agreement with B and grants B a mortgage of his assets (A's) for 5,000 rupees instead of the 10,000 rupee debt. This is a new contract and extinguishes the old one.

- e) **Rescission:** Rescission of a contract takes place when all or some of the terms of the contract are cancelled. It may occur by mutual consent of the parties or where one party fails in the performance of his obligation. In such a case the other party may rescind the contract without prejudice to his right to claim compensation for the breach of contract.

For e.g. A promise to supply certain goods to B six months after the date of agreement. By that time the goods go out of fashion. A and B may rescind the contract.

- f) **Waiver:** Waiver takes place when the parties to a contract agree that they shall no longer be bound by the contract. This amounts to a mutual abandonment of rights by the parties to the contract. Consideration is not necessary for waiver

For E.g. A owes B Rs.5,000/- B has decided to abandon his claim.

3. Discharge by lapse of time:

The Law of Limitation establishes that in case of breach of a contract, the legal actions must be taken within a specific period, called the limitation period, otherwise, the promisee is disqualified to initiate a lawsuit in a court of law and the contract is suspended.

Therefore, in certain circumstances, the lapse of time can also fulfil a contract. For example, the limitation period for simple contracts is three years under the Limitation Act and, therefore, in case of default by the debtor, if the creditor does not file a claim against him within three years

after the default, the debt will set aside. The expiration of three years and the creditor will be deprived of his appeal before the law. This in effect implies the disbursement of the contract.

In short, the contract should be performed within a fixed time period and if does not complete within a specified time than it can be understood to be discharged.

4. By operation of the law:

A contract terminates as a result of the law in the following cases:

a) Death:

When the contract is of a personal nature, the death of the promisor ends the contract. In other contracts, the rights and responsibilities of the deceased pass to the legal representatives of the deceased.

b) Insolvency:

A contract is cancelled due to the insolvency of one of the parties at the moment in which an insolvency court approves a "discharge order" that exempts the insolvent from liability for debts incurred prior to its adjudication.

5. By Breach of Contract:

The breach of a contract by one of the parties is also a method of compliance with a contract, because "breach" also ends the obligations created by a contract on the part of each of the parties. Of course, the aggrieved party, that is, the non-guilty party can sue for damages for breach of contract according to the law; but the contract as such is finished.

The breach of contract can be of two types:

- (1) Anticipatory breach; and
 - (2) Actual breach.
- i. **Anticipatory Breach:** An early breach of contract is a contract violation that occurs before the time set for performance has arrived. It can take place in two ways:
- (a) Expressly for spoken or written words: Here a part of the contract communicates to the other party, before the expiration date, its intention not to carry it out.

For example: A contracts B to supply 100 bags of wheat for Rs. 60,000 on March 2. On February 15, A informs B that it will not supply the wheat. There is express rejection of the contract.

(b) Implicitly for the conduct of one of the parties: Here a party by its own voluntary act is incapacitated to fulfil the contract. For example,

(i) a person contracts to sell a particular horse to another on June 1 and before that date, sells the horse to another person; (ii) A agrees to marry B, but before the agreed date of marriage marries C.

- ii. **Actual breach:** The actual violation can also fulfil a contract. It occurs when a party does not fulfil its obligation on the date set for compliance by the contract, for example, when the designated day the seller does not deliver the goods or the buyer refuses to accept the delivery.

It is important to bear in mind that there cannot be a real breach of the contract due to non-compliance, as long as the moment of performance has not yet arrived. The actual violation entitles the party that is not in default to choose to treat the contract as written off and sue the party at fault for damages for breach of contract.

6. By Impossibility of Performance:

A contract is discharged if its performance becomes impossible to perform. This rule is based on following two principles:

- ✓ The law does not recognize what is impossible.
- ✓ What is impossible does not create any obligations.

There are two types of impossibility and they are,

a) Initial Impossibility:

Initial impossibility is that type of impossibility which exists at the time of making the agreement, such impossibility is only physical one and not the legal one.

- i. **Known Impossibility:** Known impossibility is that type of impossibility which is known by both the parties at the time of making the agreement.

- ii. **Unknown Impossibility:** It is an impossibility which is not known to any of the parties at the time of making the agreement, in such cases the agreement or contract becomes void as soon as the impossibility is discovered.

b) Subsequent Impossibility:

Impossibility which arises subsequently that is after the formation of contract is regarded as subsequent impossibility. In such cases the contract becomes unlawful. Such contract can be discharged in the following cases:

- i. **Restriction of subject matter:** When the subject matter of the contract subsequent to its formation is destroyed without the fault of any party, the contract is said to be discharged.
A music hall was agreed to be let out for a series of concerts on certain days. The hall was destroyed by fire before the date of the first concert. The plaintiff sued the defendant for damages for the breach of contract. It was held that the contract has become void and the defendant was not liable (Taylor vs Caldwell)
- ii. **Death or incapacity of person in case of personal services:** Where the performance of the contract depends on the personal skills or qualification of the parties, is discharged during the event of the death of the party.
For e.g. Contracts A and B will marry each other. Before the time set for marriage, A goes crazy. The contract is cancelled
- iii. **Outbreak of war:** All contracts entered into with an alien enemy during the war are illegal and abrogated. The contracts concluded before the outbreak of the war are suspended during the war and can be revived after the war, as long as they have not been prescribed.

3.7 Remedies for Breach of Contract

Parties to a lawful contract are bound to perform their respective obligations, when one party fails to perform his/her obligation, then it is said to have committed a breach of contract. The other party who suffers the loss on the

account of breach of contract is said to be injured party or suffering party or aggrieved party.

When any of the parties to a contract, whether oral or written, does not comply with any of the terms of the contract, it may be found in breach of contract. A breach of contract means that one of the parties to the contract does not fulfil its contractual obligations. A violation can occur if one of the parties does not comply within the term specified in the contract, does not operate in accordance with the terms of the agreement, or fails to perform. If one of the parties fails to comply while the other party fulfils its obligations under the contract, the executing party is entitled to legal remedies for breach of contract.

In case of breach of contract, the aggrieved party or injured party have one or more of the following remedies:

1. Cancellation of contract
2. Suit for specific performance
3. Suit for Damages
4. Suit for Injunction
5. Suit for Quantum Meruit
6. Suit for Restitution

1.Cancellation of Contract:

Cancellation means revocation or putting an end to the contract. When one of the parties makes a breach of contract, then the other party may treat such contract as revoked and he/she is discharged from all the obligations under the contract. According to sec.-75, a suffering party has the right to demand for the compensation for any damages which he/she has sustained through the non-fulfilment of the contract.

2.Suit for Specific Performance:

In certain cases when the damages are not adequate monetary remedies, the court may allow the suffering party to file a suit for a specific performance of the contract. This remedy is available under specific circumstances as per the provision of specific relief act-1963.

When this option is selected, the party that broke the contract is brought before the courts, and the plaintiff requests the court to compel the

defendant to comply with the specific terms of the contract that have not been met or to refrain from participating in any prohibited activity by the contract.

For example, Lucas wanted to buy land to build a shopping centre, so he has signed an agreement with the realtors to buy the vacant lot near the city area. But at the last moment it is said that Lucas will not be granted the land because real estate brokers have another potential client who is interested in this land and willing to pay a higher price as well. In this case, Lucas could take legal action to force real estate brokers to fulfil their promises and grant them land.

3. Suit for Damages:

The term damages are used to mean compensation in monetary terms, as a substitute for the performance of promise. Damages as a monetary compensation are allowed to the injured party for the loss suffered by him/her as a result of breach of contract. By awarding damages, the court aims at putting the injured party into the position in which he would have been if the contract was not breached.

Types of Damages:

The damages may be classified into following two categories:

- a) Primary Damages
- b) Secondary Damages

Primary Damages:

The primary damages further classified into the following categories:

- i. **Ordinary or General Damages:** Damages which arises in the ordinary course that is from the breach of contract is regarded as ordinary or general damages. These damages include the direct loss suffered by the injured party. For the purpose of claiming ordinary damage the following two conditions must be satisfied:
 - The injured party must be suffered from the damages by breach of contract.

- The damage must arise from the general course such as breach of contract.
- ii. **Special Damages:** They are those damages which results from the breach of contract under special circumstances. These include the indirect loss suffered by the injured party on the account of breach of contract. They can be recovered only when special circumstances responsible for the special loss which was not made known to the other party at the time of making the contract.
 - iii. **Vindictive Damages/Exemplary Damages:** Vindictive damages are quite heavy in amount and can be awarded in the following situation:
 - Breach of contract to marry.
 - Dishonour of customer's cheque by the bank without any proper reason.
 - iv. **Nominal Damage:** These damages are quite small in the amount, they are never granted by the way of compensation for the loss because that loss is very negligible. They are awarded simply to recognize the rights of the party to claim damages for the breach of contract.

Secondary Damages:

Following are few of the damages which can be included under secondary damages:

- i. **Damages for loss of Reputation:** Damages for the loss of goodwill or reputation is generally not enough to be recover except to the rule that exist in case of bank if the customer is a trade person, he cannot recover any damages in respect of loss of reputation.
- ii. **Damages for Discomfort:** Damages can be recovered for the physical discomfort, the general rule in this connection is major of damages is not affected to the reputation of any person personally.

- iii. **Damages agreed in advance:** Sometimes, the contract restricts or decides in advance the amount to be paid in case of breach of contract. The general rule is that the stipulation can be in form of penalty.
- iv. **Damages by way of penalty:** Damages by the way of penalty are not allowed except in case of public interest or for the non-performance of public duty by the order of government.
- v. **Liquidity Damages:** Liquidity damages represent fair and reasonable amount of provisions and rules which are in favour of suffering party for the loss accrued due to the breach of contract.

4. **Suit for Injunction:**

Injunction may be defined as an order of court by which a party is refrained from doing any particular act. In the context of contract, the term injunction is regarded as a negative work or activity or order issued by the court of law. A court order that is an equitable remedy can be interlocutory or mandatory. It may even be prohibitive or restrictive in nature.

A prohibitive mandate prevents something from being done. For example, Alan wanted to sell his restaurant due to the financial problem he faces now, so he offers his restaurant for Rs. 6000000. Wilson is interested in his restaurant and agreed with the price given. Therefore, Wilson signs a contract with Alan to take over his restaurant. After the signing of the contract, another buyer, Taylor is also interested in Alans restaurant and is willing to pay a higher price, Rs. 6300000. So, Alan changes his mind and is going to sell his restaurant to Taylor. Based on this case, when Wilson discovered that Alan is going to sell his restaurant to Taylor, Wilson has the right to request a court order in court. It's because Wilson and Alan have signed a contract before this. The court will take action and stop Alan for selling his restaurant to Taylor.

5. **Suit for Quantum Meruit:**

The phrase quantum meruit means payment in proportion of the amount of work done. Right on quantum meruit arises when a contract is partly performed by one party and has become discharged by the breach of contract.

In a literal sense, the expression "Quantum Meruit" means "as much as you earn". In a legal sense, it means payment in proportion to the work performed. This principle provides for the payment of compensation in certain circumstances, to a person who has offered the goods or services to the other party under a contract that, under certain circumstances, could not be carried out in its entirety.

6. Suit for Restitution:

Restitution generally means restoration. It is based on the noble principle that a person should not be allowed to enrich himself or herself at the expense of another person. Therefore, when the contract breaches, the party who have received all the benefits must restore or compensate the other party by providing damages.

Restitution is a remedy designed to restore the injured party to the position occupied before the formation of the contract. The parties seeking restitution cannot request to be compensated for the loss of profits or other gains caused by a violation. Instead, the restitution is intended to return to the claimant any money or property that has been given to the defendant under the contract.

❖ Exercise

Descriptive Questions

1. Define consents. When are the consents to a contract said to be free?
2. "A contract the object and consideration of which is unlawful is unenforceable by law". Define the statement in the light of the provisions of the contract act.
3. Explain in brief the different types of agreements expressly declared void by the Contract Act 1872.
4. Define in detail what are contingent contracts.
5. Explain in detail the different ways to perform a contract and who can perform it.
6. Define the different ways in which the contract can be discharged.
7. When is the consideration and object of an agreement considered to be unlawful?
8. Elaborate the different remedies available to an aggrieved party for the breach of contract.

Short Notes

1. Distinction between Coercion and undue influence.
2. Distinction between fraud and misrepresentation.
3. Illegal and unlawful agreements.
4. Effects of illegality.
5. Requisites of a valid tender.
6. Wagering agreement.
7. Agreements opposed to public policy.
8. Characteristics of contingent contracts.
9. The discharge of contract by an agreement for mutual consent.
10. Impossibility of performance.
11. Types of damages awarded for breach of contract.

12. Quantum Meruit.

Multiple Choice Questions:

1. The consents to a contract are not said to be free when they are obtained under; _____
 - a.Undue influence
 - b. Coercion
 - c.Mistake
 - d.All of the above.

2. A contract to do or not to do something, if some event, collateral to such contract does or does not happen is called a. _____
 - a.Unenforceable contract
 - b. Quasi Contract
 - c.Contingent contract
 - d.None of the above

3. Under a contract if a promisor offers to attempt performance, but the promisee refuses to accept such an attempt. What does such an attempt to performance amount to?
 - a.Tender
 - b.Performance
 - c.Void Agreement
 - d.Valid Contract

4. Novation, Rescission, Alteration, Remission, Waiver and Merger are all different ways to discharge contracts by what means?
 - a.Discharge by Performance
 - b. Discharge by consent
 - c. Discharge by impossibility of performance
 - d. Discharge due to change of law.

5. A supplies B (a minor) with essential necessities for his living. B is not personally liable to pay, but A is entitled for reimbursement from the properties or estate of B. according to the Contract Act 1872 what are such contracts called?
 - a.Unenforceable contract
 - b.Quasi Contract
 - c.Contingent contract
 - d.Void Contract

6. Where in a contract, partly performed by one party has become discharged by breach of the contract by the other party. As a remedy to

a. Quantum Meruit b.Nominal Damages
c. Injunction d.Specific Performance

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13. Ordinarily, special, vindictive and nominal are all different forms of-
_____?

a.contracts

b.agreements

c.Damages

d.none of the above

MCQ Answer key

1.	2.	3.	4.	5.	6.	7.	8.	9.	10.	11.	12.	13.
d	c	a	b	b	a	b	b	c	b	d	d	c

4.1 Indemnity and Guarantee**4.1.1 Definition of Indemnity****4.1.2 Commencement of Indemnifier's Liability****4.1.3 Rights of Indemnity Holder****4.1.4 Duties of the Indemnity Holder****4.2 Contracts of Guarantee****4.2.1 Essentials of a Contract of Guarantee****4.2.2 Kinds of Guarantee****4.2.3 Rights of a surety****4.3 Distinction between contracts of Indemnity and contracts of Guarantee****4.4 Contracts of Bailment****4.4.1 Requisites of Bailment****4.4.2 Duties of Bailor****4.4.3 Duties of Bailee****4.4.4 Rights of Bailor****4.4.5 Rights of Bailee****4.4.6 Termination of Bailment****4.5 Contracts of Pledge****4.5.1 Pledge by non-owners****4.5.2 Rights and Duties of Pawnor and Pawnee****4.5.2.1 Rights of Pawnee**

4.5.2.2 Rights of Pawnor

4.6 Difference between Bailment and Pledge

❖ Exercise

4.1 Indemnity and Guarantee

4.1.1 Definition of Indemnity

A contract, by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person, is called a ‘contract of indemnity’ (Sec. 124). The person who promises to make good the loss is called the **indemnifier (promisor)** and the person whose loss is to be made good is called the **indemnified or indemnity-holder (promisee)**. A contract of indemnity is really a class of contingent contracts.

Example: A contract to indemnify Mr B against the consequences of any proceedings which Mr C may take against Mr B in respect to a certain sum of Rs. 20,000. This is a contract of indemnity. The indemnify means to compensate or make good the loss. A contract of indemnity refers to a promise made by one person to make good any loss or damage another has incurred or may incur by acting at his request or for his benefit.

A contract of **fire insurance** or **marine insurance** is always a contract of indemnity. But there is no contract of indemnity in case of a contract of life insurance. There may not be a valid contract of indemnity where it is against public policy.

The most common use of the terms *indemnify* and *indemnity* occur in insurance policies. When purchasing an insurance policy, the insurance company agrees to indemnify the policyholder, or another specified party, against losses or damages that may occur.

Example: Rasilaben has a homeowner’s insurance policy on her home in Ahmedabad. The insurance company has agreed to indemnify Rasilaben against damages to her home and the personal property kept there, from many types of damage, including fire, burglary, and liability if someone gets injured on Rasilaben’s property. A visiting neighbour trips on a crack in the walkway and falls, breaking her arm. Rasilaben’s insurance company would protect Rasilaben

from the medical bills and other losses claimed by the neighbour by paying the claim.

Example: A and B claim certain goods from a railway company as rival owners. A takes delivery of the goods by agreeing to compensate the railway company against loss in case B turns out to be the true owner. There is a contract of indemnity between A and the railway company.

According to the definition given by Sec. 124 of the Contract Act, contract of indemnity includes (i) only express promise to indemnify and (ii) cases where loss is caused by the conduct of the promisor himself or by the conduct of any other person. It does not include (a) implied promise to indemnify and (b) cases where the loss is caused by accident or by the conduct of the promisee.

Example: A wheelchair manufacturer enters into an agreement with a large hospital to provide 500 wheelchairs at a discount price. The manufacturer asks that an indemnity clause be included in the contract, in which the hospital agrees to protect the company from any losses or lawsuits should patients be injured while using any of the wheelchairs. In doing this, the hospital *indemnifies* the wheelchair company, or the hospital guarantees *indemnity* for any losses or injuries that may occur.

4.1.2 Commencement of Indemnifier's Liability

High Courts have differed in their judgements regarding commencement of indemnifier's liability. According to High Courts of Calcutta, Madras, Allahabad and Patna indemnity holders when asked to meet a liability, can compel the indemnifiers to put him (indemnity-holder) in a position to meet the liability without waiting until he (indemnity-holder) has actually discharged it. High Courts of Bombay, Lahore and Nagpur have, however, held that indemnifier can be made liable only when indemnity-holder has incurred an actual loss, i.e., discharged the liability. The former view seems to be more correct and is also in consonance with the English view "to indemnify does not merely mean to reimburse in respect of moneys paid, but to save from loss in respect of liability against which the indemnity has been given...if it be held that payment is a condition precedent to recovery, the contract may be of little value to the person

to be indemnified, who may be unable to meet the claim in the first instance.”
(Kennedy L.J.) in Liverpool Insurance Co. case 84

Thus, we can conclude that if the indemnity holder had incurred an absolute liability, he has the right to call upon the indemnifier to save him from that liability and pay it off.

4.1.3 Rights of Indemnity Holder

As per the section 125 the rights of indemnity holder are:

- 1. Damages:** In a contract of indemnity the indemnity holder is entitled to recover from the promise and indemnifier all damages for which he may be compelled to pay in any suit as of any matter to which the promise of indemnity applies while acting within the scope of his authority.
- 2. Costs:** Any person with indemnity holder and indemnified or promise is entitled to recover from promisor all costs which he may be compelled to pay in any suit in bringing or defending it if he does not go against the order of the promisor and if he has acted in absence of any contract as would have been prudent for him to do.
- 3. Sums:** An indemnity holder is entitled to recover from indemnified all sums which he has paid under the term of compromise of any suit and compromise was not against the order of the promisor and the compromiser was not against the order of the promisor and the compromise was such that it was to be done (prudent) in absence of any contract of indemnity.

Explanation of Rights of Indemnity Holder: It is to be noted that a contract of indemnity being a specie of the general contract and therefore, must satisfy all essentials of a valid contract such as competent parties, free consent, lawful object etc., otherwise it will not be valid. **Example:** A agrees to indemnify B for all consequences which may arise as a result of his (B) giving a good beating to C. The object being unlawful the agreement is also void. If any person has agreed to indemnify a person against a particular claim and debt, demand and an action is brought on that demand the indemnity holder i.e. the defendant have to

give notice to the indemnifier to come and defend the action if he does not come and refuses to do as he asked. Thus, he has to compromise on best term and can bring an action under contract of indemnity.

4.1.4 Duties of the Indemnity Holder

Even though the duties of the indemnity holder are not mentioned in any section per se, we can say that the indemnity holder has some implied duties. For example, it is the duty of the indemnity holder to comply to the terms and conditions of the contract and any alteration can enable the indemnifier to reject the claim of indemnification.

4.2 Contracts of Guarantee

A 'contract of guarantee' is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the '**surety**', the person in respect of whose default the guarantee is given is called the '**principal debtor**', and the person to whom the guarantee is given is called the '**creditor**'. A guarantee may be either oral or written (sec. 126). It may be express or implied and may even be inferred from the course of conduct of the parties concerned.

Example: S requests C to lend Rs. 500 to P and guarantees that if P fails to pay the amount, he will pay. This is a contract of guarantee. S, in this case, is the surety, C, the creditor and P, the principal debtor.

The law of contract defines that for any valid contract there must be a minimum of two parties. A contract of guarantee is one of a kind where it requires a minimum of three parties instead of two for a contract of guarantee to be valid. A contract of guarantee is a **tripartite agreement**, which contemplates the principal debtor P, the creditor C, and the surety S. In it, there is a **triangular relationship** in which the following three collateral contracts may be distinguished:

- 1) As between C and P, there is a contract out of which the guaranteed debt arises.
- 2) As between S and C, there is a contract by which S guarantees to pay to C, P's debt in case of his (P's) default.

- 3) As between S and P, there is a contract that P shall indemnify S in case S pays in the event of a default by P. This contract, if it is not expressed between the parties, is always implied.

4.2.1 Essentials of a Contract of Guarantee

1. **Concurrence of All the Parties:** All the three parties namely, the principal debtor, the creditor and the surety must agree to make such a contract.
2. **Liability:** In a contract of guarantee, liability of the surety is secondary i.e., the creditor must first proceed against the debtor and if the latter does not perform his promise, then only he can proceed against the surety.
3. **Existence of a Debt:** A contract of guarantee pre-supposes the existence of a liability, which is enforceable at law. If no such liability exists, there can be no contract of guarantee. Thus, where the debt, which is sought to be guaranteed is already time barred or void, the surety is not liable.
4. **Consideration:** There must be consideration between the creditor and the surety so as to make the contract enforceable. The consideration must also be lawful. In a contract of guarantee, the consideration received by the principal debtor is taken to be the sufficient consideration for the surety. Thus, any benefit received by the debtor is adequate consideration to bind the surety. But past consideration is no consideration for a contract of guarantee. There must be a fresh consideration moving from the creditor.
5. **Writing not Necessary:** A contract of guarantee may either be oral or written. It may be express or implied from the conduct of parties.
Note: A Contract of Guarantee is always in writing under English Law.
6. **Essentials of a Valid Contract:** It must have all the essentials of a valid contract such as offer and acceptance, intention to create a legal relationship, capacity to contract, genuine and free consent, lawful object, lawful consideration, certainty and possibility of performance and legal formalities.

7. **No Concealment of Facts:** The creditor should disclose to the surety the facts that are likely to affect the surety's liability. The guarantee obtained by the concealment of such facts is invalid. Thus, the guarantee is invalid if the creditor obtains it by the concealment of material facts.
8. **No Misrepresentation:** The guarantee should not be obtained by misrepresenting the facts to the surety. Though the contract of guarantee is not a contract of *uberrimae fidei* i.e., of absolute good faith, and thus, does not require complete disclosure of all the material facts by the principal debtor or creditor to the surety before he enters into a contract. But the facts, that are likely to affect the extent of surety's responsibility, must be truly represented.
9. **In case co-surety does not join (Sec. 144):** Where a person gives a guarantee upon a contract that the creditor shall not act upon until another person has joined in it as co-surety, the guarantee will be invalid if that other person does not join.

Example: A agrees with B to stand as a surety for C for a loan of Rs. 1000 provided D also joins him as surety. D refuses to join. A is not liable as a surety.

4.2.2 Kinds of Guarantee

Contracts of guarantee may be of two types (1) Specific, or (2) Continuing.

1. **Specific guarantee:** Specific guarantee means a guarantee given for one specific transaction. In this case the liability of the surety extends only to a single transaction.
Example: A guarantee payment to B of the price of 5 sacks of flour to be delivered by B to C and to be paid in a month. B delivers sacks to C. C pays for them. Afterwards B delivers four sacks to C, which C does not pay. The guarantee given by A was only a specific guarantee and accordingly he is not liable for the price of the four sacks.
2. **Continuing guarantee (Sec. 129):** A continuing guarantee is that which extends to a series of transactions (Sec. 129). It is not confined to a single

transaction. Surety can fix up a limit on this liability as to time or amount of guarantee, when the guarantee is a continuing one. The fact that the guarantee is continuing can also be ascertained from the intentions of the parties and the surrounding circumstances.

Example: A, in consideration that B will employ C in collecting the rents from B's tenants, promises B to be responsible, to the amount of Rs. 5,0000, for the due collection any payment by C of those rents. This is continuing guarantee.

Example: A guarantees payment to B, a tea/dealer to the amount of Rs. 100000, for tea he may from time-to-time supply to C. B supplies C with tea to the extent of the agreed value i.e., Rs. 100000 and C pays B for it. Afterwards B supplies C with tea to the value of Rs 200000. C fails to pay. The guarantee given by A was a continuing guarantee, and he is accordingly liable to B to the extent of Rs. 100000.

4.2.3 Rights of a surety

Rights against the Creditor

1. Sec. 133 – The creditor ought not to change terms of the agreement between the creditor and the principal debtor without the surety's assent. Any such change releases the surety as to transactions ensuing to the difference. However, in the event that the change is for the profit of the surety or does not prefer him or is of an irrelevant character, it might not have the impact of releasing the surety.
2. Sec. 134 – The creditor ought not discharge the principal debtor from his liability under the agreement. The impact of the release of the principal debtor is to release the surety too. Any enactment or exclusion from the creditor which in law has the impact of releasing the principal debtor puts a close to the liability of the surety.
3. Sec. 135 -In the event that an agreement is made between the Creditor and Principal debtor for intensifying the last's liability or making a guarantee to him growth of time for doing the commitments or swearing up and down to not to beyond any doubt, releases the surety unless he consents to such an agreement.

4. Sec. 139 – the surety is released if the creditor debilitates (weakens) the surety's possible remedy against the principal debtor.

Rights against the Principal Debtor

1. Right of subrogation – The surety on making good of the debt obtains a right of subrogation (the substitution of one person or group by another in respect of a debt or insurance claim, accompanied by the transfer of any asset).
2. Sec. 140 – the surety can't assert the right of subrogation to the creditor's securities in the event that he has agreed as a security for a part of the contract and security has been procured by the creditor for the complete debt.

4.3 Distinction between contracts of Indemnity and contracts of Guarantee

Points of difference	Contracts of Indemnity	Contract of Guarantee
Parties	Only two parties-'indemnifier & indemnified.	There are three parties: 'Creditor' 'principal debtor' and 'surety'.
Liability	The liability of the indemnifier is 'primary'	The liability of the surety is secondary, i.e., the surety's is liable only if the principal debtor fails. The liability of the principal debtor is primary.
Contingency	The liability of the indemnifier arises only on the happening of a contingency.	There is an existing debt or duty the performance of which is guaranteed by the surety.
Contract	There is only one contract between the indemnifier and the indemnified.	Three contracts; one between the creditor and principal debtor; second, between the surety and the creditor, and third, between the surety and the principal debtor.

Object	The indemnity contract is for reimbursement of loss. It provides 'security'.	The contract of guarantee provides 'surety' or assurance to the creditor.
Interest of parties	Indemnity contract gets formed upon indemnifier's interest	Guarantee contract gets formed upon principal debtor's interest.
Right to sue	Indemnifier cannot sue a third party for the loss suffered.	Surety can sue the principal debtor.

4.4 Contracts of Bailment

The term bailment is derived from French word 'bailor' which means to deliver. Bailment is a delivery of goods on condition that the recipient shall ultimately restore them to the Bailor or dispose of them according to the direction of the Bailee or dispose of them according to the direction of the Bailor.

Bailment etymologically means "handing over" or "change of possession". As per section 148 of the act, bailment is an act whereby goods are delivered by one person to another for some purpose, on a contract, that the goods shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them. The person who delivers the goods is called the **Bailor** and the person to whom the goods are delivered is called the **Bailee**.

4.4.1 Requisites of Bailment

1. **Contract:** A bailment is usually created by agreement between the bailor and the bailee. The agreement may be express or implied. In certain exceptional cases, bailment is implied by law as between a finder of goods and the owner.
2. **Delivery of possession:** A bailment necessarily involves delivery of possession of goods by bailor to bailee. The basic features of possession are control and an intention to exclude others. As such, mere custody of goods does not create relationship of bailor and bailee. A servant who receives certain goods from his master to take to a third party has mere custody of the

goods; possession remains with the master and the servant does not become a bailee. Thus, to create bailment, there must be delivery of goods.

Examples: (1) A delivers his watch to a watch-maker for repair.

(2) A lady handed over her old jewellery to a jeweller for melting and making it into a new one. Every evening, she used to collect the half-made jewellery and put in into a box kept in the shop of the jeweller. She used to keep the key of the box with her.

One day the box was stolen. Held, the jeweller was not liable as the jeweller had re-delivered the jewellery to the lady and as such, the jeweller could not anymore be regarded as a bailee. The lady must bear the loss herself. [Kaliaperumal Pillai v. Visolakshmi]

3. **Movable goods:** It should be noted that in bailment, only the possession of the goods is transferred not the ownership. Again, only movable goods can be bailed as immovable goods cannot be delivered. It is the main feature of bailment that it is only for the moveable property and not for the immoveable property.

4. **For some purpose:** The delivery of goods from bailor to bailee must be for some purpose. If goods are delivered by mistake to a person, there is no bailment.

Examples: (1) A leaves his suit-case with a Railway Cloak Room for safe custody.

(2) A gives his watch for repair to a watch-maker.

(3) A gives a piece of cloth to a tailor for stitching it into a shirt.

5. **Return of specific goods:** It is agreed between the bailor and the bailee that as soon the purpose is achieved, the goods shall be returned or disposed of according to the directions of the bailor. For a transaction of bailment, it is necessary that the same goods must be returned. If the goods are not to be specifically returned, there is no bailment. But there is a bailment even if the goods bailed are, in the meantime, altered in form, e.g., when a piece of cloth is stitched into a suit. Where money is deposited in a savings bank account or any other account, it is not a transaction of bailment because the

bank is not going to return the same currency notes but will return only an equivalent amount. However, where money or valuables are kept in safe custody, it will amount to a transaction of bailment as these will be returned in specie.

6. **Consideration is not necessary in case of Contract of Bailment:** In case of bailment for mutual benefit of the bailor and bailee, consideration is there for both the parties e.g., A gives his watch for repair to B for Rs. 10. For A, consideration is repair of his watch and for B, consideration is Rs. 10. However, in case of bailment either for the benefit of the bailor or bailee alone, consideration in the form of something in return is not there. In such cases the detriment suffered by the bailor in parting with the possession of goods is considered as a sufficient consideration to support the promise on the part of the bailee to return the goods.

4.4.2 Duties of Bailor

1. **To disclose known faults:** It is the first and foremost duty of the bailor to disclose the known faults about the goods bailed to the bailee. If he does not make such disclosure, he is responsible for any damage caused to the bailee directly from such faults (Sec. 150, Para 1`). **Example:** A lends a horse, which he knows to be vicious, to B. He does not disclose that the horse is vicious. The horse runs away and B is thrown and injured. A is responsible to B for damage sustained.
2. **To bear extraordinary expenses of bailment:** The bailee is bound to bear ordinary and reasonable expenses of the bailment but for and extraordinary expenses the bailor is responsible. **Example:** A lends his horse to B, a friend, for two days. The feeding charges are to be paid by B. But if the horse meets with an accident A will have to repay B medical expenses incurred by B.
3. **To indemnify bailee for loss in case of premature termination of gratuitous bailment:** A gratuitous bailment can be terminated by the bailor at any time even though the bailment was for a specified time or purpose.

But in such a case, the loss accruing to the bailee from such premature termination should not exceed the benefit he has derived out of the bailment. If the loss exceeds the benefit, the bailor shall have to indemnify the bailee (Sec. 159). **Example:** A lends an old discarded bicycle to B gratuitously for three months. B incurs Rs. 12j0 on its repairs. If A asks for the return of the bicycle after one month, he will have to compensate B for expenses incurred by B in excess of the benefit derived by him.

4. **To receive back the goods:** It is the duty of the bailor to receive back the goods when the bailee returns them after the expiry of the term of the bailment or when the purpose for which bailment was created has been accomplished. If the bailor refuses to receive back the goods, the bailee is entitled to receive compensation from the bailor for the necessary expenses of custody.
5. **To indemnify the bailee:** Where the title of the bailor to the goods is defective and the bailee suffers as a consequence, the bailor is responsible to the bailee for any loss which the bailee may sustain by reason that the bailor was not entitled to make bailment, or to receive back the goods, or to give directions respecting them (Sec. 164).

4.4.3 Duties of Bailee

1. **To take reasonable care of the goods bailed:** In all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed (Sec. 151).
2. **Not to make any unauthorized use of goods:** If the bailee uses the goods bailed in a manner which is inconsistent with the terms of the contract, he shall be liable for any loss even though he is not guilty of negligence, and even if the damage is the result of an accident (Sec. 1534). **Example:** A lends a horse to B for his riding only. B allows C, a member of his family, to ride the horse. C rides with care, but the horse accidentally falls and is

injured. B is liable to make compensation to A for the injury caused to the horse.

3. **Not to mix the goods bailed with his own goods:** The bailee must not mix the goods of the bailor with his own goods; but must keep them separate from his own goods. If he mixes the bailor's goods with his own goods.
4. **Not to set up an adverse title (Sec. 117 of the Indian Evidence Act, 1872):** The bailee must hold the goods on behalf of and for the bailor. He cannot deny the right of the bailor to bail the goods and receive them back. If he delivers the goods bailed to a person other than the bailor, he may prove that such person had a right to them as against the bailor.
5. **To return any accretion to the goods:** In the absence of any contract to the contrary, the bailee is bound to deliver to the bailor, or according to his directions, any increase or profit, which may have accrued from the goods, bailed (Sec. 163).
6. **To return the goods:** It is the duty of the bailee to return or deliver, according to the bailor's directions, the goods bailed, without demand, as soon as the time for which they were bailed has expired, or the purpose for which they were bailed has been accomplished (Sec. 160). If he fails to do so, he is responsible to the bailor for any loss (Sec. 161) notwithstanding the exercise of reasonable care on his part.

4.4.4 Rights of Bailor

1. **Enforcement of rights:** The bailor can enforce by suit all the liabilities or duties of the bailee, as his rights.
2. **Avoidance of contract:** The bailor can terminate the bailment if the bailee does, with regard to the goods bailed, any act which is inconsistent with the terms of the bailment (Sec. 153).
3. **Return of goods lent gratuitously:** When the goods are lent gratuitously, the bailor can demand their return whenever he pleases even though he lent

them for a specified time or purpose. But if the bailee suffers any loss exceeding the benefit actually derived by him from the use of such goods because of premature return of goods, the bailor shall have to indemnify the bailee (Sec. 159).

4. **Compensation from a wrongdoer:** If a third person wrongfully deprives the bailee of the use or possession of the goods bailed, or does them any injury, the bailor or the bailee may bring a suit against the third person for such deprivation or injury (Sec. 180)

4.4.5 Rights of Bailee

1. **Delivery of goods to one of several joint bailors of goods:** If several joint owners of goods bail them, the bailee may deliver them back to, or according to the directions of, one joint owner without the consent of all, in the absence of any agreement to the contrary (Sec. 165).
2. **Delivery of goods to bailor without title:** If the bailor has no title to the goods, and the bailee, in good faith, delivers them back to, or according to the directions of, the bailor, the bailee is not responsible to the owner in respect of such delivery (Sec. 166).
3. **Right to apply to court to stop delivery:** If a person, other than the bailor, claims goods bailed, the bailee may apply to the Court to stop the delivery of the goods to the bailor, and to decide the title to the goods (Sec. 167).
4. **Right of action against trespassers:** If a third person wrongfully deprives the bailee of the use or possession of the goods bailed to him, he has the right to bring an action against that party. The bailor can also bring a suit in respect of the goods bailed (Sec. 180).
5. **Bailee's lien:** Where the lawful charges of the bailee in respect of the goods bailed are not paid, he may retain the goods. This right of the bailee to retain the goods is known as 'particular lien'.
'Lien' means the right of a person to retain possession of some goods belonging to another until some debt or claim of the person in possession is

satisfied. It appertains to the person who has possession of the goods, which belong to another, entitling him to retain them until the debt due to him has been paid.

- 1) **Particular lien:** A particular lien is one, which is available to the bailee against only those goods in respect of which he has rendered some service involving the exercise of labour or skill. **Example:** (a) A delivers a rough diamond to B, a jeweller, to be cut and polished. This is accordingly done. B is entitled to retain the finished diamond till he is paid for services he has rendered. (b) A gives a piece of cloth to B, a tailor, to make into a coat. B promises A to deliver the coat as soon as it is finished. B is entitled to retain the coat till he is paid for. **Example:** A gives a piece of cloth to B, a tailor, to sew it into a coat. B promises A to deliver the coat as soon as it is finished, and to give A three months' credit for the price. B is not entitled to retain the coat.
- 2) **General lien:** A general lien is a right to retain all the goods or any property (Which is in possession of the holder) of another until all the claims of the holder are satisfied. This is a right to retain the property of another for a general balance of account. **Example:** if two securities are given to a banker but a loan is taken only against one of the securities, the banker may retain both the securities until his claim is satisfied.

4.4.6 Termination of Bailment

A contract of bailment is terminated in the following cases:

1. **On the expiry of the period:** When the bailment is for a specific period, it terminates on the expiry of that period.
2. **On the achievement of the object:** When the bailment is for a specific purpose, it terminates as soon as the purpose is achieved.
3. **Inconsistent use of goods:** When the bailee uses the goods in a manner inconsistent with the terms of the contract, the bailment terminates (Sec. 154).

4. **Destruction of the subject matter:** A bailment is terminated when the subject matter of the bailment (a) is destroyed, or (b) by reason of a change in its nature becomes incapable of use for the purpose of the bailment.
5. **Gratuitous (unjustified) bailment:** It can be terminated any time subject to condition laid down in Sec. 159.
6. **Death of the bailor or bailee:** A gratuitous bailment is terminated by the death either of the bailor or of the bailee (Sec. 162).

4.5 Contracts of Pledge

In 'pledge'. The bailor is, in this case, called the 'pledger' or 'pawnor' and the bailee is called the 'pledgee' or 'pawnee' (Sec. 172).

A pledge is a bailment for security. It is a special kind of bailment. **Example:** If A borrows Rs. 200 from B and keeps his watch as security for payment of the debt, the bailment of watch is a pledge. Any kind of movable property, i.e., goods, documents, or valuables may be pledged. Even a Savings Bank Pass Book may be pledged [J. & K. Bank v. Tek Chand, A.I.R. (1959) J. & K. 67]. But delivery is necessary to complete a pledge. The delivery may be actual or constructive. If, because of the bulk of the property or for some other reason, actual delivery is impracticable, a symbolic delivery will suffice (as for example delivery of the keys to a locker in a safe deposit vault).

4.5.1 Pledge by non-owners

Ordinarily only a person who is the real owner of the goods can make a valid pledge, but in the following cases pledge made by non-owners will also be valid.

1. **Pledge by a mercantile agent (Sec. 178):** Where a mercantile agent is, with the consent of the owner, a possession of goods or the documents of title to goods, any pledge made by him, when acting in the ordinary course of business of a mercantile agent, shall be as valid as if he were expressly authorised by the owner of the goods to make the same, provided that the pawnee act in good faith and has not at the time of the pledge notice that the pawnor has no authority to pledge.

2. Pledge by person in possession under voidable contract (Sec. 178 A): When the pawnor has obtained possession of the goods pledged by him under a contract voidable under Section 19 or Section 19A, but the contract has not been rescinded at the time of the pledge, the pawnee acquired a good title to the goods, provided he acts in good faith and without notice of the pawnor's defect of title.
3. Pledge where pawnor has only a limited interest (Sec. 179). Where a person pledges goods in which he had only a limited interest, the pledge is valid to the extent of that interest. Example: A finds a watch on the road and spends Rs. 25 on its repairs. He pledges it with B for Rs. 50/-. The real owner can get the watch by paying Rs. 25 to the pledge.
4. Pledge by a co-owner in possession: If there are several joint owners of goods and goods are in the sole possession of one of the co-owners with the consent of other co-owners, such a co-owner can make a valid pledge of goods.
5. Pledge by seller or buyer in possession after sale: A seller, who has got possession of goods even after sale, can make a valid-pledge, provided the pawnees act in good faith. Example: X buys goods from Y, pays for them, but leaves them in the possession of Y, and Y then pledges the goods with Z who does not know of sale to X, the pledge is valid. Similarly, if the buyer obtains possession of goods with the consent of the seller before payment of price and pledges them, the pawnee will get a good title provided he does not have the notice of seller's right of lien or any other right.

4.5.2 Rights and Duties of Pawnor and Pawnee.

The rights and duties of pawnor and pawnee are almost similar to those of bailor and bailee. But the rights of the Pawnee and pawnor need a special mention.

4.5.2.1 Rights of Pawnee

1. **Right of retainer:** The pawnee may retain the goods pledged until his dues are paid. He may retain them not only for the payment of the debt or the performance of the promise, but for (a) the interest due on the debt, and (b) all necessary expenses incurred by him in respect of the possession or for the

preservation of the goods pledged (sec. 173). He can however exercise only a particular lien over the goods.

2. **Right of retainer for subsequent advances:** When the pawnee lends money to the same pawnor after the date of the pledge, it is presumed that the right of retainer over the pledged goods extends to subsequent advances also. This presumption can be rebutted only by a contract to the contrary (Sec. 174).
3. **Right to extraordinary expenses:** The pawnee is entitled to receive from the pawnor extraordinary expenses incurred by him for the preservation of the goods pledged (Sec. 175). For such expenses, he has no right to retain the goods; he can only sue to recover them.
4. **Right against true owner, when the pawnor's title is defective:** When the pawnor has obtained possession of the goods pledged by him under a voidable contract (i.e., by fraud, undue influence, coercion , etc.) but the contract has not been rescinded at the time of the pledge, the pawnee acquires a good title to the goods, provided he acts in good faith and without notice of the pawnor's defect of title (Sec. 178;-A).
5. **Pawnee's rights where pawnor makes default (Sec. 176):** Where the pawnor fails to redeem his pledge, the pawnee can exercise the following rights:
 - a) He may file a suit against the pawnor upon the debt or promise and may retain the goods pledged as a collateral security.
 - b) He may sell the goods pledged after giving the pawnor a reasonable notice of the sale. Of these two rights, while the right to retain or sell the pawned goods are not concurrent, the right to sue and sell are concurrent right, i.e., the pawnee may sue and at the same time retain the goods as concurrent security or sell them after giving reasonable notice of the sale to the pawnor [Haridas Mundra v. National & Grindlays Bank Ltd., A.I.R. (1963) Cal. 132].

- c) He can recover from the pawnor any deficiency arising on the sale of the goods by him. But he shall have to hand over the surplus, if any, realized on the sale of the goods to the pawnor.

4.5.2.2 Rights of Pawnor

1. **Right to get back goods:** On the performance of promise or repayment of loan and interest, if any, the pawnor is entitled to get back the goods pledged.
2. **Right to redeem debt:** Quite often a time is stipulated for the payment of the debt, or performance of the promise, for which the pledge is made. In such a case if the pawnor makes default in payment of the debt or performance of the promise at the stipulated time, he may still redeem the goods pledged at any subsequent time before the actual sale of them; but he must, in that case, pay, in addition, any expenses which have arisen from his default (Sec. 177).
3. **Preservation and maintenance of the goods:** The pawnor has a right to see that the pawnee, like bailee, preserves the goods pledged and properly maintains them.
4. **Rights of an ordinary debtor:** The pawnor has, in addition to the above rights, the rights of an ordinary debtor, which are conferred on him by various Statutes meant for the protection of debtors.

4.6 Difference between Bailment and Pledge

The following are the major differences between Bailment and Pledge:

1. A Bailment is a contract in which goods are transferred from one party to another party for a short period for a specific objective. The Pledge is a kind of Bailment in which goods are pledged as security against payment of debt.

2. A Bailment is defined under section 148 while Pledge is defined under section 172 of the Indian Contract Act, 1872.
3. In bailment, the consideration may or may not be present, but in the case of a pledge, the consideration is always present.
4. The objective of bailment is safe custody or repairing of goods delivered. On the other hand, the sole purpose of delivering the goods is to act as security against the debt.
5. The receiver has no right to sell the goods in case of bailment whereas if Pawnor does not redeem the goods within the reasonable time, the Pawnee can sell the goods after giving notice to him.
6. In bailment, the goods are used by the bailee only for the said purpose. Conversely, in pledge, Pawnee has no right to use the goods.

BASIS FOR COMPARISON	BAILMENT	PLEDGE
Meaning	When the goods are temporarily handed over from one person to another person for a specific purpose, it is known as bailment.	When the goods are delivered to act as security against the debt owed by one person to another person, it is known as the pledge.
Defined in Section	Section 148 of the Indian Contract Act, 1872.	Section 172 of the Indian Contract Act, 1872.
Definition	Delivery of goods by Bailor to Bailee for a definite purpose on condition of their return or disposal, when purpose is accepted.	The Bailment of goods as security for payment of a debt or performance of a promise is called pledge.
Parties	The person who delivers the goods is known as the Bailor while the person to whom the goods are delivered is known as Bailee.	The person who delivers the goods is known as Pawnor while the person to whom the goods are delivered is known as Pawnee.
Consideration	May or may not be present.	Always present.

BASIS FOR COMPARISON	BAILMENT	PLEDGE
Right to sell the goods	The party whom goods are being delivered has no right to sell the goods.	The party whom goods are being delivered as security has the right to sell the goods if the party who delivers the goods fails to pay the debt.
Use of Goods	The party whom goods are being delivered can use the goods only, for the specified purpose.	The party whom goods are being delivered has no right to use the goods.
Purpose	Safe keeping or repairs, etc.	As security against payment of debt.
Example	Sam delivers cloth to John, a tailor to make a shirt. The contract between Sam and John is bailment.	If a Farmer delivers to bank 50 bags of wheat as security for obtaining a loan, it is called pledge.

❖ **Exercise**

Descriptive Questions

1. What is a Contract of Indemnity? Also explain the rights and duties of an indemnity holder.
2. What is a Contract of Guarantee? Explain the essential elements of a Contract of Guarantee.
3. Define the Contracts of Indemnity and Guarantee and explain in detail the distinction between the two.
4. What are Contracts of Bailment? Define in detail the requisites of Bailment.
5. Define in detail the rights and duties of Bailor and Bailee.
6. What are Contracts of Pledge? Define in detail the rights of Pawnor and Pawnee.
7. Define Contracts of Bailment and Pledge and explain in detail the distinction between them.

Short Notes

1. Kinds of guarantee.
2. Rights of surety.
3. Termination of Bailment.
4. Particular and General Lien.
5. Difference between Indemnity and Guarantee.
6. Difference between Bailment and Pledge.

Multiple Choice Questions

1. What type of a contract is a contract of fire insurance?
 - a. Contract of indemnity

- b. Contract of Bailment
 - c. Contract of Guarantee
 - d. Contract of Pledge
2. What rights of recovery does an indemnity holder possess?
 - a. Damages in any suit
 - b. Costs incurred in any suit
 - c. Any sum paid as compromise
 - d. All the above
3. Which of the following necessarily has to have three parties to the contract?
 - a. Contract of Indemnity
 - b. Contract of Bailment
 - c. Contract Of Guarantee
 - d. Contract of Pledge
4. In a contract of guarantee liability of the surety is _____
 - a.Primary b.Secondary
 - c.Contingent d.None of the above
5. A guarantee that extends to not one but a series of transactions is better known as _____
 - a. Specific guarantee b.Continuing guarantee
 - c.No guarantee d.Full guarantee
6. An act whereby goods are delivered by one person to another for some purpose, on a contract, that the goods shall, when the purpose is accomplished, be returned are called?
 - a.Contract of Indemnity b.Contract of Bailment
 - c.Contract Of Guarantee d.Contract of Pledge
7. The bailment of goods as security for payment of a debt or performance of a promise is called a _____
 - a.Contract of Indemnity b.Contract of Bailment
 - c.Contract Of Guarantee d.Contract of Pledge
8. A contract of bailment can be made for _____
 - a. Movable property only
 - a. immovable property only
 - b. both movable and immovable property
 - c. none of the above.
9. The right of a person to retain possession of some goods belonging to another until some debt or claim of the person in possession is satisfied is called a _____
 - a.Detention b.Penalty c.Lien d.Damages
10. A contract of bailment can be terminated in which of the following ways?
 - a. On the expiry of the specific period
 - b. on destruction of the subject matter
 - c. on the achievement of the object
 - d. all of the above

MCQ Answer key

1.	2.	3.	4.	5.	6.	7.	8.	9.	10.
a	d	c	b	b	b	d	a	c	d

BBA SEMESTER-3
BUSINESS LAW
BLOCK: 2

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'JyotirmayParisar', opp. Shri Balaji Temple, Chharodi, Ahmedabad, 382481,
Gujarat, India.
- Edition:** 2025-26 (First Edition)
- ISBN:** 978-93-5598-800-3

ISBN: 978-93-5598-800-3



5.1 Agent**5.1.1 Essentials of relationship of Agency****5.1.2 Rules of Agency****5.2 Classification of agents on the basis of extent of Authority****5.2.1 Other classification of agents****5.3 Creation of Agency****5.4 Duties of Agent****5.4.1 Rights of Agent****5.5 Duties of Principal****5.5.1 Right of Principal.****5.6 Termination of Agency****5.6.1 Termination of agency by the operation of law****5.6.2 Termination by the act of Parties****5.6.3 Termination of sub-agency and substituted agency****❖ Exercise**

5.1 Agent

When a person employs another person to do any act for himself or to represent him in dealing with third persons, it is called a '**Contract of Agency**'. The person who is so represented is called the '**principal**' and the representative so employed is called the '**agent**' (Sec. 182). The duty of the agent is to enter into legal relations on behalf of the principal with third parties. But, by doing so he himself does not become a party to the contract to the contract not does he incur

any liability under that contract. Principal shall be responsible for all the acts of his agent provided they are not outside the scope of his authority.

The term agent can best be used to denote a relationship that is very different from that between a master and his server, or an employer and his independent contractor.

"Although employees and independent contractors are parties to relationships in which one person acts for another and possesses the ability to involve that other person in responsibility, the nature of the relationship and the type of acts in question are different enough to justify the exclusion of independent servers and contractors from the law relating to the agency, unless a server or independent contractor is employed as an agent at a given time, when it should be called that way. In other words, the term agent must be restricted to the one who has the power to affect the legal status of his principal by entering into contracts or the disposition of property: but which, incidentally, may affect the legal position of his principal in other ways.

One that represents and acts for another under the contract or agency relationship. The agents are general or special. A general agent is one who is employed in his capacity as professional man or teacher of an art or trade, or to whom the director entrusts all his business or all transactions or functions of a designated class; or is a person who is authorized by his principal to execute all the deeds, sign all contracts or buy all the goods required in a particular trade, business or employment.

Definition of Agent:

"One who agrees and is authorised to act on behalf of another, a principal, to legally bind an individual in a particular business transaction third parties pursuant to an agency relationship".

West's Encyclopedia of American Law

"A person who has received the power to act on behalf of another, binding that other person as if he or she were themselves making the decisions."

Duhaime's Law Dictionary

A party that has express (oral or written) or implied authority to act for another (the principal) so as to bring the principal into contractual relationship with other parties. An agent is under the control (is obligated to) the principal, and (when acting within the scope of authority delegated by the principal) binds the principal with his or her acts. Additional powers are assigned to agents under the legal concept of "apparent authority." The agent, however, does not have title to the principal's goods in his or her possession, except where agent's lien is applicable. In general, advertising agencies do not fall under this definition of an agent, because they act as principals for the services they buy on behalf of their clients.

Definition of Principal:

In commercial law, a principal is a person, legal or natural, that authorizes an agent to act to create one or more legal relationships with a third party.

In an agency relationship, the principal is the person who gives authority to another, called an agent, to act on his or her behalf.

Generally, anyone who has the legal capacity to carry out an action can appoint an agent to do it on their behalf. Common types of principal/agent relationships include employer/employee, corporation/officer, client/attorney. It's also possible to create an agent by drawing up a power of attorney to authorize someone to act as one's representative. As long as one has the legal capacity to make decisions.

5.1.1 Essentials of relationship of Agency

There are two essentials of the relationship of agency:

- 1. Agreement between the principal and the agent:** The agency depends on the agreement, but not necessarily on the contract. As between the director and third parties, anyone can become an agent. As such, even a minor or a sick-minded person can be an agent. However, the principal is responsible for the acts of said agent.

2. **Intention of the agent to act for the principal:** Whether a person intends to act on behalf of another is a matter of fact. When a person intends to act on behalf of another, the agency may arise even if the contract between the parties stipulates that there is no such relationship.

5.1.2 Rules of Agency

There are two important rules of agency:

1. **What a person can do personally, can be done through agent:** This rule, of course, is subject to certain well-known exceptions, such as when the act that is performed is of a personal nature (i.e. singing) or is attached to a public office.
2. **He who does an act through another can be dealt by himself:** This means that the acts of an agent, subject to certain conditions, are acts of the principal. Sec. 226 clearly states that the acts and contracts of an agent will have the same legal consequences as if the contracts and acts performed by the director in person had been celebrated.

5.2 Classification of agents on the basis of extent of Authority

Depending on the scope of the authority, the agents can be classified as Agents, General Agents and Universal Agents. They are explained briefly as follows.

1. **Special agents:** A special agent is one who is designated to perform a special act or represent his principal in a particular transaction. He has limited authority. He has no authority to bind the principal with respect to any act other than that for which he is employed. **For example**, if a person is employed to buy a car, the authority of that person comes to an end as soon as he buys a car. If you exceed your authority, the principal is not responsible for such unauthorized acts.
2. **General agents:** A general agent is one who has the authority to perform all acts related to a particular trade, business or job. For example, if a person positions himself as a manager, he has the authority to bind the principal for all of his or her actions that fall within the scope of the business of running the store. Such authority of the agent is implicit as long as his actions are

within the limits of his apparent authority. It is irrelevant if they are beyond the reach of their real authority.

Third parties have the right to assume that the agent has the authority to do whatever is necessary in the course of the business, and even if the agent violates his apparent authority, his actions are binding on the principal unless third parties have notified the reduction of the apparent authority of the agent. Unless the principal ends the authority, it will be assumed to be continuous.

3. **Universal agents:** A universal agent is one who has unlimited authority to perform all acts that can be delegated to him, and which the principal can perform legally. An agent of this type is usually appointed by an employer who is still legally competent to appoint an agent, but due to his physical condition, he wishes to withdraw giving a general power of attorney to the agent to do whatever must be done while he is in the service.
4. **Co-agents:** This happens when a principal appoints two or more people as agents together. Their authority is joint when nothing is mentioned. It implies that all co-agents agree to the exercise of their authority unless their authority is fixed or unless the circumstances reveal any intention to the contrary. But when its authority is several, any other co-agent can act without the concurrence of the other.
5. **Sub-Agents:** In the language of the law, a subagent would be "a person employed and acting under the control of the original agent in the business of the agency." In simple words, the subagent is an agent of the original agent. With respect to a third party, the principal may be held liable for the acts of a secondary agent in certain cases such as fraud, etc., however, in general, the agent is liable to the principal for the acts of the secondary agent.
6. **Substituted agents:** The substitute agent is almost the same as a co-agent or a subagent. Sections 194 and 195 deal with substituted agents. It states that "when an agent has express or implicit authority to appoint another person to

act on behalf of his principal in his business, that agent is known as a substituted agent." There are certain differences between the two, which could be better understood by the way of the following **illustration**: Mr. RR authorizes Mr. YY, who is an entrepreneur in Pune, to recover the money due to RR from ABC Company, and, in turn, instructs NN, a lawyer, to Take the necessary legal actions and recover the fees Here, NN is not a subagent but an attorney of RR.

5.2.1 Other classification of agents

1. **Factor:** According to section 2 of the law of sale of goods, there is an agent known as a commercial agent. As his name suggests, he is the one who works for the business (merchandise) of the principal. A factor is a type of commercial agent that sells goods on behalf of its principal. It has broad authority and discretionary powers to sell products according to the terms and conditions it deems appropriate. In broader terms, relieves its director of the burden of his work. If a factor does any act that is beyond its authority, but that is within the scope of its apparent authority, then its principal is bound by that act.
2. **Broker:** A broker is a special type of commercial agent that acts as an intermediary between the buyer and the seller. We can say that it is used to establish a contractual relationship between the principal and the third party. In general, you receive a commission for the work done. Its function ends when it brings together the two parties. He is never in the possession of the subject, therefore he cannot exercise the right of encumbrance.
3. **Auctioneer:** The auction is usually a public sale of goods made at the highest of several bidders. An auctioneer is a commercial agent who is designated to sell goods on behalf of the principal, compensated in terms of commission.
4. **Agents of the Commission:** A commission agent is usually designated to sell or buy goods on behalf of its principal. These types of agents belong to a somewhat indefinite class of agents. He / She tries to insure the buyer for a

seller of goods and sellers for a buyer of goods and receives a commission in exchange for his work on the actual selling price.

5. **Agents of Del Credere:** An agent of Del Credere is a commercial agent that is used to sell products on behalf of its principal. It undertakes to guarantee the payment of the fees in consideration of an additional commission. We can say that in addition to being a commercial agent, an agent of the credere is also in the skin of a guarantor.

5.3 Creation of Agency

A person who has the capacity to contract can contract for himself or for another person. If you adopt the first method, it is not about agency. If you adopt the second method, then there arises the concept of an agency. The person who represents another in their dealings with third parties is called an agent and that person who is represented by an agent is called a principle.

The following are different modes of creation of agency.

1. Agency by Express agreement.
 2. Agency by Operation of law.
 3. Agency by Ratification.
 4. Agency by Implied authority.
-
1. **Agency by Express Agreement:** The authority of an agent can be expressed or implied (Sec. 186). Normally, the authority given by a principal to his agent is an express authority, which allows the agent to bind the principal for acts performed within the scope of his authority. The agent can, in such case, be designated by word of mouth or by means of a written agreement (Sec.187). The usual form of a written agency contract is power (a formal instrument by which one person empowers another to represent it, or act in its place, for certain purposes) on a stamped paper.
 2. **Agency by Implicit (implied) Agreement:** The implied agency arises from the conduct, situation or relationship of the parties. It can be deduced from the circumstances of the case, and the things spoken or written or the ordinary course of the negotiation, can be counted as circumstances of the

case (Sec. 187). **Examples:** A and P are brothers. A lives in Delhi while P lives in Meerut. A with the knowledge of P Leases P lands in Delhi. The income is reported and sent to P. A is the agent of P, although it is not expressly designated as such.

The implied agency arises when the principal addresses the person supposedly the agent or third parties in such a way, as if the director had granted the appointment of that person as agent. It includes:

a) Agency for estoppels: The doctrine of estoppel can be expressed as follows: When a person, by his behaviour, or by spoken or written words, voluntarily induces another person to believe that a certain state of affairs exists and induces him to act in accordance with that belief to alter his previous position, it is prevented from subsequently denying the fact of that state of affairs.

For e.g. In presence of A, B says to C that he (B) is A's agent though it is not so actually. A has not restricted B from making such statement. Here agency by Estoppel can be seen.

b) Agency retaining: The agency retaining is a branch of the agency by estoppel. In this case, a positive or affirmative prior act by the director is required to establish the agency later.

For e.g. P allows his servant to usually buy products on credit to T, and he pays them. On one occasion, he pays his servant money to buy the goods. The servant misappropriates the money and buys goods on credit from T. T can recover the price of P since he had offered his servant as his agent on previous occasions.

c) Agency by necessity: In certain urgent circumstances, the law confers authority on one person to act as agent for the benefit of another, with no opportunity to communicate with that other. Such an agency is called a necessity agency.

For e.g.: A has delivered 100 litres of milk for transport, to a trucking company. Actually, it's a bail contract, let's assume that in transit all vehicles have stopped and it takes a week to continue the movement. Then the authorities of the transport company have sold the milk in those nearby areas. Here you can see the agency by necessity.

3. **Agency for Ratification:** A person can act on behalf of another person without their knowledge or consent. For example, A can act as agent of P even though he does not have prior authority of P. In such a case, P can subsequently accept the act of A or reject it. If he accepts the act of A, done without his consent, it is said that he ratified that act and places the parties exactly in the same position as they would have been if A had the authority of P at the time he made the contract. In the same way, when an agent exceeds the authority granted by the principal, the principal can ratify the unauthorized act.

Ratification can be expressed or implied. In case the adoption of the activity is done through the expression, it is called express ratification. For example: without the address of A, B has purchased goods for the sake of A. After A has given his support (adoption) to the activity of B, it is called Ratification. Now A is Principal and B is agent.

Ratification where there is no expression is called implicit ratification. For example: Mr. Q has P's money with him. Without the direction of P, he has lent that money to R. There after R has paid interest directly to P. Without any debate P has taken that amount of R. This implies that P has given his support to the activity of Q. It is an implicit ratification.

Requisites of Valid Ratification

- i. The agent should pretend to act as an agent for a principal who is in contemplation and is identifiable at the time of the contract. **Example:** R was authorized by K to buy wheat at a certain price. Acting in excess of his authority, R bought wheat from D at a higher price in his own name. He did not profess but wheat in the name of K. Subsequently, K ratified the act of R but then refused to receive the wheat. D filed a claim against K. Held, the contract could not be ratified because R did not intend to act as K's agent [Keighley, Maxsted & Co. v. Durant, (1901) A.C. 240].
- ii. The principal must exist at the time of the contract. A company, for **example**, cannot ratify the contracts entered into by the promoters on its behalf before its incorporation.

- iii. The principal must have contractual capacity both at the time of the contract and at the time of ratification. If the principal was not competent to enter into a contract at the time the contract was signed, he cannot validate it by ratifying it at the time he is competent to contract.
 - iv. The ratification must be with full knowledge of the facts. A valid ratification cannot be made by a person whose knowledge of the facts of the case is materially defective (Sec. 198).
 - v. The ratification must be made within a reasonable time of the act that is intended to ratify. If it is made after the expiration of the reasonable time, it will not be valid.
 - vi. The act to be ratified must be legal and not null or illegal or ultraviolent in the case of a company. An agreement, which is void ab initio, cannot be ratified.
 - vii. The ratification must be communicated to the party to which it seeks to be linked by the act performed by the agent.
 - viii. The ratification can be of the acts that the director had the power to do. The acts, which the director is unable to do, cannot be ratified. A company, for example, cannot ratify the acts of the directors, who are at all costs of the powers of the company.
 - ix. The ratification must not expose a third party to damages. Ratification, which has the effect of subjecting a third party to damages or ending any right or interest of a third person, cannot be done (Sec. 200).
 - x. The ratification is related to the date of the act of the agent. **Example:** Whoever intends to act as an agent on behalf of P but without P's authorization accepts an offer from T. T withdraws the offer before P finds out. P subsequently ratifies the acceptance of A. The result of the ratification is a contract and, as such, is bound by the contract.
- 4. Agency by Operation of Law:** Sometimes, an agency arises because of the operation of the law. When a company is formed, its promoters are its agents by law. A partner is the agent of the company for the business purposes of the company, and the act of a partner, which is carried out to carry out, in the usual manner, business of the type carried out by the company, links to the

company (Sections 18 and 19 of the Indian Association Act, 1932). In all these cases, the agency is implied by the operation of the law.

5.4 Duties of Agent

An agent owes a number of duties to his principal which varies in degree according to the nature of agency. These duties are as follows:

1. **To carry out the work given by the director:** In the absence of such instructions, you must act in accordance with the custom that prevails when doing business of the same type in the place where you conduct such business. When acting otherwise, if any loss is sustained, it must be made good for its principal, and if any gain accrues, it must be accounted for (Sec. 211). If the disobedience of the agent is material, the director may even terminate the agency. **For e.g.** A, an agent engaged in conducting a P business, in which it is customary to invest from time to time, at interest, the money that may be available, fails to make such investments. A should be good for P the interest generally obtained by such investment.
2. **To carry out the work with care, skill and diligence:** An agent is required to carry out the business of the agency with as much skill as people in similar businesses usually possess, unless the director is aware of his lack of ability. He is always required to act with reasonable diligence, to use the skills he possesses, and to compensate his principal with respect to the direct consequence of his negligence, lack of skill or misconduct. But he is not responsible to his director regarding the loss or damage, which is indirectly or remotely caused by such negligence, lack of skill or misconduct.
3. **To communicate with the director in case of difficulty:** It is the duty of an agent, in cases of difficulty, to use all reasonable diligence to communicate with his principal and seek to obtain his instructions (Section 214).
4. **Do not try on your own:** An agent should not deal with his own account in the business of the agency without first obtaining the consent of the director and familiarizing him with all the material circumstances that he has come to his knowledge.

5. **Pay the sums received by the principal:** An agent is obligated to pay his principal all the sums received in his account (Sec. 218). He may deduct from it all the money that corresponds to him for advances made or expenses incurred by him in carrying out such business and also the remuneration that corresponds to him for acting as agent (Sec. 217).
6. **To protect and preserve the interests of the principal in the event of his death or insolvency:** When the principal expires an agency, the principal is dying or is losing sanity, the agent is obliged to take, on behalf of the representatives of his late director, all reasonable steps for the protection and preservation of the interests that are Trust (Sec. 209).
7. **Not to use information obtained in the course of the agency against the principal:** It is the duty of the agent to transmit any information received in the course of the agency to its director. When you use such information against the interest of the principal and the principal suffers a loss, you are obligated to compensate the principal. The principal may also prevent the agent from using such information through a court order.
8. **Not to make secret profit from agency:** An agent occupies a fiduciary position. It must not, except with the knowledge and consent of the principal, obtain any benefit beyond the agreed commission or remuneration.
9. **Not to set up an adverse title:** An agent must not set up his own title or the title of a third person (unless he proves a better title in that person) to the goods, which he receives, from the principal as an agent. If he does so, he will be liable for conversion (any act in relation to goods of another person which constitutes an unjustifiable denial of his title to them).
10. **Not to put himself in a position where interest and duty conflict:** An agent has the obligation, in all cases, to act in the interest of the principal. You must not place yourself in a position where your duty to the principal

and your personal interest is in conflict unless you have made a full disclosure of your interest to your principal, specifying its exact nature and obtaining your assent. **For e.g.** P hired A, a stockbroker, but with some shares for him. A sold his own shares to P without revealing that the shares belonged to him. Held, P could terminate the contract.

- 11. Not to delegate authority:** An agent should not, as a general rule, delegate another person to do what he has committed himself to do. However, this is subject to certain exceptions (Sec. 190).

Liabilities of Agent:

Actually, the agents link the principal with their activities, but there are some situations in which the agent finds personal responsibility. Those situations are the following;

- i. Liabilities regarding damages and misconduct:** In case of breach of contract by an agent, he is responsible for paying the damages. If he is found guilty of misconduct, the principal may delay his remuneration for the part of the business he has mistreated.
- ii. Personal liability of an agent when it is established by commercial custom or use:** if the commercial custom or use in the business specifies the personal responsibility of an agent, then Hill will be considered personally responsible for his / her misconduct, until specified otherwise.
- iii. When an agent expressly accepts being responsible:** when the contract expressly specifies that the agent will be personally responsible in case of breach of contract, then he can be held personally responsible.
- iv. Liability for their unlawful acts:** an agent takes personal responsibility when acting beyond his authority or commits fraud or misrepresentation.
- v. Responsibility for the actions of subagents:** when an agent appoints a sub-agent, without having the authority to do so, he will be responsible for all acts of the sub-agent, both for the principal and the third party.

5.4.1 Rights of Agent

An agent has the following rights against the principal:

1. **Right of retainer:** The agent may withhold, from any amount received on account of the principal in the agency's business, all the money owed to him with respect to his remuneration and advances made or expenses incurred by him in conducting such business (Sec. 217).
2. **Right to receive remuneration:** The agent is entitled to his agreed remuneration, or if there is no agreement, to a reasonable remuneration. But in the absence of a special contract, the payment for the performance of any act is not due to the agent until the completion of such act (Sec. 219). Now the question is: when is the act completed? This depends on the terms of the contract.
3. **Right of lien:** In the absence of any contract to the contrary, an agent has the right to retain property, papers and other property, whether movable or immovable, from the principal received by him, up to the amount owed by commission, disbursements and services in connection with the same has been paid or accounted for (Sec. 221). This encumbrance of the agent is a private encumbrance. It is limited to claims that arise in relation to the goods or goods in respect of which the right is claimed. But through a special contract, an agent can have a general lien that extends to all claims arising from the agency.
4. **Right of indemnification:** The agent has the right to be indemnified against the agent has the right to be compensated against the consequences of all legal acts performed by him in the exercise of the authority conferred on him (Sec.222).
5. **Right of compensation:** The agent has the right to be compensated for injuries sustained due to negligence or lack of skill on the part of the director (Section 225). For e.g. P employs A as a bricklayer in the construction of a

house and lifts the scaffolding himself. The scaffolding is misplaced and, consequently, A is injured. P must compensate A.

- 6. Right of stoppage in transit:** This right is available to the agent in the following two cases: (1) When you have purchased goods for your principal by incurring personal liability, you have the right to stop in transit against the principal, with respect to the money you have paid or must pay. This right of the agent is similar to that of the unpaid seller.
- (2) When he is personally liable to the principal for the price of the goods sold, he is placed in the position of a seller not paid to the buyer and may stop the goods in transit in case of insolvency of the buyer.

5.5 Duties of Principal

The duties of a principal towards his agent are the rights of the agent against the principal. The rights of an agent have already been discussed. The principal owes the following duties to an agent:

- 1. To indemnify the agent against the consequences of all lawful acts:** The principal is obliged to indemnify the agent against the consequences of all legal acts performed by said agent in the exercise of the authority conferred on him (section 222).
- 2. To indemnify the agent against the consequences of acts done in good faith:** When a person employs another to do an act, and the agent does the act in good faith, the employer is obligated to indemnify the agent against the consequences of that act, even if it causes an injury to the rights of a third party (Sec. 223). However, when a person employs another to perform an act that is criminal, the employer is not liable to the agent, either by an express or implied promise, to indemnify him against the consequences of that act (Section 224).
- 3. To indemnify agent for injury caused by principal's neglect:** The principal must compensate his agent regarding an injury caused to that agent by negligence or lack of skill of the principal (Sec.225).

4. **Duty to Compensate:** An agency relationship can be paid or free. The term of an agency can be established in an agency agreement. If the agreement of the agency does not indicate the terms of the compensation, the principal is obligated to provide the agent with reasonable compensation.
5. **Duty to Reimburse:** The principal must reimburse the agent for a reasonable amount spent in fulfilling the duties. Reasonable refund includes the cost of travel, meals, lodging, incidentals, etc.

5.5.1 Right of Principal

Rights are legal, social or ethical principles of freedom or right; that is, rights are the fundamental normative rules about what people are allowed or are owed to people, according to some legal system, social convention or ethical theory.

The principal can enforce all the duties of the agent that are indirectly the rights of the principal. When an agent fails in his duty towards the principal, the principal has the following remedies against the agent:

1. **To recover damages:** If the principal suffers a loss because the agent ignores the instructions of the principal, or does not follow the custom of the exchange in the absence of instructions from the principal, or when the principal suffers due to lack of skill, care, or diligence on the part of the agent, he can recover the accumulated damages as a result of the agent.
2. **To obtain an account of secret profits and recover them and resist a claim for remuneration:** If the agent, without the knowledge and assent of the principal, obtains secret profits from the agency, the principal has the right to recover them from the agent. Not only this, the agent also loses his right to any commission with respect to the transaction. When the agent generates a secret benefit, the contract with the third party is not invalidated.
3. **To resist agent's claim for indemnity against liability incurred:** When the principal can demonstrate that the agent has acted as principal and not merely as an agent, he can oppose the agent's claim for compensation against the liability incurred by him in that transaction.

5.6 Termination of Agency

After the termination of the agency, the agent is free of any fiduciary obligation to the principal derived from the relationship of the agency. The parties may terminate the agency by mutual agreement. An agency cannot be rescinded by the act of one of the parties and must be done mutually.

An agency relationship will end automatically when certain events occur. Such events include death, insanity or bankruptcy of the principal or agent. A court usually intervenes and terminates the agency relationship if one of the parties refuses to do so.

5.6.1 Termination of agency by the operation of law

The following are the situation where the agency is terminated by the operation of law:

1. **Expiration of time:** sometimes the agency contract can be formed for a particular period. In such case, after the expiration of the agreed period, the termination of the agency occurs.
2. **Fulfilment of the object:** sometimes the agency contract can be found for a particular purpose or to make a particular company. In such case, the termination of the agency takes place after the completion of that company.
3. **Death or madness of either party:** whenever the principal or agent encounters death or insanity, the agency contract ends.
4. **Insolvency of the director:** the director must have the capacity to contract. When the principal becomes insolvent, he renounces the ability to contract and the termination of the agency occurs. But the act is silent with respect to the agent's insolvency. As a minor can also act as an agent, it can be conformed that the insolvent person can act as an agent.
5. **Destruction of matter:** when the object of the contract is destroyed, the contract of the agency comes to an end.

6. **Principal - Alien Enemy:** when the principal is a foreigner and the war breaks out between the countries, the principal becomes a foreign enemy and the contract of the agency is cancelled.
7. **Liquidation of the company:** because of the legal entity, the company can act as principal or agent. Whatever the state, if the company goes into liquidation, the termination of the agency occurs.

5.6.2 Termination by the act of Parties

The following are the situation where the agency is terminated by the act of parties:

1. **Termination of the agency by the Principal:** the principal can terminate the agency contract by notifying the agent. In doing so, if the agent encounters some suffering the principal has to compensate the agent.
2. **Termination of the agency by the agent:** the agent can also terminate the agency's contract by notifying the principal, but in doing so if the principal encounters some suffering, the agent has to compensate.
3. **Termination of the agency by both parties to the contract:** through mutual understanding between the principal and the agent, the contract of the agency may come to an end.

5.6.3 Termination of sub-agency and substituted agency

The authority of the subagent will end when the main agency is finished. However, the substitute agency will not close automatically if the principal agent's authority is cancelled.

❖ Exercise

Descriptive Questions

1. Define agency. What are the essentials and rules related to agency?
2. Define in detail the classification of agents.
3. Elaborate the different ways in which an agency can be created.
4. Explain in detail the rights and duties of an agent.
5. Explain in detail the rights and duties of principal.
6. Elaborate the different ways in which an agency can be terminated.

Short Notes

1. Termination of agency by acts of parties.
2. Termination of agency by operation of law.
3. Creation of agency by ratification.
4. Creation of agency by implied agreement.
5. Co-agents and sub-agents.
6. Define agent and principal

Multiple Choice Questions

1. What do you call a person who has received the power to act on behalf of another, binding that other person as if he or she were themselves making the decision?
a. Principal. b. Agent. c. Creditor. d. Attorney.
2. What do you call a person who gives authority to another to act on his or her behalf?
a. Principal. b. Agent. c. Creditor. d. Attorney.
3. A principal is responsible for all the acts of his agent which is called...
a. Vicarious liability. b. Original liability of the principal.
c. Both (a) and (b) d. None of the above.

4. An agent is bound to render proper account to _____ on demand.
- a. Subagent b.creditor c.principal d.all the above
5. _____agency is the most common form of agency.
- a.Incidental. b.Apparent.
c.Implied. d.Express.
6. A _____ is a contract a principal and agent enter into that says that the principal cannot employ another agent or other then the one stated.
- a.Ratified contract. b.Exclusive agency contract.
c.Apparent agency contract. d.Exclusive principal contract.
7. A principal exception an agent's unauthorised contract through _____ of the contract.
- a.Ratification b.Ramification.
c.Subrogation d.none of the above
8. Frank enters into a contract with Sally believing that Sally is acting on her own behalf when in fact she is acting as an agent of Derek on his express instructions. In the event of a breach of contract who can Frank take action against?
- a.No one, the contract is invalid b.Sally
c.Derek d.Derek or Sally
9. Which one of the following statements is incorrect?
- a. An agency relationship may be created through necessity.
b. An agency relationship may be created through Estoppels.
c. All agents are entitled to be paid for their services.
d. An agent creates legal relationship between a third party and the principal.

10. Which one of the following is not the duty of an agent?
- Duty to exercise care and skill.
 - Duty to take commission.
 - Duty to account.
 - Duty to avoid a conflict of interest.
11. Which of the following statement is incorrect?
- An agency may be terminated by the death of either party.
 - An agency may be terminated by express agreement.
 - An agency agreement can always be terminated by a principal.
 - Mental incapacity of an agent will terminate the agency relationship.
12. Which of the following is not a method of terminating an agency relationship by operation of law?
- Bankruptcy of the principal.
 - Mutual agreement.
 - Insanity of either the principal or the agent.
 - Death of either the principal or the agent.
13. Which of the following is not a method of terminating an agency relationship by acts of the parties?
- Mutual agreement.
 - Achievement of agency purpose.
 - Lapse of time.
 - Bankruptcy of principal.

MCQ Answer key

1.	2.	3.	4.	5.	6.	7.	8.	9.	10.	11.	12.	13.
b	a	a	c	d	b	a	d	c	b	c	b	d

UNIT-6

THE NEGOTIABLE INSTRUMENTS ACT 1881

- 6.1 Introduction**
- 6.2 Definition and Meaning of negotiable instrument**
- 6.3 Features of negotiable instrument**
- 6.4 Types of negotiable instrument**
- 6.5 Promissory note**
- 6.6 Bills of exchange**
- 6.7 Difference between the Promissory Note and Bills of Exchange**
- 6.8 Classification of Bills**
- 6.9 Cheques**
- 6.10 Difference between Bills of Exchange and Cheque**
- 6.11 Parties of negotiable instruments**
 - 6.11.1 Parties of bill of exchange**
 - 6.11.2 Parties of a Promissory Note**
 - 6.11.3 Parties to a Cheque**
- 6.12 Endorsement**
 - 6.12.1 Essentials of an endorsement**
- 6.13 Difference Types of endorsements**
- 6.14 Holder and holder in due course**
- 6.15 Privileges of holder in due course**
- 6.16 Dishonour of negotiable instruments**
- 6.17 Noting and protesting**
 - ❖ **Exercise**

6.1 Introduction

In 1881, The Negotiable Instruments Act was enforced in India. Before its implementation, English Negotiable Instrument Act were applicable in India. Negotiable Instruments Act 1881 is also based on the English Act with some amendments. It is applicable to the whole of India except the J & K. This Act operates under the Sections 31 and 32 of the Reserve Bank of India Act, 1934.

6.2 Definition and Meaning of negotiable instrument

According to Section 13 (a) of the Act, “Negotiable instrument means a promissory note, bill of exchange or cheque payable either to order or to bearer.”

In other words, negotiable instrument is known as a written document which is freely transferable and payable by order to bearer. As per the Act, there are three instruments i.e., promissory note, a bill of exchange and cheque.

Any instrument which satisfies the conditions of negotiability called instruments:

1. freely transferable either by delivery or by endorsement
2. who obtains it in good faith should get it free from all defects, and be eligible to recover the amount in his own name.

Negotiable instruments include share warrants and debentures payable to bearer and dividend warrants and excludes the money orders and postal orders, share certificates, deposit receipts, dock warrant and bill of lading. Even though they are transferable by delivery and endorsements and because not able to give better title to transferee.

6.3 Features of negotiable instrument

The following are the features of negotiable instrument:

1. Title: The transferee is recognized as holder in due course of negotiable instrument. A real transferee is not affected by any defect of title from the transferor or any other previous holders.

2. **Property:** The possessor or holder of the negotiable instrument is supposed to be the real owner. It does not only provide the possession of the negotiable instrument but also provide a right of property. The instrument property can be easily transferred. In the bearer instrument, the property passes through the delivery to the transferee. In the order instrument, endorsement and delivery are essential for the transfer.
3. **Presumptions under Sections 118 and 119 of the Negotiable Instrument Act:** there are Certain presumptions which are applied in all types of negotiable instruments such as consideration, Date, Time of acceptance, Time of transfer, Order of endorsement and Proof of protest (section 119).
4. **Prompt payment:** The holder of negotiable instrument expects prompt payment due to the possibility of a dishonours.
5. **Rights:** In case of dishonours, transferee can sue in his own name. A negotiable instrument can be transferred any number of times till it is at maturity. The holder of the instrument need not give notice of transfer to the party liable on the instrument to pay.
6. **Stamp:** It shall be assumed that a lost bill of exchange, promissory note and cheque was duly stamped.
7. **Holder in due course:** it shall be supposed that the holder is always the holder in due course of negotiable instruments. It is assumed that every holder has paid consideration and taken it in good faith. if the negotiable instrument was taken from its real owner by fraud or illegal act, then the holder has to prove that he is a holder in due course.

6.4 Types of negotiable instrument

According to section 13 of negotiable instruments act, there are major three types of negotiable instruments :1. promissory note, 2. bill of exchange and 3. a cheque. As per our Indian customs and traditions there are some types of negotiable instruments which are as following: 1. Hundis, 2. Dividend warrants, 3. Share warrants, 4. Circular notes, 5. Banker's draft, 6. Bearer debentures, 7. Railway receipts and Delivery orders.

6.5 Promissory notes

According to Section 4 of the negotiable instruments act “A promissory note is an instrument in writing (except a bank-note or a currency note) containing an unconditional undertaking, signed by the maker, to pay a certain sum of money to or to the order of a certain person, or to the bearer of the instruments.”

6.5.1 Features of Promissory notes:

There are some features or characteristics of a promissory note which is given below.

1. Promissory note Must be in written form: as per the negotiable instruments, there is a pre-requisite condition that every instrument must be in written form or in evidence form. Only an oral promise to pay is not considered as a promissory note. The writing method may be as per the mutual understanding of the parties but it must be in written in such a way that none of the parties can altered easily.
2. It is a promise to pay: it clearly an express undertaking to pay. Only acknowledgment is not sufficient. If there is no promise to pay then it is not considered as a promissory note. Let's understand with an illustration:

If Ankit writes:

(a) “Mr. Bablu (I owe you) Rs. 100”

(b) “I am liable to pay Rs. 100” whenever you ask for it have to pay”.

it will be considered as a promissory note because it express promise to pay:

3. It must be unconditional: promissory note contains unconditional promise to pay. A conditional undertaking abolishes the negotiable instrument. Thus, the promise to pay is not depended on the any condition or events. It must be payable absolutely.
4. Signed by the maker: The person (maker) promises to pay must sign the negotiable instrument. In the case of promisor, who write a promissory note by himself then also he/ she has to sign it. The only legal requirement to know the identity of the person and his intention to be bound by the terms and condition of the promissory note.

5. The maker must be certain person: The maker agreeing or accept the liability to pay the amount. The maker signs in an assumed liability because he/she is taken as a certain sum of money disclose the sufficient indication about identity. In case of more numbers of maker promise to pay, then they may jointly responsible.

6. The payee must be certain: The payee should be a certain person to whom the promise has been made. The payee may be identified and the name of the payee should be mention in the documents.

7. A promise note contains a promise to pay money only: Money means legal tender money, which is the consideration between the parties.

8. To pay a specific or certain sum of money: A promissory note is certainty not only content the person to whom or by whom payment is to be made but also mention the sum of money. There are some exceptions under Section 5 provides that the amount is not specific is some case: when a promise to pay content amount with interest at a specified rate and the paid at an indicated rate of exchange.

6.6 Bill of exchanges

According to the Section 5 of the negotiable instruments Act defines “A bill of exchange is an instrument in writing containing an unconditional order, signed by the maker, directing a certain person to pay a certain sum of money only to, or to the order of a certain person or to the bearer of the instrument”.

In simple words, “A bill of exchange is a written documents of the debt written by the drawer and accepted by the drawee. There are usually three parties involves in a bill of exchange drawer, acceptor or drawee and payee. In some cases, Drawer may be the payee.

6.6.1 Features and characteristics of a bill of exchange includes the following:

- (1) It must be in written format or in an evidence document.
- (2) It is duly signed by the drawer.
- (3) There are three Parties involve in bills of exchanges, which must be certain persons i.e., drawer, drawee and payee.

(4) The amount or sum payable must be certain.

(5) It should be properly stamped.

(6) It contains an order to pay.

Let's understand with an illustration:

(a) "pay Rs. 5000 to the order of 'A'. In this case, there is an order to pay, so it will consider bills of exchanges.

(7) It contains order to pay in money.

(8) The order must be unconditional.

6.7 Difference Between the Promissory Note and Bills of Exchange

Sr.	Base	Promissory Note	Bills of Exchange
1	Number of parties	There are only two parties involves in Promissory Note such as the maker and the payee.	There are three parties involves Bills of Exchange such as drawer, drawee and payee.
2	Payment to the maker	A promissory note cannot be made payable the maker himself.	In the bills of exchange, the drawer and payee may be same person.
3	Unconditional promise	A promissory note contains an unconditional promise by the maker to pay the payee.	In the bills of exchange, there is an unconditional order to the drawee to pay as per the order of the drawer.
4	Prior acceptance	It is presented for payment without any prior acceptance by the maker.	A bill of exchange is payable after accepted by the drawee before it can be presented for payment.

5	Primary and complete liability	The liability of the maker is primary and complete.	The liability of the drawer is secondary and conditional.
6	Relation	The maker stands in immediate relation with the payee.	the maker or drawer stands in immediate relations with the acceptor and not the payee.
7	Protest for dishonour	There is no such protest needed.	Foreign bill must be protested for dishonour when such protest is required to be made by the law of the country where they are drawn,
8	Notice of dishonour	There is no such notice need to be given.	Due notice of dishonours is to be given by the holder to the drawer and the intermediate endorsers,

6.8 Classification of Bills

There are many types of bills of exchanges, which are given below.

- (1) Inland bill.
- (2) Foreign bill.
- (3) Time bill.
- (4) Demand bill.
- (5) Trade bill.
- (6) Accommodation bill.

(1) Inland bill: A bill which is drawn in India on a person residing in India, whether payable in or outside India known as an inland bill.

(2) Foreign Bill: A bill which is not an inland bill is a foreign bill. A bill which drawn outside India on any person residing outside India and made payable in India. A bill which drawn in India on a person residing

outside India and made payable outside India. A bill which drawn outside India on a person residing in India and made payable outside India.

(3) Time Bill: A bill which payable after a fixed time is termed as a time bill.

In simple words, bill payable after date is known as a time bill.

(4) Demand bill: A bill which payable on demand is termed as a demand bill.

(5) Trade bill: A bill which drawn and accepted for a normal course of business or transactions is known as a trade bill.

(6) Accommodation bill: A bill which not drawn and accepted for a normal course of business or transactions but only helpful in providing financial supports to some party is known as an accommodation bill.

6.9 Cheques

As per the section 6 of the negotiable instruments Act “A cheque is a bill of exchange drawn on a specified banker, and not expressed to be payable otherwise than on demand”.

A cheque is bill of exchange with addition of two more characteristics such as it is always drawn on a specified banker, and it is always payable on demand.

Consequently, all cheque is bill of exchange, but all bills are not cheque. A cheque must satisfy all the requirements of a bill of exchange; that is, it must be signed by the drawer, and must contain an unconditional order on a specified banker to pay a certain sum of money to or to the order of a certain person or to the bearer of the cheque. It does not require acceptance.

6.10 Difference Between Bills of Exchange and Cheque

Sr.	Base	Bills of Exchange	Cheque
1	Drawn on	It is usually drawn on some person or firm.	It is always drawn on a specified bank.
2	Acceptance	A bill of exchange must be accepted before its payment can be claimed.	A cheque does not require any Types of acceptance.

3	Payable on	A bill may be also drawn payable on demand and on the expiry of a certain period.	A cheque can only be drawn payable on demand.
4	Grace period	A grace periods of three days is allowed in the case of time bills.	There are no such grace periods is given in the case of a cheque.
5	Discharged from liability	The drawer of the bill is discharged from his liability, if it is not presented for payment,	The drawer of a cheque is discharged only if he suffers any damage by delay in presenting the cheque for payment.
6	Notice of dishonour	Notice of dishonour of a bill is necessary.	There are no such requirements of notice in the case of cheque.
7	Crossing	There is no need of crossing in the case of bill.	A cheque may be crossed. There is need of crossing in the case of cheque.
8	Stamped	A bill of exchange must be properly stamped.	A cheque does not require any stamp.
9	Demand payable	A bill payable on demand can never be drawn to bearer.	A cheque drawn to bearer payable on demand shall be valid.
10	Countermand ed	The payment of a bill cannot be countermanded by the drawer.	The payment of a cheques countermanded by the drawer.

6.11 Parties of negotiable instruments

6.11.1 Parties of Bill of Exchange

1. Drawer: The maker of a bill of exchange or a person who drawn the bill is known as a drawer.
2. Drawee: The person directed to pay the specified sum by the drawer is known as the drawee.
3. Acceptor: After sign in the bill and delivered the bills with a given notice of such signing to the holder is called the acceptor.
4. Payee: The person to whom order the money is directed to be paid is known as the payee. Payee is the real beneficiary or receiver.
5. Indorser: When the owner transfers the bills to someone else then he becomes the indorser.
6. Indorsee: The person to whom the bill is indorsed is known as an indorsee.
7. Holder: A person who have the legal possession of the bills of exchange and to receive the sum is known as a holder. When its payable to the bearer then the person in possession is known as the holder.

6.11.2 Parties of a Promissory Note

1. Maker. Who promises to pay specified sum is known as a debtor or maker.
2. Payee. To whom the specified sum is payable is known as the creditor or payee.
3. Holder. The payee to whom the Promissory note might have been indorsed.
4. both are the same i.e., indorser and indorsee.

6.11.3 Parties to a Cheque

1. Drawer. Who draws the cheque and the depositor of money.
2. Drawee. The drawer's banker on whom the cheque has been drawn.
3. Payee. Who is entitled to receive the sum of money of the cheque.
4. all are the same i.e., holder, indorser and indorsee.

6.12 Endorsement

As per the Negotiable Instruments Act “the writing of one’s name on the back of the documents with the intention of transferring the right.

Endorsement is signing for the negotiation. The person who transferred the possession by endorsement is known as an endorser and to whom the possession is transferred by endorsement is called the endorsee.

6.12.1 Essentials of an endorsement

1. Endorsement must be on the instrument: The endorsement on the back or face of the documents and made on a separate paper attached to it by ink pen.
2. It must be made or endorsed by the maker or holder and anyone cannot endorse it. Thumb impression should be shown and Signature may be made.
3. It made either by the endorser or only signing his name on the documents, which is called a blank endorsement. Any words mention the intention to endorse or transfer the documents is known as endorsement in full. There is no specific format of words is prescribed for endorsement and the intention of transfer must be present.
4. Completed by delivery of the negotiable instrument: The delivery by the endorser with the intention of passing property and keeps it in documents after his death and then transfer to the endorsee the last gets no right on the negotiable instrument.
5. An endorsement of the entire negotiable instruments: which implications to transfer the endorse some part of the sum payable known as a partial endorsement and does not operate as a valid endorsement. If delivery is conditional, then it will be depended on condition to be fulfilled and it considered as an endorsement.
6. The payee is the first rightful person to make endorsement. Thereafter it will be endorsed by the holder or possessors of the negotiable instrument.

6.13 Different types of endorsements

There are mainly five types of endorsement. Which is given below.

- (1) General or Blank endorsement
- (2) Full or Special endorsement
- (3) Partial endorsement
- (4) Restrictive endorsement
- (5) Qualified or Conditional endorsement

(1) General or Blank endorsement:

According to sections 16 and 54 describe the endorser only signs on the negotiable instrument without mentioning the name of endorsee. A blank or general Endorsement describe no endorsee. It only includes the signature of the endorser on the instruments of endorsement. A blank negotiable instrument payable to order called a bearer instrument and transferable by delivery.

In blank endorsement a bill or note both are the same payable to bearer and negotiated by delivery.

(2) Full or Special endorsement:

According to Section 16 describe the endorsement which includes the endorser signature and the endorsee name in whose favour the endorsement is made therefore it is known full endorsement. i.e., it is made in writing like Pay to Ankit or Ankit's order with the signature of the endorser. In these types of an endorsement the endorsee only can transfer the negotiable instrument.

It may be possible to Convert blank endorsement into full endorsement: the blank endorsement can convert into full endorsement with the endorser's signature by writing a direction to pay. the endorser is not liable on the negotiable instrument. In simple words, according to Section 49 the person transferring negotiable instrument does not incur all the liabilities of an endorser.

Example: Ankit is the holder endorsed by Bijal with blank endorsement. Ankit writes it to Bijal's with signature and words Pay to order to Chandar. Ankit is not liable as endorser which creates a full endorsement from Bijal to Chandar.

(3) Partial endorsement

According to Section 56, which define as a partial endorsement transfer to the endorsee a part or partial of the sum payable and not operate as a negotiation of the negotiable instrument.

Example: Ankit as a holder of Rs.1000 instruments and order to pay to Bijal or Rs.500. This is a partial or part endorsement and invalid for negotiation.

(4) Restrictive endorsement

According to the Section 50, The endorsement may contain different terms making it restrictive. It is restricted by either express words or prohibits the further negotiation and that expresses not a complete and unconditional transfer of authority to the endorsee to deal with instruments such as Pay to C and Pay to C for my use are examples of restrictive endorsement. The endorsee acquires all the rights of the endorser excluding the right of negotiation.

(5) Qualified or Conditional endorsement

In the conditional endorsement, endorser put some condition in owner liability and endorsee limits his liability through putting some condition in the negotiable instrument. The endorser may impose a precedent or a condition subsequent. The amount will payable if the endorsee reaches majority embodies. A conditional endorsement same as a restrictive endorsement does not affect the negotiability. In other terms, it is known as qualified endorsement. An endorsement made conditional or qualified with the following:

1. Sans recourse (without recourse) endorsement: An endorser use word exclude his own liability to the subsequent holder in case of dishonour which is known as an endorsement sans recourse (without recourse). Examples: as Pay to Anita or order sans recourse or without recourse to me.
2. Facultative endorsement: where the endorser extends his liability or abandons some right then it is known as facultative endorsement. Examples: as Pay Anita or order with Notice of dishonour waived.

3. Sans frais endorsement: Where the endorser does not need the subsequent holder or endorsee to cover any expense on his account therefore it is known as sans frais endorsement.
4. Liability dependent upon a contingency: an endorser makes the rights or his liability and the endorsee to receive the sum depend upon contingent event. the liability of the endorser will arise on the happening of contingent event. An endorser may Pay Anita or order on his marriage with Virender. In such a case, the endorser will be liable when the marriage takes place.

6.14 Holder and holder in due course

According to Section 9 defines holder in due course as any person who have valuable consideration becomes the possessor of a negotiable instrument payable to bearer or the endorsee or payee the amount mentioned in the document and with an assumption that title is free from any defect.

The essential prerequisite of a holder in due course as follows:

1. A holder for valuable consideration
2. Consideration not be illegal or void.
3. A holder (possessor) before the date of maturity.
4. holder in good faith of the negotiable instrument.
5. Without any negligence on his part.
6. Take the negotiable instrument complete and regular on the face of it.

6.15 Privileges of a holder in due course

1. Instrument excluded from all the defects: A holder in due course gets the good faith in the negotiable instrument and protected against all defects of title from the previous holder. It is like a current coin. As per Sec. 53, Who so ever takes it can recover the amount from previous holder of the negotiable instruments. A holder in due course purifies a defective title.

Examples: Ajay obtains Beena acceptance to a bill by fraud. Ajay indorses it to Chetan (holder in due course). The instrument is purged of its defects and Chetan gets a good title to it.

2. Fair Rights in case of an inchoate instrument: According to the Sec. 20, Right of a holder in due course to recover money is not affected even in an inchoate stamped instrument. The transferor completes the negotiable instrument for a sum greater than what was projected by maker.
3. All the previous parties are liable: All previous parties i.e., maker, acceptor and intervening indorsers liable to the holder in due course. As per Sec. 36 express that the holder in due course can file a suit against the parties liable to pay.
4. Can enforce payment of a fictitious negotiable instrument: when drawer and payee are fictitious persons then the acceptor is liable to a holder in due course. As per the section 42, the signature of the supposed drawer and the first indorser for the bill being payable to the drawer's order the fictitious drawer must indorse the bill.
5. There is No effect of conditional delivery: According to Sec. 46, when it is delivered conditionally and negotiated to a holder in due course therefore a valid delivery presumed and acquired good title to it.
6. No effect of absence of an unlawful consideration: According to section 58, The request of unlawful consideration is not available against the holder in due course. The party responsible will have to make payment.
7. Estoppel against denying original validity: As per Sec. 120, The request of original invalidity cannot be put out, against the holder in due course by the drawer or an acceptor for the honour of the drawer. when the negotiable instrument is void on the face i.e., it made payable to bearer.
8. Estoppel against denying capacity of the payee to indorsee: As per the Section 121, No maker and no acceptor of negotiable instruments payable to order by a holder in due course be allowable to resist the claim on the request that the payee.
9. Estoppel against indorser to deny capacity of parties: An indorser of negotiable instruments, endorsement guarantees that all prior endorsements are genuine and parties had capacity to enter into valid contracts or not.

6.16 Dishonour of a negotiable instrument

Any negotiable instrument is dishonoured, then the holder has a right to give a notice of dishonour to all the related previous parties in order to make them liable. The following are the conditions:

As per Section 91, Dishonour by non-acceptance within 48 hours from the time of presentment for acceptance. When the drawee of negotiable instrument is a fictitious person, incompetent to do or perform contract and either become insolvent or dead.

As per Section 92, Sometimes the acceptor fails to make payment when instruments are due and as per section 76, when overdue remains unpaid the bill is dishonoured by non-payment.

Effect of dishonour: It is either by non-acceptance or by non-payment therefore the all the related parties can be charged with liability.

Notice of dishonour: The notice of such refusal must instantly give to the related parties to whom the holder wishes to make liable.

Notice by whom: The holder of the instrument must give a notice of dishonour to all the prior related parties whom he wants to make liable.

Notice to whom? It is given to all the related parties to whom the holder to make liable. There is no need giving notice to a maker, acceptor or drawee, principal debtors.

Mode of notice: The mode of notice of dishonour may be oral or written.

What is reasonable time? there is no specific time or any hard and fast rule and it is Depends on the types of instruments.

6.17 Noting and protesting

As per Sec. 99, A dishonoured of negotiable instruments which is non-accepted or non-paid and therefore the holder may such dishonour to be noted by a notary public upon a paper or partly upon. As per Sec.100, The holder may in a reasonable time to note the negotiable instrument protested by notary public.

Noting

When the negotiable instruments are dishonoured, then the holder after giving notice of dishonour to the parties and after sue liable. As per Section 99, provides a mode of authentication and mode of noting the instrument. Noting is a minute recorded by a notary public on the dishonoured instrument or on a paper attached to such instrument.

Noting includes the fact, date of dishonour, the reason of dishonour and also the notary's charges, a reference to the notary's register and notary's initials.

It is made by the notary within a specific time after dishonour. Both are not compulsory but foreign bills must be protested for dishonour when it is essential by the law of the place. There is no requirement of noting and protesting in Cheques. There is no legal effect in Noting but some advantages are there If it is made within a reasonable time.

Protest

It is a formal document of the notary public attesting the dishonour of the negotiable instruments by non-payment. After noting, the next step for notary is to draw a certificate of protest, which is a formal declaration on the bill or a copy thereof. The chief advantage of protest is that the court on proof of the protest shall presume the fact of dishonour.

Besides the protest for non-acceptance and for non-payment the holder may protest the bill for better security. When the acceptor becomes insolvent or decline (non-payment) payment before the date of maturity. Therefore, the holder may protest for getting better security for the amount due. For the same, the holder may hire a notary public to make the demand on the acceptor and if declined then the protest may be made. As per section, Sec. 102 Notice of protest delivers to all the prior parties instead of notice of dishonour.

As per Sec. 104, Every foreign bill must be protested for dishonour as per requirement of the law of the place were drawn whereas Inland bills may be protested.

As per Sec. 104A, where a bill is essential to be protested under the respective Act with a word "noted for protest" within a specified time. The formal protest given at any time after the noting.

❖ Exercise

1. Fill in the blanks:

1. Negotiable Instruments Act was enforced in India in ----- (1881)
2. There are -----parties involved in Promissory Note. (two)
3. There are -----parties involved in Bills of Exchange. (three)

2. Answers the following questions:

1. Define a negotiable instrument and explain its meaning in the context of commercial law.
2. Discuss the essential features that characterize a negotiable instrument.
3. Describe the different types of negotiable instruments recognized under law.
4. What is a promissory note? Explain with examples.
5. Define a bill of exchange and explain its significance.
6. Distinguish between a promissory note and a bill of exchange with suitable points of difference.
7. Explain the various classifications of bills of exchange.
8. What is a cheque? Discuss its legal meaning and usage.
9. Differentiate between a bill of exchange and a cheque.
10. Who are the parties to a negotiable instrument? Explain their roles.
11. What is meant by endorsement in relation to negotiable instruments?
12. Describe the different types of endorsements with examples.
13. Explain the concepts of holder and holder in due course.
14. Discuss the legal privileges of a holder in due course.
15. What is meant by the dishonour of negotiable instruments? Explain the circumstances under which it occurs.
16. Explain the concepts of noting and protesting in relation to negotiable instruments.
17. Describe the modes of discharge of negotiable instruments.

7.1 Introduction**7.2 Essential elements of contract of sale****7.3 Important Terms in the Sale of Goods Act, 1930****7.4 Types of Goods under Sale of Goods Act 1930****7.5 Delivery****7.6 Condition and warranty****❖ Exercise**

7.1. Introduction

Almost every kind of business involves the sale and purchase of goods as part of its transaction. People in business are often entering into a contract of sale to sell their commodities. All these sales are governed by the Sale of Goods Act, 1930 which is one of the most important types of contracts under the law of India.

The Sale of Goods Act, 1930 governs the contracts relating to Sale of Goods. It provides for the setting up of contracts where the seller transfers or agrees to transfer the title (ownership) in the goods to the buyer for consideration. It is applicable all over India. Under the act, goods sold from owner to buyer must be sold for a certain price and at a given period of time.

The contracts for sale of goods under The Sale of Goods Act, 1930 are subject to the general principles of the law relating to contracts i.e. the Indian Contract Act, 1872. Till 1930, transactions relating to sale and purchase of goods were regulated by Indian Contract Act, 1872.

In 1930, Sections 76 to 123 of Indian Contract Act, 1872 were repealed and a separate act called “The Indian Sale of Goods Act, 1930” was passed. It came into force on the 1st day of July, 1930. It applies to the whole of India except the State of Jammu & Kashmir.

According to Section 4(1) of the Sale of Goods Act, 1930, “Contract of Sale of Goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price”.

There may be a contract of sale between one part-owner and another.

(2) A contract of sale may be absolute or conditional.

(3) Where under a contract of sale the property in the goods is transferred from the seller to the buyer, the contract is called a sale, but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell.

(4) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred.

(5) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred.

7.2 Essential elements of contract of sale

a. Seller and Buyer: Section 2(13) defines Seller as a person who sells or agrees to sell goods and Section 2(1) defines Buyer as a person who buys or agrees to buy goods.

b. Goods: Section 2(7) says, “Goods means every kind of movable property other than actionable claims and money and includes stocks 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.”

c. Delivery or Transfer of Goods: Under Section 2(2) delivery means voluntary transfer of possession from one person to another.

d. Price: Under Section 2(10), price means the money consideration for the sale of goods.

7.3 Important Terms in the Sale of Goods Act, 1930

1. **Buyer** - This is mentioned in section 2(1) and defined as a person who either purchases or agrees to purchase certain products. The buyer appears as one of the parties in the contract of sale.
2. **Seller** - This is defined in section 2(13) and defined as a person who either sells or agrees to sell certain products. The seller appears as one of the parties in the contract of sale.

By combining the definitions of a buyer and seller, we can conclude that it is not mandatory to transfer goods to be deemed as a buyer or a seller. Just by agreeing or promising to sell and buy goods, you become buyer and seller as per the contract of sale.

Goods - Goods are any merchandise or possession. An important clause in the contract for sale goods is described in Section 2(7) as:

- a. It is a moveable property (except for money and actionable claims)
- b. Stocks and shares
- c. Growing crops, grass, standing timber
- d. The things that are attached to the land but are agreed to be severed before the sale. For example, if a resort is offering complimentary food along with lodging and customers do not want to take the food. Then the rebate on food is not applicable as the food was not part of the sale.

Thus, we conclude here that goods are moveable property barring money and actionable claims. Goods are classified into many categories, as explained in the next section.

7.4 Types of Goods under Sale of Goods Act 1930

Section 6 of the act explains in detail all types of goods in the Sale of Goods Act. There are mainly three categories of goods:

1. **Existing Goods** – If the goods exist physically at the time of contract and the seller is in legal possession of the goods, then it is termed as existing goods. They are further divided into three types:

- a. **Specific Goods** – They are defined under section 2(14) and refer to goods that are identified and agreed to be transferred, at the time of making the contract. For example, A wants to sell a Bike of a certain model and year of manufacture, and B agrees to buy the bike. Here the bike is a specific good.
 - b. **Ascertained Goods** – These types of goods are identified by judicial interpretation and not by law. Any good where the whole or part of the good is identified and marked for sale at the time of the contract comes under ascertained goods. These goods are earmarked for sale.
 - c. **Unsanctioned or Unascertained Goods** – Those goods that are not specifically identified for sale, at the time of the contract, fall under the category of unsanctioned goods. For example, there is a bulk of 1000 quinols of wheat out of which 500 quinols are agreed to be sold. Here the seller can choose the goods from the bulk and is not specified.
2. **Future Goods** – The definition of future goods appears in section 2(6). The goods which do not exist at the time of contract but are supposed to be produced, acquired, or manufactured by the seller are called future goods. For example, A sells chairs and B wants 300 chairs of a specific design which A agrees to manufacture at a future date. Here chairs are future goods.
3. **Contingent Goods** – You can find the answer to what is contingent goods in section 6(2) of the Sale of Goods Act. A contingent good is a kind of future good, but it is dependent on the happening (or the absence of) certain conditions. As an example, X has agreed to sell 100 mangoes from his farm to Y at a future date. But this sale depends on the fact whether the trees in X's farm give a yield of 100 mangoes by the date of the contract.

7.5 Delivery

Delivery of goods appears in section 2(2) and describes the process of transferring the possession of goods from one person to another. The person receiving the goods could either be the buyer or another person authorized by the buyer to receive the goods. There are different types of delivery of goods as described below:

- **Actual Delivery** – If the commodity is handed over directly to the buyer or the person authorized by the buyer then that's called an actual delivery.
- **Constructive Delivery** – When the transfer of goods is done without any change in possession, then it is a constructive delivery. It could mean that the seller, even after selling the goods, holds them as bailee for the buyer.
- **Symbolic Delivery** – In this case, the goods are not delivered, but a symbolic means of obtaining possession is involved. For example, handing over the keys of a warehouse where the goods are stored is a symbolic delivery. Such delivery is usually done when the goods are bulky or heavy.

7.6 Condition and warranty

(1) A stipulation in a contract of sale with reference to goods which are the subject thereof may be a condition or a warranty.

(2) A condition is a stipulation essential to the main purpose of the contract, the breach of which gives rise to a right to treat the contract as repudiated.

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

(4) Whether a stipulation in a contract of sale is a condition or a warranty depends in each case on the construction of the contract. A stipulation may be a condition, though called a warranty in the contract.

When condition to be treated as warranty.

(1) Where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may waive the condition or elect to treat the breach of the condition as a breach of warranty and not as a ground for treating the contract as repudiated.

(2) Where a contract of sale is not severable and the buyer has accepted the goods or part thereof, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty and not as a ground for rejecting the

goods and treating the contract as repudiated, unless there is a term of the contract, express or implied, to that effect.

(3) Nothing in this section shall affect the case of any condition or warranty fulfilment of which is excused by law by reason of impossibility or otherwise.

Sale by description.

Where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description; and, if the sale is by sample as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.

Sale by sample

(1) A contract of sale is a contract for sale by sample where there is a term in the contract, express or implied, to that effect.

(2) In the case of a contract for sale by sample there is an implied condition—

(a)	that the bulk shall correspond with the sample in quality;
(b)	that the buyer shall have a reasonable opportunity of comparing the bulk with the sample;
(c)	that the goods shall be free from any defect, rendering them unmerchantable, which would not be apparent on reasonable examination of the sample.

Unpaid Seller:

Meaning and Definition Section 45 of Sale of Goods Act, 1930 defines Unpaid Seller as:

The seller of goods is deemed to be an “unpaid seller” within the meaning of the Sale of Goods Act:

- a. When the whole of the price has not been paid or tendered.
- b. When a bill of exchange or other negotiable instrument has been received as conditional payment and the condition on which it was

received has not been fulfilled by reason of the dishonour of the instrument or otherwise.

II. In this Part of this Act, “seller” includes any person who is in the position of a seller, as, for instance, an agent of the seller to whom the bill of lading has been endorsed, or a consignor or agent who has himself or herself paid, or is directly responsible for, the price.

It is to be seen that a seller who has received only a part of the price or consideration for the goods is also an unpaid seller and were the seller has received any kind of negotiable instrument for the price or consideration and the same is dishonoured by the payee then in that scenario, the seller will shift to be within the folds of an unpaid seller. This is because a negotiable Instrument is always presumed to be a conditional payment and when it is dishonoured, the nonfulfillment of the condition can be deduced to being an unpaid consideration.

Rights of Unpaid Seller against the goods

Section 46 seeks to protect the interest of an unpaid seller by conferring upon him the following rights:

I. Subject to the provisions of this Act and of any Act in that behalf, notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of goods, as such, has by implication of law:

- a. A lien on the goods or right to retain them for the price while he or she is in possession of them;
- b. In case of the insolvency of the buyer, a right of stopping the goods in transition after he or she has parted with the possession of them;
- c. A right of resale as limited by this Act.

II. Where the property in goods has not passed to the buyer, the unpaid seller has, in addition to his or her other remedies, a right of withholding delivery similar to and coextensive with his or her rights of lien and stoppage in transit where the property has passed to the buyer.

These rights of an unpaid seller do not depend on any agreement, express or implied, between the parties. They arise by implication of law. They are some of the incidents attached by law to a contract of sale. The buyer has no right to have

possession of goods till he pays the price. The seller's right in respect of the price is not a mere lien which he will forfeit if he parts with the possession, but grows out of his original ownership and dominion, and payment of a tender or price is a condition precedent on the buyer's part and until he makes such payment or tender, he has no right to possession.

Right to Lien

Lien is the right to retain possession of goods until certain charges due in respect of the are paid. This right is available to the unpaid seller of the goods under Section 47 of the Sale of Goods Act and is enumerated as follows:

I. Subject to the provisions of the Act, the unpaid seller of goods who is in possession of them is entitled to retain possession of them until payment or tender of the price in the following cases:

- a. Where the goods have been sold without any stipulation as to credit;
- b. Where the goods have been sold on credit, but the term of credit has expired;
- c. Where the buyer becomes insolvent.

II. The seller may exercise his or her right of lien notwithstanding that he or she is in possession of the goods as agent or bailee for the buyer.

The seller's lien is a possessory lien, i.e., the lien can be exercised only so long as the seller is in the possession of the goods. Lien can be exercised for the non-payment of price, not for any other charges. The right of lien is linked with the possession and not with the title. Thus, where the seller has transferred to the buyer the documents of the title of the goods, his lien is not defeated as long as he remains in possession.

Stoppage in transit:

Subject to this Act, when the buyer of goods becomes insolvent, the unpaid seller who has parted with the possession of the goods has the right of stopping them in transition under Section 50, that is to say, he or she may resume possession of the goods as long as they are in course of transit, and may retain them until payment or tender of the price.

Rights of Unpaid Seller as against the Buyer Suit for price

1. Where under a contract of sale the property in the goods has passed to the buyer and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may sue him for the price of the goods.

2. Where under a contract of sale the price is payable on a day certain irrespective of delivery and the buyer wrongfully neglects or refuses to pay such price, the seller may sue him for the price although the property in the goods has not passed and the goods have not been appropriated to the contract.

Damages for non-acceptance

Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may sue him for damages for non-acceptance. The seller's remedy in this case is a suit for damages rather than an action for the full price of the goods.

Sale of unascertained goods and appropriation.

(1) Where there is a contract for the sale of unascertained or future goods by description and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be express or implied, and may be given either before or after the appropriation is made.

(2) *Delivery to carrier.* Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract.

Goods sent on approval or "on sale or return".

When goods are delivered to the buyer on approval or "on sale or return" or other similar terms, the property therein passes to the buyer—

(a)	when he signifies his approval or acceptance to the seller or does any other act adopting the transaction;
(b)	if he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time.

Sale by person not the owner.

Subject to the provisions of this Act and of any other law for the time being in force, where goods are sold by a person who is not the owner thereof and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by his conduct precluded from denying the seller's authority to sell :

Provided that, where a mercantile agent is, with the consent of the owner, in possession of the goods or of a document of title to the goods, any sale made by him, when acting in the ordinary course of business of a mercantile agent, shall be as valid as if he were expressly authorised by the owner of the goods to make the same; provided that the buyer acts in good faith and has not at the time of the contract of sale notice that the seller has no authority to sell.

Sale by one of joint owners.

If one of several joint owners of goods has the sole possession of them by permission of the co-owners, the property in the goods is transferred to any person who buys them of such joint owner in good faith and has not at the time of the contract of sale notice that the seller has not authority to sell.

Sale by person in possession under voidable contract.

When the seller of goods has obtained possession thereof under a contract voidable under section 19 or section 19A of the Indian Contract Act, 1872 (9 of 1872), but the contract has not been rescinded at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of the seller's defect of title.

Delivery.

Delivery of goods sold may be made by doing anything which the parties agree shall be treated as delivery or which has the effect of putting the goods in the possession of the buyer or of any person authorised to hold them on his behalf.

Effect of part delivery.

A delivery of part of goods, in progress of the delivery of the whole, has the same effect, for the purpose of passing the property in such goods, as a delivery of the whole; but a delivery of part of the goods, with an intention of severing it from the whole, does not operate as a delivery of the remainder.

Buyer to apply for delivery.

Apart from any express contract, the seller of goods is not bound to deliver them until the buyer applies for delivery.

Rules as to delivery.

(1) Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question depending in each case on the contract, express or implied, between the parties. Apart from any such contract, goods sold are to be delivered at the place at which they are at the time of the sale, and goods agreed to be sold are to be delivered at the place at which they are at the time of the agreement to sell, or, if not then in existence, at the place at which they are manufactured or produced.

(2) Where under the contract of sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time.

(3) Where the goods at the time of sale are in the possession of a third person, there is no delivery by seller to buyer unless and until such third person acknowledges to the buyer that he holds the goods on his behalf:

Provided that nothing in this section shall affect the operation of the issue or transfer of any document of title to goods.

(4) Demand or tender of delivery may be treated as ineffectual unless made at a reasonable hour. What is a reasonable hour is a question of fact.

(5) Unless otherwise agreed, the expenses of and incidental to putting the goods into a deliverable state shall be borne by the seller.

Delivery of wrong quantity.

(1) Where the seller delivers to the buyer a quantity of goods less than he contracted to sell, the buyer may reject them, but if the buyer accepts the goods so delivered he shall pay for them at the contract rate.

(2) Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell, the buyer may accept the goods included in the contract and reject the rest, or he may reject the whole. If the buyer accepts the whole of the goods so delivered, he shall pay for them at the contract rate.

(3) Where the seller delivers to the buyer the goods, he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or may reject the whole.

(4) The provisions of this section are subject to any usage of trade, special agreement or course of dealing between the parties.

❖ Exercise

Fill in the blanks in the following statements:

1. Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may sue him for _____ (damages for non-acceptance.)
2. _____ can be exercised for the non-payment of price, not for any other charges. (Lien)
3. When the whole of the price has not been paid or tendered, the seller is _____ (unpaid seller)
4. Where there is a contract for the _____, there is an implied condition that the goods shall correspond with the description. (sale of goods by description)
5. Handing over the keys of a warehouse where the goods are stored is a _____. (symbolic delivery)
6. When the transfer of goods is done without any change in possession, then it is a _____ (constructive delivery)

7. If the commodity is handed over directly to the buyer or the person authorized by the buyer then that's called an _____ (actual delivery.)
8. The goods which do not exist at the time of contract but are supposed to be produced, acquired, or manufactured by the seller are called _____ (future goods)
9. Any good where the whole or part of the good is identified and marked for sale at the time of the contract comes under _____ (ascertained goods.)

Answer the following questions.

1. Write a short note on Sale of Goods Act, 1930
2. Explain the essential elements of contract of sale.
3. Explain the terms of Sale of Goods Act, 1930
4. Explain types of goods under Sale of Goods Act, 1930
5. Write a note on Delivery.
6. Explain the rights of unpaid seller against the goods
7. Write a note on Right to Lien

Explain the following terms.

1. Goods
2. Buyer
3. Delivery
4. Sale by sample
5. Sale by description
6. Unpaid seller
7. Constructive delivery
8. Symbolic delivery
9. Contingent goods
10. Future goods

8.1 Introduction**8.2 About Consumer Protection Act****8.3 Meaning of Consumer****8.4 Meaning of Service****8.5 Unfair Trade Practice****8.6 Rights Of the Consumers and reliefs Available to Consumer****8.7 Consumer Protection Council****8.8 Consumer Dispute Redressal Agencies****8.9 Finding of Districts Forum and Appeal****8.10 Definitions of various terms under this act****❖ Exercise**

8.1. Introduction

Besides the basic necessities of food, clothing, and shelter, we consume a variety of things in our daily lives such as cell phones, digital cameras, soaps, perfumes, cosmetics, among other things. Thus, all of us are consumers in the literal sense of the term. When we buy things from the market as a consumer, we expect value for money, i.e., quality, quantity, right price, information about the mode of use, etc. However, there may be instances where a consumer is cheated.

In such cases, most of us do not know whom to approach to seek redressal. Moreover, a majority of us also are unaware of our “rights” as a consumer and often hesitate to complain or even stand up to unfair practices. We also don't have the recourse of costly litigation to seek justice and we continue to bear such injustice.

This is where consumer forums, which can help you seek justice against unfair practices without incurring exorbitant litigation costs, come in.

8.2 About Consumer Protection Act

Consumer Protection is a concept that was first introduced by John Fitzgerald Kennedy, the 35th President of the United States on 15th March 1962. He spoke about this concept in a special speech to the Congress. His speech stressed protecting the consumer's interest. Kennedy also spoke about the four basic rights of the consumer, namely:

- Right to Safety
- Right to be Informed
- Right to be Heard
- Right to Choose.

His discussion sparked a deliberation and subsequent legislation to protect consumers. 15th March is celebrated as World Consumer Rights Day, taking inspiration from Kennedy.

Another important name in the international sphere while discussing consumer protection is **Ralph Nader**. He is the author of the book “**Unsafe at Any Speed**” which indicates the faulty design of automobiles. The book led to a series of landmark laws that have prevented multiple motor vehicle accidents thus curbing deaths and injuries. He revolutionized Consumer Protection in the United States of America.

Ancient India witnessed the supremacy of the Vedas as a religious text, coming from God himself. The Vedas were strictly followed by the majority in the ancient Indian society. Apart from the Vedas, this period also gave rise to the Code of Chanakya, Manu Smriti, Narada Smriti and so on. These ancient codes contained provisions which sought to safeguard the interests of the consumer, with the aim of consumer safety. The punishment was also granted when the consumer-related provisions were gone against.

Among the Dharmas, the most authoritative texts are:

- Manu Smriti
- Yajnavalkya Smriti
- Narada Smriti
- Bruhaspati Smriti
- Katyayana Smriti.

Among these, Manu Smriti was the most influential.

In the modern period, the previous traditional legal systems established by Indian kings were replaced by new modern laws. The British introduced the English Common Law in India along with other legislative measures for the public and in turn, the consumers.

Some of these legislations are as follows:

- The Indian Contract Act, 1872
- The Sale of Goods Act, 1930
- Indian Partnership Act, 1932
- The Agricultural Produce (Grading and Marketing) Act, 1937
- The Drugs Act, 1940
- The Drugs and Cosmetic Act 1940

These legislations proved to be immensely effective in saving the interests of the consumers during the time of the British. The rules were now uniform across the country and not arbitrary to the opinions of the various kings of the Ancient and Medieval periods.

Post-Independence Period

When India attained independence, it adopted the Anglo-Saxon system of administration of justice. Hence, the previous legislation that was established by the British continued to function in independent India.

Along with the existing legislation, the country was on its path to more laws through the creation of the Indian Constitution and its adoption in 1950. Due to the democratic nature of the Constitution, the prime focus of the laws was the benefit of the general public, who were also consumers.

Certain implications of the Indian Constitution that may apply to consumers are as follows:

Article 14 of the constitution implies equality before the law and equal protection of laws. This results in manufacturers, producers, traders, sellers and consumers having an equal position before the law.

Article 39 has two clauses, (b) and (c), according to which the state is bound to direct its policy to ensure the distribution of the ownership of the material resources of the society. This distribution should be done to serve the common good.

According to Article 43, the state must strive to develop an economic organization or to make legislation in order to secure a decent standard of life to all the workers. These workers are the ones who constitute the bulk of the consumers.

The new legislation enacted after Independence are as follows:

- The Prevention of Food Adulteration Act, 1954
- The Essential Commodities Act, 1955
- The Monopolistic Restrictive and Unfair Trade Practises Act, 1969
- The Standard of Weights and Measures Act, 1976
- The Bureau of Indian Standards Act, 1986
- The Consumer Protection Act, 1986
- The Trade Marks Act, 1999
- The Competition Act, 2002

The Consumer Disputes Redressal agencies- the National Commission, the State Commission, and the District Forum soon started working and has rapidly resulted in quick action taken against those who exploit the consumers.

The efficient justice system in the sphere of consumer protection that we see today is a resulted of all these previous developments that have taken place in the past which is worthy of appreciation.

8.3 Meaning Of Consumer

"Consumer" means any person, who

- (i) Buys any goods for a consideration (a) which has been paid or promised or partly paid and partly promised, or (b) under any system of deferred

payment. 'Consumer' also includes any user of Such goods other than the buyer himself. The use of such goods must however be for consideration paid or promised or partly paid or partly promised, or under any system of deferred payment. The use of such goods must be made with the approval of the buyer. 'Consumer' does not include a person who obtains goods for resale or for any commercial purpose. "Commercial purpose" does not include use by a consumer of goods bought and used by him exclusively for the purpose of earning his livelihood, by means of self-employment.

- (ii) Hires or avails of any services for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment. 'Consumer' also includes any beneficiary of such services other than the person who hires or avails of such services. The beneficiary must however acquire the use of such services for consideration paid or promised, or partly paid and partly promised, or under any system of deferred payment. Further such services must be availed of by the beneficiary with the approval of the hirer.

8.4 Meaning Of Service

It means service of any description which is made available to potential users. It includes the provision of facilities in connection with (a) banking, (b) financing, (c) insurance, (d) transport, (e) processing, (f) supply of electrical or other energy, (g) board or lodging or both, (h) house construction, (i) entertainment, amusement or other purveying of news or other information.

The expression 'service' includes in its scope provision of facility in connection with telephone provided by Telecommunication Department and houses and plots by the Housing & Development Board.

'Service' however does not include the rendering of any service free of charge or under a contract of personal service.

8.5 Unfair Trade Practice

It means a trade practice which a trader, 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. It includes any of the following practices, namely

The practice of making any statement, whether orally or in writing or by visible representation which,

- (i) Falsely represents that the goods are of a particular standard, quality, quantity, grade, composition, style or model;
- (ii) Falsely represents that the services are of a particular standard, quality or grade;
- (iii) Falsely represents any re-built, second-hand, renovated, reconditioned or old goods as new goods;
- (iv) Represents that the goods or services have sponsorship, approval, performance, characteristics accessories, uses or benefits which such goods or services do not have;
- (v) Represents that the seller or the supplier has a sponsorship or approval or affiliation which such seller or supplier does not have;
- (vi) Makes a false or misleading representation concerning the need for, or the usefulness of, any goods or services;
- (vii) Gives to the public any warranty or guarantee of the performance, efficacy or length of life of a product or of any goods that is not based on an adequate or proper test thereof;
- (viii) Where a defence is raised to the effect that such warranty or guarantee is based on adequate or proper test, the burden of proof of such defence shall lie on the person raising such defence.
- (ix) makes to the public a representation in a form that purports to be (i) a warranty or guarantee of a product or of any goods or services ; or (ii) a promise to replace, maintain or repair an article or any part thereof or to repeat or continue a service until it has achieved a specified result, if such purported warranty or guarantee or promise is materially misleading or if there is no reasonable prospect that such warranty, guarantee or promise will be carried out;
- (x) Materially misleads the public concerning the price at which a product or like products or goods or services, have been or are, ordinarily sold or provided. For this purpose, a representation as to price shall be deemed to refer to the price at which the product or goods or services has or have been sold by sellers or provided by suppliers generally in the relevant market unless it is clearly specified to be the price at which the product has

been sold or services have been provided by the person by whom or on whose behalf the representation is made;

- (xi) Gives false or misleading facts disparaging the goods, services or trade of another person.

8.6. Rights Of The Consumers And Reliefs Available to Consumer

Consumers' rights under section-6 of the consumer protection act are as follows:

1. **Right to Safety:** A consumer has the right to safety against such goods and services as are hazardous to his health, life and property.
For example, spurious and substandard drugs; appliances made of low-quality raw material, such as, electric press, pressure cooker, etc. and low-quality food products like bread, milk, jam, butter, etc. The consumers have the right to safety against the loss caused by such products.
2. **Right to be Informed/Right to Representation:** A consumer has also the right that he should be provided with all the information on the basis of which he decides to buy goods or services. Such information relates to quality, purity, potency, standard, date of manufacture, method of use, etc. of the commodity. Thus, a producer is required to provide all such information in a proper manner, so the consumer is not cheated.
3. **Right to Choose:** A consumer has the absolute right to buy any goods or services of his choice from among the different goods or services available in the market. In other words, no seller can influence his choice in an unfair manner. If any seller does so, it will be deemed as interference in his right to choice.
4. **Right to be Heard:** A consumer has the right that his complaint be heard. Under this right, the consumer can file a complaint against all those things which are prejudicial to his interest. First, their rights mentioned above (Right to Safety; Right to be informed and Right to Choose) have relevance only if the consumer has the right to file his complaint against them. These days, several large organisations have set up Consumer Service Cells with a view to providing the consumer the right to be heard.

The function of the cell is to hear the complaints of the consumers and to take adequate measures to redress them. Many daily newspapers have also special columns to entertain the complaints of the consumers.

5. **Right to Seek Redressal:** This right provides compensation to the consumers against unfair trade practice of the seller. For instance, if the quantity and quality of the product do not conform to those promised by the seller, the buyer has the right to claim compensation.

Several redressals are available to the consumer by way of compensation, such as free repair of the product, taking back of the product with refund of money, changing of the product by the seller.

6. **Right to Consumer Education:** Consumer education refers to educating the consumer constantly with regard to their rights. In other words, consumers must be aware of the rights they enjoy against the loss they suffer on account of goods and services purchased by them. Government has taken several measures to educate the consumers.

For instance, Ministry of Civil Supplies publishes a quarterly magazine under the title “Upbhokta Jagran”. Doordarshan telecasts a programme like the “Sanrakshan Upbhokta Ka” and apart from this, Consumer Day is observed on March 15 every year.

Note: In addition to the above mentioned six rights of the consumers, the United Nations Organisation guidelines also contain two more rights. These are the following:

7. **Right to Basic Needs:** The basic needs mean those goods and services which are necessary for a dignified living of people. It includes adequate food, clothing, shelter, energy, sanitation, health care, education and transportation. All the consumers have the right fulfil these basic needs.
8. **Right to Healthy Environment:** This right provides the consumers, protection against environmental pollution so that the quality of life is enhanced. Not only this, it also stresses the need to protect the environment for the future generations as well.

8.7. Consumer Protection Council

THE CENTRAL CONSUMER PROTECTION COUNCIL (SEC 4 TO 6)

Establishment (Sec. 4). Sec. 4 empowers the Central Government to establish, by notification, a Council to be known as the Central Consumer protection Council (referred to as the Central Council).

Membership. The Central Council shall consist of the following members, namely:

- (a) The Minister in charge of consumer affairs in the Central Government, who shall be its Chairman, and
- (b) Such number of other official or non-official members representing such interest as may be prescribed.

According to Rule 3 of the Consumer Protection Rules, 1987, the Central Council shall consist of the following **150 members**, namely:-

- (a) The Minister in charge of consumer affairs in the Central Government, who shall be the Chairman of the Central Council;
- (b) The Minister of State (where he is not holding independent charge) or Deputy Minister in the Department of Civil Supplies who shall be the Vice Chairman of the Central Council;
- (c) The Ministers of Food and Civil Supplies or Minister in charge of consumer affairs in states;
- (d) 8 Members of Parliament, 5 from the Lok Sabha and 3 from the Rajya Sabha;
- (e) The Commissioner for Scheduled Castes and Scheduled Tribes;
- (f) Representatives of the Central Government Departments, autonomous organizations concerned with consumer interests, not exceeding 20
- (g) Representatives of the Consumer Organizations or consumers-not less than 35;
- (h) Representatives of women-not less than 10
- (i) Representatives of farmers, trade and industries-not exceeding 20
- (j) Persons capable of representing consumer interests not specified above - not exceeding 15;
- (k) The Secretary in the Department of Civil Supplies shall be the member secretary of the Central Council.

The term of the Council shall be 3 years: Any member may, by writing under his hand to the Chairman of the Central Council, resign from the Council. The vacancies, so caused or otherwise, shall be filled from the same category by the Central Government. The person shall hold office so long as the member whose place he fills would have been entitled to hold office, if the vacancy had not occurred.

Procedure for meetings of the Central Council (Sec. 5). The Central Council shall meet as and when necessary, and at least one meeting of the Council shall be held every year. It shall meet at such time and place as the Chairman may think fit and shall observe such procedure in regard to the transaction of its business as may be prescribed.

Objects of the Central Council (Sec. 6). The objects of the Central Council shall be to promote and protect the rights of the consumers such as,

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

The Central Council shall give wide publicity to the rights of the consumers and the consumer dispute redressal agencies and procedure of filing complaints therein through television, radio, newspapers and magazines to give impetus to consumer movement in the country.

THE STATE CONSUMER PROTECTION COUNCILS (SECS. 7 AND 8)

Establishment (Sec. 7). The State Government may, by notification, establish with effect from such date as it may specify in such notification, a Council to be known as the Consumer Protection Council for (referred to as the State Council).

Membership. The State Council shall consist of the following members, namely

- (a) The Minister in charge of consumers affairs in the State Government who shall be its Chairman;
- (b) Such number of other official or non-official members representing such interest as may be prescribed by the State Government.

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

Time and place of meetings and procedure. The State Council shall meet at such time and place as the Chairman may think fit and shall observe such procedure in regard to the transaction of its business as may be prescribed by the State Government.

Objects of the State Council (Sec. 8). The objects of every State Council shall be to promote and protect within the State the rights of the consumers laid down in Sec. 6.

8.8. Consumer Dispute Redressal Agencies

Consumer Dispute Redressal Agencies or what we also know as the consumer courts in layman's terms. They are at three levels like any other courts of our judiciary system that is at district level along with District Courts, at state level along with the High Courts and at national level along with the Supreme Court.

CONSUMER DISPUTES REDRESSAL FORUM (THE DISTRICT FORUM)

Composition (Sec. 10).

Each District Forum shall consist of

- (a) A person who is, or has been, or is qualified to be a District Judge, who shall be its President;
- (b) 2 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.

Appointment on the recommendation of Selection Committee. Every, appointment shall be made by the State Government on the recommendation of a selection committee consisting of the following namely:

- (i) The President of the State Commission-Chairman.
- (ii) Secretary, Law Department of the State-Member.
- (iii) Secretary in charge of the Department dealing with consumer affairs in the State-Member.

Term of office. Every member of the District Forum shall hold office for a term of 5 years or up to the age of 65 years, whichever is earlier. He shall not be eligible for re-appointment.

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

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

Jurisdiction (Sec. 11).

The District Forum shall have jurisdiction to entertain complaints where the value of the goods or services and the compensation, if any, claimed does not exceed Rs. 12,00,000. This is however subject to other provisions of this Act.

A complaint shall be instituted in a District Forum within the local limits of whose jurisdiction, ---

- (a) The opposite party (i.e., the person who answers complaint or claim) 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 works for gain. But in such a 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, must acquiesce in such institution; or
- (c) The cause of action, wholly or in part, arises.

Manner in which complaint shall be made (Sec. 12).

A complaint, in relation to any goods sold or delivered or agreed to be sold or delivered or any service provided or agreed to be provided, may be-filed with a 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 recognized 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 Governments.

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

CONSUMER DISPUTES REDRESSAL FORUM (THE STATE FORUM)

Composition (Sec. 16).

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. However, no appointment under this Clause shall be made except after consultation with Chief justice of the High Court;
- (b) 2 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 these members shall be a woman. However, every appointment made under this Clause shall be made by the State Government on the recommendation of a selection committee consisting of the following, namely
 - (i) President of the State Commission-Chairman.
 - (ii) Secretary of the Law Department of the State Member.
 - (iii) Secretary, in charge of Department dealing with consumer affairs in the State Member.

The salary or honorarium and other allowance payable to, and the other terms and conditions of service of, the members of the State Commission shall be prescribed by the State Government.

Every member of the State Commission shall hold office for a term of 5 years or up to the age of 67 years, whichever is earlier and shall not be eligible for re-appointment.

Jurisdiction (Sec. 17).

The State Commission shall have jurisdiction,

- (1) To entertain-

- (i) complaints where the value of the goods or services and compensation, if any, claimed exceeds Rs. 12 lakhs but does not exceed Rs. 1 Crore and
 - (ii) **Appeals** against the orders of any District Forum within the State and
- (2) To call for the records and pass appropriate orders in any consumer dispute which is pending before or has been decided by any District forum within the State where it appears to the State Commission that such District Forum
- (i) Has exercised a jurisdiction not vested in it by law, or
 - (ii) Has failed to exercise a jurisdiction so vested, or
 - (iii) Has acted in exercise of its jurisdiction illegally or with material irregularity.

The jurisdiction of the State Commission shall be subject to other provisions of the Act.

Procedure (Sec. 18).

The provisions of Sec. 12, 13 and 14 and the rules made there under for the disposal of complaints by the District Forum shall, with such modifications as may be necessary, be applicable to the disposal of disputes by the State Commission.

CONSUMER DISPUTES REDRESSAL FORUM (THE NATIONAL FORUM)

Composition (Sec. 20).

The National Commission shall consist of

- (a) a person who is or has been a Judge of the Supreme Court, to be appointed by the Central Government, who shall be its President. However, no appointment under this Clause shall be made except after consultation with the Chief justice of India.;
- (b) 4 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 these members shall be a woman. However, every appointment under this Clause shall be made by the

Central Government on the recommendation of a selection committee consisting of the following namely:---

- (i) A person who is a Judge of the Supreme Court, to be nominated by the Chief justice of India-Chairman.
- (ii) The Secretary in the Department of Legal Affairs in the Government of India-Member,
- (iii) Secretary of the Department dealing with consumer affairs Government of India-Member.

The salary or honorarium and other allowances payable to and the other terms and conditions of service of the members of the National Commission shall be prescribed by the Central Government.

Every member of the National Commission shall hold office for a term of 5 years or up to the age of 70 years, whichever is earlier and shall not be eligible for re-appointment.

Place of the National Commission. The office of the National Commission shall be located in the Union Territory of Delhi (Rule 5 of the Consumer Protection Rules, 1957).

Jurisdiction (Sec. 21).

Subject to the other provisions of this Act, the National Commission shall have jurisdiction

(1) To entertain

- (i) Complaints where the value of the goods or services and compensation, if any, claimed exceeds Rs. 1 Crore and
- (ii) **Appeals** against the orders of any State Commission; and

(2) to call for the records and pass appropriate orders in any consumer dispute which is pending before or has been decided by any State Commission where it appears to the National Commission that such State Commission (i) has exercised a jurisdiction not vested in it by law, or (it) has failed to exercise a jurisdiction so vested, or (iii) has acted in the exercise of its jurisdiction illegally or with material irregularity.

Procedure (Sec. 22).

The National Commission shall, in the disposal of any complaints or any proceedings before it, have

- (1) The powers of a Civil Court as specified in Sec. 13.
- (2) The power to issue an order to the opposite party directing him to do any one or more of the things referred to in Sec. 14.

The National Commission shall follow such procedure as may be prescribed by the Central Government.

8.9. FINDING OF DISTRICTS FORUM AND APPEAL

(1) If, after the proceeding conducted under section 13, the District Forum is satisfied that the goods complained against suffer from any of the defects specified in the complaint or that any of the allegations contained in the complaint about the services are proved, it shall issue an order to the opposite party directing him to do one or more of the following things, namely:—

- (a) to remove the defect pointed out by the appropriate laboratory from the goods in question;
- (b) to replace the goods with new goods of similar description which shall be free from any defect;
- (c) to return to the complainant the price, or, as the case may be, the charges paid by the complainant;
- (d) to pay such amount as may be awarded by it as compensation to the consumer for any loss or injury suffered by the consumer due to the negligence of the opposite party.

Provided that the District Forum shall have the power to grant punitive damages in such circumstances as it deems fit;

- (e) to remove the defects in goods or deficiencies in the services in question;
- (f) to discontinue the unfair trade practice or the restrictive trade practice or not to repeat it;
- (g) not to offer the hazardous goods for sale;
- (h) to withdraw the hazardous goods from being offered for sale;

(ha) to cease manufacture of hazardous goods and to desist from offering services which are hazardous in nature;

(hb) to pay such sum as may be determined by it if it is of the opinion that loss or injury has been suffered by a large number of consumers who are not identifiable conveniently:

Provided that the minimum amount of sum so payable shall not be less than five per cent. of the value of such defective goods sold or service provided, as the case may be, to such consumers:

Provided further that the amount so obtained shall be credited in favour of such person and utilized in such manner as may be prescribed;

(hc) to issue corrective advertisement to neutralize the effect of misleading advertisement at the cost of the opposite party responsible for issuing such misleading advertisement;

(i) to provide for adequate costs to parties.

(2) Every proceeding referred to in sub-section (1) shall be conducted by the President of the District Forum and at least one member thereof sitting together:

Provided that where a member, for any reason, is unable to conduct a proceeding till it is completed, the President and the other member shall continue the proceeding from the stage at which it was last heard by the previous member.

(2A) Every order made by the District Forum under sub-section (1) shall be signed by its President and the member or members who conducted the proceeding:

Provided that where the proceeding is conducted by the President and one member and they differ on any point or points, they shall state the point or points on which they differ and refer the same to the other member for hearing on such point or points and the opinion of the majority shall be the order of the District Forum.

(3) Subject to the foregoing provisions, the procedure relating to the conduct of the meetings of the District Forum, its sittings and other matters shall be such as may be prescribed by the State Government.

APPEAL.

Any person aggrieved by an order made by the District Forum may prefer an appeal against such order to the State Commission within a period of thirty days from the date of the order, in such form and manner as may be prescribed:

Provided that the State Commission may entertain an appeal after the expiry of the said period of thirty days if it is satisfied that there was sufficient cause for not finding it within that period.

Provided further that no appeal by a person, who is required to pay any amount in terms of an order of the District Forum, shall be entertained by the State Commission unless the appellant has deposited in the prescribed manner fifty per cent. of that amount or twenty-five thousand rupees, whichever is less:

8.10. DEFINITIONS OF VARIOUS TERMS UNDER THIS ACT

1. **Complainant [Sec. 2 (1) (b)].** "Complainant" means
 - (i) A consumer; or
 - (ii) Any voluntary **consumer association** registered under the Companies Act, 1956, or under any other law for the time being in force; or
 - (iii) The **Central Government or any State Government**, who or which makes a complaint; or
 - (iv) **One or more consumers**, where there are numerous consumers having the same interest.
2. **Complaint [Sec. 2(1)(c)].** It means any allegation in writing made by a complainant. The allegation in writing must be that
 - (i) An **unfair trade practice** or a **restrictive trade practice** has been adopted by any trader;
 - (ii) The goods bought by him or agreed to be bought by him suffer from one or more **defects**
 - (iii) The services hired or availed of or agreed to be hired or availed of by him suffer from **deficiency** in any respect;
 - (iv) A trader has charged for the goods mentioned in the complaint a price in **excess of the price fixed** by or under any law for the time being in force

or displayed on the goods or any package containing such goods with a view to obtaining any relief provided by or under this Act;

- (v) Goods which will be **hazardous to life and safety** when used, are being offered for sale to the public in contravention of the provisions of any law for the time being in force requiring traders to display information in regard to the contents, manner and effect of use of such goods.
3. **Consumer dispute [Sec. 2 (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.
4. **Defect [Sec. 2 (1) (f)].** It means any fault, imperfection or shortcoming in the quality, quality, potency, purity or standard which is required to be maintained by or under any law for the time being in force under any contract, express or implied, or as is claimed by the trader in any manner whatsoever in relation to any goods.
5. **Deficiency [Sec. 2 (1) (g)].** It means any fault, imperfection, shortcoming or inadequacy in the quantity, nature and manner of performance which (i) is required to be maintained by or under any law for the time being in force, or (ii) has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service.
6. **Goods [Sec. 2 (1) (i)].** It means a goods as defined in the Sale of Goods Act 1930. According to Sec. 2 (7) of the Sale of Goods Act, 1930, goods means 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 land which are agreed to be severed before sale or under the contract of sale."
7. **Manufacturer [Sec. 2 (1) (j)].** "Manufacturer" means a person who
- (i) **Makes** or manufactures any goods or parts thereof; or
 - (ii) Does not make or manufacture any goods but **assembles** parts thereof made or manufactured by others and claims the end product to be goods manufactured by himself; or
 - (iii) puts or causes to be **put his own mark** on any goods made or manufactured by any other manufacturer and claims such goods to be goods made or manufactured by himself,

Where a manufacturer despatches any goods or part thereof to any branch office maintained by him, such branch office shall not be deemed to be the manufacturer even though the parts so despatched to it are assembled at such branch office and are sold or distributed from such branch office.

8. **Person [Sec. 2 (1) (m)].** "Person" includes
 - (i) a firm whether registered or not;
 - (ii) a Hindu undivided family;
 - (iii) a co-operative society;
 - (iv) every other association of persons whether registered under the Societies Registration Act, 1960 or not.
9. **Restrictive trade practice [Sec. 2 (1) (nn)].** It 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;
10. **Trader [Sec. 2 (1) (q)].** "Trader" in relation to any goods means a person who sells or distributes any goods for sale. It also includes the manufacturer of such goods. Where such goods are sold or distributed in package form, 'trader' includes the packer thereof.

❖ Exercise

Descriptive Questions

1. Explain in detail various rights of a consumer.
2. If any damage is done to a consumer by a trader, what are the rights available to a consumer by which he can move to a consumer court to get compensation?
3. Define and describe in detail the Central Consumer Protection Council.
4. Define and describe in detail the State Consumer Protection Council.
5. Define and describe in detail the composition and functioning of the District Forum.

Short Notes

1. Consumer under Consumer Protection Act
2. Complaint according to Consumer Protection Act
3. Unfair Trade Practice under Consumer Protection Act

4. Manufacturer under Consumer Protection Act
5. Consumer Rights under Consumer Protection Act
6. National Council for consumer protection
7. State Council for consumer protection

Multiple Choice Questions

1. According to the Consumer Protection Act which of the following is included under the description of a consumer?
 - a. Buyer of goods
 - b.user of goods
 - c.hirer of goods
 - d.all the above
2. A false representation about the standard, quality and quantity of goods, under the Consumer Protection Act is described as _____
 - a. Fraud
 - b.misrepresentation
 - c. unfair trade practice
 - d.none of the above
3. Under the consumer protection act a consumer is the right to file a complaint against all those things that are against his interest. This right is better described in the act as; _____
 - a. Right to choose
 - b.Right to information
 - c.Right to Be Heard
 - d.Right to Goods and Services
4. The body responsible for making the laws for consumer protection at the national level is better known as _____
 - a. Central consumer protection Council
 - b. State consumer protection Council
 - c. district Forum
 - d. National redressal agency
5. The highest body formed for addressing consumer issues in the country is better known as; _____
 - a. Central consumer protection Council
 - b. State consumer protection Council

- c. district Forum
 - d. National redressal agency
6. Who of the following is/are considered to be fit to be called a 'Complainant' according to the Consumer Protection Act 1986.
- a) A consumer
 - b) Any registered voluntary consumer association
 - c) The Central and State Government
 - d) All the Above
7. Which among the following bodies establishes the Central Consumer Protection Council?
- a.National Commission
 - b.State Government
 - c.Central Government
 - d.Appropriate Government
8. Who is considered to be qualified to be the President of the National Consumer Disputes Redressal Commission?
- a) A person qualified to be a Supreme Court Judge
 - b) A person qualified to be a High Court Judge
 - c) A person qualified to be a District Judge
 - d) All of the above
9. When was the Consumer Protection Act passed in India?
- a.1968
 - b.1986
 - c.1984
 - d.1976
10. If the value of goods or services, along with the compensation claimed is more than 10 crores, then where can the complaint be filed?
- a.District Commission
 - b.State Commission
 - c.National Commission
 - d.None of the above

MCQ Answer key

1	2	3	4	5	6	7	8	9	10
d	c	c	a	d	d	c	a	b	c

BBA SEMESTER-3
BUSINESS LAW
BLOCK: 3

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Publisher's Name: Dr. Ajaysinh Jadeja,
Registrar,
Dr. Babasaheb Ambedkar Open University,
'Jyotirmay Parisar', opp. Shri Balaji Temple, Chharodi, Ahmedabad, 382481,
Gujarat, India.

Edition: 2025-26 (First Edition)

ISBN: 978-93-5598-947-5

ISBN: 978-93-5598-947-5



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INTELLECTUAL PROPERTY RIGHTS

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9.1.Introduction

Intellectual property Right (IPR) is a term used for various legal entitlements which attach to certain types of information, ideas, or other intangibles in their expressed form. The holder of this legal entitlement is generally entitled to exercise various exclusive rights in relation to the subject matter of the Intellectual Property. The term intellectual property reflects the idea that this subject matter is the product of the mind or the intellect, and that Intellectual Property rights may be protected at law in the same way as any other form of property. Intellectual property laws vary from jurisdiction to jurisdiction, such that the acquisition, registration or enforcement of IP rights must be pursued or obtained separately in each territory of interest.

Intellectual property rights (IPR) can be defined as the rights given to people over the creation of their minds. They usually give the creator an exclusive right over the use of his/her creations for a certain period of time.

What is Intellectual Property?

Intellectual property is an intangible creation of the human mind, usually expressed or translated into a tangible form that is assigned certain rights of property. Examples of intellectual property include an author's copyright on a book or article, a distinctive logo design representing a soft drink company and its products, unique design elements of a web site, or a patent on the process to manufacture chewing gum.

What is Intellectual Property Rights?

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Intellectual property (IP) refers to creations of the mind: inventions, literary and artistic works, and symbols, names, images, and designs used in commerce.

9.2 Intellectual property rights- concept- industrial properties

The concept of intellectual property is not new as Renaissance northern Italy is thought to be the cradle of the Intellectual Property system. A Venetian Law of 1474 made the first systematic attempt to protect inventions by a form of patent, which granted an exclusive right to an individual for the first time. In the same century, the invention of movable type and the printing press by Johannes Gutenberg around 1450, contributed to the origin of the first copyright system in the world.

Towards the end of 19th century, new inventive ways of manufacture helped trigger large-scale industrialization accompanied by rapid growth of cities, expansion of railway networks, the investment of capital and a growing transoceanic trade. New ideals of industrialism, the emergence of stronger centralized governments, and nationalism led many countries to establish their modern Intellectual Property laws. At this point of time, the International Intellectual Property system also started to take shape with the setting up of the Paris Convention for the Protection of Industrial Property in 1883 and the Berne Convention for the Protection of Literary and Artistic Works in 1886. The premise underlying Intellectual Property throughout its history has been that the recognition and rewards associated with ownership of inventions and creative

works stimulate further inventive and creative activity that, in turn, stimulates economic growth.

Over a period of time and particularly in contemporary corporate paradigm, ideas and knowledge have become increasingly important parts of trade. Most of the value of high technology products and new medicines lies in the amount of invention, innovation, research, design and testing involved. Films, music recordings, books, computer software and on-line services are bought and sold because of the information and creativity they contain, not usually because of the plastic, metal or paper used to make them. Many products that used to be traded as low-technology goods or commodities now contain a higher proportion of invention and design in their value, for example, brand-named clothing or new varieties of plants. Therefore, creators are given the right to prevent others from using their inventions, designs or other creations. These rights are known as intellectual property rights.

The Convention establishing the World Intellectual Property Organization (1967) gives the following list of the subject matter protected by intellectual property rights:

- literary, artistic and scientific works;
- performances of performing artists, phonograms, and broadcasts;
- inventions in all fields of human endeavour;
- scientific discoveries;
- industrial designs;
- trademarks, service marks, and commercial names and designations;
- protection against unfair competition; and
- “all other rights resulting from intellectual activity in the industrial, scientific, literary or artistic fields.”

With the establishment of the world trade Organization (WTO), the importance and role of the intellectual property protection have been crystallized in the Trade-Related Intellectual Property Systems (TRIPS) Agreement. It was negotiated at the end of the Uruguay Round of the General Agreement on Tariffs and Trade (GATT) treaty in 1994.

The TRIPS Agreement encompasses, in principle, all forms of intellectual property and aims at harmonizing and strengthening standards of protection and

providing for effective enforcement at both national and international levels. It addresses applicability of general GATT principles as well as the provisions in international agreements on IP (Part I). It establishes standards for availability, scope, use (Part II), enforcement (Part III), acquisition and maintenance (Part IV) of Intellectual Property Rights. Furthermore, it addresses related dispute prevention and settlement mechanisms (Part V). Formal provisions are addressed in Part VI and VII of the Agreement, which cover transitional, and institutional arrangements, respectively.

The TRIPS Agreement, which came into effect on 1 January 1995, is to date the most comprehensive multilateral agreement on intellectual property. The areas of intellectual property that it covers are:

- (i) Copyright and related rights (i.e. the rights of performers, producers of sound recordings and broadcasting organisations);
- (ii) Trademarks including service marks;
- (iii) Geographical indications including appellations of origin;
- (iv) Industrial designs;
- (v) Patents including protection of new varieties of plants;
- (vi) The lay-out designs (topographies) of integrated circuits;
- (vii) The undisclosed information including trade secrets and test data.

Industrial Property

Industrial property is one of two subsets of intellectual property (the other being copyright), it takes a range of forms, including patents for inventions, industrial designs (aesthetic creations related to the appearance of industrial products), trademarks, service marks, layout designs of integrated circuits, commercial names and designations, geographical indications and protection against unfair competition. In some cases, aspects of intellectual creation, although present, are less clearly defined. The object of industrial property consists of signs conveying information, in particular to consumers, regarding products and services offered on the market. Protection is directed against unauthorized use of such signs that could mislead consumers, and against misleading practices in general.

9.3 Trademarks- definition- procedure for registration of trademarks

A trade mark (popularly known as **brand name**) in layman's language is a visual symbol which may be a word signature, name, device, label, numerals or combination of colours used by one undertaking on goods or services or other articles of commerce to distinguish it from other similar goods or services originating from a different undertaking.

1. The selected mark should be capable of being represented graphically (that is in the paper form).
2. It should be capable of distinguishing the goods or services of one undertaking from those of others.
3. It should be used or proposed to be used mark in relation to goods or services for the purpose of indicating or so as to indicate a connection in the course of trade between the goods or services and some person have the right to use the mark with or without identity of that person.

Trade Marks are distinctive symbols, signs, logos that help consumer to distinguish between competing goods or services. A trade name is the name of an enterprise which individualizes the enterprise in consumer's mind. It is legally not linked to quality. But, linked in consumer's mind to quality expectation.

Key Features of Trademark

1. Trademark must be Distinctive
2. Trademark must be used in Commerce

Types of Trademarks

1. Trademark,
2. Service mark,
3. Collective mark,
4. Certification Mark

Functions of Trademark

Trademark performs four functions –

1. It identifies the goods / or services and its origin;
2. It guarantees its unchanged quality;

3. It advertises the goods/services;
4. It creates an image for the goods/ services.

Registration of Trade Marks

The process whereby a trade mark is entered on the register of the trademarks is referred to as registration.

Any person, claiming to be the proprietor of a trade mark used or proposed to be used by him, can apply for registration of a trade mark to the Trade Mark Registry under whose jurisdiction, the principal place of the business of the applicant falls, in the prescribed manner for the registration of his trade mark. In case of a company about to be formed, anyone may apply in his name for subsequent assignment of the registration in the company's favour.

The provisions contained in Rules 25 to 31 and 33 to 36 of the Trade Marks Rules, 2002 prescribe the procedure for application of trade marks.

Registration Procedure

The registration procedure in India is based on the 'first to file' system. It is therefore important that the rights holder applies for the registration of its mark as soon as possible. The registration of a trade mark in India typically takes about 2 to 3 years, subject to the trade mark not being opposed by a third party. The Office of the Controller General of Patents, Designs and Trade Marks is the appropriate office for filing of a trade mark application in India. This office has branches in Mumbai, Delhi, Chennai, Ahmedabad and Kolkata. A trade mark application may be filed in any of these offices based on the territorial jurisdiction. The different steps that are involved in the registration process in India are as follows:

Who May Apply for Trade Mark

As per Section 18 of the Trade Marks Act, 1999 any person "claiming to be the proprietor" of the trade mark 'used' or 'proposed to be used' by him may make an application in the prescribed manner for registration of his trade mark.

"Any person" is wide enough to include any individual, company, or association of persons or body of individuals, society, HUF, partnership firm, whether

registered or not, Government, trust etc. [Section 3(42), General Clauses Act, 1897].

Filing and Prosecuting Trade mark Applications

As per rule 4, an application for registration of a trade mark may be made on Form TM-1 with prescribed fee of ` 2500/- at one of the five offices of the Trade Marks Registry located at Mumbai, Delhi, Kolkata, Chennai and Ahmedabad depending on the place where the applicant resides or has his principal place of business.

In the case of joint applicants, the principal place of business in India of the applicant will be that of the person whose name is first mentioned as having a place of business. If the applicant has no principal place of business in India, he should file the application at that office within whose territorial jurisdiction, the address for service in India given by him (as per mandatory provision in Rule 18) is located. No change in the principal place of business in India or in the address for service in India shall affect the jurisdiction of the appropriate office once entered (Rule 5).

Furthermore, trade mark applications can be filed electronically through the website (www.ipindiaonline.gov.in/etmr/).

Review by the Trade Marks Office

After the application has been filed, the Trade Marks Office reviews it to ensure that it is complete in all respects and thereafter allots an application number to the applications. If the trade mark is registered, the application number becomes the registration number.

Preliminary Approval and Publication, Show Cause Hearing or Rejection of the Application

During the process of examination, the Trade Marks Office determines if the trade mark is barred for registration either under absolute grounds for refusal and/or relative grounds for refusal as prescribed in the Trade Marks Act, 1999. Accordingly, they issue an examination report and the Applicant must respond to the objections that have been raised in the examination report within a period of one month from the issuance of the examination report. Thereafter and based on

the response to the examination report that has been filed by the Applicant, the Registrar of Trade Marks determines if the application should be refused, accepted for advertisement, accepted subject to certain limitations or put up for a “show cause” hearing, during which the application might be accepted, rejected or accepted subject to certain limitations. Should the application be rejected, the Applicant can approach the Intellectual Property Appellate Board to appeal the order of the Registrar of Trade Marks.

Registration

Within three months of the publication of the trade mark in the Trade Marks Journal, should the trade mark not be opposed by a third party, it will proceed for registration and the Trade Marks Registry will accordingly issue a registration certificate.

9.4 Patents- definition- kinds of patents-rights of patentee

Patent is a grant for an invention by the Government to the inventor in exchange for full disclosure of the invention. A patent is an exclusive right granted by law to applicants / assignees to make use of and exploit their inventions for a limited period of time (generally 20 years from filing). The patent holder has the legal right to exclude others from commercially exploiting his invention for the duration of this period. In return for exclusive rights, the applicant is obliged to disclose the invention to the public in a manner that enables others, skilled in the art, to replicate the invention. The patent system is designed to balance the interests of applicants / assignees (exclusive rights) and the interests of society (disclosure of invention).

Sec.2(1)(J) – “Invention” means a **new** product or process involving an inventive step and capable of industrial application

What is meant by ‘New’? The invention to be patented must not be published in India or elsewhere, or in prior public knowledge or prior public use with in India or claimed before in any specification in India. A feature of an invention that involves technical advance as compared to the existing knowledge or have

economic significance or both and makes the invention not obvious to a person skilled in the art.

“New invention” is defined as any invention or technology which has not been anticipated by publication in any document or used in the country or elsewhere in the world before the date of filing of patent application with complete specification, i.e., the subject matter has not fallen in public domain or that it does not form part of the state of the art [Section 2(1)(l)]; Where, capable of industrial application, in relation to an invention, means that the invention is capable of being made or used in an industry [Section 2(1)(ac)].

In *Raj Prakash v. Mangat Ram Choudhary* AIR 1978 Del.1, it was held that invention, as is well known, is to find out some thing or discover something not found or discovered by anyone before. It is not necessary that the invention should be anything complicated. The essential thing is that the inventor was first to adopt it. The principal therefore, is that every simple invention that is claimed, so long as it is something which is novel or new, it would be an invention and the claims and specifications have to be read in that light.

Therefore, the conditions of patentability are:

- Novelty
- Inventive step (non-obviousness) and
- Industrial applicability (utility)

Salient Features of the Act

1. A patent is an exclusive right granted by a country to the owner of an invention to make, use, manufacture and market the invention, provided the invention satisfies certain conditions stipulated in the law.
2. Exclusivity of right implies that no one else can make, use, manufacture or market the invention without the consent of the patent holder.
3. This right is available only for a limited period of time. However, the use or exploitation of a patent may be affected by other laws of the country which has awarded the patent. These laws may relate to health, safety, food, security etc. Further, existing patents in similar area may also come in the way.
4. A patent in the law is a property right and hence, can be gifted, inherited, assigned, sold or licensed.

5. As the right is conferred by the State, it can be revoked by the State under very special circumstances even if the patent has been sold or licensed or manufactured or marketed in the meantime.
6. The patent right is territorial in nature and inventors/their assignees will have to file separate patent applications in countries of their interest, along with necessary fees, for obtaining patents in those countries.
7. A patent is an official document given to an inventor by the government allowing him to exclude anyone else from commercially exploiting his invention for a limited period which is **20 years at present**.
8. As per the Supreme Court, the object of Patent Law is to encourage scientific research, new technology and industrial progress. Grant of exclusive privilege to own, use or sell the method or the product patented for a limited period, stimulates new inventions of commercial utility.
9. The price of the grant of the monopoly is the disclosure of the invention at the Patent Office, which, after the expiry of the fixed period of the monopoly, passes into the public domain [*M/s Bishwanath Prasad v. Hindustan Metal Industries, AIR1982 SC 1444*].
10. By granting an exclusive right, patents provide incentives to individuals, offering them recognition for their creativity and material reward for their marketable inventions. In return for the exclusive right, the inventor has to adequately disclose the patented invention to the public, so that others can gain the new knowledge and can further develop the technology. The disclosure of the invention is thus an essential consideration in any patent granting procedure.

Types of Patent Applications

1. Ordinary Application
2. Application for Patent of Addition (granted for Improvement or Modification of the already patented invention, for an unexpired term of the main patent).
3. Divisional Application (in case of plurality of inventions disclosed in the main application).
4. Convention application, claiming priority date on the basis of filing in Convention Countries.
5. National Phase Application under PCT.

9.5 Copyrights definition-essential conditions of copyrights protection- rights of copyrights owners Infringement of copyrights

Copyright is a right given by the law to creators of literary, dramatic, musical and artistic works and producers of cinematograph films and sound recordings. In fact, it is a bundle of rights including, inter alia, rights of reproduction, communication to the public, adaptation and translation of the work. It means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatsoever (*Kartar Singh Giani v. Ladha Singh & Others* AIR 1934 Lah 777).

According to Section 14 of the Act, “copyright” means the exclusive right subject to the provisions of this Act, to do or authorise the doing of any of the following acts in respect of a work or any substantial part thereof, namely: -

(a) In the case of a literary, dramatic or musical work, not being a computer programme, -

- (i) To reproduce the work in any material form including the storing of it in any medium by electronic means;
- (ii) To issue copies of the work to the public not being copies already in circulation;
- (iii) To perform the work in public, or communicate it to the public;
- (iv) To make any cinematograph film or sound recording in respect of the work;
- (v) To make any translation of the work;
- (vi) To make any adaptation of the work;
- (vii) To do, in relation to a translation or an adaptation of the work, any of the acts specified in relation to the work in sub-clauses (i) to (vi);

(b) In the case of a computer programme, -

- (i) To do any of the acts specified in clause (a);
- (ii) To sell or give on commercial rental or offer for sale or for commercial rental any copy of the computer programme: Provided that such

commercial rental does not apply in respect of computer programmes where the programme itself is not the essential object of the rental.

(c) In the case of an artistic work, -

- (i) To reproduce the work in any material form including depiction in three dimensions of a two-dimensional work or in two dimensions of a three-dimensional work;
- (ii) To communicate the work to the public;
- (iii) To issue copies of the work to the public not being copies already in circulation;
- (iv) To include the work in any cinematograph film;
- (v) To make any adaptation of the work;
- (vi) To do in relation to an adaptation of the work any of the acts specified in relation to the work in sub-clauses (i) to (iv);

(d) In the case of cinematograph film, -

- (i) To make a copy of the film, including a photograph of any image forming part thereof;
- (ii) To sell or give on hire, or offer for sale or hire, any copy of the film, regardless of whether such copy has been sold or given on hire on earlier occasions;
- (iii) To communicate the film to the public;

(e) In the case of sound recording, -

- (i) To make any other sound recording embodying it;
- (ii) To sell or give on hire, or offer for sale or hire, any copy of the sound recording regardless of whether such copy has been sold or given on hire on earlier occasions;
- (iii) To communicate the sound recording to the public.

Explanation: For the purposes of this section, a copy which has been sold once shall be deemed to be a copy already in circulation.

Indian Copyright Act affords separate and exclusive copyright protection to the following 7

clauses of work:

1. Original Literary Work
2. Original Dramatic Work
3. Original Musical Work
4. Original Artistic Work
5. Cinematograph Films
6. Sound recording
7. Computer Programme

Infringement of copyrights

Copyright protection gives exclusive rights to the owners of the work to reproduce the work enabling them to derive financial benefits by exercising such rights. If any person without authorisation from the owner exercises these rights in respect of the work which has copyright protection it constitutes an infringement of the copyright. If the reproduction of the work is carried out after the expiry of the copyright term it will not amount to an infringement.

In *Penguin Books Ltd., England v. M/s India Book Distributors & Others* AIR 1985 Del. 29, it was observed that whenever there is misappropriation of intellectual property of which the primary beneficiary is the copyright owner there is infringement of copyright. Copyright is a property right.

Throughout the world it is regarded as a form of property worthy of special protection in the ultimate public interest. The law starts from the premise that protection would be as long and as broad as possible and should provide only those exceptions and limitations which are essential in the public interest.

Section 51 of the Act contemplates situations where copyright in a work shall be deemed to be infringed. As per this section copyright in a work is infringed when any person without a licence granted by the owner of the copyright or the Registrar of Copyright or in contravention of the conditions of a licence so granted or of any condition imposed by a competent authority does —

Anything for which the exclusive right is conferred upon the owner of the copyright, or

permits for profit any place to be used for the communication of the work to public where such a communication constitutes an infringement of the copyright in the work, unless he was not aware and had no reasonable ground for believing that such communication would be an infringement of copyright.

When any person (i) makes for sale or hire or lets for hire or by way of trade display or offers for sale or hire, or (ii) distributes either for the purpose of trade or to such an extent as to affect prejudicially the owner of the copyright, or (iii) by way of trade, exhibits in public, or (iv) imports into India any infringing copies of the work. However, import of one copy of any work is allowed for private and domestic use of the importer. Explanation to Section 51 clarifies that the reproduction of literary, dramatic, musical or artistic work in the form of cinematograph film shall be deemed to be an infringing copy.

The copyright in a work shall be deemed to be infringed by any person who, without the consent of the owner of the copyright, does anything, the sole right to do which is conferred on the owner of the copyright. *Kartar Singh Giani v. Ladha Singh & Others* AIR 1934, Lah 777 (DB).

The concept of honest and concurrent user found in Section 12(3) of the 1958 Act for securing concurrent registration is totally irrelevant as defence in a suit for infringement and copyright arising out of a different Act, namely, 1957 Act (*M/s Power Control Appliances & Others v. Sumeet Machines Pvt. Ltd.* (1994) 2 SCC 448).

In *Ushodaya Enterprises Ltd v T.V. Venugopal*, 2001 PTC 727, the division bench of the Andhra Pradesh High Court held that even though the defendant has registered the carton under the Trademark Act, that may not come to the aid of the defendant as the case of the plaintiff is that it owns a copyright of the artistic work under the Copyright Act and no registration is required for the same. Thus,

the court held that the plaintiff was justified in alleging infringement of his artistic work.

One of the surest tests to determine whether or not there has been a violation of copy right is to see if the reader, spectator, or the viewer after having read or seen both the works would be clearly of the opinion and get an unmistakable impression that the subsequent work appears to be a copy of the first. In other words, dealing with the question of infringement of copy right of the applicant's work by the respondent's work, the Court is to test on the visual appearance of the object and drawing, design, or artistic work in question and by applying the test viz., 'lay observer test' whether to persons who are not experts in relation to objects of that description, the object appears to be a reproduction. If to the 'lay observer', it would not appear to be reproduction, there is no infringement of the artistic copy right in the work. A bare look at these two artistic works 'Sharp' and 'Sharp tools'. Moreover, the work 'sharp' in the work of the appellant is embedded in a semi-circle design with rays emitting from it as if it were a rising Sub; whereas, in the respondent's work it is plainly 'Sharp Tools' with no design superimposing it. Judging by the eye alone, they appear to Court to be totally different. One does not think that anyone looking at these two works would say that they are similar in any manner nor do any one would say the design, the layout and the manner in which the words written in the works of the respondent was on obvious imitation, much less an imitation of the appellant's work. Applying the various tests set out above, it cannot be said that the respondent had committed an act of piracy by way of copying the copyright of the appellant. As rightly pointed out by the Copyright Board that there can be no copyright in the word or words, but the right can only be in the artistic manner in which the same is written, and in this case the works were totally dissimilar. [Associated Electronic & Electrical] Industries (Bangalore) Pvt. Ltd. v. M/s Sharp Tools AIR 1991 Kar 406]. M/s. Video Master & another v. M/s. Nishi Productions & others, 1998(3) Bom. CR 782. The given case examined the circumstances under which the exhibition of film by various modes infringed copy rights. The plaintiff was assigned video playback and cable T.V rights and he objected to the defendants being given the satellite broadcasting rights. The Court observed that there were various modes of communication to public and each one was separate and

divisible. It was held that each of the modes of communication could exist in different persons at the same time without infringing copy right of the other.

The Bombay High Court in *Hindustan Lever Ltd., v. Nirma Private Limited*, Ahmedabad, AIR 1991 held that the dissimilarities were totally inadequate to wipe out general impression of the unwary purchaser. Thus, there was prima facie infringement of copyright. The case dealt with the infringement of the copyright in the label when there were only few changes made in the colourable imitation of label.

In *Eastern Book Company & Others v. Navin J. Desai & Another* 2001 PTC (21) 57 Del., Delhi High Court has held: Copyright is a limited monopoly having its origin in protection. There cannot be any monopoly in the subject matter which the author has borrowed from public domain. Others are at liberty to use the same material. Material in which no one has a copyright is available to all. Every man can take what is useful from the, improve, add and give to the public the whole comprising the original work with his additions and improvements. Under the guise of the copyright, the plaintiffs cannot ask the Court to restrain the defendants from making this material available to public. Judgements/orders published by the plaintiffs in their law reports 'Supreme Court Cases' is not their original literary work but has been composed of, compiled and prepared from and reproduction of the judgements of the Supreme Court of India, open to all. Merely by correcting certain typographical or grammatical mistakes in the raw source and by adding commas, full stops and by giving paragraph numbers to the judgement will not their work as the original literary work entitled to protection under the Copyright Act. Plaintiffs, therefore, have no copyright in the judgements published in their law reports. There being no copyright in the plaintiffs, there is no question of the defendant infringing any alleged copyright. Plaintiffs have failed to make out any prima facie case in their favour and are, therefore, not entitled to any relief in the application.

In *Godrej Soaps (P) Ltd. v. Dora Cosmetics Co.* 2001 PTC (21) 407 Del. It was held that the Delhi High Court held that where the carton was designed for valuable consideration by a person in the course of his employment for and on

behalf of the plaintiff and the defendant had led no evidence in his favour, the plaintiff is the assignee and the legal owner of copyright in the carton including the logo. Crowning Glory carton was designed for valuable consideration by a person who produced the said work in the course of his employment with advertising company under a contract of service for and on behalf of the plaintiff. By the reason of the circumstances in which the said artistic work was produced, the plaintiff is the owner of the legal and equitable title in the artistic work. As a matter of abundant caution, the copyright in the carton was assigned to the plaintiff. Plaintiff has proved that it is the assignee of the copyright in the carton for 'Crowning Glory'

The Criminal Offence

Any person who knowingly infringes or abets the infringement of the copyright in any work commits criminal offence under Section 63 of the Copyright Act. The minimum punishment for infringement of copyright is imprisonment for six months with the minimum fine of Rs. 50,000/-. In the case of a second and subsequent conviction the minimum punishment is imprisonment for one year and fine of Rs. one lakh.

9.6 Trade secrets- Geographical indicators

A trade secret is any kind of information that is secret or not generally known in the relevant industry giving the owner an advantage over competitors. Generally, it has been stated that any information that can be used in the operation of a business or other enterprise and that is sufficiently valuable to afford an actual or potential economic advantage over others is a trade secret. Examples of trade secrets include formulas, patterns, methods, programs, techniques, processes or compilations of information that provide one's business with a competitive advantage. The precise language by which a trade secret is defined varies by jurisdiction (as do the precise types of information that are subject to trade secret protection). However, there are three factors that (though subject to differing interpretations) are common to all such definitions: a trade secret is some sort of information that (a) is not generally known to the relevant portion of the public, (b) confers some sort of economic benefit on its holder (which means this benefit must derive specifically from the fact that it is not generally known, not just from

the value of the information itself), and (c) is the subject of reasonable efforts to maintain its secrecy.

Trade secrets are not protected by law in the same manner as trademarks or patents. Probably one of the most significant differences is that a trade secret is protected without disclosure of the secret. A trade secret might be a patentable idea but not always. Unlike patent, a trade secret does not have to pass the test of novelty; nevertheless, the idea should be somewhat new, unfamiliar to many people including many in the same trade.

Trade secrets are not registered like other forms of intellectual property and are not creatures of statutes. Instead, the judicial system of each country determines the requirements for obtaining trade secrets protection. In India, trade secrets are not covered under any law.

The TRIPS Agreement under Article 39 protects trade secrets in the form of “undisclosed information”, and provides a uniform mechanism for the international protection of trade secrets. Such information must be a secret, i.e. not generally known or readily accessible to person within the circles that normally deal with all kinds of information in question. Also, the information must have commercial value because it is secret and the information must be subject to reasonable steps by its owners to keep it secret.

TRIPS Agreement requires the member countries to provide effective remedies for trade secret misappropriation including:

- Injunctive relief;
- Damages; and
- Provisional relief to prevent infringement and to preserve evidence.

Trade secrets are by definition not disclosed to the world at large. So long as trade secret remains a secret, it is valuable for the company. Once the information enters the public domain, it is lost forever. Therefore, companies should take every precaution to keep the information secret. Instead, owners of trade secrets seek to keep their special knowledge out of the hands of

competitors through a variety of civil and commercial means, not the least of which is the employment or confidentiality agreements and/or nondisclosure agreements. In exchange for the opportunity to be employed by the holder of secrets, a worker will sign an agreement not to reveal his prospective employer's proprietary information. Often, he will also sign over rights to the ownership of his own intellectual production during the course (or as a condition) of his employment. Violation of the agreement generally carries stiff financial penalties, agreed to in writing by the worker and designed to operate as a disincentive to going back on his word. Similar agreements are often signed by representatives of other companies with whom the trade secret holder is engaged in licensing talks or other business negotiations.

If a trade secret is well protected, there is no term of protection. Trade secret protection can, in principle, extend indefinitely and in this respect offers an advantage over patent protection, which lasts only for a specified period. It is equally possible that a company may decide not to patent as for instance formula for Coca-Cola which is considered to be one of the best well protected trade secrets.

Companies often try to discover one another's trade secrets through lawful methods of reverse engineering on one hand and less lawful methods of industrial espionage on the other.

Acts of industrial espionage are generally illegal in their own right under the relevant governing laws, of course. The importance of that illegality to trade secret law is as follows: if a trade secret is acquired by improper means (a somewhat wider concept than "illegal means" but inclusive of such means), the secret is generally deemed to have been misappropriated. Thus, if a trade secret has been acquired via industrial espionage, its acquirer will probably be subject to legal liability for acquiring it improperly. (The holder of the trade secret is nevertheless obliged to protect against such espionage to some degree in order to safeguard the secret. As noted above, under most trade secret regimes, a trade secret is not deemed to exist unless its purported holder takes reasonable steps to maintain its secrecy.)

The test for a cause of action for breach of confidence in the common law world is set out in the case of *Coco v. A.N. Clark (Engineers) Ltd.*, (1969) R.P.C. 41:

- The information itself must have the necessary quality of confidence about it;
- That information must have been imparted in circumstances imparting an obligation of confidence;
- There must be an unauthorized use of that information to the detriment of the party communicating it.

The “quality of confidence” highlights the fact that trade secrets are a legal concept. With sufficient effort or through illegal acts (such as break and enter), competitors can usually obtain trade secrets. However, so long as the owner of the trade secret demonstrates that reasonable efforts have been made to keep the information confidential, the information remains a trade secret and is legally protected as such. Conversely, trade secret owners who do not demonstrate reasonable effort at protecting confidential information, risk losing the trade secret even if the information is obtained by competitors illegally. It is for this reason that trade secret owners shred documents and do not simply recycle them. Presumably an industrious competitor could piece together the shredded documents again. Legally the trade secret remains a trade secret because shredding the document is considered to have kept the quality of confidence of the information.

Geographical Indications

Geographical Indications of Goods are defined as that aspect of industrial property which refers to the geographical indication referring to a country or to a place situated therein as being the country or place of origin of that product. A product’s quality, reputation or other characteristics can be determined by where it comes from.

Geographical indications (GIs) are place names (in some countries also words associated with a place) used to identify products that come from these places and have these characteristics (for example, “Champagne”, ‘Scotch whisky’ “Tequila” or “Roquefort”).

Geographical indications serve to recognize the essential role geographic and climatic factors and/or human know-how can play in the end quality of a product. Like trademarks or commercial names GIs are also IPRs, which are used to identify products and to develop their reputation and goodwill in the market. The Agreement on Trade Related Aspects of Intellectual Property (TRIPS), prescribes minimum standards of protection of GIs and additional protection for wines and spirits.

What is a Geographical Indication?

1. It is an indication
2. It originates from a definite geographical territory.
3. It is used to identify agricultural, natural or manufactured goods
4. The manufactured goods should be produced or processed or prepared in that territory.
5. It should have a special quality or reputation or other characteristics

Examples of Indian Geographical Indications -

1. Solapur Chaddar
2. Solapur Terry Towel
3. Basmati Rice
4. Darjeeling Tea
5. Kanchipuram Silk Saree
6. Alphonso Mango
7. Nagpur Orange

The Object of the Geographical Indications of Goods (Registration and Protection) Act, 1999 is three-fold, firstly by specific law governing the geographical indications of goods in the country which could adequately protect the interest of producers of such goods, secondly, to exclude unauthorized persons from misusing geographical indications and to protect consumers from deception and thirdly, to promote goods bearing Indian geographical indications in the export market.

Salient Features Geographical Indications of Goods (Registration and Protection) Act, 1999

The salient features of Geographical Indications of Goods (Registration & Protection) Act, 1999 are as under:

1. Definitions and interpretations of several important terms like "geographical indication", "goods", "producers", "packages", "registered proprietor", "authorized user" etc.
2. Provision for the maintenance of a Register of Geographical Indications in two parts-Part A and Part B and use of computers etc. for maintenance of such Register. While Part A will contain all registered geographical indications, Part B will contain particulars of registered authorized users.
3. Registration of geographical indications of goods in specified classes.
4. Prohibition of registration of certain geographical indications.
5. Provisions for framing of rules by Central Government for filing of application, its contents and matters relating to substantive examination of geographical indication applications.
6. Compulsory advertisement of all accepted geographical indication applications and for inviting objections.
7. Registration of authorized users of registered geographical indications and providing provisions for taking infringement action either by a registered proprietor or an authorized user.
8. Provisions for higher level of protection for notified goods.
9. Prohibition of assignment etc. of a geographical indication as it is public property.
10. Prohibition of registration of geographical indication as a trademark.
11. Appeal against Registrar's decision would be to the Intellectual Property Appellate Board established under the Trade Mark legislation.
12. Provision relating to offences and penalties.
13. Provision detailing the effects of registration and the rights conferred by registration.
14. Provision for reciprocity powers of the registrar, maintenance of Index, protection of homonymous geographical indications etc.

❖ Exercise

Answer the following questions in detail:

1. What are intellectual property rights? Explain the law in India with respect to its salient features.
2. Explain the intellectual property rights law in India in light of its historical background.
3. Explain in detail the laws related to patents.
4. Explain in detail the laws related to trademarks.
5. Explain in detail the laws related to designs.
6. Explain in detail the laws related to geographical indications.

Short Notes

1. Patents under IPR Act
2. Trademarks under IPR Act
3. Designs under IPR Act
4. Copyrights under IPR Act
5. Geographical Indications under IPR Act

Multiple Choice Questions

1. The law formed to protect the creations of the human mind like inventions artwork designs etc. is called _____.
 - a. Consumer protection act
 - b. Intellectual Property Rights
 - c. Right to information act
 - d. none of the above
2. According to the Indian IPR act, creations like books, software and artwork are protected by; _____
 - a. Patents
 - b. Copyrights
 - c. Trademarks
 - d. Geographical Indications.

- ### MCQ Answer key

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- 10.1 Introduction and Objective of the Act**
- 10.2 Objectives of Right to Information Act, 2005**
- 10.3 Meaning of information according to RTI**
- 10.4 Information that can be demanded and cannot be demanded under RTI**
- 10.5 Authorities and organisations which are bound to respond to RTI**
- 10.6 Authorities and information exempt under RTI**
- 10.7 Process for filing an RTI**
- 10.8 Penalties for non-conformance of an RTI. (Failure to provide information on time, incorrect, incomplete or misleading or distorted)**

❖ **Exercise**

10.1. Introduction and Objective of the Act

Right to Information is an integral part of the freedom of speech and expression enshrined in Article 19(1)(a) of the constitution, which is regarded as the first condition of liberty. It occupies preferred position in the hierarchy of liberties giving succour and protection to other liberties. The expression “freedom of speech and expression” in Article 19(1)(a) has been held to include the right to acquire information and disseminate the same. It includes the right to communicate it through any available media whether print or electronic or audio-visual, such as, advertisement, movie, article or speech, etc.

The Right of information is an inalienable component of freedom of speech and expression guaranteed by Article 19(1) (a) of Indian constitution. Beside Article 19(1) (a), the other articles which give right to information under Indian constitution are Articles 311(2) and 22(1). Article 311(2) provides for a govt.

servant to know why he is being dismissed or removed or being demoted and representation can be made against the order. By way of Article 22(1) a person can know the grounds for his detention. According to Justice B N Srikrishna – *“Right to information emerges from right to personal liberty guaranteed by article 21 of constitution.”*

In order to promote, transparency and accountability in administration, Parliament passed “Right to Information Bill, 2004 on 15th June, 2005, “The Right to Information Act” was notified in the Gazette of India on 21st June, 2005, after repealing the Freedom of Information Act, 2002. The “Right to Information Act” has become fully operational from 12th October, 2005 so as to enable a citizen of India to secure access to information under the control of Public Authorities. The RTI Act mandates timely response to citizen requests for government information. It applies to all States and Union Territories of India, except the State of Jammu and Kashmir, which is covered under a State-level law. Prior to the Act being passed by the Parliament, the RTI Laws were first successfully enacted by the state governments of Tamil Nadu (1997), Goa (1997), Rajasthan (2000), Karnataka (2000), Delhi (2001), Maharashtra (2002), Madhya Pradesh (2003), Assam (2002) and Jammu and Kashmir (2004). Some of these State level enactments have been widely used. While the Delhi RTI Act is still in force, Jammu & Kashmir has its own Right to Information Act of 2009, the successor to the repealed J&K Right to Information Act, 2004 and its 2008 amendment.

Salient Features of Right to Information Act, 2005

1. The term Information includes any mode of information in any form of record, document, e-mail, circular, press release, contract sample or electronic data etc.
2. Any citizen (excluding the citizens within J&K) may request information from a ‘public authority’ (a body of Government or ‘instrumentality of State’) which is required to reply expeditiously or within thirty days.
3. Citizens have a right to: request any information (as defined); take copies of documents; inspect documents, works and records; take certified samples of materials of work; and obtain information in the form of printouts, diskettes, floppies, tapes, video cassettes or in any other electronic mode.

4. The Act relaxes the Official Secrets Act of 1889 which was amended in 1923 and various other special laws that restricted information disclosure in India. In other words, the Act explicitly overrides the Official Secrets Act and other laws in force as on 15 June 2005 to the extent of any inconsistency.
5. Applicant can obtain Information within 30 days from the date of request in a normal case. In specific circumstances Information can be obtained within 48 hours from time of request. If it is a matter of life or liberty of a person.
6. The Act also requires every public authority to computerise their records for wide dissemination and to proactively publish certain categories of information so that the citizens need minimum recourse to request for information formally. The Act, in particular, requires every public authority to publish 16 categories of information. This includes the particulars of its organisation, functions and duties; powers and duties of its officers and employees; procedure followed in the decision-making process; norms set for discharge of its functions; rules, regulations, instructions, manuals and records, held by it or under its control or used by its employees for discharging its functions; etc.
7. The Act enumerates the types of information(s) that are exempted from disclosure. However, these exempted information(s) or those exempted under the Official Secrets Act can be disclosed if public interest in disclosure outweighs the harm to the protected interest. Also, the exempted information(s) would cease to be exempted if 20 years have lapsed after occurrence of the incident to which the information relates.
8. Penalty for refusal to receive an application for information or for not providing information is Rs. 250/- per day but the total amount of penalty should not exceed Rs. 25,000/-
9. If an applicant is not supplied information within the prescribed time of 30 days or 48 hours, as the case may be, or is not satisfied with the information furnished to him, he may prefer an appeal to the first appellate authority who is an officer senior in rank to the PIO. If still not satisfied the applicant may prefer a second appeal with the Central Information Commission (CIC)/State Information Commission (SIC) within 90 days from the date on

which the decision should have been made by the first appellate authority or was actually received by the appellant.

Key Provisions

1. **Section 2(h):** Public authorities means all authorities and bodies under the Constitution or any other law, and inter alia includes all authorities under the Central, state governments and local bodies. The civil societies substantially funded, directly or indirectly, by the public funds also fall within the ambit'
2. **Section 4 (1)(b):** Maintain and proactively disclose information.
3. **Section 6:** Prescribes simple procedure for securing information.
4. **Section 7:** Fixes time limit for providing information(s) by PIOs.
5. **Section 8:** Only minimum information exempted from disclosure
6. **Section 19:** Two tier mechanism for appeal
7. **Section 20:** Provides penalties in case of failure to provide information on time, incorrect, incomplete or misleading or distorted information.
8. **Section 23:** Lower courts are barred from entertaining suits or applications. However, the writ jurisdiction of the Supreme Court and high courts under Articles 32 and 225 of the Constitution remains unaffected.

10.2. Objectives of Right to Information Act, 2005

The RTI Act's main vision is to empower the nation's people. To accomplish this, the nation's leader must seek to enhance openness and accountability in government activity, eliminate corruption, and enable democracy to truly operate in the residents' favour. People who are better educated are more organised and ready to maintain a constant eye on the tools of administration and make the government more answerable to the public. This Act is a significant leap toward better informing the citizens of a nation about the government's operations. The Objectives of the right to information act 2005 are as follows.

- **Empowering Citizens:** The Act aims to provide citizens with the legal right to access information held by public authorities, thereby empowering them to actively participate in the democratic process. To provide for setting out the practical regime of right to information for citizens to secure access to information under the control of public authorities

- **Promoting Transparency and Accountability:** The RTI Act seeks to foster transparency and accountability in government operations by ensuring that public authorities are open and responsive to citizen requests for information.
- **Combating Corruption:** By making government information accessible, the Act aims to reduce corruption and hold public officials accountable for their actions. Transparency and accountability play a role in the fight, against corruption. The Right to Information (RTI) Act acts as an instrument in uncovering government practices and ensuring those responsible for corruption are held answerable. By granting citizens access to details concerning government contracts, spending and decision-making processes the Act aids, in pinpointing cases of corruption and fostering responsibility.
- **Ensuring Good Governance:** The Act contributes to good governance by promoting transparency, accountability, and citizen participation in decision-making.
- **Preserving Democratic Ideals:** The RTI Act is a vital tool for preserving the ideals of democracy by ensuring that citizens are informed and can hold their government accountable. The Right to Information Act gives people the right to access information allowing them to play an active role, in democratic processes. This helps individuals make informed decisions interact with policies and ensure that public officials are responsible, for their deeds.
- **Harmonizing conflicting interests:** The Act aims to harmonize conflicting interests and prioritize operations of government, and use of resources

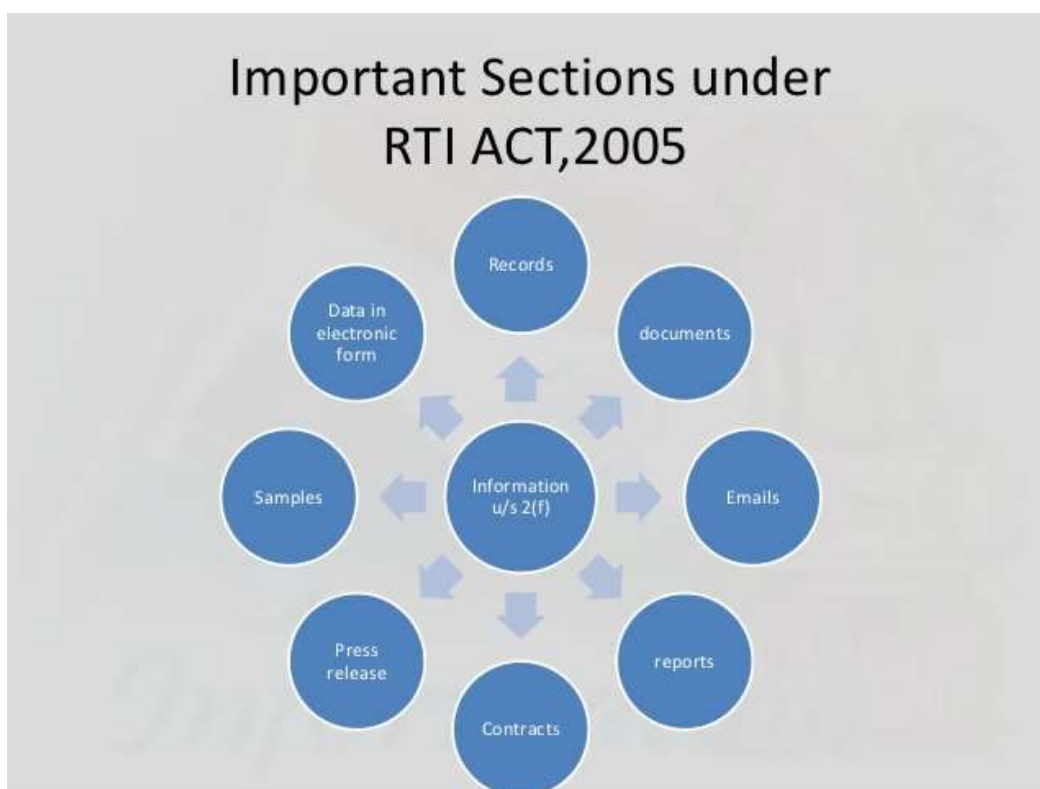
10.3. Meaning of Information according to the RTI Act, 2005

Under the RTI Act, 2005 "**information**" is defined under Section 2(f), which provides:

"information" means any material in any form, including records, documents, memos, e-mails, opinions, advices, press releases, circulars, orders, logbooks, contracts, report, papers, samples, models, data material held in any electronic form and information relating to any private body which can be accessed by a public authority under any other law for the time being in force.

This definition shows that an applicant under **Section 6** of the **RTI Act** can get any information which is already in existence and accessible to the public authority under law. Of course, under the RTI Act an applicant is entitled to **get copy of the opinions, advices, circulars, orders**, etc., but she cannot ask for any information as to why such opinions, advices, circulars, orders, etc. have been passed, especially in matters pertaining to judicial decisions.

A judge speaks through his judgments or orders passed by him. If any party feels aggrieved by the order/judgment passed by a judge, the remedy available to such a party is either to challenge the same by way of appeal or by revision or any other legally permissible mode. No litigant can be allowed to seek information as to why and for what reasons the judge had come to a particular decision or conclusion. ***A judge is not bound to explain later on for what reasons he had come to such a conclusion.***



Information can be sought under the RTI Act at different stages or different points of time. What is exempted from disclosure at one point of time may cease to be exempted at a later point of time depending upon the nature of exemption.

For example, any information which is exempted from disclosure under **Section 8** of RTI Act, 2005 is liable to be disclosed if the application is

made with regard to the occurrence or event which took place or occurred or happened twenty years prior to the date of the request vide **Section 8(3)** of the RTI Act.

In other words, information which was exempted from disclosure, if an application is made within twenty years of the occurrence, may not be exempted if the application is made after twenty years.

Similarly, if information relating to the **intellectual property that is the question papers, solutions/model answers and instructions**, with regard to any particular examination conducted by the Appellant, cannot be disclosed before the examination is held, as it would harm the competitive position of innumerable third parties who are taking the said examination.

Therefore, it is obvious that the Appellant examining body was not liable to give to any citizen any information relating to question papers, solutions/model answers and instructions relating to a particular examination before the date of such examination. But the position will be different once the examination is held.

Disclosure of the question papers, model answers and instructions in regard to any particular examination would not harm the competitive position of any third party once the examination is held. In fact, the question papers are disclosed to everyone at the time of examination. The Appellant voluntarily publishes the "suggested answers" in regard to the question papers in the form of a book for sale every year after the examination.

Therefore, **Section 8(1)(d)** of the RTI Act does not bar or prohibit the disclosure of question papers, model answers (solutions to questions) and instructions if any given to the examiners and moderators after the examination and after the evaluation of answer scripts is completed as at that stage, they will not harm the competitive position of any third party.

The information to which RTI Act applies falls into two categories, namely,

(i) Information which promotes **transparency and accountability** in the working of every public authority disclosure of which helps in containing or discouraging corruption, enumerated in Clauses (b) and (c) of **Section 4(1)** of RTI Act and

(ii) Other information held by public authorities not falling under Section **4(1)(b)** and **(c)** of RTI Act.

With regard to information falling under the first category, the public authorities owe a duty to disseminate the information widely *suo moto* to the public so as to make it easily accessible to the public. In regard to information enumerated or required to be enumerated under Section **4(1)(b)** and **(c)** of RTI Act necessarily and naturally the competent authorities under the RTI Act will have to act in a pro-active manner so as to ensure accountability and ensure that the fight against corruption goes on relentlessly.

But, with regard to other information which do not fall under Section **4(1)(b)** and **(c)** of the Act there is a need to proceed with circumspection as it is necessary to find out whether they are exempted from disclosure.

One of the objects of democracy is to bring about transparency of information to contain corruption and bring about accountability.

But, achieving this object does not mean that other equally important public interests including efficient **functioning of the governments and public authorities optimum use of limited fiscal resources, preservation of confidentiality of sensitive information**, etc. are to be ignored or sacrificed.

Specific examples of what is included in "information" under the RTI Act:

- **Records, Documents, Memos, Emails:** These are common examples of information held by public authorities.
- **Opinions, Advices, Press Releases:** This includes the reasoning behind decisions and statements made by public bodies.
- **Circulars, Orders, Logbooks:** These documents provide details about policies, directives, and activities.
- **Contracts, Reports, Papers:** This includes agreements, assessments, and research findings.
- **Samples, Models, Data:** This encompasses physical objects and data held in electronic form, such as databases.

- **Information Relating to Private Bodies:** If a public authority has access to information about a private body under another law, it's considered information under the RTI Act.

In essence, the RTI Act aims to provide broad access to all information held by public authorities, regardless of its form or nature.

10.4 Information that can be demanded and cannot be demanded under RTI

The right to seek information from a public authority is not absolute. Sections 8 and 9 of the Act enumerate the categories of information which are exempt from disclosure. At the same time Schedule II of the Act contains the names of the Intelligence and Security Organizations which are exempt from the purview of the Act. The exemption of the organization, however, does not cover supply of information relating to allegations of corruption and human rights violations. The applicants should abstain from seeking information which is exempt under Section 8 and 9 and also from the organizations included in the Second Schedule except information relating to allegations of corruption and human right violations.

Sec. 8 of the Act sets out certain information that is exempt from disclosure. When a request is made to a public authority seeking information that falls within any of the following categories, Sec. 8 exempts a public authority from the obligation of disclosure:

- (1) Notwithstanding anything contained in this Act, there shall be no obligation to give any citizen,
 - (a) Information, disclosure of which would prejudicially affect the sovereignty and integrity of India, the security, strategic, scientific or economic interests of the State, relation with foreign State or lead to incitement of an offence;

The Public Information Officer (PIO) must explain how the disclosure of information is likely to 'prejudicially affect the sovereignty and integrity of India, or the security, strategic, scientific or economic interests of the State, relation with foreign State or lead to incitement of an offence'. If no specific reasoning is given to justify denial, the

information must be provided. It must be observed that the law does not exempt files or information labelled 'confidential' as exempt. Classification as 'confidential' is an internal procedure and cannot be used to deny information, since the RTI Act has exempted this category.

- (b) Information which has been expressly forbidden to be published by any Court of law or tribunal or the disclosure of which may constitute contempt of Court;

The exemption will only apply when any matter has been specifically and expressly forbidden to be made public by a court or tribunal. Even if an issue is subjudice, the information has to be provided. This exemption will only apply if a specific order of the Court or tribunal says the particular information has been prohibited from disclosure. Such a disclosure would be contempt of court and hence barred.

- (c) Information, the disclosure of which would cause a breach of privilege of Parliament or the State Legislature;

This will primarily apply where there is a legal stipulation to present some information like a report to Parliament or the Legislature. This provision will also apply when a specific order has been given by the Legislature to avoid disclosing some information in public domain or to prohibit some proceedings of the Parliament or Legislature from being made public.

There is a common practice of governments appointing Commissions of Inquiry and often not making the reports public. Since the report has not been placed before Parliament can it be given in response to an RTI application?

As per Section 3(4) of the Commissions of Inquiry Act, "The appropriate Government shall cause to be laid before each House of Parliament or, as the case may be, the Legislature of the State the report, if any, of the commission on the inquiry made by the Commission under sub-section (1) together with a Memorandum of the action taken thereon, within a period of six months of the submission of the report by the commission to the appropriate Government."

If it has not been placed within six months before the Parliament, or State Legislature, the breach of privilege has already occurred since the

government has not abided by the provision of the Commissions of Inquiry Act. It cannot then be claimed that giving the report to the applicant will cause a breach of privilege since it has already been breached by the holder of the report.

- (d) Information including commercial confidence, trade secrets or intellectual property, the disclosure of which would harm the competitive position of a third party, unless the competent authority is satisfied that larger public interest warrants the disclosure of such information;

As an example, if a Company is negotiating with some other customers for some orders and discloses this to the Public authority, it may be claimed that it is information given in commercial confidence and disclosing this information could damage its competitive position. Similarly, if a formula/ formulation is disclosed by a company, its disclosure could be exempted since disclosure could harm its competitive position. If there is no possibility of competition, the exemption cannot be claimed under this clause.

- (e) Information available to a person in his fiduciary relationship, unless the competent authority is satisfied that the larger public interest warrants the disclosure of such information;

The fiduciary relationship is defined as “a relationship in which one person is under a duty to act for the benefit of the other on the matters within the scope of the relationship.” “Fiduciary relationship usually arises in one of the four situations: (1) when one person places trust in the faithful integrity of another, who as a result gains superiority or influence over the first, (2) when one person assumes control and responsibility over another, (3) when one person has a duty to act or give advice to another on matters falling within the scope of the relationship, or (4) when there is a specific relationship that has traditionally been recognized as involving fiduciary duties, as with a lawyer and a client, or a stockbroker and a customer. The traditional definition of a fiduciary is a person who occupies a position of trust in relation to someone else, therefore requiring him to act for the latter's benefit within the scope of that relationship. In business or law, it

generally means someone who has specific duties, such as those that attend a particular profession or role, e.g. doctor, lawyer, banker, financial analyst or trustee.

- (f) Information received in confidence from foreign Government;

It is likely that this provision could be used to refuse most information provided by a foreign Government unless it has been released in the Public domain. Effectively, this means that most information received from a foreign government is unlikely to be given. This is the only provision where the mere claim of information having been received in confidence has been given exemption in this law.

- (g) Information, the disclosure of which would endanger the life or physical safety of any person or identify the source of information or assistance given in confidence for law enforcement or security purposes;

The danger to life or physical safety must be a reasonable probability, not a mere imagination. This clause would be invoked when somebody has given information about a wrongdoing or acted as a whistleblower, and disclosure of his identity would endanger him. However, it should entail a situation where some threat to the source must be a reasonable probability. This cannot be used to deny information about examiners, names of selectors or interviewers, or remarks by superior officers against their juniors. This would be the result of a hyperactive apprehension rather than a real threat. There is an additional view at this juncture.

- (h) Information which would impede the process of investigation or apprehension or prosecution of offenders;

The investigation is not complete, and it can be shown that releasing the information could impede the process of investigation. This provision does not say that when an investigation is ongoing, information regarding it should not be provided. Hence, the PIO must consider whether there is a reasonable probability of the investigation being impeded if the information is provided. Similarly, when an investigation report is already submitted, it cannot be claimed that the process of investigation will be impeded. After this, only if there is any probability

of somebody being apprehended or prosecuted, then it has to be established that the apprehension or prosecution will be impeded.

If it is shown and established that releasing the information will result in a situation which will impede apprehending the charged persons.

Though the investigation and apprehension of offenders may be over, releasing the information would impede the process of prosecuting the offenders. If an investigation is over and no offender is likely to be apprehended or prosecuted, the information cannot be withheld.³⁶ Also, the mere fact that release of some information from the records may lead to a weakening of the prosecution case cannot be advanced as a reason to deny information, since this would imply that the truth on records is not being revealed.

- (i) Cabinet papers including records of deliberations of the Council of Ministers, Secretaries and other officers: Provided that the decisions of Council of Ministers, the reasons thereof, and the material on the basis of which the decisions were taken shall be made public after the decision has been taken, and the matter is complete, or over: Provided further that those matters which come under the exemptions specified in this section shall not be disclosed;

This provision is often misunderstood as being a complete bar on providing information under Right to Information about cabinet papers and the cabinet deliberations. Once a decision is taken and the matter is complete or over, it places an obligation on the government to make public the material on the basis of which the decision has been taken. This means that the government must make the basis of taking the decisions public on its own. For example, once a bill is presented in Parliament or Legislature, the matter relating to the purpose of the deliberations and cabinet related file noting is clearly complete and over.

- (j) Information which relates to personal information the disclosure of which has no relationship to any public activity or interest, or which would cause unwarranted invasion of the privacy of the individual unless the Central Public Information Officer or the State Public Information Officer or the appellate authority, as the case may be, is

satisfied that the larger public interest justifies the disclosure of such information: Provided that the information which cannot be denied to the Parliament or a State Legislature shall not be denied to any person.

To qualify for this exemption, it must be personal information. In common language, we would ascribe the adjective 'personal' to an attribute which applies to an individual and not to an institution or a corporate. Therefore, it suggests that 'personal' cannot be related to institutions, organizations or corporates. Hence Section 8(1) (j) of the RTI Act cannot be applied when the information concerns institutions, organizations or corporate. The information requested, may be denied under section 8(1)(j), under the following two circumstances –

- i. Where the information requested is personal information and the nature of the information requested is such that it has apparently no relationship to any public activity or interest; or
 - ii. Where the information requested is personal information, and the disclosure of the said information would cause an unwarranted invasion of the privacy of the individual.
- (2) Notwithstanding anything in the Official Secrets Act, 1923 (19 of 1923) nor any of the exemptions permissible in accordance with sub-section (1), a public authority may allow access to information, if public interest in disclosure outweighs the harm to the protected interests.
- (3) Subject to the provisions of clauses (a), (c) and (i) of sub-section (1), any information relating to any occurrence, event or matter which has taken place, occurred or happened twenty years before the date on which any request is made under section 6 shall be provided to any person making a request under that section: Provided that where any question arises as to the date from which the said period of twenty years has to be computed, the decision of the Central Government shall be final, subject to the usual appeals provided for in this Act.

(Section 9) Grounds for rejection to access in certain cases. Without prejudice to the provisions of section 8, a Central Public Information Officer or a State Public Information Officer, as the case may be, may reject a request for

information where such a request for providing access would involve an infringement of copyright subsisting in a person other than the State.

10.5 Authorities and organisations which are bound to respond to RTI

Under the Right to Information (RTI) Act, 2005, a broad range of entities are considered "public authorities" and are bound to respond to information requests. These include constitutional bodies, entities created by law, and those substantially financed or controlled by the government. Essentially, any authority or body established by law or by government order or notification is generally considered a public authority under the RTI Act.

“Public authority” is defined in Section 2(h) of the RTI Act. It states:

“Public authority” means any authority or body or institution of self-government established or constituted—

- (a) By or under the Constitution;
- (b) By any other law made by Parliament;
- (c) By any other law made by state legislature;
- (d) By notification issued or order made by the appropriate Government, and includes any
 - (i) Body owned, controlled or substantially financed;
 - (ii) Non-Government organization substantially financed, directly or indirectly by funds provided by the appropriate Government;

The Act thus defines public authorities in two parts. The first part of the definition (clauses 2(h)(a) to (d)) clearly delineate bodies created by the Constitution of India (Union and state executives, Election Commission, etc.), by laws made by Parliament and state legislatures (Central and state universities, regulators such as RBI, SEBI, TRAI etc.), and by government orders or notifications (Planning Commission) as public authorities.

The second part broadens the scope of the definition of a public authority to include anybody owned, controlled or substantially financed, and any non-governmental body substantially financed by the appropriate government. This

second part of the definition has been the subject of much controversy largely because it leaves the question of what constitutes

- (a) Ownership,
- (b) Control or/and
- (c) Substantial financing open to interpretation.

Unsurprisingly therefore, most of the case law related to the question of public authorities is linked to this aspect of the definition

Specific Examples of Public Authorities:

- **Constitutional Authorities:** The President, Governors, Parliament, State Legislatures, Election Commission, Comptroller and Auditor General of India, and the Union and State Executives.
- **Bodies created by Law:** Regulatory bodies like SEBI and RBI, High Courts, and educational institutions established by law.
- **Government-Owned or Controlled Entities:** Public Sector Undertakings (PSUs) and bodies substantially financed or controlled by the Central or State Governments.
- **Non-Government Organizations (NGOs):** NGOs substantially financed by government funds are also considered public authorities.
- **Exemptions:** Certain organizations, primarily those related to intelligence and security, are exempted from the Act, but these exemptions are not absolute.

As mentioned earlier, the bulk of the controversy regarding which entities are public authorities arises from the second part of the definition of public authorities. Decisions of courts on these issues (government control, substantial financing by the government, and the performance of public functions) are varied, and at times contradictory.

Control by the government: How is control by government defined? High Courts have considered entities to be controlled by the government on the basis of (a) the definition of “State” in Article 12 of the Constitution (most courts have

however held that the Article 12 test is not relevant for the RTI Act), and, (b) supervision and regulation by the government agencies under laws such as Kerala State Co-operatives Act. Some courts have also taken the opposite point of view arguing that regulation and supervision cannot be equated with control. Substantial control implies significant influence over an entity's management and operations, surpassing mere regulatory oversight.

Subsidiary Companies: A subsidiary company is one that is wholly or partly owned and controlled by another company (the parent). When the parent is a public body, its subsidiaries may also fall under public authority if they are substantially financed and controlled by the government.

Controlling Interest: Controlling interest refers to ownership of sufficient voting stock in a company to control its policies and management. This does not require direct participation in daily operations but involves the ability to influence key decisions.

Substantial Financing: The RTI Act does not define substantial financing. Consequently, courts are often required to decide whether a particular form and quantum of financial aid constitutes substantial finance. Courts have not given a uniform interpretation of what constitutes substantial financing. In one case benefits received by the institution in the form of share capital contribution, subsidies, land allotment etc. were cited as examples of such financing. Payments of grants for salaries of teachers and staff in educational institutions have also been held to be substantial funding. In some cases, the quantum of financing was considered in arriving at a decision. For example, the Indian Olympic Association was considered a public authority because the central government paid the travel expenses of the players, and provided 85% of their living expenses. Importantly, courts have refrained from adopting a benchmark based on the quantum of financing in most cases

Based on these criteria, High Courts have brought a number of entities within the ambit of “public authority”. These include:

- (a) Autonomous institutions such as sports associations: Indian Olympic Association, Chandigarh Lawn Tennis Association.
- (b) Schools and educational trusts: Sanskriti School²³, Dhara Singh Girls High School, Ghaziabad, DAV College Trust.
- (c) Registered societies, and cooperatives: Jullundar Gymkhana and Sutlej Club, Mulloor Rural Co-operative Society Ltd.

Conclusion

The Delhi High Court's judgment in *Mother Dairy Fruit & Vegetable Pvt. Ltd. v. Hatim Ali* significantly clarifies the ambit of 'public authority' under the RTI Act. By underscoring that substantial control and financing by a public body or government effectively categorizes a company as a public authority, the court ensures that entities with significant government ties remain accountable and transparent. This decision not only reinforces the principles of the RTI Act but also promotes greater transparency in entities that are indirectly influenced by governmental powers through corporate structures.

Legal practitioners and public bodies must heed this judgment to ensure compliance with the RTI Act, particularly when dealing with subsidiary entities. The clarified definitions of control and substantial financing serve as guiding principles for future cases, fostering a more accountable and transparent governance framework.

10.6 Authorities and information exempt under RTI

According to Section 24: Act not to apply to certain organisations

1. Nothing contained in this Act shall apply to the intelligence and security organisations specified in the Second Schedule, being organisations established by the Central Government or any information furnished by such organisations to that Government. It is Provided that the information pertaining to the allegations of corruption and human rights violations shall not be excluded under this sub-section. It is Provided further that in the case of information sought for is in respect of allegations of violation of human rights, the information shall only be provided after the approval of the Central Information Commission, and notwithstanding anything contained

in section 7; such information shall be provided within forty-five days from the date of the receipt of request.

2. The Central Government may, by notification in the Official Gazette, amend the Schedule by including therein any other intelligence or security organisation established by that Government or omitting there from any organisation already specified therein and on the publication of such notification, such organisation shall be deemed to be included in or, as the case may be, omitted from the Schedule.
3. Every notification issued under sub-section (2) shall be laid before each House of Parliament.
4. Nothing contained in this Act shall apply to such intelligence and security organisation being organisations established by the State Government, as that Government may, from time to time, by notification in the Official Gazette, specify. It states further that the information pertaining to the allegations of corruption and human rights violations shall not be excluded under this sub-section. Further stating that in the case of information sought for is in respect of allegations of violation of human rights, the information shall only be provided after the approval of the State Information Commission and, notwithstanding anything contained in section 7, such information shall be provided within forty-five days from the date of the receipt of request.
5. Every notification issued under sub-section (4) shall be laid before the State Legislature.
6. The Central government has added the Computer Emergency Response Team (CERT-In) among a list of organisations that are exempted from the ambit of the Right to Information Act (RTI), 2005. The CERT-In is the national nodal agency for responding to computer security incidents as and when they occur. One of its primary objectives is enhancing “security awareness among common citizens”. It functions under the Ministry of Electronics and Information Technology.

List of Organisations

1. Intelligence Bureau.
2. Research and Analysis Wing of the Cabinet Secretariat.

3. Directorate of Revenue Intelligence.
4. Central Economic Intelligence Bureau.
5. Directorate of Enforcement.
6. Narcotics Control Bureau.
7. Aviation Research Centre.
8. Special Frontier Force.
9. Border Security Force.
10. List of Organisations
11. Intelligence Bureau.
12. Research and Analysis Wing of the Cabinet Secretariat.
13. Directorate of Revenue Intelligence.
14. Central Economic Intelligence Bureau.
15. Directorate of Enforcement.
16. Narcotics Control Bureau.
17. Aviation Research Centre.
18. Special Frontier Force.
19. Border Security Force.

10.7 Process for filing RTI

To file RTI application, you generally need to write a clear and concise application to the relevant Public Information Officer (PIO) or Assistant Public Information Officer (APIO) of the public authority. You should include your name, address, and a clear description of the information you are seeking. There is no prescribed format, but the application should be in English, Hindi, or the local language of the area. You'll also need to pay a fee (typically Rs. 10) with the application. You can submit the application by post (registered or speed post), or in person. Below is the process in detail:

1. **Identify the Relevant Public Authority:** Determine the public authority that holds the information you are seeking. This could be a central government ministry, a state government department, or a local authority. For instance, anything related to income tax should go to Income Tax department or defence related query should go to Ministry of Defence.
2. **Prepare Your Application:** Clearly State Your Information Request. Describe the information you need in precise and specific terms. The

language of the application can be Hindi or English. Similarly, the government can also respond in either language. Make sure that the questions you ask relate to only one subject; the application has a chance of rejection if you ask more than one questions in a single RTI Application. For instance, if you are enquiring about your passports, then ask questions which are only related to the passports. Include Your Contact Information. Provide your full name and address for the PIO to be able to contact you. No Required Proof of Identity. Generally, you don't need to provide proof of citizenship or identity with your application.

3. **Pay the Application Fee:** The application fee is typically Rs. 10. You can pay the fee by cash, postal order, or bank draft.
4. **Submit Your Application:** Send the application to the PIO or APIO of the concerned public authority. You can submit it by post (registered or speed post) or in person.
5. **Track Your Application:** You may receive a registration number or acknowledgement upon submission of your application. You can track the status of your application through the RTI online portal or by contacting the PIO.
6. **Central Information Commission:** The Central Information Commission is a government body which has been established to address the grievances of the people who have not been able to submit an RTI Application due to the following reasons: (1) There is no State Public Information Officer or Central Public Information Officer appointed. (2) Either of the officers (PIO) have refused to take the RTI Application.
7. **Time Limits:** The public authority is required to provide information within 30 days, or 48 hours if the information concerns life or liberty.
8. **Exemptions:** Some information may be exempted from disclosure under the RTI Act, but the public body can disclose it if the public interest outweighs the potential harm.
9. **Appeals:** If your application is rejected, you have the right to appeal to a higher authority.
10. **Online Filing:** Many government departments also offer online RTI filing through their respective portals.

10.8 Penalties for non-conformance of an RTI. (Failure to provide information on time, incorrect, incomplete or misleading or distorted)

Under the Right to Information (RTI) Act, penalties can be imposed on Public Information Officers (PIOs) for failing to comply with the Act's provisions, such as providing information on time, providing accurate and complete information, or refusing to provide information. Specifically, a penalty of Rs 250 per day can be imposed, with a maximum limit of Rs 25,000.

Here's a more detailed look at the penalties:

Penalties for non-compliance:

- **Failure to provide information within the time limit:** The Information Commission (CIC or SIC) can impose a penalty of Rs 250 per day until the information is provided, up to a maximum of Rs 25,000.
- **Providing incorrect, incomplete, or misleading information:** The PIO can be penalized for knowingly providing such information.
- **Destroying information:** If a PIO destroys information requested under the RTI Act, they can face penalties.
- **Obstructing the process:** Any action that hinders the process of providing information can result in a penalty.
- **Refusing to receive an application:** If a PIO refuses to accept an RTI application, they can be penalized.
- **Malafide denial of request:** If the PIO deliberately denies a request for information, they can be penalized.
- **Penalty imposed on PIO:** The penalty is typically imposed on the PIO (Public Information Officer) and is payable from their salary, not the public authority.
- **Reasonable opportunity to be heard:** Before imposing a penalty, the CIC or SIC must give the PIO a reasonable opportunity to be heard, allowing them to explain their actions.
- **Disciplinary action:** Besides monetary penalties, the CIC or SIC can also recommend disciplinary action against the PIO under the applicable service rules.

Appeal: If a PIO is dissatisfied with the penalty, they can appeal to a higher authority. In essence, the RTI Act aims to ensure that public authorities provide information efficiently and accurately, and it provides mechanisms for holding PIOs accountable when they fail to do so.

In the following explanations, Reply, statements & Comments furnished by the Public Information Officers (PIO) / Deemed PIO's were not accepted by the CIC during hearing on the issue of delay in furnishing information under RTI Act.

1. There was a "System failure" and nobody could be identified and made accountable for the delay in replying to the RTI application.
2. PIO cannot take a recourse that the applicant is satisfied with the information and therefore no Penalty be levied upon him. Commission pointed out that the views of the applicant cannot be a reasonable cause for dropping penalty proceedings against the PIO.
3. The Commission takes strong exception for terming an RTI applicant as an irritant.
4. Ignorance of the RTI Act is not a reasonable cause for delay in supply of information.
5. The Plea by the CPIO that delay was entirely due to the failure of junior officer is being taken rather routinely. CPIO's claim that he had sought assistance from 'X' under Section 5 (4) cannot be sustained as 'X' was a part of the CPIO's office and he could not be treated either as a holder of information or an independent functionary.

The following explanations, Reply, statements & Comments furnished by the Public Information Officers (PIO) / Deemed PIO's were accepted by the CIC during hearing as reasonable cause under RTI Act and drops the penalty proceedings.

1. The custodies of the information stated that he had denied the information with the approval of his administrative head. Since, the information was denied under the directions of the Administrative Head, the commission exonerates him from levy of penalty.
2. The PIO submitted that the delay was caused because he had to collect the information from several departments.
3. The Commission taken lenient view on the number of days the PIO was temporary duty at different places during the delayed period.

❖ Exercise

Descriptive Questions

1. Explain the salient features of the Right to Information Act.
2. Define information according to RTI Act.
3. What information cannot be demanded under the RTI Act? Write in detail.
4. Explain in detail the authorities and organisation which are bound was on to an RTI.
5. Explain in detail the authorities and information which are exempt under RTI.
6. Discuss in detail the process of filing an RTI.
7. Discuss the penalties that can be levied on authorities and organisations fail to provide timely, correct or complete information.

Multiple choice questions (MCQs)

1. The law that brings about transparency and accountability on the part of the government machinery; is called _____
a. law of contracts
b. the Parliament
c. Right to information act
d. labour laws
2. The present Right to Information Act in India was in a tent in the year; _____
a. 2005
b. 1995
c. 2015
d. none of the above
3. The officer designated by the public authorities in all administrative units of offices under it to provide information to the citizens requesting for information under the RTI Act is known as _____
a. Appellate authority
b. Chief information Commissioner
c. Public information officer
d. Asst Public information officer
4. What is the time limit to get the information under the RTI act 2005?
a. 15 days
b. 30 days
c. 45 days
d. 60 days

5. What is the fee for getting information under RTI act?
a.Rs. 20 b.Rs. 50 c.RS. 100 d.Rs. 10
6. The RTI act is not applicable to _____
a. Intelligence and security organisations
b. All organisations owned, controlled or substantially financed by the appropriate government
c. All non-government organisations are substantially financed by the appropriate government
d. All of the above
7. All public authorities are bound to respond to an RTI. Which of the below is considered a public authority according to RTI Act?
a. Constitutional authorities
b. Bodies created by law
c. Government owned or controlled entities
d. All of the above
8. What information cannot be demanded under RTI?
a. Information that affects the sovereignty and integrity of India.
b. Information related to trade secrets or intellectual property.
c. Cremation received in confidence from foreign governments
d. All of the above
9. When is a Public Information Officer liable for penalties?
a. When he provides timely information
b. When he provides incorrect, incomplete or misleading information
c. When he refuses to provide information as it pertains to another department
d. None of the above

10. If a citizen is not provided with the required information within 30 days of his application a penalty of rupees 250 per day is impose until the information is provided. Who pays his penalty?
- a. The central government
 - b. The concerned department
 - c. Public information officer from his salary
 - d. None of the above

MCQ Answer key

1	2	3	4	5	6	7	8	9	10
c	a	c	b	d	a	d	d	b	c

- 11.1 Introduction– What is Partnership?**
- 11.2 Nature of Partnership**
- 11.3 Characteristics / Features of Partnership**
- 11.4 Types of Partnership**
- 11.5 Advantages of Partnership**
- 11.6 Indian Partnership Act 1932**
- 11.7 Meaning of Partnership Deed**
- 11.8 Registration of Partnership Deed**
- 11.9 Partnership Deed Contents**
- 11.10 Importance of Partnership Deed**
- 11.11 Documents are required for registration of a partnership firm**
- 11.12 Rights of Partners**
- 11.13 Duties of Partners**
- 11.14 Dissolution of Partnership Firm**
- 11.15 Reasons for Dissolution of Partnership**
- 11.16 Methods of dissolving partnership firm**
- 11.17 The Limited Liability Partnership Act, 2008 of India**
- 11.18 Incorporation of Limited Liability Partnership Act**
- 11.19 Features of Limited Liability Partnership**
- 11.20 Advantages of Limited Liability Partnership**

11.21 Disadvantages of an LLP

11.22 Difference between LLP and Partnership Firm

❖ Exercise

11.1. Introduction – What is Partnership?

A partnership is a kind of business where a formal agreement between two or more people is made who agree to be the co-owners, distribute responsibilities for running an organization and share the income or losses that the business generates.

In India, all the aspects and functions of the partnership are administered under ‘The Indian Partnership Act 1932’. This specific law explains that partnership is an association between two or more individuals or parties who have accepted to share the profits generated from the business under the supervision of all the members or behalf of other members.

11.2. Nature of Partnership – Meaning

When two or more people join hands to set up an enterprise and share its gains and losses, they are said to be in a partnership. Section 4 of the Indian Partnership Act 1932 states partnership as the association between people who have consented to share the profits of an enterprise carried by all or any of them acting for all.

People who have entered into a partnership with one another are independently termed as ‘partners’ and comprehensively termed as ‘firm’. The name under which the trade is carried is called the ‘name of the firm’. A partnership enterprise has no distinct legal entity apart from the partners comprising it.

11.3. Characteristics / Features of Partnership

Two or more persons: In order to manifest a partnership, there should be at least two persons possessing a common goal. To put it in other words, the minimal number of partners in an enterprise can be two. However, there is a constraint on their maximum number of people.

By the uprightness of Section 464 of the Companies Act 2013, the Central Government is authorised to stipulate a maximum number of partners in an enterprise; however, the number of partners cannot exceed 100.

Under Rule 10 of the Companies (miscellaneous) Rules 2014, the central government has stipulated the maximum number of partners in an enterprise to be 50. Hence, a partnership enterprise cannot have more than 50 people (partners).

Agreement: It is the outcome of an accord between two or more people to regulate a business and share its gains and losses. The agreement (accord) becomes the basis of the association between the partners.

Such an agreement is in the written form. An oral agreement is even-handedly legitimate. In order to avoid controversies, it is always good if the partners have a copy of the written agreement.

Sharing of profit: Another significant component of the partnership is the accord between partners to share the gains and losses of a trading concern. However, the definition held in the Partnership Act elucidates partnership as an association between the people who have consented to share the gains of a business. The sharing of loss is implicit. Hence, the sharing of gains and losses is vital.

Agreement between Partners: It is an association of two or more individuals, and a partnership arises from an agreement or a contract. The agreement (accord) becomes the basis of the association between the partners. Such an agreement is in the written form. An oral agreement is even-handedly legitimate. In order to avoid controversies, it is always good, if the partners have copy of the written agreement.

Business Motive: It is important for a firm to carry some kind of business and should have a profit gaining motive.

Mutual Business: The partners are the owners as well as the agent of their firm. Any act performed by one partner can affect other partners and the firm. It can be concluded that this point acts as a test of partnership for all the partners.

11.4. Types of Partnerships

A partnership is divided into different types depending on the state and where the business operates. Here are some general aspects of the three most common types of partnerships.

General Partnership

A general partnership comprises two or more owners to run a business. In this partnership, each partner represents the firm with equal right. All partners can participate in management activities, decision making, and have the right to control the business. Similarly, profits, debts, and liabilities are equally shared and divided equally.

In other words, the general partnership definition can be stated as those partnerships where rights and responsibilities are shared equally in terms of management and decision making. Each partner should take full responsibility for the debts and liability incurred by the other partner. If one partner is sued, all the other partners are considered accountable. The creditor or court will hold the partner's personal assets. Therefore, most of the partners do not opt for this partnership.

Limited Partnership

In this partnership, includes both the general and limited partners. The general partner has unlimited liability, manages the business and the other limited partners. Limited partners have limited control over the business (limited to his investment). They are not associated with the everyday operations of the firm.

In most of the cases, the limited partners only invest and take a profit share. They do not have any interest in participating in management or decision making. This non-involvement means they do not have the right to compensate the partnership losses from their income tax return.

Limited Liability Partnership

In Limited Liability Partnership (LLP), all the partners have limited liability. Each partner is guarded against other partners legal and financial mistakes. A

limited liability partnership is almost similar to a Limited Liability Company (LLC) but different from a limited partnership or a general partnership.

Partnership at Will

Partnership at Will can be defined as when there is no clause mentioned about the expiration of a partnership firm.

Under section 7 of the Indian Partnership Act 1932, the two conditions that have to be fulfilled by a firm to become a Partnership at Will are:

- The partnership agreement should have not any fixed expiration date.
- No particular determination of the partnership should be mentioned.

Therefore, if the duration and determination are mentioned in the agreement, then it is not a partnership at will. Also, initially, if the firm had a fixed expiration date, but the operation of the firm continues beyond the mentioned date that it will be considered as a partnership at will.

11.5. Advantages of Partnership

- **Easy Formation** – An agreement can be made oral or printed as an agreement to enter as a partner and establish a firm.
- **Large Resources** – Unlike sole proprietor where every contribution is made by one person, in partnership, partners of the firm can contribute more capital and other resources as required.
- **Flexibility** – The partners can initiate any changes if they think it is required to meet the desired result or change circumstances.
- **Sharing Risk** – The Partnership comes into the limelight when:
 - There is an outcome of agreement among the partners.
 - The agreement can be either in written or oral form.
- The Partnership Act does not demand that the agreement has to be in writing. Wherever it is in the form of writing, the document, which comprises terms of the agreement is called ‘Partnership Deed.’
- It usually comprises the attributes about all the characteristics influencing the association between the partners counting the aim of trade, the

contribution of capital by each partner, the ratio in which the gains and losses will be divided by the partners and privilege and entitlement of partners to interest on loan, interest on capital, etc.

11.6. Indian Partnership Act 1932

Most of the businesses in India adopt a partnership business, so to monitor and govern such partnership The Indian Partnership Act was established on the 1st October 1932. Under this partnership act, an agreement is made between two or more persons who agrees to operate the business together and distribute the profits they gain from this business.

11.7. Meaning of Partnership Deed

Partnership deed is a written legal document that contains an agreement made between two individuals who have the intention of doing business with each other and share profits and losses. It is also called a partnership agreement.

11.8. Registration of Partnership Deed

- All the rights and responsibilities of each member are recorded in a document known as a Partnership Deed. This deed can be oral or written; however, an oral agreement is of no use when the firm has to deal with tax. A few essential characteristics of a partnership deed are:
- The name of the firm.
- Name and addresses of the partners.
- Nature of the business.
- The term or duration of the partnership.
- The amount of capital to be contributed by each partner.
- The drawings that can be made by each partner.
- The interest to be allowed on capital and charged on drawings.
- Rights of partners.

- Duties of partners.
- Remuneration to partners.
- The method used for calculating goodwill.
- Profit and loss sharing ratio

11.9. Partnership Deed Contents

- While making a partnership deed, all the provisions and the legal points of the partnership deed are included. This deed also includes basic guidelines for future projects and can be used as evidence at times of conflict or legal procedures. For a general partnership deed, the below mentioned information should be included.
- Name of the firm as determined by all partners.
- Name and details of all the partners of the firm.
- The date on which business commenced.
- Firm's existence duration.
- Amount of capital contributed by each partner.
- Profit sharing ratio between the partners.
- Duties, obligations and power of each partner of the firm.
- The salary and commission if applicable that is payable to partners.
- The process of admission or retirement of a partner.
- The method used for calculating goodwill.
- The procedure that must be followed in cases of dispute arising between partners.
- Procedure for cases where a partner becomes insolvent.
- Procedure for settlement of accounts in the event of dissolution of a firm.

11.10. Importance of partnership deed

- A few important advantages of a well-drafted deed are listed:
- It controls and monitors the rights, responsibilities and liabilities of all the partners
- Avoids dispute between the partners.
- Avoids confusion on profit and loss distribution ratio among the partners.
- Individual partner's responsibilities are mentioned clearly.
- Partnership deed also defines a remuneration or salary of the partners and working partners. However, interest is paid to each partner who has invested capital in the business.

11.11. Documents are required for registration of a partnership firm

- Documents required for registration of a partnership firm are:
- Certified original copy of Partnership deed
- Partner's documents (PAN Card and Aadhar or Driving License)
- Address proof of the firm (rent agreement and utility bills (gas, landline or electricity)
- GST registration
- Specimen of an affidavit certifying all the details mentioned in the partnership deed and documents are correct.
- Application for registration of partnership

11.12. Rights of Partners

- Participation in business: Each Partner will have an equal opportunity to participate in their business operation. If the partnership contract stipulates so, partners can restrict this power to allow only some of them to contribute to the running of the business.

- Right to express views: Partners have the freedom to express their opinions. A majority vote of the partners can settle discrepancies in common business issues. To help solve such problems, each Partner can communicate their idea.
- Right to access the books and accounts: Every Partner has the right to investigate and make copies of the company's accounting records. This implied consent to both active and dormant partners.
- Right to share profits: Partners outline specific details in their partnership deed the percentage to exchange the firm's profits. If they've not consented to a fixed share of the profits, all the partners must share the company's profits evenly.
- Right to be indemnified: Partners could make a payment and debts directly a consequence of their business practices. They can sue one another for compensation for the Partner's decisions. Such decisions need to be made in an urgent situation and should be of the sort that a prudent and reasonable partner would end up making in identical conditions.
- Right to interest on capital and advances: In most instances, partners do not earn interest in their investments. If they decide to express an interest, it must be compensated only from profits. They could indeed earn interest at a rate of 6% per annum on any subsequent advances made to the business.

11.13. Duties of Partners

- Every Partner does have obligations such as continuing the business for the biggest public good by being truthful to one another. They should be providing main information and supplying complete information on all issues about the business.
- Every Partner is obligated to compensate the firm for damages incurred due to any partner's wrongdoing in the transaction of business.

- Every Partner should undertake his or her duties to the business as diligently as possible since his or her inability to do so impacts other partners as well.
- As all own the firm's property jointly, partners can use it exclusively for business reasons and not for personal benefit.
- Each Partner must operate under mutually agreed-upon objectives.

1] Active Partner or Managing Partner

As the name suggests he takes active participation in the firm and the running of the business. He carries on the daily business on behalf of all the partners. This means he acts as an agent of all the other partners on a day to day basis and with regards to all ordinary business of the firm. Hence when an active partner wishes to retire from the firm he must give a public notice about the same. This will absolve him of the acts done by other partners after his retirement. Unless he gives a public notice he will be liable for all acts even after his retirement.

2] Dormant or Sleeping Partner

This is a partner that does not participate in the daily functioning of the partnership firm, i.e. he does not take an active part in the daily activities of the firm. He is however bound by the action of all the other partners.

He will continue to share the profits and losses of the firm and even bring in his share of capital like any other partner. If such a dormant partner retires, he need not give a public notice of the same.

3] Nominal Partner

This is a partner that does not have any real or significant interest in the partnership. So, in essence, he is only lending his name to the partnership. He will not make any capital contributions to the firm, and so he will not have a share in the profits either. But the nominal partner will be liable to outsiders and third parties for acts done by any other partners.

4] Partner by Estoppel

If a person holds out to another that he is a partner of the firm, either by his words, actions or conduct then such a partner cannot deny that he is not a partner.

This basically means that even though such a person is not a partner he has represented himself as such, and so he becomes partner by estoppel or partner by holding out.

5] Partner in Profits Only

This partner will only share the profits of the firm; he will not be liable for any liabilities. Even when dealing with third parties he will be liable for all acts of profit only, he will share none of the liabilities.

6] Minor Partner

A minor cannot be a partner of a firm according to the Contract Act. However, a partner can be admitted to the benefits of a partnership if all partner gives their consent for the same. He will share profits of the firm but his liability for the losses will be limited to his share in the firm. Such a minor partner on attaining majority (becoming 18 years of age) has six months to decide if he wishes to become a partner of the firm. He must then declare his decision via a public notice. So, whether he continues as a partner or decides to retire, in both cases he will have to issue a public notice.

11.14. Dissolution of Partnership Firm

Dissolution of partnership is said to take place when one of the partners associated with the business, ceases to be a part of the business going forward. The dissolution of a partnership means a change of business relationship between partners whereas the dissolution of a firm means dissolving of the firm along with the relation between partners.

11.15. Reasons for Dissolution of partnership

There can be several reasons for the dissolution of a partnership, which are mentioned below:

1. Death of a partner.
2. Admission of a new partner.
3. Insolvency of an existing partner.

4. Early retirement of a partner.
5. Due to expiry of a partnership period after a certain time as mutually agreed upon by all partners.

11.16. Methods of dissolving partnership firm

Generally, a partnership terminates or dissolved when a partner discontinues participating in the business operation. The dissolution can happen in three different ways.

- **By an act of the partners-** When a partner agrees to dissolves partnership at a particular time. For instance, partners can come to an agreement that a partnership should continue for a span of five years. The partners can dissolve the agreement at the end of the five (5) years. Sometimes, it can be mentioned that a partner can be suspended under a specific condition. If a partner breaks a rule, then this can dissolve the partnership.
- **By operation of law-** A Partnership is a consequence of an agreement which is governed by the law. Therefore, any hindrance to the agreement or unlawful operating of business can cancel the partnership contract. For instance; you cannot make a valid partnership for selling illegal things.
- **By court's decree-** A partner can demand partnership dissolution, and the law will allow the dissolution only under these conditions: a partner's incapability to work; breach of the agreement by a partner; when a partner is mentally unstable; and the misbehaviour of a partner that impacts the partnership.
- **Statement of Dissolution – This** is done by filing the statement to the state's secretary. The form can be taken from the website of the secretary of state. The form must have the partnership name, date and reason of dissolution.
- **Personal Notification-** This can be done by giving personal notice to the partnership's creditors. Also, inform who is associated with the partnership by publishing the notification in a newspaper.

11.17. The Limited Liability Partnership Act, 2008 of India

The act was passed by the Indian Parliament on December 2, 2008. It provides a new legal framework for forming limited liability partnerships (LLPs). The LLP is an association of two or more persons who have agreed to be jointly and severally liable for the obligations incurred by the LLP. The LLP has no legal personality and does not own any property. It is governed by a contract that sets out its members' rights, duties, and liabilities.

11.18. Incorporation of Limited Liability Partnership Act

The LLP Act provides a framework for regulating the business affairs of limited liability partnerships. It also defines what constitutes a partnership, how it can be formed, dissolved, and other important terms related to this type of entity.

Incorporating a limited liability partnership is a procedure to create the legal entity known as a limited liability partnership.

The articles of incorporation for a limited liability partnership must include the following:

- The name, address, and registered agent of the LLP
- The name, address, and registered agent of each general partner
- The name and address of each member
- The date when formed the LLP was formed
- A brief statement about what type of business or profession is being conducted by the LLP

Every limited liability partnership shall have at least two designated partners who are individuals and at least one of them shall be a resident in India. Provided that in case of a limited liability partnership in which all the partners are bodies corporate or in which one or more partners are individuals and bodies corporate, at least two individuals who are partners of such limited liability partnership or nominees of such body's corporate shall act as designated partners. For the purposes of this section, the term "resident in India " means a person who has

stayed in India for a period of not less than one hundred and twenty days during the financial year.

11.19. Features of Limited Liability Partnership:

- **Separate legal entity**

An LLP is a distinct legal entity from its partners, meaning it can own assets, enter into contracts, and sue third parties in its own name.

- **Limited liability**

Partners are only liable for the amount they've contributed to the LLP, protecting their personal assets from business debts.

- **Flexible structure**

LLPs combine the flexibility of a partnership with the liability protection of a company.

- **Perpetual succession**

An LLP continues to exist even if partners retire, die, or leave, ensuring continuity and stability for the business.

- **Low formation cost**

Establishing an LLP is less expensive than forming a private limited company.

- **Fewer regulations**

LLPs have fewer regulatory requirements and compliance obligations than other business structures.

- **No minimum capital requirement**

There's no mandatory minimum capital contribution needed to start an LLP.

- **Taxed as a partnership**

LLPs are taxed as a partnership.

11.20. Advantages of Limited Liability Partnership

- **Limited liability**

Partners are only liable for the LLP's debts up to the amount they've contributed, so their personal assets are protected.

- **Separate legal entity**

An LLP is a registered legal entity that can buy, sell, and own property, employ staff, and enter into contracts.

- **Fewer compliance requirements**

LLPs have fewer compliance requirements than corporations, such as no annual general meeting or audited financial statements.

- **Flexible management**

Partners can have different levels of investment and participate in management in ways that suit their agreement.

- **Tax benefits**

LLPs are taxed as a partnership, so profits and losses flow through to the partners, who report them on their personal tax returns.

- **Increased credibility**

LLPs are seen as more credible than other business structures, which can help attract customers and investors.

- **Easy to form and dissolve**

LLPs are easier to form and dissolve than other business structures.

11.21. Disadvantages of an LLP

- Public disclosure is the main disadvantage of an LLP. ...
- Income is personal income and is taxed accordingly. ...
- Profit cannot be retained in the same way as a company limited by shares.
- An LLP must have at least two members. ...

11.22. Difference between LLP and Partnership Firm

Particulars	LLP	Partnership Firm
Governing law	The Limited Liability Partnership Act, 2008 governs LLPs.	The Indian Partnership Act, 1932 governs partnership firms.
Registration	The registration of an LLP as per the LLP Act is mandatory.	The registration of a partnership firm under the Indian Partnership Act is voluntary.
Registering authority	An LLP should submit the registration form and all the subsequent e-forms with the Registrar of Companies.	The firm must submit the partnership firm registration form and other subsequent forms with the Registrar of Firms.
Creation	An LLP is created by law.	A partnership firm is created by contract.
Power to enter into contract	An LLP can enter into a contract in its name.	A partnership firm cannot enter into a contract in its name.
Separate legal entity	An LLP has a separate legal entity under the law.	A partnership firm has no separate legal status apart from its partners.
Liability of partners	The partner's liability of an LLP is limited to the extent of their capital contribution to the LLP.	The partner's liability of a partnership firm has unlimited liability.
Name	The name of an LLP must contain the word 'LLP' at the end of its name.	The partnership firm can have any name, and it need not mention any word in its name.
Perpetual succession	An LLP has perpetual succession, which means its existence is not affected when a partner joins or leaves.	A partnership firm does not have perpetual succession, and its existence depends upon the will of its partners.

Maximum partners	There is no limit on maximum partners in an LLP.	The maximum number of partners in a partnership firm is limited to 100 partners.
Ownership of assets	The LLP has the ownership of assets which are independent of the partners. No partner owns the assets of the LLP.	The partners have joint ownership of all the assets belonging to the partnership firm. The firm cannot own the assets.
Power to own property	The LLP can hold property in its name.	The partnership firm cannot hold property in its name. It must be in the names of all partners or the authorised partner as per the partnership deed.
Common seal	An LLP has a common seal which denotes the signature of an LLP. The common seal is used to sign documents.	There is no concept of a common seal in a partnership firm. The authorised partner must sign the documents.

❖ Exercise

Q-1 Answer the following Questions:

1. What is the difference between an LLP and a traditional partnership firm?
2. Describe the key advantages of forming an LLP.
3. What are the different types of partners? Explain.
4. Discuss the various types of partnership firms.
5. What are the main features of a partnership firm?
6. Highlight the salient features of an LLP.
7. Write a short note on the dissolution of a partnership firm.
8. Discuss the rights and duties of partners.

Q-2 Write short notes on the following:

1. Disadvantages of LLP
2. Advantages of LLP
3. Contents of a Partnership Deed
4. Documents required for the registration of a partnership firm
5. Limited Partnership
6. Duties of a Partner
7. Rights of a Partner
8. Nature of Partnership
9. Reasons for the Dissolution of a Partnership
10. Importance of a Partnership Deed
11. Active Partner
12. Nominal Partner
13. Indian Partnership Act, 1932
14. Minor Partner

UNIT-12

LIMITED LIABILITY PARTNERSHIP ACT 2008

12.1 Introduction

12.2 Meaning and definition of LLP

12.3 Historical Background

12.4 Types of LLP

12.5 Salient Features of LLP

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12.7 Incorporation and registration of LLP

12.8 Winding Up and Dissolution

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12.11 Extent and Limitation of Liability of Partners

12.12 Powers of Tribunal and Appellate Tribunal

12.13 Financial Disclosures

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❖ Exercise

12.1. Introduction

The types of business entities range from limited liability companies to sole proprietorship, corporations and partnership firms. Limited liability partnership is a new form of business entity and a new form of business model which combines the advantages of a corporate structure and traditional partnership structure. Here partners have limited liability to any debt which may arise in future in running the business. In this form, the partners are required to

contribute in LLP as specified in the LLP agreement and their contribution can be in any form tangible, intangible, movable, immovable or money. In case of any losses or debts, the LLP will be responsible not the individual partners unlike in a traditional type of partnership and partners in LLP are responsible limited to the extent of their contributions in LLP. LLP is regulated by the Limited Liability Partnership Act 2008 and Limited Liability Partnership Rules 2009.

12.2. Meaning and definition of LLP

Partnership is the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all. Under the Partnership Act 1932, persons who have entered into partnership with one another are called individually “partners” and collectively “a firm”, and the name under which their business is carried on is called the “firm name”. Generally, partners in partnership firm are personally liable to any extent and mutual agent of each other.

Definition of Limited Liability Partnership has not found the place anywhere. Under section 2(1)(n) of Limited Liability Partnership Act 2008, "limited liability partnership" means a partnership formed and registered under the Act 2008.

The definition and features of partnership and Limited Liability Partnership are different because a limited liability partnership is a body corporate formed and incorporated under the LLP Act 2008 and is a legal entity separate from that of its partners. A limited liability partnership shall have perpetual succession. Any change in the partners of a limited liability partnership shall not affect the existence, rights or liabilities of the limited liability partnership.

12.3. Historical Background

The Indian Contract Act, 1872, is a parent law in-so-far as the general principles contained therein are applicable to all kinds of contracts including partnership under Chapter XI of section 239-266. As a result, the above-mentioned sections were repealed as they were regarded as inefficient. On 8th April 1932, new law i.e. the Indian Partnership Act was passed by the legislation, and it had come into effect on 1st October which extends to the whole of India. Section 3 of the Indian

Partnership Act, 1932, therefore, provides the un-repealed provisions of the Indian Contract Act, 1872, save in-so-far as they are inconsistent with the express provisions of this Act, shall continue to apply to firms. Section 25 of Indian Partnership Act 1932 provides that every partner will be jointly and severally liable for the acts done by the partners.

However, with the advent of limited liability concept, the partnership model and sole proprietorship were regarded as risky businesses. And it became necessary to add the limited liability to these forms of businesses.

The Limited Liability Partnership Act 2008 was notified on 9th January 2007 by the Ministry of Law and Justice and it was passed on 12th December 2008. The president assented the bill on 7th January 2009. Under this Act, LLP is a hybrid system with advantages of both partnership and a company. The Act 2008 has 81 sections and 4 schedules.

The First Schedule	Deals with Mutual Rights and Duties of Partners
The Second Schedule	Deals with Conversion of firm into LLP
The Third Schedule	Deals with conversion of a private company into LLP
The Fourth Schedule	Deals with conversion of unlisted public company into LLP

Limited Liability Partnership Act 2008 was amended in 2021 and became effective from April 1, 2022, primarily to decriminalize certain offenses, ease doing business, and facilitate a streamlined process for LLPs.

12.4. Types of LLP

LLP can be a general LLP and Small LLP. Small Limited Liability Partnership means a limited liability partnership-- (i) the contribution of which, does not exceed twenty-five lakh rupees or such higher amount, not exceeding five crore rupees, as may be prescribed; and (ii) the turnover of which, as per the Statement of Accounts and Solvency for the immediately preceding financial year, does not exceed forty lakh rupees or such higher amount, not exceeding fifty crore rupees, as may be prescribed. The Central government may also designate certain LLPs as start-up LLPs which may also be considered as small limited liability

partnership. Small LLPs are subject to certain benefits like reduced compliance requirements, lower fees or less penalties. All other LLPs other than small LLPs are normal or general LLPs.

12.5. Salient Features of LLP

- a) Body corporate: A body corporate is an entity that has been incorporated under statutory laws, which means it has been legally established and registered as a corporation or company. So, LLP is a partnership registered and incorporated under LLP Act 2008 not under Indian Partnership Act 1932.
- b) Juridical Person: LLP is a legal person in the eyes of law because it gains the identity through law only. It has legal rights and obligations like a natural person, can enter into contracts, sue or be sued and own property.
- c) Separate legal entity: LLP is a legal structure where a business is recognized by law as a distinct entity separate from its partners. The partners are liable to the extent of their agreed contribution in the LLP and they will not personally liable to the creditors of LLP.
- d) Perpetual succession: Any change in ownership, management or membership in the LLP will not affect its existence. LLP can continue operating even on the death, insanity, retirement or insolvency of its partners.
- e) Common seal: LLP is capable of entering into contracts and holding the ownership in property in its own name through its partners. But it is not mandatory to have a common seal and it shall remain in the custody of authorized person. It shall be affixed in the presence of at least 2 designated partners.
- f) Limited liability: A partner is not personally liable, directly or indirectly for an obligation solely by reason of being a partner of the limited liability partnership and is not bound by anything done by other partner without authority. It shall not affect the personal liability of a partner for his own wrongful act or omission, but a partner shall not be personally liable for the wrongful act or omission of any other partner of the limited liability partnership.

g) Management of business: The partners in the LLP are entitled to manage the business of LLP. But only the designated partners are responsible for legal compliances.

h) No mutual agency: The mutual rights and duties of the partners and the mutual rights and duties of the limited liability partnership and its partners shall be determined by LLP agreement. All the partners are the agent of LLP alone and there is no mutual agency in between the partners. No partners are responsible for the unauthorized act of other partners.

i) Minimum and maximum number of partners: Every limited liability partnership shall have at least two partners and two designated partners out of all partners. If the limit is reduced below two for more than 6 months and remaining partner (Only partner) carries on business after 6 months with the knowledge of partnership without two minimum partners, then he will be personally liable during that period. At least two individual partners or nominees of body corporate (In case body corporate is a partner of LLP) shall be appointed as designated partners and be given the Designated Partner Identification Number(DPIN). There is no maximum limit on the partners of LLP.

J) Business for profit only: the essential feature of LLP is that it is formed for the purpose of earning profit out of it not for charitable or non-economic purposes.

k) LLP agreement: Rights and liabilities of partners shall be specified by an agreement in between the partners of LLP. In absence of such agreement then mutual rights and liabilities of partners shall be governed by the first schedule of the Limited Liability Partnership Act 2008.

l) Annual accounts and audit: The limited liability partnership shall maintain such proper books of account at its registered office and shall also prepare the statement of Account and Solvency within 8 months from the end of the last financial year. The accounts of limited liability partnerships shall be audited in accordance with such rules as may be prescribed

m) Conversion into LLP: A partnership firm, private company or unlisted public company can be converted into LLP as per the provisions of chapter X of LLP act 2008. LLP shall within 15 days of conversion inform the registrar of firm or

registrar of companies about the conversion of firm or company which was registered by them under specific law.

n) Winding up of LLP: The winding up of a limited liability partnership may be either voluntary by agreement in between the partners or by the Tribunal. LLP may be wound up by tribunal on various grounds like by consent of partners, number of partners reduced to below two, default in filing the Statement of Account and Solvency or annual return with the Registrar, LLP acted against the interests of the sovereignty and integrity of India, the security of the State or public order.

o) Taxation of LLP: For the AY 2025-26, a Partnership Firm (including LLP) is taxable at 30% and a 12% surcharge if the total income exceeds 1 crore.

p) E-filing of documents: Every form, application or documents relating to LLP shall be filed online on the website of Ministry of Corporate Affairs i.e. www.mca.gov.in. But all these documents shall be authenticated by partners or designated partners by the use of electronic or digital signature.

q) Foreign LLP: Foreign Limited liability Partnership means the firm registered or incorporated outside India but established a place of business in India. The central government can make rule for the establishment of such LLP in India. But foreign LLP can become the partner in Indian LLP.

r) Investigation: The Central Government shall appoint one or more competent persons as inspectors to investigate the affairs of a limited liability partnership and to report thereon if Tribunal or any Court, by order, declares that the affairs of a limited liability partnership ought to be investigated.

s) Compromise or Arrangement: The application of compromise or arrangement between LLP and creditors or between LLP and its partners shall be made before tribunal. The order made by tribunal shall be binding and a copy of the order shall be submitted to the registrar within 30 days of the order.

t) Non applicability of Indian Partnership Act 1932: The provisions of the Indian Partnership Act, 1932 shall not apply to an LLP.

12.6. Difference between LLP and Partnership Firm

Areas of difference	LLP	Traditional Partnership Firm
Liability of Partners	Limited	Unlimited
Separate Legal Entity	Yes	No
Establishment	Formal	Informal
Designated Partners	Mandatory to be appointed	Not required
Application of Law	Limited Liability Partnership Act 2008	Indian Partnership Act 1932
Incorporation or registration	Mandatory	Not mandatory
Legal Person	Yes	No
Administrating Authority	Registrar of Companies	Registrar of Firms
Maximum number of Partners	No limit	20
Agency	Partners are agent of LLP not of other partners	Partners are agent of other partners and bind them by their acts
Perpetual Succession	Death, insolvency, retirement of partner will not affect the continuation of business because of perpetual succession.	Death, retirement or insolvency may affect its existence as it has no perpetual succession.
Common Seal	Yes	No
Financial Disclosures	Mandatory to file annual return and statement of solvency with registrar	Not required to file annual return or solvency statement with registrar
Foreign partners	Foreign individuals or body corporate can become the partners in LLP	Foreign national cannot become the partners

12.7. Incorporation and registration of LLP

LLP contains the benefits of limited liability company and flexibility of traditional partnership firm. Incorporating an LLP involves several key steps, including choosing partners, appointment of designated partners, obtaining necessary certificates, reserving a unique name, drafting the LLP agreement, and filing the incorporation documents. Once approved, the LLP receives a Certificate of Incorporation and an LLP Identification Number (LLPIN).

Who can be the Partners: Every LLP shall have at least two partners for incorporation. A partner can be an individual or a body corporate. But an individual shall not be capable of becoming a partner of a limited liability partnership, if—(a) he has been found to be of unsound mind by a Court of competent jurisdiction (b) he is an undischarged insolvent; or (c) he has applied to be adjudicated as an insolvent and his application is pending.

A body corporate means a company defined in Companies Act 2013 and includes (i) a limited liability partnership registered under this Act; (ii) a limited liability partnership incorporated outside India; and (iii) a company incorporated outside India, but does not include—(i) a corporation sole; (ii) a co-operative society; and (iii) any other body corporate (not being a company as defined in the Companies Act, 2013 or a limited liability partnership as defined in this Act), which the Central Government may, by notification in the Official Gazette, specify in this behalf.

Appointment of Designated Partners: Every limited liability partnership shall have at least two designated partners who are individuals and at least one of them shall be a resident in India. The designated partner shall be of age of majority i.e. 18 years, sound mind, solvent and not convicted for any offence. Provided that in case of a limited liability partnership in which all the partners are bodies corporate or in which one or more partners are individuals and bodies corporate, at least two individuals who are partners of such limited liability partnership or nominees of such bodies corporate shall act as designated partners. The term "resident in India" means a person who has stayed in India for a period of not less than one hundred and twenty days during the financial year. These designated partners shall be appointed with their prior consent in the prescribed format because these partners are only responsible for all acts or things to be

done by LLP and also liable to penalties for any contravention of the legal compliance.

In case of vacancy, new designated partner shall be appointed within 30 days. Each partner shall be deemed to be a designated partner, if no designated partner is appointed or if at any time vacancy is not filled within the specific time.

Types of Certificates required: Every designated partner in an LLP must obtain a Designated Partner Identification Number (DPIN) before commencing operations. It is a unique eight-digit alphanumeric code assigned by the Ministry of Corporate Affairs (MCA) and It's analogous to the Director Identification Number (DIN) for company directors. DPINs help maintain an official database of designated partners, which allows regulatory bodies to track their activities and ensure transparency within the LLP.

As all documents and applications related to the LLP must be submitted online to the Ministry of Corporate Affairs (MCA) with digitally signature on it, so the designated partner must obtain the Digital Signature Certificate (DSC).

Unique Name of the LLP: Every limited liability partnership shall have its unique name with the words "limited liability partnership" or the acronym "LLP" as the last words of its name. A person may apply in such form accompanied by such fee as may be prescribed to the Registrar of Companies for the reservation of a name set out in the application as the name of a proposed limited liability partnership. Upon the receipt of the application, the registrar may reserve the name for a period of three months but the name shall not be undesirable or identical or resembles to the other LLP or company or registered trade mark. If it resembles to the name of another LLP or trade mark of a company, then on the application of that LLP or proprietor of company, central government may direct the LLP to change the name within 3 months. After the change of name LLP shall inform the registrar about the change within 15 days who shall carry out the changes in the certificate of incorporation within 30 days. Any LLP may change its name later with the registrar by filling a notice of change.

Every limited liability partnership shall ensure that its invoices, official correspondence and publications bear the following, namely: —(a) the name, address of its registered office and registration number of the limited liability

partnership; and (b) a statement that it is registered with limited liability. If the limited liability partnership contravenes the provisions of this section, the limited liability partnership shall be liable to a penalty of ten thousand rupees.

Contribution by Partners: A contribution of a partner may consist of tangible, movable or immovable or intangible property or other benefit to the limited liability partnership, including money, promissory notes, other agreements to contribute cash or property, and contracts for services performed or to be performed.

LLP Agreement: Limited liability partnership agreement" means any written agreement between the partners of the limited liability partnership or between the limited liability partnership and its partners which determines the mutual rights and duties of the partners and their rights and duties in relation to that limited liability partnership. Every LLP has been given power to devise their agreement as per their requirement and agreement in between the partners. The LLP agreement shall be drafted carefully and to be filed with the registrar of companies. In the absence of such LLP agreement, the mutual rights and duties shall be governed by the LLP Act 2008 and its schedule I. Generally, LLP agreement shall contain the following clauses:

- Names of all partners who have entered into the agreement
- Rights, responsibilities, and duties of ordinary members and designated members
- Capital investment and non-financial contributions of partners
- How much ownership and control each partner has
- Limited liability of members – how much they are personally required to contribute toward the LLP's debts if it becomes insolvent
- Profit-sharing and/or remuneration arrangements
- How losses will be shared between members
- Criteria and admission procedures for appointing new LLP members
- Expulsion criteria
- Rules and procedures when a member resigns or retires
- Obligations of outgoing partners, e.g. confidentiality and non-compete provisions

- How decisions are made and which members have the right to make them
- Annual leave, pensions, and other entitlements
- Dispute resolution procedures

Incorporation Documents: The Incorporation document shall be in a Form (FiLLiP-form for incorporation of limited liability partnership) and shall be submitted electronically on the website of Ministry of Corporate Affairs. The form shall state

- a) Proposed name of Limited Liability Partnership
- b) The proposed business of LLP
- c) The address of the registered office of LLP
- d) Name and address of person who are to be partners of LLP
- e) Name and address of the person who are to be designated partners of LLP
- f) Such other information concerning the proposed LLP
- g) The incorporation form shall be filed along with a statement made by either advocate, Company Secretary, a chartered accountant or cost accountant who is engaged in the formation of LLP and by anyone who subscribed his name to the incorporation document, that all the requirements of this Act and the rules made thereunder have been complied with, in respect of incorporation.

Registration: When the requirements are complied with of incorporation documents then the registrar shall retain and register the incorporation document. Then the registrar shall issue the certificate signed and authenticated by his official seal within 14 days. The certificate shall be conclusive evidence that the limited liability partnership is incorporated by the name specified therein. Where there is a change in name or address of partner, admission of new partner or ceases to be a partner, LLP shall file notice of change duly signed by designated partner with the registrar within 30 days of such change.

Effect of Registration: On registration, a limited liability partnership shall, by its name, be capable of—(a) suing and being sued; (b) acquiring, owning, holding and developing or disposing of property, whether movable or immovable, tangible or intangible; (c) having a common seal, if it decides to

have one; and (d) doing and suffering such other acts and things as bodies corporate may lawfully do and suffer.

Registered Office: Every LLP shall have one registered office for communication. Any document may be delivered to LLP registered office or partner or designated partner by post or registered post at the registered office or any address declared by LLP agreement. An LLP may change the place of registered office by sending notice of change to the registrar.

12.8. Winding Up and Dissolution

The winding up of a limited liability partnership may be either voluntary or by the Tribunal and limited liability partnership, so wound up may be dissolved.

- a) **Voluntary Winding Up:** any LLP may be wound up voluntarily if the LLP passes a resolution to wind up with the approval of at least three fourth of the total number of partners. A copy of resolution shall be filed with the registrar within 30 days of the passing of the resolution. Provided that where the LLP has creditors, whether secured or unsecured, the winding up shall not take place unless approval of such creditors takes place. The designated partners shall make a declaration that LLP has no debt or that it will be able to pay in full within one year from the commencement of winding up.

LLP shall appoint the liquidator within 30 days for the purpose of winding up and that liquidator shall also be approved by two third of the creditors in value of LLP (If there are creditors of LLP). Where creditors do not approve the voluntary liquidator appointed by partners then they can nominate one liquidator. If the creditors and partners nominate different liquidator, then person nominated by creditors shall be final.

- b) **Winding up by Tribunal:** An application for winding up of an LLP can be presented by way of petition by LLP, partner, partners, creditors, registrar, central government or state government. A limited liability partnership may be wound up by the Tribunal,—(a) if the limited liability partnership decides that limited liability partnership be wound up by the Tribunal; (b) if, for a period of more than six months, the number of partners of the limited liability partnership is reduced below two; (d) if

the limited liability partnership has acted against the interests of the sovereignty and integrity of India, the security of the State or public order; (e) if the limited liability partnership has made a default in filing with the Registrar the Statement of Account and Solvency or annual return for any five consecutive financial years; or (f) if the Tribunal is of the opinion that it is just and equitable that the limited liability partnership be wound up.

On hearing the petition, the tribunal may dismiss it, make interim order, direct the action for revival or rehabilitation of LLP, appoint a provisional liquidator till the making of winding up order or make an order for the winding up. After the order of winding up, the tribunal appoint the liquidator for the further proceedings. The liquidator shall submit the report within 60 days containing the particulars like details of assets of LLP and its value, cash in hand and in the bank, marketable securities, contributions received and outstanding from partners, details of debts due to LLP, existing and contingent liabilities of LLP, details of intangible assets, list of cases filed by or against LLP and scheme of revival or rehabilitation if any. On the receipt of report, the tribunal may fix the time limit within which the entire proceedings shall be completed and the LLP dissolved.

12.9. Establishment of Special Courts

The Central Government may, for the purpose of providing speedy trial of offences under this Act, by notification, establish or designate as many Special Courts as may be necessary for such area or areas, as may be specified in the notification. (2) The Special Court shall consist of— (a) a single Judge holding office as Sessions Judge or Additional Sessions Judge, in case of offences punishable under this Act with imprisonment of three years or more; and (b) a Metropolitan Magistrate or a Judicial Magistrate of the first class, in the case of other offences, who shall be appointed by the Central Government with the concurrence of the Chief Justice of the High Court. Provided that until Special Courts are designated or established LLP Act 2008, the Courts designated as Special Courts in terms of section 435 of the Companies Act, 2013 (18 of 2013) shall be deemed to be Special Courts for the purpose of trial of offences

punishable under this Act. The Special Court may, if it thinks fit, try in a summary way any offence under this Act which is punishable with imprisonment for a term not exceeding three years.

12.10. Cessation of Partnership Interest

The mutual rights and duties of the partners of a limited liability partnership, and the mutual rights and duties of a limited liability partnership and its partners, shall be governed by the limited liability partnership agreement between the partners, or between the limited liability partnership and its partners. A partner shall cease to be partner in following circumstances:

- In accordance with LLP agreement
- giving a notice in writing of not less than thirty days to the other partners of his intention to resign as partner.
- on his death or dissolution of the limited liability partnership
- if he is declared to be of unsound mind by a competent court;
- if he has applied to be adjudged as an insolvent or declared as an insolvent.

If any person is dealing with LLP without of the notice of cessation of any partner of LLP, the ceased partner shall remain liable to the person. So, it is advised to send notice of admission of new partner or cessation of partner to the registrar immediately by LLP or the partner within 30 days.

Unless otherwise provided in LLP agreement, the outgoing partner shall be entitled to contribution made by him in LLP and a share in accumulated profits after deducting accumulated losses.

12.11. Extent and Limitation of Liability of Partners

Every partner of a limited liability partnership is, the agent of the limited liability partnership for the purpose of the business of the limited liability partnership, but not of other partners. A partner is not personally liable solely by reason of being a partner of the limited liability partnership and a partner shall also not be personally liable for the wrongful act or omission of any other partner of the limited liability partnership. The limited liability partnership is liable if a partner

of a limited liability partnership is liable to any person as a result of a wrongful act or omission on his part in the course of the business of the limited liability partnership or with its authority. The liabilities of the limited liability partnership shall be met out of the property of the limited liability partnership. But LLP is not bound by anything done by a partner in dealing with a person if—(a) the partner in fact has no authority to act and (b) the person knows that he has no authority or does not know or believe him to be a partner of the limited liability partnership.

In the event of an act carried out by a limited liability partnership, or any of its partners, with intent to defraud creditors of the limited liability partnership or any other person, or for any fraudulent purpose, the liability of the limited liability partnership and partners who acted with intent to defraud creditors or for any fraudulent purpose shall be unlimited for all or any of the debts or other liabilities of the limited liability partnership and every person who was knowingly a party to the carrying on of the business in the manner aforesaid shall be punishable with imprisonment for a term which may extend to five years and with fine which shall not be less than fifty thousand rupees but which may extend to five lakh rupees.

Holding Out: Any person, who by words spoken or written or by conduct, represents himself, or knowingly permits himself to be represented to be a partner in a limited liability partnership is liable to any person who has on the faith of any such representation given credit to the limited liability partnership, whether the person representing himself or represented to be a partner does or does not know that the representation has reached the person so giving credit. Provided that where any credit is received by the limited liability partnership as a result of such representation, the limited liability partnership shall, without prejudice to the liability of the person so representing himself or represented to be a partner, be liable to the extent of credit received by it or any financial benefit derived thereon.

12.12. Powers of Tribunal and Appellate Tribunal

National Company Law Tribunal which is constituted under the Companies Act 2013 shall also be doing the work of Tribunal under LLP Act 2008. Following powers shall be exercised by Tribunal in regard to LLP:

- a) Winding Up: The winding up of a limited liability partnership may be either voluntary or by the Tribunal and limited liability partnership, so wound up may be dissolved.
- b) Investigation: The Tribunal, either suo motu, or on an application received from not less than one-fifth of the total number of partners of limited liability partnership, by order, declares that the affairs of the limited liability partnership ought to be investigated. The central government shall appoint one or more inspectors to investigate the affairs of a Limited Liability Partnership and to report thereon. If, from the report, it appears to the Central Government that any person in relation to the limited liability partnership or in relation to any other entity whose affairs have been investigated, has been guilty of any offence for which he is liable, the Central Government may prosecute such person for the offence.
- c) Compromise or arrangements: In case of a proposal of a compromise or arrangement in between LLP and its creditors or between LLP and its partners, any partner or creditor or LLP may apply before the tribunal. On application, tribunal may call the meeting and if three fourth creditors or partners agree to compromise or arrangement, then tribunal shall sanction it and will become binding on all. Tribunal also has power to supervise, enforce or modify the compromise or arrangement for the proper working.
- d) Reconstruction and Amalgamation: The Tribunal facilitates the reconstruction or amalgamation of LLPs, ensuring proper transfer of property, rights, liabilities and ongoing legal proceedings.
- e) Enforcement of duty of financial disclosures: If any LLP fails to submit annual returns, document or statement even after the service of notice by the registrar, the tribunal may on the application by the registrar make an order directing LLP to make good the default within specified time.

- f) **Appeal to Tribunal:** An appeal may be made before the Tribunal in case of refusal of registration of conversion of firm or company into LLP by the Registrar.

Any person aggrieved by an order of Tribunal may prefer an appeal to the Appellate Tribunal within 60 days from the date on which the copy of the order of the Tribunal is made available to the person aggrieved. Provided that the Appellate Tribunal may entertain an appeal after the expiry of the said period of sixty days, but within a further period of not exceeding sixty days, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the period so specified. The Appellate Tribunal shall send a copy of every order made by it to the Tribunal and the parties to the appeal. The National Company Law Appellate Tribunal acts as an Appellate Tribunal under LLP Act 2008.

12.13. Financial Disclosures

a) LLP shall maintain books of accounts relating to its affairs for each year on cash basis or accrual basis and according to double entry system of accounting. Any limited liability partnership which fails to comply with above provision, such limited liability partnership shall be punishable with fine which shall not be less than twenty-five thousand rupees, but may extend to five lakh rupees and every designated partner of such limited liability partnership shall be punishable with fine which shall not be less than ten thousand rupees, but may extend to one lakh rupees.

b) It shall prepare a statement of account and solvency for every financial year within 6 months from the end of each financial year and file with the registrar. Any limited liability partnership which fails to file it with registrar within the prescribed time, such limited liability partnership and its designated partners shall be liable to a penalty of one hundred rupees for each day during which such failure continues, subject to a maximum of one lakh rupees for the limited liability partnership and fifty thousand rupees for every designated partner.

c) The accounts of LLP shall be audited. Any limited liability partnership which fails to comply with above provision, such limited liability partnership shall be punishable with fine which shall not be less than twenty-five thousand rupees,

but may extend to five lakh rupees and every designated partner of such limited liability partnership shall be punishable with fine which shall not be less than ten thousand rupees, but may extend to one lakh rupees.

d) Every LLP shall file an annual return duly authenticated with the registrar within 60 days of the closure of financial year. If any limited liability partnership fails to file its annual return before the expiry of the period specified therein, such limited liability partnership and its designated partners shall be liable to a penalty of one hundred rupees for each day during which such failure continues, subject to a maximum of one lakh rupees for the limited liability partnership and fifty thousand rupees for designated partners

If in any return, statement or other document required by or for the purposes of any of the provisions of this Act, any person makes a statement—(a) which is false in any material particular, knowing it to be false; or (b) which omits any material fact knowing it to be material, he shall, save as otherwise expressly provided in this Act, be punishable with imprisonment for a term which may extend to two years, and shall also be liable to fine which may extend to five lakh rupees but which shall not be less than one lakh rupees.

12.14. Conversion into LLP

Conversion from firm into limited liability partnership: A firm may convert into a limited liability partnership by filing application to registrar in the manner set out in Second Schedule if and only if the partners of the limited liability partnership into which the firm is to be converted, comprise, all the partners of the firm and no one else.

Conversion from public or private Limited company into limited liability partnership: A company may apply to registrar for conversion into a limited liability partnership in accordance with Third or fourth Schedule if and only if— (a) there is no security interest in its assets subsisting or in force at the time of application; and (b) the partners of the limited liability partnership to which it converts comprise all the shareholders of the company and no one else.

Registration and effect of conversion: On satisfaction of legal compliance of conversion, the registrar shall issue a certificate of registration stating that the

LLP is on and from the date specified in the certificate registered under LLP Act 2008. The Newly converted LLP shall inform the registrar of companies or registrar of firms about the conversion within 15 days. The firm or the company, as the case may be, shall be deemed to be dissolved and removed from the records of the Registrar of Firms or Registrar of Companies. All tangible (movable or immovable) and intangible property vested in the firm or the company, as the case may be, all assets, interests, rights, privileges, liabilities, obligations relating to the firm or the company, as the case may be, and the whole of the undertaking of the firm or the company, as the case may be, shall be transferred to and shall vest in the limited liability partnership without further assurance, act or deed.

❖ **Exercise**

A) Multiple Choice Questions

- 1) Which schedule of Limited Liability Partnership Act 2008 deals with mutual rights and duties of partners?
a) First b) Second c) Third d) Fourth
- 2) How many designated partners are required for LLP?
a) Minimum two b) Minimum three
c) Minimum one d) as per the LLP agreement
- 3) For the appointment of designated partner, at least one shall be the resident of India. Here resident of India means a stay in India for the period of not less than
a) One hundred and thirty days b) Sixty days
c) Ninety days d) One hundred and twenty days
- 4) If a person wants to open an LLP with the specific name i.e. ABC LLP. He can reserve this name by making an application to the registrar and registrar can reserve the name for the how many months/month?
a) 2 months b) 3 months c) 4 months d) 1 month

- 5) Limited Liability Partnership Act 2008 was amended in which year?
- a) 2020 b) 2022 c) 2021 d) 2023
- 6) Which of the following is not one of the features of LLP?
- a) Perpetual succession b) Common seal
c) Mutual agency d) Limited liability
- 7) The application of compromise or arrangement between LLP and creditors or between LLP and its partners shall be made before
- a) Tribunal b) Special Court
c) Investigator d) Appellate Tribunal
- 8) If any LLP fails to maintain the accounts of any financial year, such limited liability partnership shall be punishable with fine which shall not be less than _____ rupees, but may extend to _____ rupees.
- a) Ten thousand and one lakh
b) Twenty thousand and one lakh
c) Twenty-five thousands and five lakhs
d) Thirty thousand and two lakhs
- 9) Which of the following is not the ground for winding up by Tribunal?
- a) Number of partners reduced to below two
b) LLP unable to pay debts
c) Number of designated partners reduced to one
d) Made a default in filling annual return to registrar
- 10) What is the full form of DPIN
- a) Designed Partnership Investigation
b) Designated Partners Identification Number
c) Designated Principles for Identification
d) Disputed Partners Information Number

B) True/False

- 1) Indian Partnership Act is applicable to Limited Liability Partnership.
- 2) LLP shall be registered with the registrar of firms.
- 3) The appointment of designated partners is optional for incorporation of LLP
- 4) Conversion of existing partnership firm into LLP is not possible before the actual dissolution of the firm under Indian Partnership Act 1932.
- 5) If a fraud is committed by any partner in the course of dealing of LLP, his liability will be limited to his contributions only.
- 6) LLP agreement can be in oral or in writing in between the partners.

C) Write Short Notes on:

- 1) Small Limited Liability Partnership
- 2) Incorporation Documents
- 3) Winding up of LLP
- 4) Designated Partners
- 5) Effect of Registration of LLP
- 6) Registration of conversion of firm into LLP
- 7) Advantages of LLP
- 8) Holding out
- 9) Establishment of special courts
- 10) Types of certificates required for incorporation of LLP

D) Answer the following questions in detail:

- 1) Explain in detail the essential features of Limited Liability Partnership.
- 2) Define the LLP and explain in brief its registration process.
- 3) How the limited liability partnership can be wound up and dissolved?
- 4) Explain the financial disclosures of LLP.
- 5) Explain the types of LLP and to what extent the partners are liable to each other or to LLP?
- 6) Discuss the powers and duties of Tribunal given under the Limited Liability Partnership Act 2008.

- 7) Discuss the process of conversion of firms, public limited company or private limited company into LLP and its registration and effects of registration.
- 8) Define LLP agreement. What shall be the content of LLP agreement?
- 9) Who can be the partners and designated partners of LLP and explain their mutual rights and liabilities.
- 10) Explain the different steps from the appointment of designated partners to the registration of the LLP.

E) Write short notes highlighting the key differences between the following:

- 1) Difference between partners and designated partners
- 2) Difference between LLP and Partnership Firm
- 3) Difference between limited liability company (LLC) and LLP

F) Fill in the blanks

- 1) The application or documents relating to LLP shall be filed online on the website of _____
- 2) LLP is regulated under Limited Liability Partnership Act _____ (Year of enactment)
- 3) _____ shall appoint one or more competent persons as inspectors to investigate the affairs of a limited liability partnership and to report thereon if Tribunal or any Court, by order, declares that the affairs of a limited liability partnership ought to be investigated.
- 4) If the name of LLP resembles with the trade mark of other company, then the manager or proprietor of company can file the application to _____.
- 5) Every LLP shall file an annual return duly authenticated with the registrar within _____ days of the closure of financial year

- 13.1 Introduction**
- 13.2 Objective**
- 13.3 Brief Historical Overview of Indian Competition Law.**
- 13.4 Monopolies and Restrictive Trade Practices Act, 1969.**
 - 13.4.1. Definitions**
- 13.5 Anti Competitive Agreements**
 - 13.5.1. Horizontal agreements (Section 3(3))**
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 - 13.7.1. Ex-ante regulation of Combinations**
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 - 13.7.3. Relevant Market**
- 13.8 Competition Advocacy under the Competition Law**
 - 13.8.1. Statutory Basis**
 - 13.8.2. Objectives of Competition Advocacy**
 - 13.8.3. Key Activities of the CCI in Advocacy**
 - 13.8.4. Importance of Competition Advocacy**
- 13.9 Enforcement of Competition Law**
 - 13.9.1. Director General**
 - 13.9.2. Competition Commission of India (CCI)**

13.9.3. Appellate Authorities

13.10 Summary of Competition Law (India)

13.10.1. Anti-Competitive Agreements (Section 3)

13.10.2. Enforcement and Adjudication Mechanism

13.10.3. Advisory Role

13.11 Penalty under the Competition Act, 2002

13.11.1. Anti-Competitive Agreements (Section 3)

13.11.2. Abuse of Dominant Position (Section 4)

13.11.3. Combinations (Mergers and Acquisitions) (Section 5 and 6)

13.11.4. Failure to Comply with CCI Orders (Section 42)

13.11.5. Making False Statements or Omitting Material Facts (Section 44)

13.11.6. Lesser Penalty for Leniency (Section 46)

❖ Exercise

13.1. Introduction

An Act to provide, keeping in view of the economic development of the country, for the establishment of a Commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India, and for matters connected therewith or incidental thereto.

Competition Law for India was triggered by *Articles 38 and 39* of the Constitution of India. These Articles are a part of the *Directive Principles of State Policy*. Based on the Directive Principles, the first Indian competition law was enacted in 1969 and was labeled the MONOPOLIES AND RESTRICTIVE TRADE PRACTICES ACT, 1969 (MRTP Act).

Articles 38 and 39 of the Constitution of India mandate, inter alia, that the State shall strive to promote the welfare of the people by securing and protecting as effectively, as it may, a social order in which justice – social, economic and political – shall inform all the institutions of the national life, and the State shall, in particular, direct its policy towards securing

1. That the ownership and control of material resources of the community are so Distributed as best to sub serve the common good; and
2. That the operation of the economic system does not result in the concentration of wealth and means of production to the common detriment.

One of the *main goals* of the MRTP Act was to *encourage fair play* and *fair deal* in the market besides promoting healthy competition. They seek to afford protection and support consuming public *by reducing* Monopolistic, Restrictive and Unfair Trade Practices from the market

Globalization has the fundamental attributes of relying significantly in the market forces, ensuring competition and keeping market functioning efficiently.

In the *Pre-1991* Reforms period, India's planned strategic and economic development stressed the broad policy objectives of

1. The development of an industrial base with a view to achieving self reliance and
2. The promotion of social justice

13.2. Objective

The **Competition Act** is a law that promotes and protects competition in the marketplace. It prevents anti-competitive practices, ensuring businesses operate fairly. Competition law concerns itself with firms enjoying undisputed market power, which opens up the possibility of hindering consumer welfare by increasing prices, reducing output, diminishing product quality and suppressing innovation.

- The primary aim is to enhance and sustain competition by preventing practices that might restrict or distort competition in the market.
- Understand the Objectives of Competition Law and Brief Historical Introduction of Indian Competition Law.
- Describe Monopolies and Restrictive Trade Practices Act, 1969 and Competition Act, 2002.
- Understand the different types of Agreement like Anti-competitive Agreements and Vertical Agreements.
- Understand the different Enforcement Authorities of Competition law.

13.3. Brief Historical Overview of Indian Competition Law.

In India, the first legislation to restrain abuse of market power was enacted in 1969, i.e., Monopolies and Restrictive Trade Practices Act (MRTP Act). The MRTP Act was enacted to ensure that the economic system didn't result in concentration of economic power, to provide for control of monopolies and to prohibit monopolistic and restrictive trade practices. As India moved steadily on the path of reforms comprising of Liberalization, Privatization and Globalization, it did away with the MRTP Act, 1969 as it was realized that the Act had outlived its utility and control of monopoly was not appropriate to support the growth aspirations of more than 1 billion Indians. Indeed, need was felt to promote and sustain competition in the market place. The then Finance Minister (Shri. Yashwant Sinha) in the budget speech in 1999 had announced: “The Monopolies and Restrictive Trade Practices Act has become obsolete in certain areas in the light of international economic developments relating to competition laws. We need to shift our focus from curbing monopolies to promoting competition. Government has decided to appoint a Committee to examine this range of issues and propose a modern Competition Law suitable for our conditions.”

In October, Central government appointed high level committee under the chairmanship of Mr. Raghavan, the aim of the committee was to formulate the competition law in tune with economic reforms and international development. The committee presented its report on May 2000; the draft competition law was presented on November 2000. After certain amendments the parliament passed

the new law, called competition Act 2002. The act came into force on **January 2003**. The Act was amended by the Competition Amendment Act, 2007 and became fully operational from **1 June 2011**,

- The provisions relating to competition advocacy was notified **in 2003**,
- The provisions regulating anti-competitive agreements and abuse of dominance were notified with effect from **20 May 2009**
- The provisions regulating mergers and acquisitions were notified on **June 2011**

Both the Competition Commission of India (CCI) (which administers the law) and the Competition Appellate Tribunal (CAT) are operational.

The Framework of Competition Act 2002 has essentially four compartments:

1. Anti- Competitive Agreements [Section 3]
2. Abuse of Dominance [Section 4]
3. Combination Regulation [Section 5 & 6]
4. Competition Advocacy [Section 49]

13.4. Monopolies and Restrictive Trade Practices Act, 1969

The MRTP Act was enacted to control monopolies, to ensure that the economic system does not culminate in concentration of economic power and, to disallow monopolistic and restrictive trade practices. What highlighted the second phase, ranging from 1991 to present, was bringing forth market-oriented economic policies with the coming of the New Economic Policy (NEP), that needed to be in tune with the rise of globalization, liberalization and privatization policies. These policies led to de-licensing and deregulation of sectors that were priority under the control of the public sector. Industrial activities which were exclusively operated by the public sector were opened up for entry by the private sector. The MRTP Act was observed to be incompatible with this shift in industrial policies, which focused on competition and market orientation. Thus,

arose the need for a regulator which could facilitate market functioning in accordance with the country's changing industrial policies

COMPETITION ACT, 2002

The Competition Act was enacted in 2002, based on the recommendations of the Raghavan Committee for ensuring fair competition and ushering economic development in the country. The primary aim of this piece of legislation is to avert practices having anti-competitive effects, for the advancement of competition in the markets, to safeguard the interests of the consumers and, to guarantee freedom of trade to the market participants. This legislation is the successor to Monopolies and Restrictive Trade Practices Act, 1961. The Act lays down provisions relating to horizontal and vertical anti-competitive agreements have an adverse effect on competition, prohibition of abuse of dominance, and rules for combinations and their regulation. The Competition Act also contains certain provisions to promote competition advocacy.

13.4.1. Definitions

Acquisition Sec 2 (a)

•**Acquisition** means, directly or indirectly, acquiring or agreeing to acquire

Shares of any enterprise

Voting rights of any enterprise

Assets of any enterprise

Control over management of any enterprise

Control over assets of any enterprise

Agreement Sec 2 (b)

(b) "Agreement" includes any arrangement or understanding or action in concert,—

(i) Whether or not, such arrangement, understanding or action is formal or in writing; or

(ii) Whether or not such arrangement, understanding or action is intended to be enforceable by legal proceedings;

•**Agreement** includes any arrangement or understanding or action in concert: Whether or not, such arrangement, understanding or action is **formal or in writing** or, Whether or not such arrangement, understanding or action is intended to be enforceable by legal proceedings.

Cartel Sec 2 (c)

(c) “cartel” includes an association of producers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit, control or attempt to control the production, distribution, sale or price of, or, trade in goods or provision of services;

•Cartel includes an **association** of:

Producers,

Sellers,

Distributors,

Traders or,

Service providers,

Who by agreement amongst themselves, **limit, control or attempt to control** the:

Production, distribution, sale or,

Price of or trade in goods or provision of services

Goods Sec 2 (i)

•**Goods** mean good as defined in the Sale of Goods Act 1930 and include:

Products manufactured, processed or mined.

Debentures, stock and shares after allotment.

In relation to goods supplied, distributed or controlled in India, goods imported into India

Sec 2(f) “consumer” means any person who—

(i) buys any goods for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any user of such goods other than the person who buys such goods for consideration paid or promised or partly paid or partly promised, or under any system of deferred payment when such use is made with the approval of such person, whether such purchase of goods is for resale or for any commercial purpose or for personal use;

(ii) hires or avails of any services for a consideration which has been paid or promised or partly paid and partly promised, or under any system of deferred payment and includes any beneficiary of such services other than the person who hires or avails of the services for consideration paid or promised, or partly paid and partly promised, or under any system of deferred payment, when such services are availed of with the approval of the first-mentioned person whether such hiring or availing of services is for any commercial purpose or for personal use;

13.5. Anti-competitive agreements

(1) No enterprise or association of enterprises or person or association of persons shall enter into any agreement in respect of production, supply, distribution, storage, acquisition or control of goods or provision of services, which causes or is likely to cause an appreciable adverse effect on competition within India.

(2) Any agreement entered into in contravention of the provisions contained in sub-section (1) shall be void.

(3) Any agreement entered into between enterprises or associations of enterprises or persons or associations of persons or between any person and enterprise or practice carried on, or decision taken by, any association of enterprises or

association of persons, including cartels, engaged in identical or similar trade of goods or provision of services, which—

- (a) Directly or indirectly determines purchase or sale prices;
- (b) Limits or controls production, supply, markets, technical development, investment or provision of services;
- (c) Shares the market or source of production or provision of services by way of allocation of geographical area of market, or type of goods or services, or number of customers in the market or any other similar way;
- (d) Directly or indirectly results in bid rigging or collusive bidding,

Shall be presumed to have an appreciable adverse effect on competition:

Provided that nothing contained in this sub-section shall apply to any agreement entered into by way of joint ventures if such agreement increases efficiency in production, supply, distribution, storage, acquisition or control of goods or provision of services.

[Provided further that an enterprise or association of enterprises or a person or association of persons though not engaged in identical or similar trade shall also be presumed to be part of the agreement under this sub-section if it participates or intends to participate in the furtherance of such agreement.]

Explanation.—For the purposes of this sub-section, “bid rigging” means any agreement, between enterprises or persons referred to in sub-section (3) engaged in identical or similar production or trading of goods or provision of services, which has the effect of eliminating or reducing competition for bids or adversely affecting or manipulating the process for bidding.

(4) [Any other agreement amongst enterprises or persons including but not restricted to agreement amongst enterprises or persons] at different stages or levels of the production chain in different markets, in respect of production, supply, distribution, storage, sale or price of, or trade in goods or provision of services, including—

- (a) Tie-in arrangement;
- (b) Exclusive [dealing] agreement;
- (c) Exclusive distribution agreement;
- (d) Refusal to deal;
- (e) Resale price maintenance,

Shall be an agreement in contravention of sub-section (1) if such agreement causes or is likely to cause an appreciable adverse effect on competition in India.

[Provided that nothing contained in this sub-section shall apply to an agreement entered into between an enterprise and an end consumer.]

Explanation.—for the purposes of this sub-section,—

[(a) “tie-in arrangement” includes any agreement requiring a purchaser of goods or services, as a condition of such purchase, to purchase some other distinct goods or services;

(b) “exclusive dealing agreement” includes any agreement restricting in any manner the purchaser or the seller, as the case may be, in the course of his trade from acquiring or selling or otherwise dealing in any goods or services other than those of the seller or the purchaser or any other person, as the case may be;]

(c) “exclusive distribution agreement” includes any agreement to limit, restrict or withhold the output or supply of any goods [or services] or allocate any area or market for the disposal or sale of the goods [or services];

(d) “refusal to deal” includes any agreement which restricts, or is likely to restrict, by any method the persons or classes of persons to whom goods [or services] are sold or from whom goods [or services] are bought;

(e) “resale price maintenance” [includes, in case of any agreement to sell goods or provide services, any direct or indirect restriction] that the prices to be charged

on the resale by the purchaser shall be the prices stipulated by the seller unless it is clearly stated that prices lower than those prices may be charged.

(5) Nothing contained in this section shall restrict—

(i) the right of any person to restrain any infringement of, or to impose reasonable conditions, as may be necessary for protecting any of his rights which have been or may be conferred upon him under—

(a) The Copyright Act, 1957 (14 of 1957);

(b) The Patents Act, 1970 (39 of 1970);

(c) The Trade and Merchandise Marks Act, 1958 (43 of 1958) or the Trade Marks Act, 1999 (47 of 1999);

(d) The Geographical Indications of Goods (Registration and Protection) Act, 1999 (48 of 1999);

(e) The Designs Act, 2000 (16 of 2000);

(f) The Semi-conductor Integrated Circuits Layout-Design Act, 2000 (37 of 2000);

[(g) Any other law for the time being in force relating to the protection of other intellectual property rights.]

(ii) The right of any person to export goods from India to the extent to which the agreement relates exclusively to the production, supply, distribution or control of goods or provision of services for such export.

Explanation:

Agreements entered between enterprises, persons, or association of enterprises or persons in pursuance of production, distribution, supply, storage or control of products or services, which have a tendency to result in Appreciable Adverse Effect on Competition (AAEC) within the jurisdiction are referred to as anticompetitive agreements and they shall be declared void. To determine if an

agreement has an appreciable adverse effect on competition, the Commission shall have due regard to factors including, creation of barriers to new entrants, driving off existing competitors, foreclosure of competition by hindering entry, improvement of production or distribution of goods, etc. In a competitive market set-up, firms vying for the business or the consumers are supposed to compete with one another, not collude and cooperate to alter the process of competition. Cartels are horizontal agreements made for the purpose of market allocation, price fixing, output restriction and, the submission of collusive tenders to rig the outcome of competitive tenders are some of the techniques employed by conniving firms to distort competition. Under the Competition Act, 2002, section 2(c) puts forth an inclusive definition of ‘cartel’, as “an association of producers, sellers, distributors, traders or service providers who, by agreement amongst themselves, limit, control or attempt to control the production, distribution, sale or price of, or, trade in goods or provision of services.” In the ***cartelization by public sector insurance companies*** ‘case, the CCI took suo motu cognizance to investigate if four public sector insurance companies had formed a cartel and engaged in bid-rigging in response to a tender issued by the Kerala Government. Rejecting the argument of the insurance companies that they formed a single economic entity and were thus subject to the control of the central government, the CCI held that the submission of separate bids by the companies for the tender, along with the resolution regarding determination of bid amounts being taken voluntarily through an internal meeting without the supervision by the finance Ministry, proved the contrary. Based on the business sharing agreement and the evidence of the opposite Parties (OPs) having met one day before the submission of tender, the CCI held that there was a conclusive proof of bid rigging and collusive bidding by the OPs, satisfying the requirements for contravention under section 3(3)(d) of the Competition Act. Any agreement entered or decision taken amongst enterprises, persons, association of enterprises or persons or, between a person and an enterprise, including cartels, shall be presumed to have an appreciable adverse effect on competition and shall be considered anti-competitive per se, if they result in the following:

(a) Determination of sale prices:

The competition regulatory framework not only concerns itself with blatant price fixing, but also agreements having an effect on suppressing price competition. In other words, the act of price fixing does not just encompass the final price but also instances having an indirect impact on the final price.

Reducing price competition by agreeing not to offer discounts, making use of an open information scheme and, charging uniform delivered prices may also be instances of price fixing. Market participants forming a cartel, agreeing to offer identical discounts and applying the same in the downstream market was also held to be another facet of price fixing and declared to be Anticompetitive in nature.

(b) Output control

An agreement among firms to control or limit production, supply, technical progress, markets or provision of goods and services shall be presumed to be anticompetitive. The CCI generally focuses on factors such as production capacity, capacity utilization of the competitors, and demand for the product in question to decipher any patterns of output control for the concerned product. In the ***Cement Cartel*** case, the Commission found evidences regarding the formation of understanding and agreement among the Opposite Parties (OPs) via the Cement Manufacturing Association (CMA) for communicating and information sharing in relation to manufacture of cement. The Commission also unearthed low-capacity utilization leading to controlled supply of cement by the companies, which was in clear contravention of section 3(3)(b) of the Competition Act. The commission opined that limiting the supplies of cement over the course of years and giving rise to shortages had led to an upward demand, resulting in a hike in prices thereafter. In the absence of any efficiency or improvement in manufacture owing to the coordinated behavior of the cement manufacturing companies, the OPs were held to have formed a cartel. Recently, the CCI passed a final order against three beer companies, viz.,

United Breweries Limited, SABMiller India Limited (renamed as Anheuser Busch InBev India Ltd.) and, Carlsberg India Private Limited for forming a

cartel and selling beer in many States and Union Territories, in conjunction with the All-India Brewers' Association. The cartel had engaged in price parallelism which was in contravention of Section 3(3)(a) of the Competition Act, 2002.

(c) Market allocation

Competition may also be threatened by an agreement between the firms to apportion segments of market amongst themselves, to be handled exclusively by each seller such that they no longer have to compete with each other. When the participating firms concur to share particular markets based on geographical area, classes of customers or, on the basis of the product, such agreements may be referred to as horizontal market sharing agreements. In ***HFB Holding v. Commission***, the opposite parties were penalized for forming a cartel and indulging in sharing of the entire European market among themselves. They further engaged in acts to hinder the only substantial competitor not forming a part of the cartel, driving it away from the concerned market.

(d) Bid rigging or collusive bidding

Agreements capable of lessening or wiping off competition for bids or, which have the effect of manipulating the process of bidding are held to be anticompetitive per se. Bid rigging or collusive tendering is said to occur when competing bidders decide not to compete genuinely, or endeavor to secretly influence the outcome of a bidding process by submission of identical or cover bids.

In the case of ***cartelization in tenders of Pune Municipal Corporation for Solid Waste Processing***, a *prima facie* opinion was formed by the CCI against the OPs for having engaged in the acts of bid rigging or collusive bidding violating Section 3(3)(d) of the Competition Act, 2002. The CCI opined that bid rigging under Section 3(3)(d) shall be presumed to have an adverse effect on the competition irrespective of the purpose or duration of the cartel and, it is immaterial if the act culminated in a benefit being accrued from the cartelization. The CCI also held that so long as a subset of bidders is found rigging the bidding process by colluding, the onus shall shift on the OPs to rebut the presumption of having caused an AAEC. Disagreeing with the contention of the OPs that the

latter were engaged in different business activities at the time of the bidding process, and thus not amenable under section 3, the commission held that the activity for which bidding was held and in pursuance of which the alleged violation of law took place is what proves significant in determination of cartels.

13.5.1 Horizontal agreements (Section 3(3))

“Horizontal Agreement” means an agreement between enterprises, each of which operates at the same level in the production or distribution chain. Defined under Section 3(3) of the Act, horizontal agreements include agreement which : (a) Directly or indirectly determine purchase or sale prices: Fixing of prices by competitors is a horizontal agreement wherein competitors conspire to raise, decrease, fix or stabilize prices in a specific market. The prices in a competitive market should be determined freely on the basis of demand and supply and not as a result of an agreement between the competitors. An understanding between the competitors under which the competitors agree to take actions to raise, decrease, fix or stabilize prices would be anticompetitive. Such agreements are often done in secret but can be unearthed through circumstantial evidence.

Example 1:

Businessman 1: Every shop in the mall is slashing their prices.

Businessman 2: Now we have to lower our prices too.

Businessman 1: Look, we'll all end up making less if we go on like this. Why don't we talk to other owners and stop the price war? Let's fix the prices together. Then we can keep our margin.

Businessman 2: That sounds like a smart plan. Let's talk to other owner

Businessman 3: Smart Plan? If you're smart, you'll know this is against the Competition Law.

Businessman 1: Come on! No one cares about small businesses like us.

Businessman 3: That's not right! It's got nothing to do with the business size. Price fixing is wrong. I am not going to do anything illegal.

Inference: Price-fixing is serious anti-competitive conduct under the Competition Law. No business, big or small, should agree with their competitors to fix prices. Don't cheat. Compete.

(b) Limit or control output, technical development, services etc: Production control involves competitors agreeing to limit the quantity of goods or services available in the market. Competitors agreeing to specialize in certain products, ranges of products or in particular technologies could also be deemed to be anticompetitive.

Example 2:

Producer 1: None of us have really been doing well recently. We must think of something to boost the profit. I've been thinking to reduce the supply together. When there's less supply, we can raise the price. Things are only precious when they are rare.

Producer 2: Ok. You are right. Things are only precious when they are rare. You're the industry leader. We'll take our cue from you.

Producer 3: Have you considered the implication of such agreement? This is an illegal act and in contravention of the competition laws

Inference: Output restriction agreed between competitors is serious anticompetitive conduct under the Competition Law. Businesses should make independent commercial decisions and never collude with each other to restrict output.

(c) Share or divide markets: This could include competitors agreeing to allocate customers between themselves or agreeing to stay out of each other's geographic territory or customer base.

Example 3:

Businessman 1: I didn't know that operating bus services for business units was so lucrative.

Businessman 2: Smartly, We agreed among ourselves to send out quotations to different business units respectively. Now they don't really have a choice. And we will virtually monopolize the shuttle bus business. We can charge whatever we like!

Businessman 1: Even if your clients ask me for quotation, I am not going to reply.

Businessman 2: So, how are we going to share those estates this year?

Businessman 1: Same as usual, let's split the districts between us. I'll send you the list when it's done.

After a month:

Businessman 1: No wonder the bus fares are getting higher and higher. It's all because of our agreement to share the market!

Inference: Such agreement is in contravention of the law and is considered as a serious anti-competitive conduct under the Competition Law.

(d). Indulge in bid-rigging or collusive bidding:

Taking turns to win competitive tender contracts is an example of bid-rigging. This could include:

- parties agreeing to submit cover bids (high) that are intended not to be successful – where the unsuccessful bidders may get kick-backs;
- bid suppression where parties agree that only one of them will submit a bid for the contract;

- Bid rotation where the parties to the agreement take turns to win contracts. More than one of these bid-rigging practices can occur at the same time. For example, if one party to the agreement is designated to win a particular contract, the other parties could avoid winning either by not bidding ("bid suppression") or by submitting a high bid ("cover bidding"). This is an arrangement between competitors whereby one of them agrees to refrain from bidding, in exchange of acting as a sub-contractor.

Example 4:

Company XYZ: Let's invite bids. We need to procure pipes.

Employee XYZ: All the bids are in! It is so strange... They all have similar prices and they're all very high too. We have compared all the tender submissions. Only ABC Enterprises quoted the lowest price.

Company XYZ: Alright then, we'll go for ABC Enterprises!

Employee XYZ calls ABC Enterprises and informed that he had won the tender! ABC Enterprises call other bidders: It is celebration time! We won the bid. Thanks guys for jacking up your prices; we'll be making a huge profit from this contract.

Other bidders: Don't be silly! We are partners – we all win from this!

ABC Enterprises: That's right; it'll be your turn to win next time! I will not submit my bid next time. We're in this together, and we'll all make profit from this! Newspaper headlines: CCI Fined ABC Enterprises and other companies for Bid-Rigging. Directors Disqualified.

Inference: Bid rigging is a violation of the Competition Law. Businesses might appear to win by not competing with each other, but they too can become victims.

13.5.2 Vertical Agreements (Section 3(4))

Vertical Agreements are agreements between firms at different levels of the manufacturing or distribution processes. For example, an agreement between the manufacturer and a distributor is a vertical agreement. Defined by Section 3(4) of the Act, vertical agreements include:

(a) Tie-in arrangements- Tying occurs when customers buy a product they want (the tying product) but are required (forced) to buy a product (the tied product) from a different market that they may not want. Tying would be anti-competitive as it would restrict access to the tied product market by competitors. Bundling could be distinguished from tying, as bundling would normally involve products from the same market which consumers generally would buy together. For example, a car which is sold (bundled) together with tyres.

Example 5:

Hospital XYZ: Our new contract negotiation with ABC Enterprises is under way. But they request for an additional clause specifying that if we want to buy the medical device that only ABC Enterprises makes, we must buy other medical supplies including medical masks, gloves, syringes etc. as well.

Employee XYZ: But our current suppliers of these equipment offer lower prices and better quality. There's no reason for us to switch to ABC Enterprises.

Hospital XYZ: But if we do not agree, ABC Enterprises will not sell us their medical device and we can't provide proper care without this device. That leaves us no choice at all.

Employee XYZ: Calm down. This tying clause might contravene the Competition Law. ABC Enterprises cannot make such request.

Inference: Tie-in agreement is anti-competitive as per Section 3 (4) of the Competition Act and thereby punishable with penalty under Section 27.

(b) Exclusive distribution agreements- In an exclusive distribution agreement, the supplier agrees to sell his products only to one distributor for resale in a particular territory. At the same time, the distributor is usually limited in his active selling into other exclusively allocated territories.

Example 6: Enterprise X is a producer of laptops who distributes throughout India through its distributors. However, it gives only one distributorship for East, West, North and South India and it does not allow distributors to sell in each other's territory. Such an arrangement by enterprise X will prevent competition among distributors.

Inference: Exclusive distribution agreement is considered to impinge on competition.

(c) Refusal to deal- It means restricting by any method any person/classes of persons to whom goods are sold. Businesses have the right to use their discretion in choosing whom to do business with. However, if this choice is made through a conspiracy with another competitor, business, or individual, they will likely be in contravention of the law. A Refusal to deal is a violation of competition law because it harms the boycotted business by cutting them off from a facility, product supply, or market. By harming the boycotted business in this way, the competing businesses controls or monopolizes the market by unreasonably restricting competition.

Example 7: Enterprise A is an enterprise in the market for lead used to make pencils. Enterprise B is a major manufacturer of pencil in the market but its production is dependent on supply of lead by enterprise A. Enterprise A suddenly refuses to supply lead to B because a new company, C has entered the pencil market in direct competition to B and though A can supply to both B and C, A refuses to deal with B on entry of C in market. In such situation B can approach the Commission with information filed under Section 3 (4).

Inference: Refusal to deal is Anti-competitive.

(d) Resale price maintenance- It means selling goods with condition on resale at stipulated prices. It generally occurs when an upstream seller (Producer) imposes

a fixed or a minimum price that a downstream buyer (Distributor or Retailer) must resell. For example, a manufacturer sets the price for which its products are sold at the retail level. The result is that resellers (e.g. retailers) do not compete on price. This is considered to be anti-competitive.

Example 8:

Producer: What brings you here? Is there any problem with my products?

Chain Store Owner: It's not about your products. I'm just not happy with the small competitors! If I sell something for Rs.500 in my chain stores, smaller retailers sell the same for Rs.400, then my customers all ask me for discount.

Producer: Why don't you fix a resale price for each product and make sure that all the retailers will sell your products at your fixed prices. So everyone can make a profit, the customers don't have to shop around and we don't have to get into a price war.

Chain Store Owner: My business is built on reputation and integrity. I won't play dirty tricks to get business.

Inference: Resale price maintenance may restrict competition by preventing businesses setting their prices independently

13.6. Prohibition of Abuse of Dominance (Section 4)

The Act prohibits a dominant player from abusing its market power by either restricting competition or by imposing unfair terms and conditions on its customers. Company has a dominant position if it enjoys a position of economic strength (and market power) to behave independently of its competitors, customers, and consumers to an appreciable extent. In other words, dominant position is a position of strength enjoyed by a firm which enables it to behave/act independently of the market forces i.e. in the determination of price of the product. Dominant position in itself is not illegal. However, abuse of dominance is. Dominant companies have a special responsibility to behave responsibly. They have to comply with special rules that are designed to protect competitors,

customers and market structure from abusive behavior. Abuse of dominance is violation of section 4 of the Competition Act.

The Act specifies a number of factors such as market share, size and resources of the firm, market structure etc. that should be taken into account while determining whether an enterprise is dominant or not. For example: very large market shares, maintained stable for a long time can be considered as evidence for the existence of a dominant position in the relevant market. Relevant market is defined on the basis of geographical and product market. Relevant geographic market is a geographical territory in which competition conditions in a relevant market of a product are sufficiently the same for all participants in such market and therefore this territory can be separated from other territories. The relevant geographic market is affected by factors like consumption and shipment patterns, transportation costs, perish ability and existence of barriers to the shipment of products between adjoining geographic areas. For example, in view of the high transportation costs in cement, the relevant geographical market may be the region close to the manufacturing facility. Relevant product market is defined in terms of substitutability. It comprises of all those products and/or services which are regarded as interchangeable or substitutable by the consumer by reason of the products' characteristics, their prices and their intended use. The market for cars, for example, may consist of separate 'relevant product markets' for small cars, mid-size cars, luxury cars etc. as these are not substitutable for each other on a small change in price. The Commission while determining the “relevant geographic market”, gives due regard to all or any of the following factors, namely:- regulatory trade barriers; local specification requirements; national procurement policies; adequate distribution facilities; transport costs; language; consumer preferences; need for secure or regular supplies or rapid after-sales service. In case of “relevant product market”, the Commission gives due regard to all or any of the following factors, namely:- physical characteristics or end-use of goods; price of goods or service; consumer preferences; exclusion of in-house production; existence of specialized producers; classification of industrial products. The Act applies only to abuse by the dominant firms because the presumption is that a small firm will lose its customers to its competitors if it charges excessive prices. Customers might have nowhere to turn if a dominant firm charges an excessive price. The abuse of dominant position is broadly

classified into exploitative and exclusionary practices. The following are examples of abuse under each of the practices:

13.7. Regulation of combinations : Mergers And Combinations, Combination Regulation (Section 5 & 6)

Combinations mean mergers, amalgamations of companies or acquisitions of control, shares, voting rights or assets of one company by another company or group. Good combinations lead to a more efficient business which passes on some of those efficiency savings to its customers. On the other hand, bad mergers lead to a situation where one or more businesses have the power to raise their prices to their customers. That is, they substantially lessen competition.

13.7.1. Ex-ante regulation of Combinations:

Combination review is based on age-old dictum, 'Prevention is better than cure' and therefore ex-ante in nature. Rationale for Ex-ante regulation of Combinations (Mergers & Acquisitions):

- Combinations should not be permitted to create, enhance, or entrench market power or to facilitate its exercise
- Combinations enhances market power if it is likely to encourage one or more firms to raise price, reduce output, diminish innovation, or otherwise harm consumers as a result of diminished competitive constraints or incentives
- Unilateral effects - Firms can enhance market power simply because of elimination of competition through merger or acquisition.
- Coordinated effects - merger can also result in increased risk of joint dominance through coordinated, accommodating, or concerted behavior among remaining market players in relevant market
- Post-combination, unscrambling a merger may also involve high socioeconomic costs.
- Regulation of combination provides legal certainty to business, had the combining enterprises taken clearance after filing notification

The Act provides for mandatory filing of notice with CCI regarding the combination based on asset/turnover. The failure to notify and obtain required approval attracts penalties (up to 1% of total turnover or the assets, whichever is higher) under Section 43A of the Act. The Commission also has the power to take suo-moto action by calling for notice from parties to the mergers, which do not comply with the mandatory filing requirements. The transaction would be rendered void, if the CCI subsequently determines that the combination has an 'appreciable adverse effect on competition in India'. Provisions of 'Regulation of Combinations' in the Act intend to ensure that the firms do not acquire such a degree of market power in the market so as to harm the interest of consumers, the economy and society as a whole. to harm the interest of consumers, the economy and society as a whole.

Example 14: Suppose there are four firms in a market having the following market shares:

Table 1

FIRM NAME	MARKETSHARE (%)
A	50
B	40
C	5
D	5

If a firm 'A' merges with firm 'B' then such post-merger entity A+B will capture almost the whole market thereby impinging on the competition in the market. Such market power may incentivize the businesses in exploiting the consumers. The Competition Commission's role is to screen mergers for potential anti-competitive effects. The Commission decides whether the combination should be approved, prohibited or approved with modifications to the combination. The modifications are made on the basis of how the anti-competitive effects could be alleviated. In competition parlance such modifications are termed as 'Remedies'. Remedies can either be: a) Structural; or b) Behavioral.

13.7.2. Thresholds for Combinations

Current thresholds as enhanced vide Govt. Notification dated 4th March 2016 for the purpose of Section 5 of the Act is as follows:

Criteria	Assets	Turnover	
Only within India	No Group	>Rs. 2,000 cr	>Rs. 6,000 cr
	Group	>Rs. 8,000 cr	>Rs 24,000 cr
Within and Outside India	No Group	>US \$ 1 billion (with at least Rs.1,000cr in India)	>US \$ 3 billion (with at least Rs.3,000cr in India)
	Group	>US\$ 12 billion (with at least Rs.3,000cr in India)	>US \$ 4 billion (with at least Rs.1,000cr in India)

13.7.3 Relevant Market

Under the framework of the Competition Act, identifying the relevant market holds critical importance. In cases involving alleged abuse of dominance, an enterprise can only be deemed dominant if it possesses a position of strength within this defined market. This identification is equally crucial when assessing mergers or combinations, as the Competition Commission of India (CCI) must ensure that such mergers do not cause a significant adverse effect on competition.

In the case of *Competition Commission of India v. Coordination Committee of Artists and Technicians of West Bengal Film and Television Industry*, the Supreme Court clarified that defining the relevant market is not a prerequisite for proceedings under Section 3 of the Act. This is because agreements between market participants under this section are presumed to have an appreciable adverse effect on competition (AAEC).

The CCI may determine the relevant market in terms of either the **relevant product market**, the **relevant geographic market**, or both. The relevant product market refers to a market comprising products or services that consumers consider interchangeable or substitutable, based on factors like their characteristics, price, or intended use.

For example, in the *In Re Matrimony.com and Google* case, Google was accused of abusing its dominant position by favoring its own services in search results. The CCI defined the relevant market as the market for online web search services in India and the market for online search advertising in India. The distinction was made by separating online advertising from offline advertising, as the two were found not to be substitutable.

The relevant geographic market, on the other hand, refers to a region where competitive conditions for supplying goods or services are sufficiently uniform and can be distinguished from surrounding areas. In *Re Harshita Chawla and Others*, it was found that the functionality of OTT messaging applications was consistent across India. Hence, the CCI determined that the entire country constituted the relevant geographic market.

13.8. Competition Advocacy under the Competition Law

Sec.49. [(1) The Central Government may, in formulating a policy on competition (including review of laws related to competition) or any other matter, and a State Government may, in formulating a policy on competition or on any other matter, as the case may be, make a reference to the Commission for its opinion on possible effect of such policy on competition and on the receipt of such a reference, the Commission shall, within sixty days of making such reference, give its opinion to the Central Government, or the State Government, as the case may be, which may thereafter take further action as it deems fit.]

(2) The opinion given by the Commission under sub-section (1) shall not be binding upon the Central Government [or the State Government, as the case may be] in formulating such policy.(3) The Commission shall take suitable measures for the promotion of competition advocacy, creating awareness and imparting training about competition issues.

Explanation:

Competition advocacy refers to activities aimed at promoting a culture of competition across sectors of the economy, beyond enforcement of the law. It plays a vital role in ensuring that competition principles are considered in policymaking, regulation, and administrative action. Under the **Competition Act, 2002**, **competition advocacy** is formally recognized as a core function of the **Competition Commission of India (CCI)**.

13.8.1. Statutory Basis

Section **49** of the Competition Act, 2002 provides for **competition advocacy**. According to this provision:

“The Central Government may, in formulating a policy on competition (including review of laws affecting competition), seek the opinion of the Commission, and the Commission shall give its opinion to the Central Government.”

Additionally, the CCI may **take measures for the promotion of competition awareness** and can **disseminate information on the benefits of competition** to stakeholders including consumers, businesses, government departments, and regulatory bodies.

13.8.2. Objectives of Competition Advocacy

1. **Promote Competitive Markets:** Encourage pro-competitive policies in legislation and economic planning.
2. **Enhance Awareness:** Educate stakeholders—including policymakers, industry players, and the public—on the value and principles of competition.
3. **Influence Policy and Regulation:** Prevent policy decisions that may unintentionally restrict market competition.
4. **Capacity Building:** Strengthen institutional understanding and compliance through workshops, publications, seminars, and training programs.

13.8.3. Key Activities of the CCI in Advocacy

- **Issuing Opinions** to government on request regarding policies, regulations, or bills that may impact competition.
- **Publishing studies and market assessments** on specific sectors to inform and guide policy decisions.
- **Engagement with stakeholders**, including government departments, trade associations, chambers of commerce, and academia.
- **Educational initiatives** like moot court competitions, essay contests, and training programs aimed at law students and professionals.
- **Collaborations with international organizations**, such as UNCTAD, OECD, and ICN, to align advocacy with global best practices.

13.8.4. Importance of Competition Advocacy

While enforcement ensures compliance with competition law, **advocacy prevents anti-competitive outcomes at the source**—during the formulation of policies, laws, and regulations. It is especially important in:

- **Heavily regulated sectors** (e.g., telecom, energy, transport)
- **Digital and emerging markets**, where policy often lags behind innovation
- **Developing economies**, where awareness of competition law is still evolving

13.9. Enforcement of Competition Law

The Competition Act establishes a **multi-level enforcement structure**. In accordance with its provisions, inquiries into alleged violations of Section 3(1) or Section 4(1) may be initiated **suo motu**, on the basis of information received, or through a reference submitted by the Central Government, State Governments, or any statutory authority. Notably, **no locus standi requirement** is imposed by the statute. Upon receiving such information, the Competition Commission of India (CCI) is obligated to determine whether a **prima facie** case exists. If so, it may

issue directions to the **Director General** (DG) under Section 26(1) for the commencement of an investigation.

13.9.1. Director General

The Director General, who is tasked with assisting the Commission, conducts investigations into alleged violations of the Act or related rules and regulations. For this purpose, the DG is vested with powers equivalent to those conferred on the Commission. When the Commission is satisfied that a **prima facie** case exists, the DG is directed to carry out an investigation.

In the case of *Excel Crop Care Ltd. v. Competition Commission of India & Another*, the Supreme Court clarified the scope of such investigations, stating that all relevant facts and evidence must be examined to assess anti-competitive conduct. It was further held that while the inquiry may begin with the complaint's allegations, any new facts discovered during the investigation may be included in the DG's report.

13.9.2. Competition Commission of India (CCI)

Upon completion of the investigation, the DG submits a report of findings to the CCI. Based on this report, the Commission may either close the case if no contravention is found or may order further investigation if necessary. As the statutory authority responsible for fostering and maintaining market competition, the CCI is also empowered to issue interim orders during inquiries to prevent acts likely to have an appreciable adverse effect on competition or which may involve abuse of dominance.

Additionally, the Commission holds the authority to impose penalties for non-compliance with its directions or those of the DG. It may also penalize parties for failing to furnish adequate information regarding combinations when required. Sanctions may be applied for omissions, intentional misrepresentations, or false statements made before the Commission.

In cases involving cartels, a **lesser penalty** may be imposed on a member who provides **full and truthful disclosure** of the violation. However, this benefit is

unavailable if the disclosure is made after the DG's report has been submitted to the Commission.

The CCI also plays an **advisory role to the Government** in matters concerning competition policy formulation.

13.9.3. Appellate Authorities

Appeals from the CCI's decisions are heard by the **National Company Law Appellate Tribunal (NCLAT)**, which has been designated as the appellate forum for this purpose. The NCLAT is empowered to hear and dispose of appeals against any order, direction, or decision of the Commission. Furthermore, the Tribunal may adjudicate compensation claims arising from the Commission's findings and can issue orders for the recovery of such compensation.

After hearing the involved parties, the Appellate Tribunal may issue orders affirming, modifying, or setting aside the CCI's decision. While the Tribunal is not bound by the Code of Civil Procedure, 1908, it is required to adhere to the principles of natural justice. It also possesses all the powers of a civil court necessary for the performance of its functions.

Decisions of the NCLAT may be appealed before the **Supreme Court**, with such appeals needing to be filed within **sixty days** from the date on which the Tribunal's decision or order is communicated.

13.10. Summary of Competition Law (India)

The **Competition Act, 2002** was enacted with the objective of preventing practices having an adverse effect on competition, promoting and sustaining fair competition in markets, protecting the interests of consumers, and ensuring freedom of trade carried on by other participants in the Indian markets.

The Act is primarily structured around three substantive areas:

13.10.1. Anti-Competitive Agreements (Section 3):

The Act prohibits agreements between enterprises or associations which cause or are likely to cause an **appreciable adverse effect on competition (AAEC)** within India. This includes **cartelization, bid rigging, and exclusive supply or distribution arrangements**. A presumption of AAEC applies to horizontal agreements among competitors.

1. **Abuse of Dominant Position (Section 4):**The Act proscribes the **abuse of dominant position** by any enterprise or group. Abuse includes actions such as **imposing unfair or discriminatory conditions, limiting or restricting production or technical development, and denial of market access**, which may distort market structure or harm consumer interests.
2. **Regulation of Combinations (Sections 5 & 6):**The Act mandates prior notification to the **Competition Commission of India (CCI)** in respect of mergers, acquisitions, and amalgamations that meet specified thresholds. The objective is to ensure that such combinations do not result in or are not likely to cause an AAEC within the relevant market in India.

13.10.2. Enforcement and Adjudication Mechanism

The **Competition Commission of India (CCI)** is the statutory authority empowered to enforce the provisions of the Act. The CCI is vested with powers to conduct inquiries either **suo motu**, on **receipt of information**, or upon **reference from government authorities**. Upon the establishment of a **prima facie** case, the CCI may direct the **Director General (DG)** to undertake an investigation.

Following the DG's report, the CCI may pass appropriate orders including **cease and desist directions, imposition of monetary penalties, or structural remedies** in the case of anti-competitive conduct or abuse of dominance. The CCI may also issue **interim orders** to prevent ongoing violations.

A **lesser penalty** regime exists under the Act for cartel participants who make **full and true disclosures**, subject to specified conditions.

Appeals from the orders of the CCI lie with the **National Company Law Appellate Tribunal (NCLAT)**, and further appeals may be preferred to the **Supreme Court of India**.

13.10.3. Advisory Role

The CCI also serves an advisory role to the Central Government on issues concerning the promotion and sustenance of competition, including suggestions for the framing of **national competition policy**.

13.11. Penalty under the Competition Act, 2002

Under the **Competition Act, 2002** in India, several penalties can be imposed for violations related to anti-competitive agreements, abuse of dominant position, and combinations (mergers and acquisitions) that adversely affect competition. The **Competition Commission of India (CCI)** is the authority responsible for enforcing the law and levying penalties.

13.11.1. Anti-Competitive Agreements (Section 3)

- **Horizontal agreements** (e.g., cartels) and **vertical restraints** (e.g., resale price maintenance) are prohibited if they cause or are likely to cause an appreciable adverse effect on competition (AAEC).
- **Penalty:**
 - **Up to 10% of the average turnover** for the last three preceding financial years for each enterprise/individual involved.
 - **Cartels:** The CCI may impose a **penalty of up to three times the profit** for each year of the agreement or **10% of turnover**, whichever is higher.

13.11.2. Abuse of Dominant Position (Section 4)

- A dominant enterprise is prohibited from abusing its position, such as by imposing unfair prices or discriminatory conditions.
- **Penalty:**
 - **Up to 10% of the average turnover** for the last three financial years.

13.11.3. Combinations (Mergers and Acquisitions) (Section 5 and 6)

- If a combination causes or is likely to cause an appreciable adverse effect on competition and is not approved by the CCI:
 - **Penalty:**
 - **Up to 1% of the total turnover or assets**, whichever is higher, of the combination.

13.11.4. Failure to Comply with CCI Orders (Section 42)

- Non-compliance with CCI's directions or orders:
 - **Penalty:**
 - **Up to ₹1 lakh per day** of non-compliance, subject to a maximum of ₹10 crore.
 - In case of continued failure:
 - **Imprisonment up to 3 years**, or
 - **Fine up to ₹25 crore**, or both (only by order of the Chief Metropolitan Magistrate, Delhi).

13.11.5. Making False Statements or Omitting Material Facts (Section 44)

- Furnishing false information or omitting material facts during an inquiry:
 - **Penalty:**
 - **Up to ₹1 crore.**

13.11.6. Lesser Penalty for Leniency (Section 46)

- Members of a cartel can get a **reduction in penalty** if they disclose vital information and cooperate fully with the CCI.

❖ Exercise

Q.1 Multiple choice question:

1.CCI consists of a appointed by the Central Government:

- | | |
|--------------------------------|-----------------------------|
| a. Chairperson and six Members | b.Director and 6 Members |
| c.Director and 4 Members | d.Chairperson and 4 Members |

Answer: A

2.....is not a type of Agreement under Competition Act, 2002

- a.Horizontal Agreement b.Hybrid Agreement
- c.Vertical Agreement d.None of the above

Answer: D

3,.....has power to exempt enterprise, practice or agreement from application of Competition Act, 2002.

- a.Competition Commission b.Appellate Tribunal
- c.Central Government d.State Government

Answer: C

4. What as per the Competitive Act 2002 refers to the sales of goods or provision of services, at a price which is below the cost to eliminate the competitors?

- a.MRP b.Predatory price c.Preparatory price d.GST price

Answer: B

5..... is a horizontal agreement:

- a.Tie in arrangements b.Resale Price Maintenance
- c.Cartel d.Exclusive Distribution

Answer: C

6. The Monopolies and Restrictive Trade Practices Act, 1969 ("the MRTP Act") stands repealed and is replaced by the Competition Act, 2002, with effect from:

- a. September 1, 2008.
- b. September 1, 2003.
- c. September 1, 2009.
- d. September 1, 2002

Answer: C

7. Which of the following is not the duty of Competition Commission:

- a. to protect the interests of investors;
- b. to ensure freedom of trade carried on by other participants in markets in India and -for matters connected therewith or incidental thereto;
- c. to prevent practices having adverse effect on competition;
- d. to promote and sustain competition in markets;

Answer: A

8. What is the minimum number of member to be appointed by central government in CCI, as per the Competition Act, 2002?

- a. 2
- b. 3
- c. 4
- d. 1

Answer: A

9. CCI shall not initiate an inquiry into a combination after the expiry of year from the date on which the combination has taken effect:

- a. 5 year
- b. None
- c. 1 Year
- d. 3 Year

Answer: C

10. Anti competitive agreements are:

- a. voidable
- b. Void
- c. valid
- d. none of the above

Answer: B

Q-2 Answer the following questions in detail:

1. What are the different kinds of horizontal and vertical agreements? Discuss with relevant examples.
2. What is meant by abuse of dominance? Mention the three important steps required in every abuse of dominance investigation.
3. How are mergers and combinations regulated under the Competition Act, 2002?
4. What do you understand by the term “Green Channel” under the Competition Act, 2002?
5. Write a brief note on the powers and functions of the Competition Commission of India (CCI) under the Competition Act, 2002.

14.1 Introduction**14.2 Key Definitions under FEMA****14.3 Regulatory Framework under FEMA****14.4 Types of Transactions under FEMA****14.5 Authorized Persons under FEMA****14.6 Foreign Investment Regulations****14.7 Penalties and Enforcement****14.8 Appeals and Appellate Tribunal****❖ Exercise**

14.1. Introduction

The Foreign Exchange Management Act (FEMA), 1999 represents a significant milestone in India's journey toward a liberalized and globally integrated economy. It came into force on June 1, 2000, replacing the earlier Foreign Exchange Regulation Act (FERA) of 1973. The transition from FERA to FEMA was not merely a change in legal terminology but a shift in the country's overall approach to foreign exchange governance—from strict control and regulation to facilitation and management. The backdrop to this change was India's economic crisis of 1991, which forced the nation to open its doors to global trade, foreign investment, and market-oriented reforms. As part of this liberalization process, a modern, transparent, and investment-friendly foreign exchange law was needed to replace the outdated and often criticized FERA, which had become a symbol of the restrictive and bureaucratic regime of the past.

FEMA was enacted to align India's foreign exchange laws with its new economic reality, where increased foreign trade, cross-border investments, and international financial collaboration were not only desirable but essential. Unlike FERA, which treated foreign exchange violations as criminal offences and presumed

guilt, FEMA adopts a civil approach and emphasizes voluntary compliance. It facilitates external trade and payments and promotes the orderly development and maintenance of the foreign exchange market in India. The law distinguishes between capital account and current account transactions and provides a regulatory framework through which both types of activities can be conducted legally, subject to reasonable restrictions imposed by the Reserve Bank of India (RBI) and the Central Government.

The primary objective of FEMA is to foster an environment of ease in doing business and participating in the global economy, while at the same time ensuring that India's financial system remains stable and secure. It empowers the RBI to regulate foreign exchange dealings through rules, directions, and notifications. FEMA also provides for the appointment of Authorized Persons, such as banks and money changers, to conduct forex transactions on behalf of individuals and corporations, thereby decentralizing operations but under strict compliance norms. Furthermore, FEMA ensures that all inflows and outflows of foreign currency are traceable, monitored, and reported, contributing to transparency and reducing the risk of money laundering and illicit financial flows.

In the global context, FEMA reflects India's commitment to international agreements and economic cooperation. It plays a vital role in managing balance of payments, foreign exchange reserves, and the stability of the rupee. It also aligns domestic laws with the norms of institutions like the International Monetary Fund (IMF), where India has obligations as a member state. In this way, FEMA is not only a domestic legislation but also an instrument of global financial diplomacy.

In essence, FEMA marks India's transformation from a closed, inward-looking economy to one that is confident, competitive, and outward-oriented. It upholds the principle that economic liberalization must be matched with regulatory prudence. For students of business and commerce, understanding FEMA is crucial as it governs key aspects of international trade, foreign investments, corporate strategies, and financial markets. It bridges the gap between national interest and global participation, thereby making it a cornerstone of India's modern economic architecture.

Need for FEMA:

- India moved from a tightly controlled economy to a liberalized one after 1991.
- FERA was restrictive and criminalized even minor violations.
- There was a need for a simpler, investor-friendly law that aligned with global economic trends.
- FEMA was introduced to **facilitate external trade and payments** and **promote orderly development of the foreign exchange market in India**.

Comparison between FERA and FEMA

Feature	FERA	FEMA
Year of Enactment	1973	1999
Nature	Regulatory and criminal	Management and civil
Focus	Control of foreign exchange	Management and facilitation of foreign exchange
Presumption	Guilty unless proven innocent	Innocent unless proven guilty
Punishment	Criminal prosecution with imprisonment	Civil penalties and monetary fines
Approach	Restrictive	Liberal and supportive of trade

Table No.1 showing the difference between FERA and FEMA

FERA was a product of a **closed economy**, while FEMA reflects the **open-market economy** India embraced post-1991.

Objectives and Scope of FEMA

Objectives:

1. To facilitate external trade and payments.
2. To promote the orderly development and maintenance of the foreign exchange market in India.
3. To regulate dealings in foreign exchange and foreign securities.

4. To simplify procedures and regulations for foreign transactions.
5. To ensure balance-of-payments stability.

Scope:

- Applies to all branches, offices, and agencies outside India owned or controlled by Indian residents.
- Covers all transactions involving foreign exchange, foreign security, and payments from outside India to India and vice versa.
- Regulates transactions related to import/export, foreign investments, remittances, travel, education abroad, and more.

14.2. Key Definitions under FEMA

Understanding key definitions under FEMA is essential for interpreting its provisions and applying them correctly in business and financial contexts. These terms are defined under **Section 2** of the **Foreign Exchange Management Act, 1999**.

i. Foreign Exchange

According to Section 2(n) of FEMA:

Foreign Exchange means:

- Foreign currency (like dollars, euros, etc.)
- Deposits, credits, or balances payable in foreign currency
- Drafts, traveller's cheques, letters of credit, and bills of exchange drawn in Indian or foreign currency but payable in foreign currency

Example: If an Indian exporter receives payment in U.S. dollars, that is foreign exchange.

ii. Authorized Person

As per Section 2(c) of FEMA:

An **Authorized Person** is any individual or entity that is authorized by the **Reserve Bank of India (RBI)** to deal in foreign exchange.

This includes:

- Authorized dealers (banks)
- Money changers
- Off-shore banking units
- Any other person authorized by RBI

These persons are allowed to buy or sell foreign currency on behalf of customers.

iii. Person Resident in India

Section 2(v) defines a **Person Resident in India** as:

A person who has **resided in India for more than 182 days during the preceding financial year**, except:

- Those who have gone abroad for employment, business, or any purpose indicating intention to stay outside India for an uncertain period

It includes:

- Indian citizens staying in India
- Companies or firms registered in India
- Offices, branches, or agencies in India owned by non-residents

14.3 Regulatory Framework under FEMA

The **Foreign Exchange Management Act (FEMA), 1999** provides a **structured regulatory framework** to manage foreign exchange in India. The effective functioning of any financial system requires a clear legal and institutional framework to ensure accountability, transparency, and compliance. The Foreign Exchange Management Act (FEMA), enacted in 1999, lays the foundation for India's foreign exchange operations to be conducted within such a disciplined environment. At the heart of FEMA lies a regulatory structure that facilitates foreign trade and payments while ensuring that transactions involving foreign exchange are carried out in accordance with national priorities. This framework is designed not merely to control but to manage foreign exchange flows, protect economic stability, and support India's integration with the global economy.

One of the fundamental features of FEMA's regulatory approach is its shift from a command-and-control model to a system based on regulation, facilitation, and trust. It recognizes the need to support businesses and individuals engaging in legitimate cross-border activities while ensuring that such activities do not harm the country's economic interests. To achieve this, FEMA empowers various institutions to oversee and monitor foreign exchange dealings, each with a specific role in guiding the flow of capital, ensuring legal compliance, and taking corrective measures when necessary.

Central to the regulatory process is the emphasis on rule-based governance. FEMA operates through a well-established set of notifications, circulars, and directions issued from time to time. These regulatory instruments cover areas such as capital account transactions, current account dealings, overseas investments, repatriation of income, and foreign currency accounts. Their implementation requires not only legal clarity but also institutional coordination across multiple levels. Institutions involved in FEMA's framework are expected to perform regulatory functions while simultaneously encouraging transparency and investor confidence in India's financial system.

In situations of non-compliance, FEMA has laid down specific mechanisms for scrutiny and enforcement. These include inquiries into transactions that appear to breach the law, provisions for adjudication, and the ability to take corrective or penal action where required. However, rather than creating an atmosphere of fear or punishment, FEMA focuses on promoting voluntary compliance and correction of errors through compounding and self-reporting processes. This balanced approach is intended to maintain the integrity of the financial system without hampering the ease of doing business.

Over the years, the regulatory framework under FEMA has evolved in response to the changing dynamics of international finance, trade agreements, and domestic economic reforms. It has expanded to accommodate new forms of digital payments, fintech platforms, and emerging foreign investment models while staying rooted in principles of accountability and national interest. The framework not only governs transactions but also acts as a guide to policy direction in matters of foreign exchange, influencing India's external economic strategies.

In conclusion, the regulatory framework under FEMA is an essential component of India's economic governance. It ensures that foreign exchange operations are orderly, lawful, and aligned with the broader objective of financial stability. Through a coordinated system of regulation, monitoring, and enforcement, FEMA fosters a trustworthy environment where businesses and individuals can participate in global economic activity while adhering to the principles of national financial integrity.

It assigns specific powers and responsibilities to key institutions like the **Reserve Bank of India (RBI)**, the **Central Government**, and the **Enforcement Directorate (ED)**.

Role of Reserve Bank of India (RBI)

The **RBI** is the **main regulatory authority** under FEMA.

Key Roles:

1. **Regulation and Control:** RBI regulates foreign exchange transactions, both capital and current account.
2. **Granting Permission:** It grants permissions to **Authorized Persons** (like banks and money changers) to deal in foreign exchange.
3. **Framing Regulations:** It issues **notifications, circulars, and guidelines** regarding transactions involving foreign currency.
4. **Monitoring Transactions:** RBI monitors remittances, foreign investments, and import-export payments.
5. **Reporting and Compliance:** Individuals and companies must report certain foreign exchange transactions to RBI (like FDI, ECBs, etc.).

Example: RBI sets the limit for how much Indian residents can send abroad under the **Liberalised Remittance Scheme (LRS)*.

Role of Central Government

The **Central Government**, particularly the **Ministry of Finance**, plays a supervisory and policy-making role under FEMA.

Key Roles:

1. **Making Rules:** It has the power to make rules to carry out the provisions of FEMA.
2. **Regulating Transactions:** It may regulate or prohibit certain classes of foreign exchange transactions, especially in the **public interest**.
3. **Delegating Powers to RBI:** The Central Government delegates powers to the RBI to implement foreign exchange policies.
4. **Policy Decisions:** It formulates foreign investment policies (like FDI policy), in consultation with other ministries and departments.

Example: The Central Government decides which sectors are open to foreign investment and what the FDI limits are.

Powers of Enforcement Directorate (ED)

The **Enforcement Directorate (ED)** is the agency responsible for **enforcing FEMA provisions** and taking action in case of violations.

Key Powers:

1. **Investigation:** ED investigates cases of foreign exchange violations like illegal remittances, hawala transactions, or unauthorized foreign investments.
2. **Adjudication:** It conducts inquiry proceedings to determine whether FEMA has been violated.
3. **Imposing Penalties:** ED can impose monetary penalties and seize assets involved in the violation.
4. **Summoning Individuals:** It has the power to summon individuals and demand documents for investigation.

Example: If a company illegally sends money abroad without RBI approval, ED can investigate and penalize them under FEMA.

14.4 Types of Transactions under FEMA

Under the Foreign Exchange Management Act (FEMA), 1999, all foreign exchange transactions are broadly classified into two categories: Capital Account Transactions and Current Account Transactions. This classification is crucial for understanding how cross-border movements of funds are regulated in India. FEMA was enacted with the objective of facilitating external trade and payments while ensuring the orderly development and maintenance of the foreign exchange market in India. To achieve this, it sets out clear rules regarding what types of foreign exchange transactions are permitted, restricted, or prohibited.

- **Capital Account Transactions**
- **Current Account Transactions**

Capital Account Transactions are those that result in a change in the assets or liabilities, including contingent liabilities, of a person resident in India or a person resident outside India. These transactions generally involve the inflow or outflow of capital and investment, such as purchasing or selling foreign assets, acquiring immovable property abroad, making foreign direct investments (FDI), or borrowing and lending in foreign currency. Because such transactions can affect the financial stability of the country, they are more tightly regulated by the Reserve Bank of India (RBI). Some capital account transactions are permitted freely, but most require prior approval from the RBI or are subject to sectoral caps and guidelines issued from time to time. For example, an Indian company investing abroad or an Indian citizen purchasing property in the USA would be engaging in capital account transactions, and these may require specific permissions and adherence to prescribed limits.

Current Account Transactions, on the other hand, are those that do not alter the assets or liabilities of a person but relate to day-to-day business or personal requirements. These include payments for imports and exports of goods and services, remittances for education, medical expenses, travel, and maintenance of close relatives abroad. Under FEMA, most current account transactions are freely permitted, reflecting India's liberalized approach toward global trade and personal foreign transactions. However, the Central Government has the power to impose reasonable restrictions in public interest, and certain transactions are

either prohibited or require prior approval. For example, sending money abroad for gambling or lottery is prohibited, while sending money for foreign education is allowed within prescribed limits under the Liberalised Remittance Scheme (LRS).

The distinction between capital and current account transactions ensures a balanced approach to liberalization and control. It helps the RBI and the Central Government manage India's foreign exchange reserves effectively while also enabling individuals and businesses to engage in international transactions with clarity and legal backing. Understanding these two types of transactions is essential for compliance and strategic financial planning in the globalized economic environment.

14.5 Authorized Persons under FEMA

Under the Foreign Exchange Management Act (FEMA), 1999, the term “Authorized Person” plays a significant role in the regulation and facilitation of foreign exchange transactions in India. As per Section 2(c) of FEMA, an Authorized Person is any individual or institution that has been authorized by the Reserve Bank of India (RBI) to deal in foreign exchange or foreign securities. The main objective of appointing such persons is to ensure that foreign exchange operations are carried out within a regulated and monitored framework while simplifying procedures for individuals and businesses engaging in international financial activities.

Authorized Persons are categorized into different types, including Authorized Dealers (ADs), Full-Fledged Money Changers (FFMCs), Offshore Banking Units, and any other persons as may be authorized by the RBI. Among these, Authorized Dealers—typically scheduled commercial banks—are the most prominent and deal in various foreign exchange transactions like inward and outward remittances, foreign currency accounts, export and import payments, and other capital or current account transactions. Full-Fledged Money Changers are entities that are authorized to buy and sell foreign currency notes, travellers' cheques, and other instruments. These entities act as a bridge between the public and the broader foreign exchange market.

Authorized Persons have specific powers and obligations under FEMA. They are empowered to deal in foreign exchange transactions as permitted by the RBI,

subject to conditions and limits prescribed from time to time. However, this power comes with strict responsibilities. They must verify the genuineness of transactions, maintain detailed records, report all transactions to the RBI regularly, and ensure that all foreign exchange dealings comply with FEMA rules and related RBI notifications. Failure to follow the prescribed procedures can lead to penalties and cancellation of their authorization.

Compliance with RBI directions is a legal obligation for Authorized Persons. They are required to follow the RBI's guidelines, circulars, and notifications meticulously. This includes Know Your Customer (KYC) norms, reporting obligations under the Anti-Money Laundering Act, and limits for various remittances. In cases of suspicious or illegal transactions, Authorized Persons must immediately report to the appropriate regulatory authorities. Their role is not merely operational but also regulatory in nature, ensuring the integrity of the foreign exchange system in India.

In conclusion, Authorized Persons under FEMA serve as the operational arms of the RBI for managing and regulating foreign exchange transactions. They ensure that India's foreign exchange market functions smoothly, transparently, and in accordance with national economic objectives. Their role is central to maintaining the balance between promoting international trade and safeguarding national financial security.

14.6 Foreign Investment Regulations

Foreign investment plays a vital role in the economic growth of a country, and in India, the regulation of such investments is governed by the Foreign Exchange Management Act (FEMA), 1999. FEMA provides a legal framework for managing foreign exchange transactions and controlling the inflow and outflow of foreign investments. The Reserve Bank of India (RBI), along with the Central Government, regulates different types of foreign investments to ensure that they align with the country's economic and strategic interests. The major forms of foreign investments regulated under FEMA include Foreign Direct Investment (FDI), Foreign Portfolio Investment (FPI), and Overseas Direct Investment (ODI).

Foreign Direct Investment (FDI) refers to an investment made by a person resident outside India in the equity instruments of an Indian company to establish

a long-term interest and significant control. FDI typically involves capital inflow for setting up business operations or acquiring a substantial ownership stake in existing Indian companies. FEMA allows FDI through two routes—automatic and government. Under the automatic route, investors do not require prior approval, while under the government route, prior permission from concerned ministries is mandatory. Sectors such as defence, telecom, and media have caps and restrictions, and FEMA regulations aim to balance foreign participation with national security and local economic interests.

Foreign Portfolio Investment (FPI), in contrast, involves investment in Indian securities such as shares, bonds, and debentures without having management control or long-term involvement in the company. FPIs are generally institutional investors like foreign mutual funds, pension funds, or hedge funds who invest in the Indian stock market for short-term gains. FEMA and the Securities and Exchange Board of India (SEBI) jointly regulate FPIs. These investments are more volatile but provide liquidity and depth to the capital market. FEMA prescribes reporting requirements, sectoral limits, and investment ceilings to monitor and manage FPI flows effectively.

Overseas Direct Investment (ODI) involves Indian companies or residents investing in joint ventures or wholly-owned subsidiaries abroad. Under FEMA, such outward investments are allowed within specified limits under the Liberalised Remittance Scheme (LRS) or other RBI frameworks. ODI helps Indian businesses expand globally and acquire strategic assets. However, FEMA imposes strict reporting norms and conditions to ensure that funds are used for genuine business purposes and do not contribute to illegal capital flight. Companies must seek prior approval in certain cases, such as investing in financial sectors abroad or when the total financial commitment exceeds prescribed thresholds.

In summary, FEMA provides a comprehensive mechanism to regulate various forms of foreign investments in a way that encourages international capital flow while safeguarding national economic interests. By distinguishing between FDI, FPI, and ODI, and prescribing separate rules and procedures for each, the law ensures transparency, accountability, and strategic alignment with India's broader

economic policies. These regulations make it possible to attract foreign capital while retaining control over sensitive areas of the economy.

14.7 Penalties and Enforcement

The Foreign Exchange Management Act (FEMA), 1999 not only facilitates foreign exchange transactions but also lays down clear provisions for ensuring compliance and penalizing violations. The enforcement mechanism under FEMA is civil in nature and focuses on promoting transparency, lawful conduct, and timely rectification rather than harsh punishment. It provides for a well-structured system of penalties, adjudication, and compounding to deal with contraventions effectively and fairly.

Contraventions under FEMA refer to any act or omission that violates the provisions of the Act, its rules, regulations, notifications, or directions issued by the Reserve Bank of India (RBI). Such contraventions can involve a wide range of activities, such as unauthorized foreign exchange dealings, delayed reporting of foreign investments, remittances exceeding permissible limits, and failure to follow procedural requirements. It is important to note that FEMA treats violations as civil offences rather than criminal ones, thereby allowing the focus to remain on correction and compliance.

When a contravention is identified, FEMA empowers the authorities to impose penalties. As per the Act, any person found guilty of violating FEMA provisions is liable to pay a penalty up to three times the sum involved in the contravention, or up to two lakh rupees if the amount is not quantifiable. In the case of continuing violations, an additional penalty of up to five thousand rupees for every day of default may be imposed. The adjudication of such cases is carried out by appointed Adjudicating Authorities, who are responsible for conducting inquiries, hearing the parties involved, and issuing appropriate orders. These authorities ensure that the principle of natural justice is followed and that the person being penalized has a fair opportunity to explain their case.

In order to make the compliance process more flexible and business-friendly, FEMA provides for the compounding of offences. Compounding is a voluntary process where the person who has committed a contravention can apply to the RBI or other designated authorities to settle the offence by paying a prescribed sum without undergoing lengthy adjudication proceedings. This helps in

reducing litigation, speeding up resolution, and improving ease of doing business. The application for compounding must be made within a specified time, and if accepted, the offence is considered resolved with no further legal proceedings initiated for the same violation.

Overall, the penalties and enforcement framework under FEMA is designed to ensure that foreign exchange transactions are conducted legally, transparently, and with accountability. It aims to encourage voluntary compliance rather than instilling fear through punitive actions. By offering a balanced approach that includes clear penalties, a proper adjudication process, and the option of compounding offences, FEMA maintains discipline in the foreign exchange market while promoting economic growth and cross-border cooperation.

14.8 Appeals and Appellate Tribunal

The Foreign Exchange Management Act (FEMA), 1999 provides a structured legal framework not only for regulating foreign exchange transactions but also for addressing grievances through a well-defined appellate mechanism. This system ensures fairness and transparency in the adjudication process by allowing individuals and institutions to challenge decisions made under the Act. It promotes the rule of law by giving the affected parties a chance to seek redress and present their case before a higher authority.

When a person is found in contravention of any provision of FEMA, the case is initially decided by an Adjudicating Authority. This authority is appointed by the Central Government and is responsible for conducting inquiries, examining evidence, and passing orders regarding the alleged violation. The Adjudicating Authority plays a quasi-judicial role, and its orders carry legal weight. However, if any party is not satisfied with the decision made by the Adjudicating Authority, FEMA provides the right to appeal.

The first level of appeal lies with the Appellate Tribunal for Foreign Exchange. This tribunal was established under FEMA to hear and decide appeals against the orders of Adjudicating Authorities. It functions as an independent body and is empowered to review cases on both legal and factual grounds. The tribunal ensures that no person is penalized without a fair opportunity to challenge the findings of the lower authority. The tribunal may confirm, modify, or set aside the original order after examining all relevant facts and documents.

The procedure for filing an appeal is clearly defined. An appeal must be filed within forty-five days from the date of receiving the order of the Adjudicating Authority. The appeal must be made in the prescribed form and accompanied by the necessary documents and fees. The tribunal may, in special circumstances, allow an appeal even after the expiry of this period if sufficient cause for the delay is shown. The hearing before the tribunal is conducted in accordance with the principles of natural justice, ensuring that all parties are heard and that a reasoned order is delivered.

FEMA also allows for a further appeal to the High Court on questions of law, if a party is dissatisfied with the decision of the Appellate Tribunal. This ensures that there is a final level of judicial oversight, and that legal interpretations under FEMA are consistent and just.

In conclusion, the appeal and appellate mechanism under FEMA is an essential part of its enforcement system. It ensures legal accountability, protects the rights of individuals and businesses, and builds confidence in the foreign exchange regulatory framework. By providing a fair and efficient path to challenge decisions, FEMA promotes lawful conduct and strengthens the integrity of India's foreign exchange management system.

❖ Exercise

Short Answer Questions

1. What is FEMA and when did it come into force?
2. Mention any two objectives of FEMA.
3. How is FEMA different from FERA?
4. Define the term "foreign exchange" under FEMA.
5. Who is considered an "authorized person" under FEMA?
6. What is a capital account transaction?
7. What is a current account transaction?
8. Write a short note on the role of RBI under FEMA.
9. What is meant by compounding of offences under FEMA?

10. What is the time limit for filing an appeal under FEMA?
11. Name two examples of permissible current account transactions.
12. Mention any two sectors where FDI is allowed under the automatic route.
13. Who appoints the Adjudicating Authority under FEMA?
14. What is the purpose of the Appellate Tribunal for Foreign Exchange?
15. What is the maximum penalty for contravention under FEMA?

Long Answer / Essay Type Questions

1. Discuss in detail the background, objectives, and significance of the Foreign Exchange Management Act (FEMA), 1999.
2. Compare and contrast FERA and FEMA with respect to their nature, scope, and enforcement mechanism.
3. Explain the regulatory structure of FEMA. Highlight the roles played by the Reserve Bank of India and the Central Government in foreign exchange management.
4. Define and differentiate between Capital Account Transactions and Current Account Transactions under FEMA. Provide examples and explain their regulatory provisions.
5. Discuss the concept of “Authorized Person” under FEMA. What are their powers, duties, and responsibilities?
6. Explain the provisions under FEMA relating to Foreign Direct Investment (FDI), Foreign Portfolio Investment (FPI), and Overseas Direct Investment (ODI).
7. Analyse the enforcement provisions under FEMA. Discuss the procedure for handling contraventions, penalties imposed, and the concept of compounding.
8. Describe the appellate mechanism available under FEMA. How does the adjudication and appeals process work under the Act?
9. Examine the key definitions under FEMA and explain their importance in interpreting foreign exchange transactions.

10. Discuss how FEMA facilitates foreign trade and investment in India while maintaining financial discipline.

Multiple Choice Questions (MCQs)

1. FEMA came into force on:
a) 1 January 1999 b) 1 June 2000
c) 15 August 2001 d) 1 April 1995
✓ Correct Answer: b) 1 June 2000
2. FEMA replaced which of the following Acts?
a) Companies Act b) SEBI Act
c) FERA d) Income Tax Act
✓ Correct Answer: c) FERA
3. Under FEMA, foreign exchange violations are treated as:
a) Criminal offences b) Civil offences
c) Constitutional violations d) Tax evasion
✓ Correct Answer: b) Civil offences
4. Who is the main regulatory authority under FEMA?
a) Supreme Court b) Enforcement Directorate
c) Ministry of Finance d) Reserve Bank of India (RBI)
✓ Correct Answer: d) Reserve Bank of India (RBI)
5. Which of the following is a Capital Account Transaction?
a) Payment for import of goods
b) Investment in shares of a foreign company
c) Travel expenses abroad
d) Payment for software services

✓ Correct Answer: b) Investment in shares of a foreign company

યુનિવર્સિટી ગીત

સ્વાધ્યાય: પરમં તપ:

સ્વાધ્યાય: પરમં તપ:

સ્વાધ્યાય: પરમં તપ:

શિક્ષણ, સંસ્કૃતિ, સદ્ભાવ, દિવ્યબોધનું ધામ
ડૉ. બાબાસાહેબ આંબેડકર ઓપન યુનિવર્સિટી નામ;
સૌને સૌની પાંખ મળે, ને સૌને સૌનું આભ,
દશે દિશામાં સ્મિત વહે હો દશે દિશે શુભ-લાભ.

અભણ રહી અજ્ઞાનના શાને, અંધકારને પીવો ?
કહે બુદ્ધ આંબેડકર કહે, તું થા તારો દીવો;
શારદીય અજવાળા પહોંચ્યાં ગુર્જર ગામે ગામ
ધ્રુવ તારકની જેમ ઝળહળે એકલવ્યની શાન.

સરસ્વતીના મયૂર તમારે ફળિયે આવી ગહેકે
અંધકારને હડસેલીને ઉજાસના ફૂલ મહેંકે;
બંધન નહીં કો સ્થાન સમયના જવું ન ઘરથી દૂર
ઘર આવી મા હરે શારદા દૈન્ય તિમિરના પૂર.

સંસ્કારોની સુગંધ મહેંકે, મન મંદિરને ધામે
સુખની ટપાલ પહોંચે સૌને પોતાને સરનામે;
સમાજ કેરે દરિયે હાંકી શિક્ષણ કેરું વહાણ,
આવો કરીયે આપણ સૌ
ભવ્ય રાષ્ટ્ર નિર્માણ...
દિવ્ય રાષ્ટ્ર નિર્માણ...
ભવ્ય રાષ્ટ્ર નિર્માણ



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