TEERTHANKER MAHAVEER UNIVERSITY MORADABAD, INDIA

CENTRE FOR ONLINE & DISTANCE LEARNING

Programme: Bachelor of Arts (BA) Economics

Course: Business Law

Semester-II

Syllabus

Objectives: The course will develop understanding of the essential elements of contract law including formation, termination, current issues/changes. This course is intended to make students understand various Acts applicable in business.

Unit I

Law of Contract: Introduction, kinds of contracts, offer and acceptance, consideration, capacity of

parties, free consent, legality of object, performance and discharge of contract remedies for breach of contract, introduction to the concept of agent and different types of mercantile agents, bailment and pledge, indemnity and guarantee.

Unit II

Sale of Goods Act: Introduction, formation of contract, condition and warranties, difference between transfer of property and possession, right of an unpaid seller, performance of contract of sales.

Unit III

Negotiable Instrument: Introduction, bills of exchange, promissory note, cheque, parties of negotiable instrument, negotiation, presentation, discharge and dishonor of negotiable instrument rules of evidence, banker and drawer.

Unit IV

Law of Partnership: Introduction, formation, rights duties, liabilities of partners, dissolution of partnership firm, limited liability partnership. ***Salient Features of RTI Act***, **Consumer Protection Act 1986**: objectives features, structure

Suggested Readings:

- N D Kapoor Element of Mercantile Law Sultan Chand & Sons
- M C Kuchhal Business Law Vikas Publication Gulshan, Kapoor Business Law including C. Law New Age International Pathak, Akhileshwar Legal Aspects of Business, Tata McGraw Hill Education

Bare Acts:

- Indian Contract Act, 1872
- Sale of Goods Act 1930

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LESSON – 1

Law of Contract-1

Structure

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1.12 Answer to Check Your Progress

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1.1 Objectives:

After reading this lesson, you should be able:

- To understand the meaning of law
- To understand meaning of contract
- To understand essentials of valid contact

- To differentiate between offer and acceptance
- To understand consideration, capacity of parties, free consent and legality of object etc.

1.2 Definition of contract

The word contract owes its origin to the Latin word „contractum" which means drawn together. Contract is an agreement creating and defining obligations between parties.

Anson defines a contract as "A legally binding agreement made between two or more persons by whom rights are acquired by one more to act or forbearance on the part of the other or others"

A contract is defined in the contract act, (section 2h) as "an agreement enforceable by law"

The concept of a contract consists of two elements, i.e. obligation and agreement. Obligation is understood „as alegal tie, which impose upon a person or persons. When two or more parties reach in identity of minds regarding a particular subject matter and express to each other that identity of minds in some understandable manner, we call it an agreement.

Agreement = Offer+ Acceptance

The requirements of an obligation are:

a. There must be two persons
b. The obligation must relate to definite act or acts
c. The obligation must relate to legal matters and not social or domestic affairs
d. Consensus ad idem or identity of minds

   An agreement is necessarily the outcome of consenting minds. This means parties to agreement must have agreed about the subject matter of the agreement in the same sense and at the same time.

(e) Mutual communication

There should be communication of their respective intentions.

1.3 Essentials of a valid contract

Contracts arise under various circumstances. They may arise from face to face conversations over telephone or by any other means of communication. All contracts are agreement, but all agreements are not contracts.

According to the section 10 of the contract act "all agreements are contracts if they made by the free consent of parties competent to contract, for lawful consideration and with a lawful object, and are not hereby expressly declared to be void".

According to above definition a valid contract must have the following elements:

1. Offer and Acceptance: in order to create a valid contract, there must be a lawful offer by one party and lawful acceptance of the same by the other party.

2. **Consensus Ad Idem:** there must be identity or meeting of minds. Parties are said to consent when they agree upon the same thing in the same sense.

> For example, if A who owns two estates, one at Mumbai and another at Delhi, offers to sell B one estate, A intending it to be the one Mumbai and B accepts the offer, thinking that it is the estate at Delhi, there is no consensus, and hence no contract. Such a contract is void.

3. **There should be no flaw in the consent of the parties:** consent is said to be free when it is not caused by coercion, undue influence, fraud, mispresentation or mistake. The existence of any these vitiating elements would make the contract a voidable one.

4. **Competency of parties:** the parties of the agreement must have the capacity to contract. Secs. 11 and 12 of the act deal with this aspect. Every parson of full age and sound mind is competent to contact. Flaw in capacity to contract may arise from minority, idiocy, drunkenness, etc., and status. If either party has suffered incapacity to contract, the contract is rendered void.

5. **Lawful consideration:** an agreement without consideration is void. Consideration means an advantage or benefit moving from one person to the other. In other words, it is something in return.

6. **Lawful object:** the object of the agreement must not be illegal, immoral or opposed to public policy. The rule is that, an agreement is the object of which is unlawful is void

7. **Agreement not declared to be void:** the agreement should not have been expressly declared void by any law in force of the land. Thus the agreement in restraint of trade, in restraint of marriage isall void.

8. **Legal formalities**: an oral contract is a perfectly valid contract, except in those cases where writing, registration etc. is required by some statue. In Indiawriting is required in the cases of sale, lease and gift of immovable property, negotiable instrument etc.

1.4 Offer

The process of making an agreement commences with offer. Offer is a proposal by one party to another to enter into a legally binding agreement with him. A proposal is an expression of will or intention. A person is said to have made a proposal, when he signifies to another his willingness in order to obtain the assent of another to such act. The word proposal is synonymous with the English word offer. The person who makes the offer is called the offeror, proposer or promisor and the person to whom it is made is known as the offeree or promise.

1.4.1 Essentials of a valid offer

1. **Express and implied offer:**An express offer is one which is made by words, spoken or written.
   Example: an offer to sell his pen to b for Rs 20
   An implied offer is one which is gathered from the conduct of the parties or the circumstances of the case.
2. **Specific and general offer:** An offer is said to be specific when it is addressed to a definite person or body of persons. A general offer is one which is addressed to the world at large even though it may beaccepted by a definite person. General offers are termed as offers at large or offers to public, and specific offers to the individual.
3. **Offer and standing offer or tender:**An offer for the continuous supply of certain goods at a certain rate over a definite period is called astanding offer. Such offers though accepted do not give rise to a contract unless an actual order is placed. The offeror can withdraw his offer at any time, before an order is placed with him. But when a particular

order is placed for goods the person who made the tender cannot refuse to supply those goods.

4. **Offer and invitation to treat:**An invitation to treat is sometimes called an invitation to offer. Every expression of willingness to enter into a contract may not amount to an offer. It is only an initial step in the formation of a contract. So, quotations, catalogues, advertisement in a newspaper for sale of an article or goods displayed by the shopkeeper in a shop window or on shelves do not constitute an offer.
5. **Offer must be capable of creating legal relations:** To constitute an offer the offeror must intend to create a legal obligation. Social invitation, even though it is accepted, does not create legal relations. To offer a friend a dinner, does not involve a legal action.
6. **Offer must be definite:**Section 29 states "agreement, the meaning of which is not certain, or capable of being made certain, are void". So the notice of revocation is complete as against the person making it when it is in transit. As against the person to whom the revocation is made, it is complete when it comes to is knowledge.

1.5 Acceptance

The assent given to a proposal may be understood as acceptance. A proposal when accepted becomes a promise. In other words, offer+ acceptance=contract. An application for the shares in a company is in the nature of offer while the allotment of the shares by the company is an acceptance resulting in a contract. An acceptance once completed cannot be revoked.

An 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 parties.

1.5.1 Essentials of valid acceptance

For a valid acceptance, the following are the elements

1. Acceptance must be by the offeree.
2. Acceptance must be absolute and unconditional.
3. Acceptanceshould be before an offer lapses. Acceptance should be communicated.

1. **Acceptance must be by the offeree**: when an offer is made to a specified person it can be accepted by him alone. No person can give himself a contractual right by inter posing in an offer which was not intended for him.
2. **Acceptance must be absolute and unconditional:** the acceptance of the offer should correspond to the terms of the offer, and the acceptor should not impose any condition while accepting the offer. Acceptance must be without any condition.
3. **Acceptance should be before the offer lapses:** an offer in order to ripen into a contract by acceptance should continue to exist at the time of acceptance. Until an offer is accepted, it creates no legal obligations, and it may be terminated at any time.
4. **Acceptance should be communicated:** just as the communication of the offer, acceptance also should be communicated. The communication need not be of a particular kind, but silence can never be prescribed as amode of communication.

Activity-1

Explain essentials of a valid offer withexamples----------

1.5.2 Revocation of acceptance

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

1.6 Consideration

Consideration can be defined as “itis the price of a promise”

According to section 2(d) of the Indian Contract Act, "When at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or abstain from doing something, such act or abstinence is called a consideration for the promisee."

It is clear from the above definition that consideration consists of either some benefits to the promiser or some detriment to the promise. Moreover, consideration is:

a) An act, i.e. doing of something. In this sense consideration is an affirmative form.
   Example: X promises Y to guarantee payment of price of the goods which y sells on credit to Z. here sates by Y to Z is a consideration for the promise of X.
b) An abstinence or forbearance, i.e. astringing or refraining from doing something. In this sense, consideration is in a negative form.

Example: X promises Y not to file a suit against him if he pays him Rs. 1000. The abstinence of X is the consideration for the payment of Y.

c) A return promise.

1.6.1 Essentials of valid consideration

1) **Consideration is essential:**Consideration in the sense of detriment is quite indispensable to support a simple promise.
2) **Consideration must move at the desire of the promisor:**The act or forbearance must be at the desire of the promisor. The act has done at the desire of the third party cannot be a consideration. A promise which is gratuitous is void. A promise to give a donation is not enforceable as there is no benefit to the promiser. But if the promise has incurred liability relying upon the promise, it is enforceable.
3) **Consideration may move from the promisee or any other person:**InIndian law, a stranger to consideration may maintain a suit if he is a party to the contract. But under the English law, consideration must move from the promise.
   “Chinnaya vs ramayya (1882 Madras HC)
   Fact

A, an old lady, granted / gifted an estate to her daughter the defendant, with the direction / condition thatthe daughter should pay an annuity (annual payment) of Rs 653 to A‟s brother, the plaintiff. On the same day the defendant, daughter (promisor) , made a promise vis a vis an agreement with her uncle that she would pay the annuity as directed by her mother, the old lady Later the defendant refused to pay on the ground that her uncle (promisee, plaintiff) has not given any consideration. She contended that her uncle was stranger to this consideration and hence he cannot claim the money as a matter of right.

Held

The Madras HC held that in this agreement between the defendant and plaintiff the consideration has been furnished on behalf of the plaintiff (uncle) by his own sister (defendant‟s mother). Although the plaintiff was stranger to the consideration but since he was a party to the contract he could enforce the promise of the promisor, since under Indian law, consideration may be given by the promisee or anyone on his behalf – vide Section 2 (d) of ICA. Thus, consideration furnished by the old lady constitutes sufficient consideration for the plaintiff to sue the defendant on her promise. Held, the brother / uncle was entitled to a decree for payment of the annual sum of money."

Source: https://tanaysaraf.wordpress.com/2009/07/18/contract-i-case-laws/

4) Consideration may be past, present or future: Under the English past consideration is no consideration. In other words, consideration must be either executed or executory, but can never be past.

   In Indian law, consideration may be past, present or future.

   Example: X promises to deliver certain goods to Y after a fortnight.

5) **Consideration must be competent:**Although consideration need not be adequate, it must be real, competent and not illusory. For example a promised to pay money a police officer to investigate into a crim. It was held that the agreement was invalid because, the officer was already under duty to do so by law.
6) **Consideration must be lawful:**If the consideration is unlawful, the contract is unforce able and void. there are three concepts in consideration-

- STRANGER TO CONSIDERATION: a stranger to consideration is a party to the contract but consideration is given by a third person
- STRANGER TO CONTRACT: a stranger to contract is not at all a party to the contract;the contract is between other parties.
- NO CONSIDERATION NO CONTRACT: Every agreement to be enforceable at law must be supported by valid consideration. An agreement made without consideration is void.

1.7 Legality of an object

One of the most important elements of a valid contract is that its object and consideration must be lawful. If the object or the consideration is unlawful, the contract is also unlawful and unenforceable. Sec. 10 and sec. 23 emphasize this requirement in the following words:

Sec. 10 "all agreement is contract if they are made for lawful consideration and with lawful object".

Sec. 23" every agreement of which the object or consideration is lawful, is void".

1.7.2 Meaning of object and consideration

Thus, a contract, the object and consideration of which is unlawful, the contract will be unenforceable. The words‟ object‟ means the „purchase‟ for which the contract has been entered into. Where a loan of Rs. 50,000 is taken for the purpose of marriage, the consideration for the contract is a loan and the object of the contract is marriage. There are cases where consideration for an agreement may be legal but its purpose may be illegal or unlawful. In such cases, agreement would be void.

1.7.3 Meaning of legality

The term„legality‟ may be defined as „conformity to law‟. In other words, any act or a contract must not be outside the provisions of law in force from time to time. Sec. 23, states the acts which are unlawful or done for unlawful object or consideration.

Cases of unlawful object or consideration

An agreement, the object and consideration of which is unlawful, and unenforceable and void. Under section 23 the object or consideration of an agreement is applicable in the following cases:

1. If it forbidden by law.
2. If it defeats the provisions of any law.if it is fraudulent
3. If it involves injury to person or property of another.
4. If it is immoral
5. If the court regards it as opposed to public policy.

1. **If the object is forbidden by law:** where the object or consideration of an agreement is forbidden by law it is void and unlawful, an act is forbidden and specially punishable under the provisions of law of the country or if it is forbidden by special legislation or by the regulations made by the competent authority under powers derived from the legislation. The term „law‟ includes any law for the time being in force in India including personal law

   Example: ram agrees to sell certain goods to Mohan. Ram knows that the goods are to be smuggled out of India. The contract is unlawful because selling of goods for smuggling is forbidden by law.
2. **If object is of such a nature that, if permitted, it would defeat the provisions of law**: sometimes the object and consideration of an agreement is not directly forbidden by law, but it is of such a nature that, if permitted, it would defeat the provisions of the law. In such cases, the object of consideration is unlawful and void.

Example:Ramesh‟s estate is sold for the recovery of land revenue. Under the provisions of an act of legislature, by which the defaulter is not allowed to purchase directly or indirectly his own estate, Naresh by an arrangement with Ramesh, agreed to purchase the land in auction. Naresh purchased the land and he conveyed it to Ramesh receiving from him the price paid. The agreement is unlawful, if it is allowed; it will defeat the purpose of the law.

3. **If it is fraudulent:** if the object of agreement is to cheat the other party it is unlawful and void.

   Example: X, Y and Z enter into an agreement to divide among themselves the gain acquired or to be acquired by them by fraud. The agreement is void as its object is fraudulent
4. **If it involves or implies injury to the person or property of another:** where the purpose of an agreement is to make injury to the person or property of another person it is

unlawful and void. Injury means damages, harm or wrong. Property may be movable or immovable.

Example: an agreement which compels a debtor to do manual labor for the creditor as long as the debt is not repaid is injurious to the person hence unlawful and void.

5. **If the court regards it immoral:** if the court regards the purpose of consideration of an agreement immoral, it is void. The term „immoral" depends upon the standards of morality prevailing at a particular time and place and as approved by the court. In general sexual immorality is regarded as an immoral act.

   Example: X agrees to let his daughter to Y for concubinage. The agreement is void being immoral, though the letting is not punishable under Indian panel code.

6. **Where the court regards it as opposed to public policy:** public policy is that principle of law which provides that no person can lawfully do that which has a tendency to be injurious to the public or pubic goods, the term public policy is not capable of exact definition. This is a wider term and it is difficult to determine its limits with any degree of exactness. Agreement as opposed to public policy is unlawful and void, if the object or consideration of an agreement is against public goods or when it harms the public welfare.

Activity- 2

Explain essentials of valid consideration.....

Check your progress A

(1) Consent means parties agree upon the……

(a) Same thing (b) Different thing (c) Same thing in the same sense

(d) None of these

(2) An acceptance must be absolute and……

(a) Unconditional (b) Unnecessary (c) Valid (d) None of these

1.8 Capacity of parties

For a validcontract, the parties to a contract must have capacity i.e. competence to enter into acontract.

Section 11 of the contract act deals with the competency of parties and provides that "every person is competent to contract who is of age majority according to the law which he is subject, and who is of sound mind and is not disqualified from contracting by any law to which he is subject."

According to this the following persons are incompetent to the contract

a) Minor
b) Person of unsound mind
c) Persons disqualified by any law to which they are subject

If the above persons entered into a contract then it is a voidable contract.

a) Minor

An infant or a minor is a person who is not a major: according to theIndian majority act, 1875, a minor is one, who has not completed his or her age of 18 years,

Effects of minor"s agreement

The following are the various rule related to minor‟s agreement:

1. **An agreement with minor is a void contract:** section 10 of the contract act requires that the parties to a contract must be competent and section 11 says that a minor is not competent. But neither section 10 nor 11 makes it clear that the contract made by minor is void and voidable contract. But the Privy Council made it perfectly clear that a contract entered by a minor is void contract and minor is not competent to a contract.
2. **No ratification:** an agreement with minor is completelyvoid. A minor cannot ratify the agreement even on attaining majority, because a void agreement cannot be ratified.
3. **No estoppel against a minor:**where a minor by misrepresenting his age and has induced the other party to enter into a contract with him, he cannot be made liable on the contract. There is no estoppel against him. The court may direct the minor to restore property whether minor has got protection but he has no right to deceive others.
4. **Minor can be a beneficiary:** if a minor gets some benefit from a contract in which he enter. Then there is no restriction on him to become a beneficiary
5. **Insolvency:** a minor cannot be declared insolvent as he is not able to pay debt and dues from his personal property.He is not personally liable.
6. **Minor can be an agent:** a minor can be an agent but he will not be liable to his principal for his act.
7. **Partnership:** a minor cannot enter in a contract or become a partner in partnership firm but he can attain the benefits of partnership.
8. **Joint contract by minor and adults:** in such cases adult can be liable but not the minor. When there is a joint purchase by two purchasers one is adult and other is minor then the vendor can enforce the contract against the major partner not the minor.
9. **Surety for a minor:** in a contract of guarantee when an adult stands surety for a minor then he is liable to third party as there is a direct contract between surety and third party.
10. **Minor as a shareholder:** a minor being incompetent to contract cannot be a shareholder of the company.

Persons of unsound mind

As per section 11 of contract act, for a valid contract each party to the contract must have sound mind. Those contracts are void which are made by persons of unsound.

Section 12 deals with this question as to what is a sound mind for the aim of entering into contract. According to this section "a person is said to be sound for the purpose of making a contract if, at the time when he makes it he is capable of understanding it and of forming a rational judgement as to its effect upon his interests"

Unsoundness of mind arises from idiocy, insanity, drunkenness, hypnotism and mental decay etc.

d) Persons disqualified by any law to which they are subject:

1. **Alien enemies:** an alien is competent to a contract with Indian citizens. If he can enter into a contract during peace time but if war is started an alien cannot enter into contract and contract entered into before war are either stayed or terminated but contract during war are unenforceable.
2. **Foreign sovereigns and any minor:** there persons have a right to enter into a contract but cannot claim the privilege of not being sued,
3. **Insolvents:** an insolvent cannot enter into a contract as his property vests in official receivers. This disqualification of an insolvent is removed after his discharge.
4. **Convicts:** when a convict is undergo imprisonment he is not capable of entering into contract. But it comes into end when his sentence is over.
5. **Corporations:** a corporation is an artificial person recognized by law. It exists only in the eyes of law. It can enter into a contract only by its agents.

1.9 Free consent

Free consent of all the parties is one moat important element of contract as per requirement of section 10.

1.9.1 Meaning of consent

Two or more persons are said to consent when they agree upon the same thing in the same sense (section 13).it means that there is no contract if the parties have not agreed upon same thing in the same sense. If the parties enter into an agreement concerning particular persons or things but each other has different persons and thing in his mind then there is no presence of contract according to law.

According to section10- consent is said to be when it is not caused by

1. Coercion
2. Undue influence
3. Fraud
4. Misrepresentation
5. Mistake

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

Coercion

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

Example: By threat of suicide, a Hindu induced his wife and son to execute a release in favor of his brother in respect of certain properties which they claimed as their own. It was held that threat of suicide amounted to coercion within section 15 and the release deed was voidable

Example: A threatens to shoot B friend of C, if C does not let out his house to him C agrees to do so. The agreement has been brought about by coercion.

Effect of coercion-Coercion vitiates Free Consent. The party or parties whose consent is taken under the effect of Coercion get a right to avoid the contract, if he so likes. However, if the aggrieved party has received any benefit under the contract which he is avoiding on the basis of Coercion, he has to return that benefit to the other party or parties.

Undue influence

Sometimes the parties to an agreement are so related to each other that one party is in the position to dominate the will of other party. On party compels the other to enter into contract against his will as result of undue influence exerted by the other who is dominating position. Coercion is the dominance of strong party on weak mind.

According to section 16 of Indian contract act "a contract is said to be induced by undue influence where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses the position to obtain an unfair advantage over the other".

Example: A, police officer purchased a property worth Rs 2 lakhs for Rs. 20,000 from B, an accused under his custody. But later on B wants to cancel the sale on the ground of undue influence. It was held that A, the police officer is in the position to dominate the will of B and existence of undue influence can be presumed.

Effect of undue influence- contract vitiated by undue influence is voidable at the option of weaker party. The court can set aside such contract-

(i) Either wholly: or

(ii) Where the weaker party has enjoyed some benefit under the terms of the contract, then upon just and equitable terms

Examples: A‟s son has forged B‟s name to a promissory note. B under threat of prosecuting A‟s son obtains a bond from A for the amount of the forged note. If B sues on this bond, the court may set the bond aside.

Fraud

The term fraud includes all the acts committed by a person with an intention to deceive another person.

Fraud is the willful representation made by a party to a contract with the intent to deceive the other party or to induce such party to enter into a contract. It means a false statement made by knowingly or without belief in its truth or recklessly without caring whether it is true or false.

Example: A person aged over 60 years and thus beyond insurable age, deliberately makes a false statement that he is 48 years old in order to take out an insurance policy. This amounts to fraud, and the insurer is entitled to avoid the policy.

Effect of fraud-Fraud gives the following rights to the aggrieved party.

(1) He can avoid the contract and file a suit on the other party for damages; or

(2) He can revoke the contract, or

(3) He can refuse to fulfill his part of the promise and defend the suit filed by the other party for the breach of contract for damages or specific performance, or

(4) He can treat the contract as a valid one and ask for the specific performance, or for damages in addition to the substitution of the original contract.

Misrepresentation

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

Example: A intends to sell his horse to B and says "My horse is perfectly sound" a genuinely believe the horse to be sound, although he does not know that the horse has fallen ill yesterday. B there upon buys the horse. There is misrepresentation on the part of A.

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 defense to an action of the contract.

Mistake

Mistake may be defined as an erroneous belief concerning something. It means that parties intending to do one thing have by intentional error done something else. Mistake may be of two types:

1. Mistake of law
2. Mistake of fact

Check Your Progress B

State which of the following alternative is correct.

(1) Agreement=..... + acceptance

(a) Contract (b) offer (c) coercion (d) law

(2) Contract= agreement+ ……..

(a) Mistake (b) void (c) voidable (d) Enforceability by law

1.10 SUMMARY

The concept of a contract consists of two elements, i.e. obligation and agreement. Obligation is understood ,,as a legal tie, which impose upon a person or persons. When two or more parties reach in identity of minds regarding a particular subject matter and express to each other that identity of minds in some understandable manner, we call it an agreement.an agreement or contract has essentials element which include free consent of parties, lawful consideration, lawful object and capacity to parties etc.

1.11GLOSSARY

Contract: Contract is an agreement creating and defining obligations between parties.

Fraud: Fraud is the willful representation made by a party to a contract with the intent to deceive the other party or to induce such party to enter into a contract

Free consent: Two or more persons are said to consent when they agree upon the same thing in the same sense (section 13).

Coercion: coercion is a threat or force used by one party against another for compelling him to enter into an agreement.

Minor: An infant or a minor is a person who is not a major

1.12 ANSWERS TO CHECK YOUR PROGRESS

Check Your Progress A

(1) b

(2) d

Check Your Progress B

(1) c

(2) a

1.13 SUGGESTED READINGS

Garg, Sareen, Sharma, Chawla. *Mercantile Law*. Kalyani Publishers, 2010.

Kapoor, N.d. *Elements of Mercantile Law*. Sultan Chand & Sons, 2013.

1.14 TERMINAL AND MODEL QUESTIONS

1. “Parties to contract must be competent to contract” explain.

2. Define offer. What are the essentials of a valid offer?

3. “Two or more persons are said to consent when they agree upon the same thing in the same sense”. Explain

4. In what cases the consideration and object of an agreement are said to be unlawful? Illustrate with examples.

Lesson-2

Law of Contract-2

Structure

2.0 Objectives

2.1 Performance of contract

2.1.1 Effect of refusal to accept offer of performance

2.1.2 By whom contracts must be performed

2.1.3. Demand of performance

2.2 Discharge of Contract

2.2.1 Discharge by agreement

2.2.2. Discharge by operation of law

2.2.3Discharge by breach

2.2.4 Discharge by performance

2.2.5 Discharge by impossibility

2.2.6 Discharge by lapse of time

2.3 Remedies for Breach of Contract

2.4 Summary

2.5 Glossary

2.6 Answer to check your progress

2.7 Model questions

2.8 Suggested readings

2.0 Objectives

After reading this lesson, you should be able:

- To understand the performance of contact.
- To understand the performance of offer.

2.1 Performance of contract

Every contract creates a legal obligation which continues till the contract has been performed or otherwise discharged. Performance of the contract is, in fact the most natural and usual mode of extinction of an obligation. Performance of a contract consists in doing or causing to be done what the promiser has promised to do. Section 37 of the act provides that the parties to a contract must either

(a) Perform their respective promises or

(b) Offer to perform the same, unless

(c) Such performance is dispensed with or

(d) Excused under the provisions of this act, or of any other law.

A contract is said to be performed, when parties make:

1. **Actual performance**: When a party has done what he undertook to do there is nothing left for to do. Then he said to have performed his obligation. The performance of contract in order to be complete must, however, is made in accordance with the terms of the contract.
2. **Attempted performance or offer to perform**: Sometimes it so happens that the promiser or offers to perform his obligation under the contract but the promise does not accept. This is known as attempted performance or tender.

Where the promiser has made an offer of performance and the offer has been refused, the promiser is not responsible for non-performance. Offer of performance is also known as tender. The motive of the party „tendering to perform" is to perform it. Thus a valid tender of performance is considered to be the performance of a promise and it discharge a party from his obligation under a contract. If the offeror produces goods of the correct quality and quantity, the rejection of his offer discharges him from further liability. If a debtor tenders

money due under a debt, the effect of such a tender is to stop the running of interest on the amount payable but the debt is not discharged.

Essentials of a valid tender

In order that a tender should be valid and adequate, it must fulfil the following conditions which are laid down in section 38.

i. It must be conditional. Where a tender or offer of performance is conditional, the other party is under no obligation to accept it. A person is not bound to accept a tender of railway receipt that is made subject to demurrage. But a tender with a request for a receipt is valid.

   Example: N sent a single cheque for two items, only one of which was due at the time, while the other was payable after sometime. The cheque being one and indivisible could be accepted as whole or not at all. It was held that the promise was within his right in rejecting cheque.

ii. It must be made at a proper time and place. When the contract provides that tender should be made at a particular place and time, it should be so done. If the place is not mentioned, the rule is that the debtor must find the creditor. Where no time is fixed then it is valid to make the tender at any reasonable time. A tender before due date is not valid.

   Example: N owes M Rs 500 payable on 1st August with interest. But M offers to pay the amount and interest on 1 December so this is not a valid tender as it is not made at appointed time.

iii. A person to whom the tender is made must be given a reasonable opportunity of inspection of goods or articles. The inspection is to satisfy oneself as to whether the thing offered is what was promised. There is no valid tender where goods are locked in a box and the other party is not allowed to open it.

   Example: we can take an example of online purchasing. someone purchases online product. The company offers to check the material at the time of delivery before made the payment.

iv. The tender must be whole and not of the part. Tender in part is no tender. A creditor need notaccept a smaller sum than that what he is entitled to. A tender by instalments is invalid unless the contract so provides. A tender of a lessor amount does not stop the running of interest on the entire amount.

v. The tender must be in proper form. Tender of money should be in the current coins. A person is not bound to accept a cheque. A tender by cheque is valid when the person to whom it is tendered is willing to accept such payment.

vi. The tender must be made to a proper person. Tender made to a stranger would be invalid. It should be made to the promise or his duly authorised agent.

vii. Tender for the delivery of goods must be the quantity and quality as stipulated in the contract.

viii. A tender made to one of the several joint promises has the same legal consequences as a tender to all of them.

2.1.1 Effect of refusal to accept offer of performance

According to section 38 where a promisor has an offer of performance to the promise and the offer have not been accepted:

a) The promisor is not responsible for the non-performance nor
b) Does he thereby lose his rights under the contract

2.1.2 By whom contracts must be performed

1. **By the promisor:**As a general rule, a contract may be performed by the promisor, either personally or through any other competent person. But where personal considerations are the foundation of contract, it has to be performed by the promisor himself and in case of his death or disablement, a contract will be discharged and the other party would be freed from liability.

Example: A promises to make a dress for B. The promise must be performed by A himself.

2. **By the agent:**Where personal skill is not necessary and the work could be done by any one, the promisor or his representatives may employ a competent person to perform it.

3. **By the representative:**In the event of the death of the promiser before performance, their representative is bound by the promises, unless personal considerations are the foundation of the contract. The legal representatives of the deceased promisor cannot be required to perform contract involving personal skill and action.
4. **By third person:**If the promisee accepts performance of the promise from a third party, there is a discharge of the contract. Once the third party performs the contract, and that is accepted by the promisee there is an end of the matter and the promiser is thereby discharge (section 41).

2.1.3. Demand of performance

It is only the promisee or his agent who can demand performance of the promise under a contract. It is immaterial whether the promise is for the benefit of the promisee or for the benefit of some other person. In the case of death of the promisee, his legal representatives can demand performance. In certain cases a third person who is not a party to the contact to the contact can also demand performance.

Time and place of performance

It is for the parties to a contract to decide the time and place for the performance of the contract. Sections 46 to 50 0f the Indian contract act lay down certain rules in this regarded which are as follows:

1. Where a contract does not specify any time for performance and the promisee is not supposed to ask for performance, the promisor must perform it within a reasonable time.(section 46)
2. When a contract is to be performed on a particular day, without any application of the promisee being required, the promisor may perform contract on that particular day during the usual hours of business on such day and at the place at which promise ought to be performed (section 47)
3. In above two cases, the promisor undertakes to perform the promise without application by the promisee. But where the promise has to be performed on a certain day but the promisor had not undertaken to perform it without application by the promisee, the promisee is bound to apply for performance at proper time place and within the usual hours of business (section 48)

4. When a promise is to be performed without application by the promisee, and no place is fixed for the performance of it, it is the duty of the promisor to apply to the promisee to appoint a reasonable place for the performance of the promise, and to perform it at such place(section 49).
5. A contract should be performed in the manner and at the time prescribed in the contract(section 50).

2.2 Discharge of Contract

A contract is said to be discharged or terminated when the rights and obligations created by it are extinguished. A contract may be discharged in many ways. The following are the various modes in which a contract may be discharged:

1. Discharge by agreement
2. Discharge by operation of law
3. Discharge by breach
4. Discharge by performance
5. Discharge by impossibility
6. Discharge by lapse of time

2.2.1 Discharge by agreement

A contract is created by the parties to it. Similarly, it can also come to an end by their mutual agreement. The rights and obligations created by an agreement can be discharged without their performance by means of another agreement between the parties which provides for the extinguished of the earlier rights and obligations. The parties may agree to terminate the existence of the contract by any of the following ways.

a. Novation: It means that there being a contract in existence some new contract is substituted for it, either between the same parties or between different parties, the consideration mutually being the discharge of old contract, it is transaction by which, with the consent of all the parties concerned, the old contract is revoked and substituted by a new contract.

Novation may occur in two ways

1. New parties substituted for old one
2. Parties may substitute new contract for the old one

Example: A owes money to B under a contract. It is agreed between A,B and C that B shall thenceforth accept C as his debtor instead of A. The old debt of A to B is at an end a new debt from C to B has been contracted.

b. Alteration: It means a change in one or more of a contract. Alteration is valid if it is done with the consent of all the parties to the contract. In alteration, unlike novation, there is change in the terms of the contract but no change of the parties. Alteration made with the consent of all the parties results in the discharge of the original contract.

Example: A enters into a contract with B for the supply of a 1,000 bales of cotton at his warehouse on 1st June 1980. Later both A and B agree to postpone the date of delivery to 1st September 1980. This change amounts to alteration of the contract.

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

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

e. Waiver: It means the abandonment of right which a person is entitled to. A party to a contract may waive his rights under contract, whereupon the other party is released from his obligations. To constitute a waiver neither an agreement nor consideration is necessary.

Example: A promises to write an article for B. B later on forbids him to do so. A is no longer bound to perform the promise.

f. Accord and satisfaction: Accepting any other satisfaction than the performance originally agreed is known in English law as accord and satisfaction. Accord means the promise to accept less than what is due under the old contract. Satisfaction means the

payment or the fulfilment of the smaller obligation. An accord is unenforceable but an accord followed by satisfaction discharges the pre-existing obligation.

Once the promisee accepts such satisfaction as discharge of the original obligation, the obligation is discharged. Under section 63 a promisee may accept instead of the performance of the promise made to him any satisfaction which he thinks fit.

Activity-1

Explain different ways to discharge the contract by agreement with suitable examples----------
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2.2.2 Discharge by operation of law

a. **Insolvency:**Upon insolvency, the rights and liabilities of the insolvent are, with certain expectations transferred to an officer of the court, known as official assignee in presidency towns and as official receiver in other areas.

b. **Merger:**It occurs when there is acceptance of a higher security in the place of the lower. It is an operation of law which extinguishes a right by virtue of its coinciding with another and greater right in the same person.
c. **Alteration:**An alteration of a written contract made without the consent of the other party has the effect of discharging the contract provided the alteration is of a material part.

Example: A bill of exchange for Rs 25000 has been altered to one for Rs 2500, the bill becomes bad in law and the creditor cannot even ask for a decree of Rs. 2500.

d. **Death:**Where performance of a contract is required to be made in person and the personal qualifications of the promisor are the considerations for the contract, the death of the promisor discharges the contract. In other contracts, the rights and liabilities of a deceased person pass to his legal representatives.

2.2.3 Discharge by breach

Parties to contract are expected to perform their respective obligations. If any party fails to perform his obligation, there takes place a breach of contract. Breach of the contract operates as discharge of the contract. The breach of contract may be actual or anticipatory

Actual breach- it may take place in the following ways:

I. When performance is actually due or
II. When actually performing the contract

Breach of contract when performance is actually due: when a person does not perform his part of the contract at the time when it is due, he will be liable for its breach. Thus, where A agreesto deliver toB 30nchairs on 1stJune and fails to do soon that day there is a breach of contract by A.

Breach of contract when actually performing the contract: when a party to a contract performs his part of the contract, but the other party alleges that it is not a proper performance, according to the terms of the contract, in that case if the breach is of a condition essential to the main purpose of the contract, the contract is discharged,. But if the breach is only of a collateral term, this will not entitle the other party to rescind the contract, but he can only claim damages.

C agreed to supply to a company with 5000 chairs. After 2000 chairs had been delivered the company told to C that no more will be required. There is a breach of contract by company.

2.2.4 Discharge by performance

Performance of contract is one of the most usual ways of discharge of contract. The performance of a contract lies in doing or causing to be done what the promisor has promised to do.

2.2.5 Discharge by impossibility of performance

Impossibility of performance results in the discharge of the contract. Agreements which are impossible in it are void because law does not compel the impossible. Thus a promise by A that he will grow a tree in one hour in B‟s garden by invoking some mantras is void. The impossibility referred here must be in existence at the time when the contract is made and may or may not be known to both the parties at thattime.

A contract may become impossible of performance after the date of contract by:

1. **Destruction of the subject matter:**Where the subject matter of a contract is destroyed, without the fault of parties the contract, the contract is discharged.
2. **Death or personal incapacity:**A promise may become physically incapable of performance by the reason of the death or inability of some person whose continued life and heath are necessary for the performance of the contract. Such impossibility discharges the promisor from liability.
3. **Change of law:**Contracts which are lawful when made but become unlawful later by reason of change in law, become impossible of performance.
4. **Non-existence or non-occurring of particular state of things:**Where a state of things which was the basis of the contract ceases to exist, the contract is discharged.
5. **Declaration of war:**A contract entered into before the commencement of war remains suspended during the war. However, such a contract may be revived and enforced at the end of war, if the performance of the contract goes to help the enemy, it becomes void.

Exceptions

Some of the circumstances in which a contract is not discharged on the ground of supervening impossibility are as follows

1. Difficulty of performance
2. Commercial impossibility
3. Impossibility due to the failure of a third person on whose work the promisor relied
4. Self-induced impossibility
5. Failure of one of the objects

2.2.6 Discharge by lapse of time

A contract is discharged by lapse of time. The Limitation act 1940 lies down that a contract should be performed within a specified period. If the contract is not performed and no legal action is taken by the promisee within the period of limitation, he is deprived of his remedy at law. The contract is terminated in such a case. For instances, the period limitation to file a money suit is three years. If within tree years the creditor fails to file a suit to recover his amount the debtor is discharged.

Check your progress (A)

1. Which of the following is not an essential of valid tender?

a) It must be unconditional

b) It must be at proper time

c) It must be at proper place

d) A tender may be in part

2. Which ONE of the following is not a method by which a contract can be discharged?

a) Discharge by misrepresentation

b) Discharge by performance

c) Discharge by breach

d) Discharge by agreement

3. Regarding the time of performance, which ONE of the following statements is untrue?

a) Where time is of the essence of a contract, a slight delay will not allow the non-breaching party to terminate the contract.

b) Where a contract does not provide that performance must be completed by a certain date, the parties to the contract must perform their obligations within a reasonable time

c) Here the time of performance is not 'of the essence of the contract,' then a party to the contract can give notice that it has become of the essence of the contract.

d) Time will be of the essence where the subject matter of the contract indicates that time shall be of the essence.

2.3 Remedies for Breach of Contract

Parties to lawful contract are bound to perform their respective obligations. But when one of the parties repudiates the contract, by refusing to perform his obligations he is said to have committed a breach of the contract. In case of breach of contract, the law provides the following remedies to an injured party.

1. **Cancellation or rescission:** rescission is the revocation of a contract. It is a way by which a contract may be discharged. Where one of the parties to a contract commits breach, the other [arty may treat the contract as rescinded. He is freed from all the obligations under the contract. Under section 64 the party rescinding a voidable contract shall if he has received any benefit thereunder from all another party o such contract restore such benefit to the person from whom it was received. Further under section 75 a person who rightfully rescinds a contract is entitled to compensation for any damage which he has sustained through the non- fulfilment of the contract.

   Example: A singer contracts with B, the manager of theatre to sing at his theatre for two nights in every week during the next two months and B engages to pay her Rs. 200 for each night performance. On the sixth night A wilfully absents herself from the theatre and B in consequences rescinds the contract. B is entitled to claim compensation for the damages which he has sustained through the non- fulfilment of the contract.

When rescission is be refused

Under section 27(1) of the specific relief act, the court may grant rescission in the following cases

I. Where the contract is voidable at the option of the plaintiff the court grants rescission to the plaintiff.
II. Where the contract is unlawful for causes not apparent on its face and defendant is more to blame than the plaintiff, the court may grant rescission.

When rescission may be refused

The court may, however, refuse to rescind the contract

I. Where the plaintiff has expressly or implied ratified the contract or
II. Where owing to the change of circumstances, the parties cannot be resorted to their original positions or
III. Where third parties have, during the subsistence of the contract acquired rights in good faith and for value or
IV. Where only a part of the contract is sought to be rescinded and such part is not severable from the rest of the contract.

2. **Restitution:** it means return of the benefit received by one party to the contract from the other party under void contract. When a contract becomes void it need not be performed by either party. Section 65 provides that when an agreement is discovered to be void or when a contract becomes void any person who has received any advantage under such agreement or contract is bound to restore it or to make compensation for it to the person from whom he received it.

   This section applies to contracts „discovered to be void" and contracts become void. It does not apply to contracts which are known to be void. Thus, if A pays Rs. 300 to B to beat C, the money is not recoverable.

   Example: A pays B Rs. 2000 in consideration of B"s promising to marry C, A"s daughter. C is dead at the time of promise. The agreement is void but B must repay A Rs. 2000.

3. **Specific performance:** under certain circumstances a person aggrieved by the breach of the contract can file a suit for specific performance, i.e. for an order by the court upon the party guilty of breach of contract directing him to perform what he promised to do. Specific performance is discretionary remedy which is allowed only in limited number of cases. Rules regarding the granting of this relief are contained in the section Relief Act, 1877

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

a) Where monetary consideration is not adequate remedy for the breach of contract.

b) When there exist no standard for ascertaining the actual damage caused by the non-performance of the contract.

In the following cases however specific performance will not be granted:

a. Where the contact is of personal nature.
b. Where damages are an adequate remedy.

4. Injunction: an aggrieved party can sue for an injunction i.e.an order of the court restraining the wrong doer from doing continuing the wrongful act complained of. Injunctions are usually granted to enforce negative stipulations in case where damages are not adequate relief. Injunction is a preventive relief. It is particularly appropriate in cases of anticipatory breach of contract.

   Example: M, a firm actress agreed to act exclusively for brother‟s son for one year. During the year she contracted to act for Z. it was held that she could be restrained by injunction from acting for Z.

5. **Quantum meruit:** the phrase „Quantum meruit‟ means „payment in proportion to the amount of work done.‟ A right to sue on a quantum meruit arises where a contract, partly performed by one party, has become discharged by the breach of the contract by the other party. The right is founded not on the original contract, which is discharged or is void, but on an implied agreement to pay for what has been done.

6. **Damages:** a person who commits a breach of contract must make compensation therefore to the injured party. The primary purpose of awarding damages is to put the injured person in as good a position as he would have been if performance had been rendered as promised. The term damages are used to mean compensation in money as a substitute for the promised performance. Damages for the breach of a contract are intended to compensate the injured party so as far as money can do so. Law of contract does not seek to punish the guilty but, if by reason of his wrongful act, the other party has suffered any pecuniary loss, and the court will compel the party in breach to make good the loss by paying damage to the other party. Its purpose is compensation and compensation alone.

   Damages are of four kinds:

1) General or ordinary damages
2) Special damages
3) Vindictive or exemplary damages

4) Nominal damages

MEASURE OF DAMAGES

1. Restitution; the injured party is entitled to be placed in the same position as if the contract had been performed

2. General damages: a party who suffer by the breach of a contract is entitled to only such damages which arise naturally in usual course of things as a results of such breach

3. Special damages: where a party claims special damage for any loss sustained he must prove that the other party knew at the time of the making of the contract that special loss was likely result from the breach of the contract.

Check your progress (B)

1. Which of the following is not the remedy for breach of contract?

a) Cancellation

b) Injunction

c) Damages

d) Mitigation of loss

2. Which one of the following is kind of damage?

a) Special damages

b) Injunction

c) Restitution

d) None of above

3. Explain the term restitution?

Activity-2

Explain Remedies for Breach of Contract by giving examples----------
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2.4 Summary

Every contract creates a legal obligation which continues till the contract has been performed or otherwise discharged. Performance of the contract is, in fact the most natural and usual mode of extinction of an obligation. Performance of a contract consists in doing or causing to be done what the promiser has promised to do. It is only the promisee or his agent who can demand performance of the promise under a contract. It is immaterial whether the promise is for the benefit of the promisee or for the benefit of some other person. In the case of death of the promisee, his legal representatives can demand performance. In certain cases a third person who is not a party to the contact to the contact can also demand performance. Parties to lawful contract are bound to perform their respective obligations. But when one of the parties repudiates the contract, by refusing to perform his obligations he is said to have committed a breach of the contract. In case of breach of contract, the law provides remedies to an injured party.

2.5 Glossary:

Novation: it means that there being a contract in existence some new contract is substituted for it, either between the same parties or between different parties

Damages: a person who commits a breach of contract must make compensation therefore to the injured party.

2.6Answers to check your progress

Answers to check your progress(A)

1. (d)
2. (a)
3. (a)

Answer to check your progress (B)

1. (d)
2. (a)
3. Return of benefit received by one party.

2.7Model questions

1. Explain the term tender. What are the essential of a valid tender?
2. What do you mean by performance of contract?
3. State the various ways in which a contract may be said to be discharged.
4. When does merger takes place?
5. What are the various remedies available to a party in case of breach of contract?

2.8Suggested readings

Garg, Sareen, Sharma, Chawla. *Mercantile Law*. Kalyani Publishers, 2010.

Kapoor, N.d. *Elements of Mercantile Law*. Sultan Chand & Sons, 2013.

Lesson 3

Law of Agency I

Structure

3.0 Learning objectives

3.1 Introduction

3.2 Meaning of an Agent

3.3 Procedure of appointing an agent

3.3.1 by express or direct appointment in oral or in writing

3.3.2 By inferring an agency

3.4 Creation of an Agency relationship between an agent and principal

3.5 Essentials of agency relationship

3.6 Types of Agent

3.7 Agent and Servant

3.8 Agent and independent contractor

3.9 Duties of an agent

3.10 Rights of an agent

3.11 Duties of principal

3.12 Rights of principal

3.13 Summary

3.14 Keywords

3.15 Answer to check your progress

3.16 Terminal questions

3.17 Suggested readings

3.0 Learning objectives

This lesson will enable you to understand the following

- Concept and Importance of agency law.
- Definition of an agent and its different types.
- Differentiation between an agent and servant.
- Rights and duties of an agent.
- Rights and duties of principal

3.1 Introduction

The complexities in modern business are such that it is not possible for any man to transact all business by himself. For this he has to depend on the services of other person in order to run all day to day business. Such persons are called as agents. In law terminology, the term agency is relationship which remains with the person who has an authority to make lawful relationship between a person conquering to the position of principal and third parties. The agency relationship arises whenever one person is an agent who has authority to act on behalf of another person called the principal and accords to act. The agency contract may be in written under seal like power of attorney or it may be an oral agreement. So person called an agent can do any act for another or can be representative for another in making deals with third party or person. The person for whom such act is done is termed as a "Principal

So we can conclude an agent as a person who acts in the name of and on behalf of other person, given considerable authority and assuming it to act so. Currently most of the organized human activity or along with all commercial activity virtually is done by an agency. Without an agency concept establishment is not even possible even in the theory concept. For example "General Motors is building cars in China," but we can"t interact while purchasing car and cannot even shake hands with General Motors. So it is clear that "The General," a company exists and works through an agency or agents. Same as in other business organizations and in partnership firm depend on agents to carry on their business broadly. If we say that agency is the keystone for most of the organization for their business surely, it is not an overstatement. In a partnership firm each partner act as general agent, while under corporation law the officers and all the employees are agents of the corporation. The existence of agents does not have any requirement for a whole

new law of contracts. A contract is neither harmful when committed by an agent; a contract nor binded when negotiated by an agent. Overall mainly the manner of the agents act counts on the behalf of his principal and towards a third party.

3.2 Meaning of an Agent

The law of agency is administered by Part X of the Contracts Act 1950"An Agent is a person employed to do any act for another in making deals with third person".
The person for whom such act is done is a Principal.
According to the law "Any person who is of age of majority to which he is subject and is of sound mind can employ an agent. An agent is a person who acts in the name of and on behalf of other, having been given and assumed some degree of authority to do so". Mostly organized human activity along with virtually all commercial activity is carried on by agency. Thus an agent is one

- Who is employed by another person called "Principal".
- To do any act for another person "Principal".
- To represent "Principal" in dealings with third party.

Definition: An agent is a person who is "employed" by another person called principal to bring that other person into contractual relationship with third party e.g. real estate agent, travel agent etc. P (principal) enters a contract with A (an agent) to negotiate contracts with T (third party); which builds a legal contract between P and T.
The most important feature in an agency relationship is the authority given by principal to an agent. The extent of the authority will be mentioned as a term in the contract between agent and principal. What the agent can and cannot do on behalf of the principal is also mentioned.

Note that, Agent has contract with principal. Principal has contract with third party. For example if Asif appoints Sahaj to sign the agreement on his behalf then in this case Asif is the principal and Sahaj is his agent.

3.3 Procedure of appointing an agent

According to section 136 CA – "Any person who is eighteen years old and above and who is of

sound mind may be a principal. As between the principal and third persons, any person may become an agent, but persons of unsound mind and who are below 18 years of age are not liable towards their principal for acts done by them as agents". For example if Ajay employs Bob (a minor person) to buy some goods from Chirag on his behalf and Chirag supplies the goods to bob , now Ajay cannot allege that he is not liable to pay for the goods just because Bob is not at the age of majority. Ajay is still liable to pay Chirag for those goods.

There is some rule to be followed for an appointment of a person as an agent. Appointment of agent may be made by any of the following ways:

3.3.1 by express or direct appointment in oral or in writing

Express appointment can be done in written or in oral form. Power of Attorney is an example of an express appointment in writing. Even while appointing an agent, a letter written or words spoken can be effective. Very specific and particular words are used to mention that an agent has been appointed e.g. Ajay appoints Vijay as his agent in writing. Such appointment is called direct or express appointment.

3.3.2 by inferring an agency

In some circumstances an agent may be appointed for many reasons like when the appointer has not enough intellectual capability and skills to do the assigned work, when appointer is lacking confidence while doing work by him and when an appointer really wants to delegate the work with considerable authority. In the above cases appointment is called "**Implied appointment".**

3.4 Creation of an Agency relationship between an agent and principal

Almost all agency relationships are known as depository relationships. This refers to involve certain level of trust and confidence in the agency relationship. The agent has obligation to act at his best in accomplishing the interest of the principal because the actions taken by an agent will generate obligations on the legal ground for the principal. This agency relationship permits the agent to act on behalf of his principal whether the principal was present or acting alone.

For example, suppose wilka contracts with Rosy to buy 600 rawhide bones. Rosy delivers the bones, but bobby and Bubbly fails to pay the bill. As wilka as the principle is legally responsible even though she never personally made this deal for Rosy's bill. If rosy decides to sue for collection of the bill, they'll likely to sue Bobby and Bubbly and Wilka, rather than Wilka. As long as Wilka was properly acting as my agent when she made this deal, she's not legally responsible.

An agency can be created by any of the following ways:

- **By Agreement**

When both the parties contract in normal contractual way it is known to be creating agency relationship by agreement. The considerable authority that principal provides to agent is most important characteristics in an agency relationship. There should be properly mentioned the extent of the authority provided by the principal in the contract, it will be a definite term in the contract between principal and agent. The scope of the act of an agent is decided by this term i.e. the agent can act and cannot act on behalf of the principal.

The authority given can be of two types namely **apparent authority and actual authority** (whether implied or express authority).

- **Apparent authority**: Apparent authority said to be exist where the conduct of principal would lead a sound person in the third party's place or position to have faith on the agent who had authority to act, even if the purported agent and principal had never involved in a discussion over such a relationship. An example would be an agent that displayed signs, pre -printed company forms and stationary with the company logo would lead one to believe that the agent had the authority to act for the principal (the insurer).

  For example: Ajay and Pranay are brothers. Ajay lives in Delhi while Pranay lives in Mumbai. Ajay with the knowledge of Pranay‟s leases lands in Delhi. He realises the rent and remits it to Pranay. Ajay is the agent of Pranay, though not expressly appointed as such.

- **Express Authority***:* Express actual authority exists when an agent has expressly told to act on the behalf of principal. An insurer specifically authorizes an agent to bind certain risks.

For example: The usual form of written contract is power of attorney**.**

- **Implied actual authority:** Implied actual authority is the authority possess by an agent who has by virtue of being reasonably necessary to carry out his or her express authority. As such, it can be inferred by virtue of a position held by an agent. An insurance agent implied authority would suggest an agent can accept premium payments on behalf of the principal (i.e. the insurer).

  For example: A women allowed her son to drive a car for her, she paying all the expenses of maintenance and operation. The son caused an accident injuring his wife. Held, the wife could sue the mother as the son was an implied agent of the mother.

- **By Ractification** –A person may act on the behalf of another without his knowledge. For example, A may act as P‟s agent though he has no prior authority from P. In such a case P may subsequently either accept the act of A or reject it. If he accepts the act of A, done without his consent, he is said to have ratified that the act and it places the parties in exactly the same position in which they would have been if A had P‟s authority at the time he made the contract. Likewise, when an agent exceeds the authority given to him by principal, the principal may ratify the unauthorised act.
  Taking another example to develop our understanding; Say A insures P‟s good without his authority. If P ratifies A‟s act, the policy will be valid as if A had been authorised to insure the goods.

- **By Estoppel** – "When Principal allows any third party to believe on agent that he has power/authority to act on his behalf. Agent has apparent (also called "ostensible") authority. The principal is **estopped** (prevented) from denying that agent had not authority". A court will defend a contract where there is apparent authority.

  For example: Ajay tells Tarun within the hearing of Pankaj that he (Ajay) is an agent of Pankaj. Pankaj does not have any objection to this statement. Later Tarun supplies certain goods to Ajay, who pretends to act as an agent of Pankaj. Pankaj is liable to pay the price to Tarun. By being calm, Pankaj had led Tarun to believe that Ajay is really his agent.

- **By Necessity** – When any kind of emergency arises then agency relationship is automatically created without consent of the parties. This type of agency relationship is said to be created by necessity

  For example: Pankaj consigns provisions to Ajay at Gwalior with direction to send them immediately to Varun at Indore, Ajay may sell the provisions at Gwalior, if they will not bear the journey to Indore without spoiling the consignment.

- **Agency by operation of law:**

  Sometimes operation of law gives rise to an agency relationship. According to Sec 18 and 19 of the Indian Partnership Act.1932 "When a company is formed, by operation of law, its promoters are its agents. A partner is the agent of the firm for the purpose of the business of the firm, and act in a partnership, which is done to carry on business activity, in an usual way, kind of the business carried on by the firm binds the partner in the firm, in all these cases, agency is implied by operation of law".

3.5 Essentials of agency relationship

There are two essentials in the relationship of the agency:

- **Agreement between the principal and an agent:**

  "Agency depends on the agreements but not necessarily on contract. As between the third persons and the principal, any person may become an agent" [Sec.184].

  As such even a minor or a person of unsound mind may be an agent; The Principal is liable for the acts of such an agent.

- **Intention of the agent to act on behalf of the principal**:

  Whether a person has intention to act on the behalf of another person is a question of the fact. Where a person does intend to act on behalf of another, agency may arise although the contract between the parties provides that there is no such relationship.

3.6 Types of Agent

There are basically two types of agent Mercantile and Non-Mercantile. But in this lesson we are concerned about different types of mercantile agents.

"Mercantile Agent has an important role in transferring goods from the manufacturer to the consumer".

The following are the different kinds of Mercantile Agent:

Broker: A Broker is a mercantile agent , he is employed to buy or sell goods on the behalf of another person. He has been appointed to make negotiation and establish a contract for selling or purchasing of goods but the possession and control of the goods remains with his principal He cannot act or sue in his own name, he has no possession and has no right of lien.

Usual mode of dealing by a broker is to put the terms of contract in writing in a book, sign it and then send the particulars of the contract to both the parties. The document sent to the buyer is called the "bought note" and then sent to the seller the "sold note", If these documents agree, the term of contract are defined. If they do not agree, there is no binding contract. A reference is then made to signed entry in the broker‟s book.

Factor: A factor is also a mercantile agent who has the authority to sell or dispose goods which are in his possession. He has authority to do such things as are usual way in the conduct of business. He sells goods in his own name as an owner. He can sell goods on credit as well. He can also receive price for goods and give a good discharge to the purchaser.

Example: P owned a motor car and delivered it to A, a mercantile agent for sale at not less than 500000 INR.A sold the car for 400000 INR to T, who bought it in good faith and without notice of any fraud. A misappropriated the 400000 INR and F sued to recover the car from T .Held, as A was in possession of the car with P‟s consent for the purpose of sale, T got a good title.

Auctioneer: An Auctioneer is a mercantile agent, and is appointed by a seller to sell his goods by public auction for a reward generally in the form of a commission, who sells goods by way of public offer to the highest bidder for the Principal. An auctioneer is. He is primly the agent of seller but after the sale has taken place he then become the agent of purchaser also. He has authority to receive the price for selling goods. He can also sue for the price in his own name.

Example:

P instructed to sell pony to A by auction, subject to a reserve price of 25000 INR.A at the time of sale stated that there was no reserve price and sold pony to D at 16000 INR. Held, the sale was binding on p.

Del Credere: A Del Credere is also a mercantile agent is who make establishment in the form of the contract between his principal and a third party and also gives surety to the principal about the performance of the contract by the third party but remember he is not liable for an act to the third party.

Commission Agent: When one person is appointed by principal to buy goods from the market on his behalf on a commission basis then this person is said to be commission agent. He is also a mercantile agent who charges commission for his act. He belongs to indefinite class of agents. He is employed to buy and sell goods, or transacts business generally for other person and receives money for his labour and trouble a money payment, called commission. Commission agents are of two kinds:

i).**Kuchha Arhatya**: He is very similar to a broker. He brings together the buyer and the seller in order to make negotiation and then collects a brokerage fee from the contract made between them.

ii).**Pakka Arhatya**: He is an agent who purchases and sells goods in his name without revealing the name of the principal.

Activity

Aarti enters into a contract with Bhawna for buying Bhawna‟s Car as agent for Chirag without Bhawna‟s authority. Bhawna repudiates the contract before Chirag comes to know of it. Chirag subsequently ratifies the contract and sues to enforce it. Advise Bhawna.

3.7 Agent and Servant: There are so many similarities between an agent and a servant as both are employed to act for and on behalf of another person. However, there are a lot of dissimilarities between an agent and a servant too.

The points of differences are summarized as follows:

- An agent has an authority to create contractual relationship between the principal and a third party. But servant has no such authority.
- An agent does not come under the direct control or supervision of the principal. A principal has the right to direct the act of an agent. An agent has also the right to say how it is to be done in what ways. On the contrary a servant acts under the direct control and supervision of his master, and is bound to carry out all orders given to him in the course of his work.
- An agent receives commission on the basis of his work done. A servant is paid by way of salary or wages.
- A principal is liable for only those acts which are within the scope of the authority given to the agent, so scope is limited .A master is liable for the wrongs of his servants committed in the course of employment.
- An agent may work for a number of principals at the same time. A servant usually serves only one master.

3.8 Agent and independent contractor

- An agent acts under the supervision or in the control of his principal but contractor uses his own material, labour machines and equipment etc.
- An agent is bound by the instructions of his principal but an independent contractor is bound by the terms of the contract.

- An agent can bind his principal by his act but an independent contractor cannot bind his employer.

3.9 Duties of an agent

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

- To carry out the work undertaken as per the direction of the principal.
- To carry out the work with reasonable care, skill and diligence.
- To render proper accounts to his principal.
- To communicate with the principal in case of difficulty.
- Not to deal on his own account.
- To pay sums received for the principal.
- To protect and preserve the interest of the principal in case of his death or insolvency.
- Not to use information obtained to the course of the agency against the principal.
- Not to make secret profit from agency.
- Not to set up an adverse title.
- Not to put himself in a position where interest and duty conflict.
- Not to delegate authority.

3.10 Rights of an agent

An agent has the following rights:

1. Rights of retainer:

As per the section 217 "The agent may retain, out of any sums received on account of the principal in the business of the agency, all money due to himself in respect of his remuneration and advances made properly incurred by him in conducting such business".

2. Right to receive remuneration:

As per the section 219 "The agent is entitled to his agreed remuneration, or if there is no agreement, to a reasonable remuneration".

3. Right of lien:

As per the section 221 “In the absence of any contract to the company ,an agent is entitled to retain goods, papers and other property whether movable or immovable of the principal received by him until the amount due to himself for commission ,disbursement and services in respect of the same has been paid or accounted for to him”.

4. Right of indemnification:

As per section 222 “The agent has a right to be indemnified against the consequences of all lawful acts done by him in exercise of the authority conferred upon him”

5. Right of compensation:

As per section 225” The agent has the right to be compensated for injuries sustained by him by neglect or want of skill on the part of the principal”.

6. Right of stoppage in transit:

This right can be availed by agent in two cases:

1. Where goods bought by agent for his principal by incurring a personal liability then he has a right of stoppage in transit against the principal in respect of the money which he has paid or is liable to pay. This is same as right of an unpaid seller.

2. Where he is personally liable to the principal for the price of the goods sold.

3.11 Duties of principal

The principal owes following duties to an agent.

- To indemnify the agent against the consequences of all lawful acts.
- To indemnify the agent against the consequences of acts done in good faith.
- To indemnify agent for injury caused by principal‟s neglect.
- To pay the agent the compensation or other remuneration agreed.

3.12 Rights of principal

When an agent has fails in his duty towards the principal then principal has following remedies against agent:

- To recover damages.
- To obtain an account of secret profits and recover them and resist a claim for remuneration.
- To resist agent‟s claim for indemnity against liability incurred.

Check your progress

1._____agency is the most common form of agency

2. Agency by_____occurs when (1) a person misrepresents himself or herself as another's agent when in fact he or she is not and (2) the purported principal accepts the unauthorized act.

3. Apparent agency is also referred to as_____.

4. A principal accepts an agent's unauthorized contract through_____of the contract.

5. A principal-agent relationship is formed when an employer hires an employee and gives that employee authority to act and enter into contracts on his or her behalf.(True/False)

6. An employer-independent contractor relationship exists when an employer hires an employee to perform some form of physical service. (True/False)

7. Implied agency is the most common form of agency. (True/False)

8. A power of attorney is one of the most formal types of implied agency agreements. (True/False)

9. Agency by ramification occurs when (1) a person misrepresents himself or herself as another's agent when in fact he or she is not and (2) the purported principal ratifies (accepts) the unauthorized act. (True/False)

10. Apparent agency, or agency by estoppel, arises when a principal creates the appearance of an agency that in actuality does not exist. (True/False)

3.13 Summary

In conclusion to the concept of an agent we can say that an Agent is a person employed to do any act for another in making deals with third person. The person for whom such act is done is the Principal. An agent can be mercantile and non-mercantile, and mercantile agents are broker, factor, an auctioneer, Del Credere and Commission Agent.

3.14 Keywords

- **Agent** is a person engaged to do any act for another or to represent another in dealings with third persons.
- ***Mercantile Agent*** *has an important role in transferring goods from the manufacturer to the consumer.*
- **Express appointment** when an agent is directly appointed.
- **Implied appointment** by inferring agency in the circumstances of the case.
- **Commission Agent:** When one person is appointed by principal to buy goods from the market on his behalf on a commission basis then this person is said to be commission agent.

3.15 Answer to check your progress

Ans.1 Express.

Ans.2 Ratification

Ans.3Agency by estoppel

Ans.4 Ratification

Ans.5 True

Ans.6 False

Ans.7 False

Ans.8 False

Ans.9 False

Ans.10 True

3.16 Terminal questions

1) Name any two types mercantile agents.

2) Write about appointment of an agent.

3) Why appointment of an agent is needed?

4) Elaborate the concept of an agent in detail.

5) Differentiate between an agent and an independent contractor?

6) Differentiate between an agent and servant?

7) Write notes on Agency by estoppel?

8) What is the extent of liability of the principal when his agent exceeds authority?

9) What are the essentials of the relationship of an agency?

10) What is meant by agency by ratification?

3.17 Suggested readings

1. N.D. Kapoor, Company Law, Sultan Chand & Sons, New Delhi.
2. P.P.S. Gogna, Mercantile Law, S.Chand & Company, New Delhi.
3. S.K. Aggarwal, Business Law, Galgotia Publishing Company, New Delhi.
4. S.C. Aggarwal, Company Law, Dhanpat Rai Publications, New Delhi.
5. G.K. Varshney, Elements of Business Law, S Chand & Co., New Delhi.
6. S.S. Gulshan & G.K. Kapoor, Business Law, New Age International Publishers, New Delhi.
7. K.R. Balchandari, Business Law for Management, Himalaya Publication House, New Delhi.
8. Avtar Singh, the Principles of Mercantile Law, Eastern Book Co., Lucknow.
9. S.C. Kuchhal, Mercantile Law, Vikas Publishing House, New Delhi.
10. M.C. Shukla, Manual of Mercantile Law, S. Chand & Co., New Delhi.
11. R.S.N. Pillai and Bagavathi, Business Law, S. Chand & Co., New Delhi.

Lesson 4

Law of Agency II

BAILMENT AND PLEDGE

Structure

4.0 Learning objectives

4.1 Introduction

4.2 Definition of bailment

4.3 Essential elements of bailment

4.4 Duties and liabilities of a Bailor

4.5 Important rights of bailor

4.6 Duties of bailee

4.7 Important rights of the bailee

4.8 Detailed comparison between Sale and Bailment:

4.9 Pledge

4.10 Basic requisite of pledge

4.11 Rights of a Pawnee

4.12 Key Differences between Bailment and Pledge

4.13 Pledge by non-owner

4.14Summary

4.15 Keywords

4.16 Answer to check your progress

4.17 Terminal questions

4.18Suggested readings

4.0 Learning objectives

After reading this lesson, you should be able to

- Define bailment its essentials.
- Define pledge and explain its components.
- Make a comparison between sale and bailment.
- State the rights in bailment and pledge.

4.1 Introduction

Bailment is that type of activity in which one‟s property goes into another‟s possession temporarily. Only the possession goes to another but the ownership of the property remains with the giver for example giving motorcycle for repair, or, giving a cloth for stitching to a tailor, parking a car in a parking lot etc. Pledge is a special kind of bailment, it only differs from bailment in the matter of purpose, when a person transfers the possession of his property to another for securing the loan taken from the other side, is called a pledge.

4.2 Definition of bailment

Section 148 - "A bailment is the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them". Bailor delivers the goods and to whom they are delivered is called the bailee.
Explanation –

If A sells his old books to B and B is supposed to be returned those books after examination. Then there is a contract of bailment.

4.3 Essential elements of bailment

- **Delivery of goods**

  Goods in possession must transfer from one person to another person. What so ever be the purpose of bailment goods must be handed over to the bailee.

- **Types of Delivery -** As per **section 149,** "The delivery to the bailee may be made by doing anything which has the effect of putting the goods in the possession of the intended bailee".

There can be two types of delivery i.e. **Actual and Constructive** In the actual delivery, the good‟s physical possession is handed over by bailor to the bailee and in constructive delivery the good‟s physical possession remains with the bailor upon authorization of the bailee.

- **Delivery upon contract**

There must be contract for the delivery of goods and when the purpose is solved and over then it will be returned. Remember that if there is no contract made for delivery of goods then there is no bailment.

- **Delivery is conditional**

There is the condition mentioned in the contract regarding the goods that it will be disposed and returned after accomplishment of objectives or wishes of the bailer so keeping goods is not permanent, it is temporary. On this particular condition goods‟ possession is given by bailor to the bailee. For further explanation we can take one example that when we give unstitched suit material to the tailor for stitching then after stitching is done, he has to return to us the stitching is complete, the tailor is supposed to return the garment to the bailor.

4.4 Duties and liabilities of a Bailor

Following are the important duties and liabilities of bailor:

- **Explain the defect:-**

  According to the Sec.150, "It is the first and foremost duty of the bailor that if he knows any fault in the goods then he should disclose all the defects of the goods before delivering of goods to the bailee".

According to the Sec.150, "In case the goods are bailed for hire, the duty of the bailor is still greater and he is responsible even for those faults which are not known to him".

Example: - Mr Yash hires a bike from Mr Zanish. Bike is defective. Mr Yash does not disclose facts that bike has some kind of defective. Mr Zanish uses a bike and he gets injured. In this case he is responsible.

2. Warning to the Bailee:-

If a bailor senses and observes that bailee is careless regarding usage of goods and goods can be damaged and are in danger then he can warn the bailee.

3. Payment of necessary expense:- It is the duty of the bailor and can say bailor is bound to bear regarding the payments of necessary expenses of the bailment sustained by the bailee in connection with the bailment.

4. To Indemnify The Bailee :- As per the Sec.164, "Where the title of the bailor to the goods is defective and bailee suffers as a consequences, 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".

4.5 Important rights of bailor

Following are the important rights of bailor :

1.Enforcement of rights :-

Bailor has a right to take back the goods bailed when its purpose is fulfilled. The bailor can enforce all the duties and liabilities by suit of bailee. Bailor has a right to claim compensation if bailee fails to return.

2. Return Before time:-

Bailor may return his goods before the specified period by mutual conversation or agreed condition with bailee,

3. Right of termination:-

In the case where goods are mishandled or treated not as per the contract condition then the bailor can terminate bailment contract.

4. Right of profit:-

According to the contract‟s conditions the bailor has right to gain profit from the goods bailed.

5. Return of goods lent gratuitously :-

As per Sec.180, “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”.

4.6 Duties of bailee

1. Duty to take reasonable car

The bailee is bound to take proper care of the goods bailed to him.

Example: Reeta was admitted to the hospital and she handed over her jewellery to the hospital official for safe custody. The jewellery was stolen.Held , the hospital officials were bailees for reward and were liable for the loss as they had failed to take care of jewellery.

2. Duty not to make unauthorized use

According to **Section 154** , “ if the bailee makes any use of the goods bailed which is not according to the conditions of the bailment, he is liable to make compensation to the bailor for any damage arising to the goods from or during such use of them”.

Example: A hires ship from B for his use and give it to C one of the family member of A. While going in that ship suddenly it stopped may be for any reason, in this case for that loss A is liable to B.

3. Duty not to mix (Section 155-157)

“The bailee should maintain the separate identity of the bailor's goods. He should not mix his goods with bailor's good without bailor's consent. If he does so, and if the goods are separable, he is responsible for separating them and if they are not separable, he will be liable to compensate the bailor for his loss”.

Example: Anita bails 100 bales of cotton having with particular mark to Vijay. Vijay without the consent of Anita mixed the 100 bales of different mark to that .Anita is entitled to have her 100 bales returned and Vijay is bound to bear all the expenses incurred in the separation of the bales , and any other incidental charges.

4. Duty to return (Section 160)

Section 160 , "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".

5. Duty to return increase (Section 163)

As per **Section 163,** "In absence of any contract to the contrary, the bailee is bound to deliver to the bailor, or according to his directions, any increase of profit which may have accrued from the goods bailed".

Example – Ajay leaves a cow in the custody of Bijay to be taken care of. The cow has a calf. Bijay is bound to deliver the calf as well as the cow to Ajay.

6. Duty not to set up jus tertii (Section 166)

As per **Section 166,** "If the bailor has no title and the bailee, in good faith returns the goods back to the bailor or as per the directions of the bailor, he is not responsible to the owner in respect of such delivery. Thus, once the bailee takes the goods from the bailor, he agrees that the goods belong to the bailor and he must return them only to the bailor. He cannot deny redelivery to the bailor on the ground that the bailor is not the owner ".

4.7 Important rights of bailee

Bailor has some duties , these are the rights of the bailee and they are as follows:

1. Compensation Right :-

Bailee should get compensation from the bailor for any loss ,it is the right of the bailee.

2. Recovery of Losses:-

If there is any defects with the bailed goods for which bailee suffers a loss or damage, he has a

right to recover it from the bailor.

3. Right of Indemnity:-

Any loss which bailee has sustained may recover from the bailor on the following grounds, "The bailor was not entitled to make the bailment, or receive back the goods, or to give directions in this respect."

4. Recovery of Expenses:-

Bailee may recoverd all the expenses from bailor incurred for the bailment.

5. Right of Retain:-

In some cases where bailee can performs some kind of services for the fulfilment of the purpose of bailment has a right to detain such bailed goods until he receives the reward of his services.

Activity A

A‟s coat , while he was having lunch in a restaurant ,was taken by a waiter and hung on a hook behind A. The coat was stolen.

a) Can A recover the loss?
b) If So, from whom?

_____

_____

_____

_____

_____

_____

4.8 Detailed comparison between Sale and Bailment:

	Sale	Bailment
Ownership	Ownership is transferrable to the buyer.	Ownership resides with the bailor.
Possession	Transferred to the buyer.	Transferred to the bailee.
Usage	The buyer may use the goods in any way he likes.	A bailee can use the goods only according to the directions of the bailor.
Return	There is no return of goods from the buyer to the seller, unless there is breach.	The goods are returned after the specified time or accomplishment of the purpose.
Consideration	The consideration is the price i.e. money.	The consideration is not the money in this case , an undertaking to return the goods after the accomplishment of the purpose.
Charges	The question of any charges to be paid by the seller to buyer but vice- versa does not arise.	The bailor has to repay the charges which the bailee has incurred in keeping the goods safe.
Duration	Final.	Temporary.

Check your progress A

1. The person who deliver goods during the contract of bailment is called ----------.
2. The person whom goods are delivered according bailment is called---------- --.
3. In bailment, bailor is duty bound to disclose fault in goods bailed as provided in section----- .....
4. The bailment of goods as security for payment of debt or performance of a promise is called.....

4.9 Pledge

It can be defined as "Bailment of goods as a security for the payment of a debt or performance of a promise is called pledge".

As per Sec.172, "The bailment of goods as security for payment of debt or performance of a promise is called pledge, The bailor in this case , is called pledger or Pawnor and Bailee is called Pawnee or pledge" .

Example:- Mr. Rathi borrows Rs. Twenty thousand from Mr. jai and keeps his motor cycle as security for payment of the debt. The bailment of motor cycle is called pledge.

Note: In this example Mr. Rathi is a Pawnor and Mr. Jai is a pawnee.

4.10 BASIC REQUISITES OF PLEDGE

Following are the important essentials of pledge :

1. Moveable Property :-

All types of goods and valuable documents are involved in pledge should be regarding movable ability of goods so the pledge is concerned with the moveable property..

2. Transfer of Possession:-

Only possession of goods is transferred by the pawnor to the pawnee.

Example :- Mrs. Neelu ledges car with Mr. Ramesh and gets Rs. 200,000. He gives the possession of car to Mr. Ramesh.

3. Ownership Right:-

The ownership of the goods remains with the pawnor not with the pawnee.

Example:- Mr. Walia pledges the plot with Mr. Raizada and gets 20 lac. The ownership of the plot remains with Mr. Walia.

4. Case of Mere Custody:-

People who have only mere custody of goods they are having ,cannot pledge them.

Example :- A custodian cannot pledge his master‟s kothi. It will be invalid pledge.

5. Limited Interest:-

Pledge is not valid for unlimited interest. If someone pledges goods for some specific purpose i.e. only limited interest is there, the pledge is valid to the extent of that interest only.

Example:- Mrs. Neelu gives car to Mr. Andy for repair, but does not pay Rs. 10,000 repair charges. Mr Andy pledges the car with Mrs. Sunita and borrows Rs. 50000. This pledge is valid only up to ten thousands.

4.11Rights of a Pawnee

1. Right of retainer (Section 173- 174) - As per **section 173**," the pawnee may retain the goods pledged, not only for a payment of a debt or the performance of the promise, but also for the interest of the debt, and all necessary expenses incurred by him in respect of the possession or for the preservation of the goods pledged".

Further, as per **section 174**," in absence of any contract to the contrary, the pawner shall not retain the goods pledged for debt or promise other than the debt or promise for which they have been pledged".

However, such contract shall be presumed in absence of any contract to the contrary with respect to any subsequent advances made by the pawnee.

This means that if A pledges his gold watch with B for 2000 Rs and later on he promises to teach B's son for a month and takes for 700Rs for this promise , and if he does not teach B's son, B cannot retain A's gold watch after A pays 2000 Rs. Thus, the right of retainer is a sort of particular lien.

2. Right to extra ordinary expenses (Section 175) - As per section 175, "the pawnee is entitled to receive from the pawner, extra ordinary expenses incurred by him for the preservation of the goods pledged. For such expenses, however, he does not have right to detain the goods".

3. Right of sale (Section 176) - As per **section 176** ,"If the pawnor makes default in payment of the debt or performance at the stipulated time, of the promise, in respect of which the goods were pledged, the Pawnee may bring a suit against the pawn or upon the debt or the promise and retain the goods pledged as a collateral security; or he may sell the thing pledged, on giving the pawnor reasonable notice of the sale".

4.Pawnor's Right to Redeem (Section 177)

As per **section 177,** "It provides a very important right to the pawnor. It allows the pawnor to redeem his property even if he has defaulted. It says that if a time is stipulated for the payment of a debt or performance of the promise for which the pledge is made, and the pawnor make default in payment of the debt or performance of the promise at the stipulated time, he may redeem the goods pledged at any subsequent time before the actual sale of them; but he must, in that case, pay, in addition, any expense which have arisen from his default".

Activity B

A, a doctor, persuades his patient B by exercise of undue influences to sell his valuable diamond at a very low price to him then A obtains possession of the diamond and pledges it with C.Is this a valid pledge?

4.12 Key Differences between Bailment and Pledge

The following are the major differences between Bailment and Pledge

1. A Bailment is defined under section 148 while Pledge is defined under section 172 of the Indian Contract Act, 1872.
2. A Bailment is a contract in which for a short period of time goods are transferred from one party to another for some specific purpose. The Pledge is a kind of Bailment in which goods are pledged as a security against payment of debt.
3. 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.
4. The objective of bailment is to safe custody or repairing of goods delivered. On the other hand, the sole purpose of delivering the goods is to act as security against debt.
5. In bailment, the consideration may or may not be present, but in case of pledge, the consideration is always present.

6. The receiver has no right to sell the goods in case of bailment whereas if the goods are not redeemed by pawnor within the reasonable time the pawnee can sell the goods after giving a notice to him.

4.13 Pledge by non- owners

As we all know that there must be an owner who can create a valid pledge. But following are the cases where even non-owner can make a valid pledge:

1. **Pledge by mercantile agent:**
   As per Sec 178, "Where a mercantile agent is, with the consent of the owner, in the possession of goods or the documents of titles to goods , any pledge made by him ,when acting in the ordinary course of business of a mercantile agent is as vaild as if he were expressly authorised by the owner of the goods to make the same". But the pledge is valid only if the pawnee acts in good faith and has not at the time of the pledge notice that the pawnor has the authority to pledge".
2. **Pledge by buyer or seller after sale:**
   Sec.30 states that , " A seller left in the possession of goods after sale and a buyer who obtains possession of goods with the consent of the seller before sale, can create a valid pledge provided the pawnee acts in good faith and has no notice of the previous sale of goods to the buyer or the lien of the seller over the goods".
3. **Pledge where pawnor has a limited interest:**
   As per the section 179, "where a person pledges goods in which he has only a limited interest, the pledge is valid to the extent of that interest".
4. **Pledge by co-owner in possession:**
   One of the co-owner who is in possession of goods with the assent of other co-owner may create a valid pledge of the goods.
5. **Pledge by person to possession under a voidable contract:**
   As per sec.178 , " Where a person obtains possession of goods under a voidable contract ,the pledge created by him is valid provided (1) the contract has not been rescinded before the contract of pledge, and (2) the pawnee acts in good faith and without notice of the pawnor"s defect of title".

Check your progress B

1. In pledge bailor is called ---------- --.
2. The term "Pledge" means thing which is given as ---------- --.
3. A person employed to do any act for another or to represent another in dealings with third person is called ---------- --.
4. Section 178, of the Contract Act 1872 deals with ---------- --.

4.14 Summary

When we make bailment and pledge as a type of contract in our life, especially the contract of bailment because all of us has left our things such as cars in the service centre for repairs, it is bailment. Pledge has a limited scope as compared to bailment, many company take a loan from financial institution by pledging their stock as security. In short, we can say that every pledge is a bailment, but every bailment is not pledge. So, both of them are very important at their places and we must know their differences.

4.15 Keywords

Bailment is delivering goods for a specified purpose on trust. The goods are to be returned after the purpose is over.

Gratituous Bailment : Where neither the bailor nor the bailee get any kind of remuneration, then it is gratuitous.

Non-Gratituous Bailment : When either the bailor or bailee get any remuneration, then it is known as non-gratuitous bailment.

Pledge: Bailment of goods as a security for payment of debts or performance of promise is called pledge. The bailor is called pledger or pawnor and the bailee is called Pawnee.

Contract of Sale: Sec 4 states "A contract of sale of the goods is a contract whereby the seller agrees to transfer and transfer property in goods to the buyer for a price".

Hire Purchase Agreement: When the owner delivers his goods on hire basis to a person ,a hire purchase agreement is said to be exist.

Bailment: When the goods are delivered by one person to another for some purpose on the condition of goods shall be returned back on the achievement of the purpose, it is a case of bailment of goods.

4.16Answer to check your progress

Answer to check your progress A

Ans.1 Bailor

Ans.2 Bailee

Ans.3 149, of the Contract Act

Ans.4 Pledge

Answer to check your progress B

Ans.1 Pawnor

Ans.2 Security

Ans.3 Agent

Ans.4 Pledge by mercantile agent

4.17 Terminal questions

1. Define a bailment and briefly state the rights and duties of bailor and bailee.

2. Define bailment and give its characteristics. How does bailment differ from „sale"? What is a bailee"s lien?

3. Explain the nature of the bailee"s particular lien. How does it differ from the general lien of bankers and factors?

4. What are the rights and obligations of a finder of goods?

5. Define pledge, and state the respective rights and duties of pawnor and pawnee.

6. When does bailment come to an end?

7.”The position of a finder of goods is exactly that of a bailee in case of a deposit.” Comment.

8. To what extent is a bailee responsible for loss arising from defective title of the bailor.

9. When is a pledge created by non-owners valid?

10. Distinguish between „bailment“ and „ pledge“.

4.19 Suggested readings

1. N.D. Kapoor, Company Law, Sultan Chand & Sons, New Delhi. S.C. Aggarwal, Company Law, Dhanpat Rai Publications, New Delhi.
2. G.K. Varshney, Elements of Business Law, S Chand & Co., New Delhi.
3. S.K. Aggarwal, Business Law, Galgotia Publishing Company, New Delhi.
4.R.H. Pandia, Priciples of Mercantile Law, N.M. Tripathi Pvt. Ltd., Mumbai.
5. S.R. Davar, Mercantile Law, Progressive Corporation Pvt. Ltd., Mumbai.

Lesson 5

Indemnity and Guarantee

Structure

5.0 Learning objectives

5.1 Introduction

5.2 Definition of Contract of Indemnity

5.3 Parties involved in Contract of Indemnity

5.4 Rights of indemnity holder

5.5 Definition of Guarantee of Contract

5.6 Parties involved on contract of guarantee

5.7 Elements of contract of guarantee

5.8 Rights of a surety in contract of guarantee

5.9 Difference between Contract of guarantee & Contract of indemnity

5.10 Kinds of Guarantee

5.11 Discharge of surety from liability

5.12 Summary

5.13 Answer to check your progress

5.14 Keywords

5.15 Terminal questions

5.16 Suggested readings

5.0 Learning Objective

After reading this lesson, you should be able to

a) Define Indemnity and Guarantee its essentials.

b) Make a distinction the two concepts.

c) State the rights under Indemnity and Guarantee.

5.1 Introduction

The term Indemnity means “Security against loss”. In a contract of indemnity one party (the indemnifier) promise to compensate the other party (the indemnified) against the loss suffered by the other. As per sec.124, “A contract by which one party promises to save the other from loss occurred by promisor is called a Contract of indemnity”. Guarantee means security. As per sec. 126, “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”. Guarantee and Indemnity both contract are a kind of modes of compensation .They are like “two sides of the same coin” . In this lesson we will discuss it one by one. First we will explain the meaning of indemnity and guarantee , then their differences and the similarities.

5.2 Definition of Contract of Indemnity

According to sec 124, "A contract by which one party promises to save the other from the loss caused to him by the contract of the promisor himself or by the conduct of other person”.

This all means there is a recompense for any liability or loss which one person has incurred , whether the duty to indemnify comes from an agreement or not.

Example: A contracts to indemnify B against the consequences of any proceedings which C may take against B in respect of a certain sum of Rs.2000. This is a contract of indemnity.

The English law definition of a contract of indemnity is – “it is a promise to save a person harmless from the consequences of an act”. The definition provided by the Indian Contract Act confines itself to the losses occasioned due to the act of the promisor or due to the act of any other person.

Example1. X and Y are rival owners and they claim certain goods from a railway company. This is a contract of indemnity between X and Railway Company. If X takes delivery of the goods by

agreeing to compensate the railway company against loss in case Y turns out to be the true owner.

Example2: Mr. Jha makes a contract of indemnity with Mr. Raman against the consequences of any proceeding. Which Mr.Chandesh may take against Mr. Raman in respect of certain sum of Rs.200000 The contract between Mr. Jha and Mr. Raman is called the contract of indemnity.

5.3 Parties involved in Indemnity contract

In this type of contract, two parties involved. A person whom protection is provided is called **indemnity holder**. On the other hand who contributes the indemnity of protection to other person is called **indemnifies.**

The above particular definition of contract of indemnity consists of the following **Essential elements -**

1. There should be or you can say must be some type of loss.

2. That loss must be produced by promisor or any other person.

3. Indemnifier has the liability for the loss only.

Thus, it is well clear that this contract of indemnity has contingent nature and can be enforced only when the loss occurs not all the time.

A contract of indemnity is a species of the general contract so it contains all essentials of a valid contract.

Activity 1

X and Y go in to shop. X told shopkeeper, “let Y purchase the goods and he does not pay, I (x) will,” What kind of the contract is this?

5.4 RIGHTS OF INDEMNITY HOLDER

Important rights of indemnity holder are as follows:

- **Suit expenditure recovery:**

As per sec 125, "Holder has right to recover all the expenditure spent by him on suits defending his case. It is necessary that holder had acted according to indemnifies direction”.

- **Rights of loss recovery:**

As per sec 125, "It is a right of the indemnity holder to recover all the losses which he is compelled to pay in the related suit for indemnifies".

- **Compromise cost recovery:**

As per sec 125, "Under the terms of any compromise in such suit sometimes money is also paid. Holder is entitled to recover all the sum of money paid by him for this purpose".

- **Rights of Indemnifies**

As per sec 125, "He is entitled to the benefit of all the securities which the creditor has against the principal debtor, whether he was aware of them or not".

5.4 Rights of indemnifier: The Indian Contract Act has no content for rights of indemnifier in the indemnity contract but it is included in the dictionary of the English Law, that rights of indemnifier is similar to the rights of a surety under Sec. 141 that are discussed later in this chapter.

Check your progress A

1. Indemnity" means----------

2. Section 124, of the Contract Act, define ----------.

3. 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----------

4. The contract of insurance is a contract of----------

5.5 Definition of Guarantee of Contract

Indian Contract Act 1872 (**Section 126**) defines a contract of guarantee as follows:

"A contract of guarantee is a contract to perform the promise, or to discharge the liabilities of a third person in case of his default. The person who gives the guarantee is called Surety, the

person in respect of whose default the guarantee is given is called Principal Debtor, and the person to whom the guarantee is given is called Creditor. A Guarantee may be either oral or written."

Examples:

a) P requests to Q to lend Rs.1000 to C and guarantees that if C fails to pay the amount, he will pay. This is a contract of guarantee. In this case, P is the surety, Q the creditor and C, the principal debtor.
b) S requests C to lend Rs.5000 to P and guarantees that if p will fail to pay the in that case S will pay. This is a contract of guarantee. In this case, S is the surety, C the creditor and C, the principal debtor is P.

Note that A "contract of guarantee" is a tripartite agreement that means three parties are involved, for example: when Ajay promises to a shopkeeper Chirag that ajay will pay for the items bought by Bikram if Bikram fails to pay, , Chirag can sue ajay to recover the balance, this is a contract of guarantee. There is a triangular relationship between three collateral contracts which has been distinguished as follows:

1. As between P and C, there is a contract out of which the guaranteed debt arises.
2. As between C and S, there is a contract exists through that S guarantees to pay C, P„s debt in case of P"s default.
3. As between P and S, there is a contract that P shall indemnify S in the case S pays in the event of a default by P. It is implied always if in the contract it is not expressed.

5.6 Parties involved on contract of guarantee:-

There are three parties involved in this contract. **Surety** is A person who gives the guarantee**,** **Principal Debtor** is the person on whose default the gurantee is given and the person to whom the guarantee is given is called the **Creditor.**

5.7 Essential elements of contract of guarantee

1. Existence of Creditor, Surety, and Principal Debtor –

The economic function of a guarantee is to help a credit-less person to get a loan or employment or something else. Thus, there must be the existence of a principal debtor for a recoverable debt for which the surety is liable in case of the default of the principal debtor.

Example: C made contracts with P .Without any communication S undertakes with P for moving from C to indemnify C against any kind of damage that results from breach of P‟s obligation. This not at all make S as P‟s surety because without the consent of principal debtor person cannot become a surety.

2. Distinct promise of surety –

There must be a distinct promise by the surety to be answerable for the liability of the Principal Debtor.

3. Liability must be legally enforceable –

Only if the liability of the principal debtor is legally enforceable, the surety can be made liable. For example, a surety cannot be made liable for a debt barred by statute of limitation.

4. Consideration –

Any valid contract of guarantee must have a consideration which is nothing but anything promise to do or done or the something for the benefit of the principal debtor.

Example: P requests C to deliver goods to P on credit. C agrees to do so, provided S will give guarantee for the payment of C‟s good .S promises to guarantee the payment in the consideration of C‟s promise to deliver goods. There is sufficient consideration in this case.

Section 127 clarifies this as follows:

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

Illustrations:

1. Ajay is agree to sell certain goods to Bikram only if Chirag guarantees the payment for the goods sold . Chirag makes promise to ajay to guarantee the payment in consideration of Ajay's promise to deliver goods to Bikram. This is a sufficient consideration for Chirag's promise.
2. Ajay sells and delivers goods to Bikram. Chirag, afterwards, requests Ajay to forbear to sue Bikram for an year and promises that if Ajay does so, he will guarantee the payment if Bikram does not pay. Ajay forbears to sue Bikram for one year. This is sufficient consideration for Chirag‟s guarantee.

3. Ajay sold and delivered goods to Bikram. Later on, Chirag, without any kind of consideration makes promise to pay Ajay if Bikram fails to pay. The agreement is void due to lack of consideration.

5.8 Rights of a surety in contract of guarantee

A surety has the following rights against

1. The creditor,
2. The principal debtor
3. Co-sureties.

1. As against the Creditor:

According to the Indian Contract Act, 1872,

- Sec. 133 –“The creditor ought not fluctuate terms of the agreement between the creditor and the principal debtor without the surety‟s assent. Any such fluctuation 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”.

- 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".
- 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".
- Sec. 139 – "The surety is released if the creditor debilitates the surety‟s possible remedy against the principal debtor".

2. Against the Principal Debtor

- Right of subrogation – The surety on making good of the debt obtains a right of subrogation.
- 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".

Example: P is indebted to C and S is surety for the debt. C demands payment from S and he refuses and then C sues S for that amount, S defends the suit on reasonable ground but after that S is forced to make payment for the amount of the debt with costs.

4. Against the co-sureties

Rights of contribution: When two or more person guaranteed the debt they are called co-sureties. The co-sureties are liable to make contribution, as per the agreement and towards the payment of the guaranteed debt. When any of the co-sureties makes payment he can claim contribution from the other co-sureties. In this heads following are the rules:

- **Co-sureties liable to contribute equally**

As per sec.146 , "Where two or more persons are co-sureties for the same debt or duty, either jointly or severally, and whether under the same or different contracts, and whether with or without the knowledge of each other, the co-sureties, in the absence of any

contract to the contrary, are liable, as between themselves, to pay each an equal share of the whole debt, or of that part of it which remains unpaid by the principal debtor".

Example: P1, P2 and P3 are the sureties to P4 for the sum of 3000 INR lent to S. S makes default in the payment, P1, P2 and P3 are liable to pay 1000INR each between themselves.

- **Liability of co-sureties bound in different sums**

Sec.147 states "Where the co-sureties have agreed to guarantee different sums, they have to contribute equally subject to the maximum amount guaranteed by each one. The fact that the sureties are jointly or severally liable under the contract, or without the knowledge of each other, is immaterial".

Example: Ajay, Vijay and Charu, are the sureties for Dinesh and enter into three several bonds each in different penalty as Ajay has the penalty of 10,000 rupees, Vijay has penalty of 20,000 rupees, Charu has penalty of 40,000 rupees, conditioned for Dinesh's duly accounting to Eimely. Dinesh makes default to the extent of 40,000 rupees. Ajay is liable to pay 10,000 rupees, and Vijay and Charu 15,000 rupees each.

- **Release of Co- Surety:**

As per sec 138,"Where there are co-sureties, a release by the creditor of one of them does not discharge others, neither does it free the surety so released from his responsibility to the other sureties".

Activity 2

Calls on shares by Q in R ltd. were guaranteed by S. On non- payment of the last call, the company forfeited the shares. Is S discharged of his liability?

5.9 Difference between Contract of guarantee & Contract of indemnity

1. **Difference in Meaning**

   Contract of guarantee: In the contract of guarantee one person gives guarantee for the performance of the contract.

   Contract of indemnity: In the contract of indemnity one person promises to save the other

from any loss.

2. Difference in the Number of Parties involved in the contract:-

Contract of guarantee : Contract of guarantee is a tripartite in nature. Under the contract of guarantee there are three parties.

Contract of indemnity: Under the contract of indemnity there are two parties.

3. Difference in the Liability:-

Contract of guarantee: In case of guarantee contract surety has the secondary liability.

Contract of indemnity: Under indemnity contract the basic liability falls on indemnifies.

4. Difference in the number of contracts:

Contract of guarantee: Under the contract of guarantee there must be at least three contracts i.e. collateral contracts.

Contract of indemnity: Under the indemnity contract there is one contract only.

5. Difference in the nature of interest:

Contract of guarantee: Under the contract of guarantee guarantor he has only interest in guarantee.

Contract of indemnity: In case of indemnity contract, indemnifies has the interest in earning commission and premium.

6. Difference in the right of claim:

Contract of guarantee: If Guarantor has paid the debt , he is entitled to proceed against the principal debtor in his own name.

Contract of indemnity: Indemnifies cannot sue the third party.

7. Difference in the Performance of Contract:-

Contract of guarantee: In case of guarantee there is an existing debt or duty performance about which guarantee is given.

Contract of indemnity: Contract of indemnity depends upon the possibility of risk or loss.

5.10 Kinds of Guarantee

For the performance of any promise or to discharge of a liability guarantee is given. Kinds of guarantee are as follows :

1. Guarantee for repayment of a debt:

This is given for the loan repayment or debt repayment.

2. Fidelity guarantee:

This is the Guarantee which is given for the honesty and good conduct of an employee..

3. Specific guarantee:

To understand this type of guarantee let‟s take one example , Ajay asks Birender to give a loan of Rs. 5000 to Chirag promising to pay the amount on the failure of Chirag to pay the amount here this is the specific guarantee which is given in respect of a single transaction.

4. Continuing guarantee:

Where the guarantee is not limited to single transaction but extends to a number of transactions, called continuing guarantee. Fidelity guarantee is a continuing guarantee.

5. Prospective guarantee:

Prospective guarantee is given for a future debt.

6. Retrospective guarantee:

Retrospective guarantee is given for an existing debt.

7. Guarantee for the entire debt:

Where whole of the debt is guaranteed, it is called guarantee for the entire debt.

8. Guarantee for a part of a debt:

A surety can limit his liability, where he feels that he cannot undertake responsibility for the whole of the debt. He may guarantee a part of the debt.

5.11 DISCHARGE OF SURETY FROM LIABILITY

There are some circumstances under which a surety is discharged from his liability which are described as follows:

Death of surety :

According to Sec131, "In case of a „continuing guarantee‟ the death of a surety also discharges him from liability as regards transactions after his death, unless there is a contract to the contrary. The deceased surety‟s estate will not be liable for any transaction entered into after the death, even if the creditor has no notice of the death".

Notice of revocation:

According to sec.130, "An „ordinary guarantee‟ for a single specific debt or transaction cannot be revoked once it is acted upon. But a „continuing guarantee‟ may at any time, be revoked by the surety as to future transactions, by giving notice to the creditor".

Release or discharge of principal debtor (Sec. 134):

According to sec.134, " This Section provides for the following two ways of discharge of surety from liability:

(a) The surety is discharged by any contract between the creditor and the principal debtor, by which the principal debtor is released. Any release of the principal debtor is a release of the surety also.

(b) The surety is also discharged by any act or omission of the creditor, the legal consequence of which is the discharge of the principal debtor".

Variance in terms of contract (Sec. 133):

According to sec.133, "Any variance, made without the surety‟s consent in the terms of the contract between the principal debtor and the creditor, discharges the surety as to transactions subsequent to the variance".

Creditor‟s act or omission impairing sureties eventual remedy

According to sec.139, "If the creditor does any act which is inconsistent with the rights of the surety, or omits to do any act which his duty to the surety requires him to do, and the eventual remedy of the surety himself against the principal debtor is thereby impaired, the surety is discharged."

Arrangement by creditor with principal debtor without surety‟s consent (Sec. 135):

According to sec.135, " Where the creditor, without the consent of the surety, makes an arrangement with the principal debtor for composition, or promises to give him time or not to sue him, the surety will be discharged".

But in the following cases, a surety is not discharged, According to sec.136, "Where a contract to give time to the principal debtor is made by the creditor with a third person, and not with principal debtor, the surety is not discharged". .

Loss of security (Sec. 141):

According to sec.141, "If the creditor loses or, without the consent of the surety, parts with any security given to him, at the time of the contract of guarantee, the surety is discharged from liability to the extent of the value of security". The word „loss" here means loss because of carelessness or negligence".

Invalidation of the contract of guarantee (in between the creditor and the surety):

A surety is also discharged from liability when the contract of guarantee (in between the creditor and the surety) is invalid. A contract of guarantee is invalid in the following cases:

(i) According to sec.142 and 143, "Where the guarantee has been obtained by means of misrepresentation or fraud or keeping silence as to material part of the transaction, by the creditor or with creditor"s knowledge and assent". Notice that under these Sections the guarantee remains valid if the misrepresentation or concealment is done by the debtor without the concurrence of the creditor.

(ii) According to sec.144 , "Where a person gives a guarantee upon a contract that the creditor shall not act upon it until another person has joined in it as co-surety, the guarantee is not valid if that other person does not join".

(iii) Where it lacks one or more essential elements of a valid contract, e.g., surety is incompetent to contract or the object is illegal.

Check your progress B

1. Section 124 to 147, of the Contract Act, deals with----------

2. A guarantee which extend to a series of transactions is called --------- --.

3 A in consideration that B will employ C in collecting the rent of B's zamindari, promises B to be responsible, to the amount of 5000 rupees for the due collection and payment by C of those rents. This is ----------

4. Section 142 of the Contract Act 1872 deals with ----------

5.12 Summary

Guarantees and Indemnities have an important role in commercial lease cases, particularly in difficult financial crises. Although there is no compelling cause to look first at the principal ,an indemnity by contrast, accommodates simultaneous obligation.Generally it is an agreement that the surety will hold the lender innocuous against all misfortunes emerging from the agreement between the principal and the lender. Generally, a guarantee accommodates an obligation far-reaching with that of the principal. At the end of the day, the guarantor can‟t be at risk for much more than the client. The document will be understood as a guarantee if, on its actual development, the commitments of the surety are to "remained behind" the principal and just go to the fore once a commitment has been broken as between the principal and the lender. The commitment is an auxiliary one, reflexive in character. An indemnity emerges on event of an occasion, whereas a guarantee emerges on default by a third party. Hence we have explained what indemnity and guarantee means and on what grounds they differ on like the number of parties involved and the nature of risks involved and we have also worked upon the small but significant differences both in working and in principal between guarantee and indemnity. Therefore, though guarantee and indemnity have a few similarities, they are inherently different in nature.

5.12 Answer to check your progress

Answer to check your progress A

Ans.1 Security from damage or loss and Security for more profit

Ans.2 Contracts of indemnity

Ans.3 Contracts of indemnity

Ans.4 indemnity

Answer to check your progress B

Ans.1 Contracts of indemnity & Contracts of Guarantee.

Ans.2Continuing guarantee

Ans.3 continuing guarantee

Ans.4 Guarantee obtained by misrepresentation

5.13 Keywords

Indemnity: Security against loss.

Indemnity Contract: It is defined in the following words, "A contract by which one party promises to save the other from the loss caused to him by the contract of the promisor himself or by the conduct of other person".

Indemnifier: Person who gives the indemnity of protection to other person.

Guarantee of Contract: A contract of guarantee is a contract to perform the promise, or to discharge the liabilities of a third person in case of his default.

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

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

5.14Terminal questions

1. Define contract of indemnity? Illustrate your answer.

2. What do you mean by the term “guarantee”.

3. What are the rights of an indemnity holder when sued?

4. Differentiate between contract of indemnity and contract of guarantee?

5. When is a contract of guarantee held to be invalid?

6. The liability of surety is secondary. Discuss.

7. The liability of a surety is co-extensive with that of the principal debtor.

8. State the circumstances in which a surety is discharged from liability?

9. What is the nature if a surety is act as authority?

10. What are the rights of indemnifier?

5.15 Suggested readings

1. S.R. Davar, Mercantile Law, Progressive Corporation Pvt. Ltd., Mumbai.

2. R.H. Pandia, Principles of Mercantile Law, N.M. Tripathi Pvt. Ltd., Mumbai

3. N.D. Kapoor, Company Law, Sultan Chand & Sons, New Delhi. S.C. Aggarwal, Company Law, Dhanpat Rai Publications, New Delhi.

4. G.K. Varshney, Elements of Business Law, S Chand & Co., New Delhi.

5. S.K. Aggarwal, Business Law, Galgotia Publishing Company, New Delhi.

Lesson-6

Sale of Goods Act

Structure

6.0 Objective

6.1 Introduction

6.2 Contract of sale

6.2.1 Essential of contract of sale

6.2.2 Difference between sale and sell to agreement

6.3 Formation of contract of sale

6.4 Subject matter of contract of sale

6.5 Effect of destruction of subject matter

6.6 Price

6.6.1 The mode of fixing the price

6.6.2 The mode of payment of price

6.7 Earnest money

6.8 Summery

6.9 Glossary

6.10 answer to check your progress

6.11 suggested reading

6.12 model Questions

6.0 Objectives

After reading this lesson, you should be able:

- To understand meaning of goods.
- To understand the contract of sale of goods act.

6.1 Introduction

The saleof goods acts 1930 deals with the law relating to sale of goods in India. The term goods mean every kind of movable property, other than money and actionable claims.The sale of goods act, 1930 is mainly based on the English sale of goods act, 1893, before the sale of goods act, 1930, the law relating to sale of goods was covered under the chapter VII of Indian contract act, 1872, the provision of which were found to be inadequate.

Therefore a strong need was felt to have an independent sale of goods act and consequently a new act called sale of goods act, 1930 was passed. The presently act containing 66 sections came into force from 1st July, 1930 which extends to whole of India expect the state of Jammu and Kashmir

6.2 Contract of sale

Section 4 of the sale of goods act define "A contract whereby the seller transfer or agrees to transfer the property in goods to a buyer for a price"

A contract of sale consists of the following:

i. Sale (or absolute sale),
ii. Agreement to sell(or conditional sale).

I. Sale (or absolute sale)

Where the property(ownership) in the goods is immediately transferred from the seller to buyer, and nothing is left on the part of the seller, there is a sale or absolute sale. Counter sale in a shop is a sale or an absolute sale.

II. Agreement to sell or conditional sale

Where the transfer of property(ownership) in the goods shall take place in future or on the fulfillment of certain conditions, it shall be an agreement to sell or a conditional sale. The

property (ownership) in goods shall not be transferred from the seller to the buyer until and unless some condition is fulfilled for the completion the contract.

How agreement to sell becomes a sale

In the first stage every contract of sale is an agreement to sell. When seller and buyer agree to sell and buy some goods at a price, there is an agreement between the two for the sale of the goods. Now what remains, is the transfer of ownership of goods from the seller to the buyer? If the ownership is transferred by the seller immediately it becomes a sale and if he does not transfer the ownership until some condition is fulfilled it shall remain an agreement to sell till the condition is fulfilled and the ownership is transferred.

6.2.1 Essentials of a contract of sale

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

(1) valid contract

A contract of sale is just like any other contract made under Indian contract act, 1872. Therefore to constitute a valid contract of sale, it should satisfy all the essentials of a valid contract namely, a valid offer, a valid acceptance, free consent of parties, a valid and lawful consideration, parties must be competent to contract and lawful object etc.

(2) Two parties

To constitute a contract of sale, there must be a transfer or agreement to transfer the property in goods by the buyer. It means that there must be two persons, one the seller and the other the buyer. The seller and buyer must be two different people, because one person cannot buy its own products. The parties must be competent to contract.

Example: A club supplies food and drinks at fixed prices. This was held to be not a sale as a member of the club pays to the members jointly i.e. to the club. “Members of club are undivided joint owners and not part owners.”

There are certain exceptions to the rule that the same person cannot be both a purchaser and a seller. These are:

a) Where a person‟s goods are sold in execution of a decree, he may himself buy them.
b) A part owner can sell his share to the other part owner so as to make the other part-owner the sole owner of goods.
c) Where a Pawnee sells the goods pledged with him on non-payment of bill money. The pawnor may himself buy such goods.
d) A partner may also buy the goods from the firm in which he is a partner and vice versa.
e) In case there is a sale by auction, the seller may reserve right of making a bid at the auction and may thus purchase his goods.

(3) Agreement for the transfer of ownership

To constitute a valid contract of sale, there should be immediate transfer or an agreement to transfer the general property in goods sold or agreed to be sold. It is essential to transfer the general property in the goods from the seller to the buyer with or without physical possession of the goods.

(4) Goods:

The subject matter of the contract of sale must be „goods‟ the property in which is to be transferred from the seller to the buyer. According to section 2(7), "goods means every kind of immoveable property other than actionable claims and money and includes stock and shares, growing crops, grass, trees and things attached to or forming part of the land which are agreed to be served it before sale or under contract of sale."

Example: where the trees were sold so that they were to be cut out and separated from land and taken away by the buyer. The contract was for sale of trees as movable goods.

(5) Price:

To constitute a valid contract of sale, consideration for transfer must be money paid or promised. Where there is no money consideration the transaction is not a contract of sale, as for instance goods given in exchange for goods or as remuneration for work or labour. However, an existing debt due from the seller to buyer is sufficient. Further, there is nothing to prevent the consideration from being partly in money and partly in goods or some other articles of value.

Example: A refrigerator company supplies a newrefrigerator of Rs. 7000 in exchange of old refrigerator and Rs. 5000 in cash. It is a sale under the sale of goods act.

It may be noted that no particular form is necessary to constitute a contract of sale. A contract of sale may be made in writing or by words of mouth or may be implied from the conduct of the parties.

Check your progress A

1. Which of the following is the Essentials of a contract of sale
   a) valid contract
   b) Price
   c) Agreement for the transfer of ownership
   d) Contract
2. A contract of sale consists of the following
   a) Sale
   b) Agreement to sell
   c) Both A and B
   d) None of these

6.2.2 Difference between sale and agreement to sell

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

(1) Nature of contract

An agreement to sell is an executory contract is a contract pure and simple and no property passes, whereas a sale is an executed contract plus a conveyance.

(2) Transfer of property(ownership)

In sale the property in goods passes from seller to buyer immediately and buyer becomes the owner of the goods immediately.

But In an agreement to sell the property in goods passes from seller to buyer at some future date or subject to the fulfilment of certain conditions i.e. the seller continues to be the owner of the goods supplied until the agreement to sell becomes a sale.

(3) Risk of loss:

In a sale, if the goods are destroyed, the risk of loss falls on the buyer even if the goods were in the possession of the seller because the risk of loss passes with the ownership.

But in an agreement to sell if goods are destroyed the risk of loss falls on the seller even if the goods were in the possession of the buyer because ownership has not passed from the seller to the buyer and the risk passes with the ownership.

(4) Consequences of the breach:

On the branch of an agreement to sell by the seller, the buyer has only a personal remedy against the seller, but if after a sale the seller breaks the contract(e.g. resells the goods) the buyer may sue for delivery of the goods or for damages.

In an agreement to sell, if the buyer fails to accept the goods the seller may sue for damages only and not for the price. On a sale, if the buyer does not pay the price, the seller may sue him for the price.

(5) Insolvency of the buyer:

In a sale, if the buyer is adjudged an insolvent, the seller in the absence of a lien over the goods is bound to deliver the goods to the official receiver or assignee. The seller will, however, be entitled to a ratable dividend for the price of the goods.

In an agreement to sell, when the buyer becomes insolvent before he pays for the goods, the seller may not part with the goods.

(6) Insolvency of the seller:

In a sale, if the seller becomes insolvent, the buyer is entitled to recover the goods from the official receiver or assignee as the property of goods is with the buyer.

In the agreement to sell, if the buyer has already paid the price and the seller becomes insolvent, the buyer can claim only a ratable dividend and not the goods.

(7) General and particular property:

In case of an agreement to sell the buyer and seller get remedy against each other in case of breach of an agreement. The agreement of sale creates a right with which only the contracting parties are concerned and not the whole world.

Whereas in case of sale, the buyer gets an absolute right of ownership and this right of the buyer is recognized by the whole world.

(8) Right of re-sale

In a sale, the seller cannot resell the goods even if he is in possession of the goods after sale. If he does so the new buyer does not get the good title and the first buyer can recover the goods.

In an agreement to sell, the seller may sell the goods since ownership is with the seller. If he does so, he may become liable for breach of agreement. But in this case the new buyer gets good title.

6.3 Formation of contract of sale

Section 5 lays down the formalities of the contract of sale as under:

1) A contract of sale is made by an offer to buy or sell goods for a price. The contract may provide for the immediatedelivery of goods or immediate payment of the price or both, or the delivery or payment by instalments, or that the delivery or payment or both shall be postponed.
2) A contract of sale may be made in writing or by word of mouth or party in writing and partly by word of mouth, or may be implied from the conduct of parties.

Explanation: a contractof sale is made like any other contract under the general law of contract, without any particular form of a contract of sale as such. A contract of sale is made by a buyer offering to buy or a seller offering to sell goods for a price, and the other party accepting the offer of the buyer or the seller as the case may be. Therefore every contract of sale shall have two parties,i.e. a buyer and a seller, one of them must offer and the other must accept to buy or sell goods for a price.

The parties to a contract of sale may agree in the following terms:

1) That delivery of goods shall be made immediately
2) That delivery of goods shall be made at some future date.
3) That payment of price shall be made immediately
4) That payment of price shall be made at some future date.
5) There may be immediate payment of price and delivery of the goods.
6) That the goods may be delivered in due course and payment be made in instalments.

A contract of sale may be expressed or implied. It can be oral or in writing and partly oral and partly in writing. An oral offer can be accepted in writing and written offer can be accepted orally.

6.4 Subject matter of contract of sale

Section 6 provides that "Goods" form the subject matter of a contract of sale. "Goods" mean every kind of movable property other than actionable claims and money and includes stock and shares, growing crops, grass, and things attached to or forming part of the land which are agreed to be served before sale or under the contact of sale. The definition of „goods" as given the act is exhaustive. Actionable claims and current money have been expressly excluded from the scope of the definition. The definition of „goods" under the act includes all growing crops and grass and things attached to or forming part of the land which are agreed to be served before sale. The interest of a partner in partnership also comes within the definition of goods.

Goods which form the subject matter of a contract of sale may be divided into three types namely:

1) Existing goods
2) Future goods
3) Contingent goods

(1) Existing goods

Goods owned and possessed by the seller at the time of the making of the contract of sale are called existing goods. Sometimes the seller may be in possession but may not be the owner of the goods.In case of sale by a mercantile agent or a pledge the goods are possessed but not owned by the seller. Where the existing goods are the subject matter of a contract, it is essential that they must be in actual existence, for a present sale can be made only of a subject matter having actual or possible existence. Thus for example if A sells his horse to B, believing it to be in existence but in fact the horse is dead, no contract will arise.

The existing goods can be further classified as under:

(i) Specific goods
(ii) Ascertained goods
(iii) Unascertained goods

i) Specific goods:

Specific goods are those goods which are identified and agreed upon at the time of contract of sale are made. It is essential that the goods are identified and separated

from the other goods at the time of contract of sale is made and the goods merely in an identified position does not make the goods specific.

Example: Pin case of sale of one horse out of 30 horses, goods shall be specific if the horse is selected before the contract of sale is made. Here it is important to note that all the horses are horses but they cannot be exactly similar to each other. Therefore it is essential to select the horse out of the lot as specific goods.

ii) Ascertained goods:

Sometimes the term "specific goods" and "Ascertained goods" are used interchangeably. But actually they are not same and different in the sense that specific goods are identified at the time of contract of sale whereas the ascertained goods are identified after the contract of sale as per the terms decide. It is important to note that the goods are almost of exactly the same type and quality and the buyer is to select keeping in mind the defective pieces only.

Example:If there is going to be a sale of 30 chairs for an office out of a lot of 100 such chairs of the same design and quality, the goods are unascertained till 30 particular chairs are selected so that they are notdefective in any way and are considered to be the best of the lot for the satisfaction of the buyer, though they are all best and equal in quality from the point of view of seller. When the required 30 chairs are selected out of the lot, the goods are said to be ascertained goods for the contract of sale.

iii) Unascertained goods:

When the goods are not separately identified or ascertained at the time of making a contract of sale, are known as unascertained goods. When the buyer does not select the goods for him from a lot of goods, but are defined or indicated only by description, we call them unascertained goods. As soon as particular goods are separated from the lot they become ascertained goods. Ion the example quoted in ascertained goods, the lot of 100 chairs is ascertained goods. When 30 chairs are selected or identified for purchase they become ascertained goods.

(2) Future goods

It means goods to be manufactured or produced or acquired by the seller after the making of contract of sale, as rule, any person may sell or offer for sale at any price goods of

which he is not the owner, but which he hopes or expects to acquire. A contract to sell oil not yet pressed from seeds in his possession is a contract for the sale of future goods.

It may, however be noted that where by a contract the seller purports to effect the present sale of future goods, the contract operates as an agreement to sell. The reason is same is that the ownership of the goods cannot be transferred before the goods come into existence. Thus a contract for the sale of future goods cannot be transferred before the goods come into existence. Thus a contract for the sale of future goods is always an agreement to sell.

Example: A agrees to sell to Q all the mangoes which will be produced in his garden next year. This is an agreement for the sale of future goods.

(3) Contingent goods

These are a type of goods of future goods, the acquisition of which by the seller depends upon a contingency which may or may not happen. A seller may contact to sell goods conditionally on their acquisition, that is, goods which might be expected to come into existence, as

a. Goods to arrive
b. Future crops
c. The eggs

Such contracts are completed when goods arrive or crops mature or the eggs grow. But such contracts give no right of action if the contingency does not happen.

Example: A agrees to sell B a certain ring provided he is able to purchase it from its present owner. This is an agreement for the sale of contingent goods.

Activity-1

Explain different types of goods by giving suitable examples----------
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6.5 Effect of destruction of subject-matter

Section 7 and 8 lay down the rules applicable to cases where the subject-matter of a contract of sale is destroyed before and after the contract.

1. **Goods perishing before making of contract**

Where there is a contract for the sale of specific goods, the contract is void, if the goods, without the knowledge of the seller have at the time when the contract was made, perished or become so damaged as no longer to answer to exist, the agreement of sale is void and there is no sale.

Example: A agrees to sell to B, a specific cargo supposed to be on its way from England to Bombay. It turns out that, before the day of the bargain the ship carrying the cargo has been cast away and the goods lost. Neither party was aware of the facts. The agreement is void.

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

a. The goods must be specific goods. The section does not apply to unascertained goods.
b. The goods must have perished or damaged before entering into contract without the knowledge of the seller.

The words „perished goods" are not defined in act. It means not only goods physically destroyed, but also if they have ceased to exist in a commercial sense, that is , if their merchantable character as such had been lost and, therefore , unsaleable as dates which had become contaminated or sugar which had been converted into sharbat, or cement which had lost through moisture its properties as such.

This section pre-supposes that the seller does not know that the goods have perished. When the seller knows the goods to have perished, agreed to sell them. He will be liable in damages if the buyer did not know of this fact. If buyer has the knowledge of the perishable goods, but not the seller, will be estopped from setting up a contract.

In the case of a contract for supply of specific goods, if part of the goods are lost or destroyed, the question arises as to whether performance would be excused with regard to the whole. The answer would depend upon whether the contract is divisible or indivisible. Where the subject matter of the sale is an indivisible whole, and part of the goods has been destroyed, the seller would be wholly discharged. If the subject matter of contract of sale is divisible, the contract will not be void.

Example: There was a sale of 700 bags of nuts. Unknown to the seller before sale 109 bags had been stolen, the sale is void and the buyer cannot be compelled to take the remainder.

2. Goods perishing before sale but after agreement to sell

Section 8 deals with the effect of perishing of specific goods before sale but after agreement to sell. Unlike section 7, it deals with a case where the goods are in existence at the time of making the contract but perish without the fault of either party before the risk has passed to the buyer. While under section 7 the contract is void. Under present section it is not so, but performance on either side is excused as from the time of the perishing of the goods.

An agreement to sell specific goods becomes void if subsequently the goods without the fault of the seller or buyer have perished or become so damaged as no longer to answer their description in the agreement, provided this happens before the risk has passed to the buyer.

According to section 8 a contact can be avoided on the ground of impossibility of performance of the contract, if it satisfied the following conditions:

a. The contract must be an agreement to sell and not an actual sale.
b. The loss must be specific, i.e. it should relate to specific goods.
c. The goods must have perished or damaged before the property or the risk passes to the buyer.
d. The perishing of or the damage to goods must be without any fault on the part of seller or the buyer.

6.6 The price

Price is an essential element of sale; price means the money consideration for a sale of goods. No valid sale can take place without a price. If no consideration is given, then it will be a gift. It may be noted that old and rare coins not included in the definition of the term money. The price constitutesthe essence of a contract of sale as no sale can take place without a price. The price may be money actually paid or promised to be paid depending on whether the agreement is for cash or credit sale. However, where goods are for a fixed sum and the price is paid partly in terms of cash and partly in terms of valued goods it is sale.

6.6.1 Modes of fixing the price

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

1. **Expressly stated in the contract:** the parties may fix such price for the goods as they may please. Mere inadequacy of price does not affect a sale. But the sum should be definite. Thus, a man may sell his goods at any price he likes and may even sell them at a loss.
2. **Price to fix in agreed manner:** the contract may provide for the manner in which the price is to be fixed. The agreement may be to pay as much for the goods as others pay, or a fair market value. But, where

(i) Where the price is left to be fixed by only one of the contracting parties the agreement would be uncertain as to price and hence void

(ii) The price tis agreed to whatever sum as such shall be offered by any third party.

3. **Determined by the course of dealing between the parties:** a practice to deduct discount in determining the price may be implied from a course of dealing. Similarly a usage to

pay the price at the rate prevailing in the market on the date of delivery may be implied from the course of dealing

4. **Reasonable price:** where the price is not determined in accordance with the above three modes, the buyer shall pay the seller a reasonable price. What is a reasonable price is a question of fact dependent upon the circumstances of each particular case.
5. **Price to be fixed by the valuation of third party:** when such third party makes the valuation. There is a determination of price and the agreement becomes a contract of sale. In case the party which had to fix the price does not fix the same, the agreement thereby is avoided. Where goods or part thereof have been delivered and appropriated by the buyer he shall [pay a reasonable price therefore. If one of the parties wrongfully prevents the valuation from taking place, the part not in fault may claim damages from the other party.

Check your progress B

1. Which of the following is the modes of fixing the price
   a) Reasonable price
   b) Price to fixed in agreed manner
   c) Expressly stated in the contract
   d) All of these
2. Goods which form the subject matter of a contract of sale are
   a) Existing goods
   b) Future goods
   c) Contingent goods
   d) All of these

Activity-2

Explain the different modes of fixing the price----------

6.6.2 Mode of payment of price.

In the absence of an agreement to the contrary, the seller is not bound to accept any kind of payment other than the currency of the country. He is not bound to accept payment of cheque unless he has accepted cheque on previous occasions. By common consent or in accordance with an established course of dealing, the seller may accept payment.

a. By a cheque or draft
b. By a bank guarantee
c. By a letter of credit
d. By any other mode

6.7 Earnest money

Where buyer has paid some amount by way of earnest money as security for the performance of his part of the contract, it will stand adjusted against the price on performance. If the buyer fails to perform his promise, the seller can forfeit the money.

6.8 Summary

The sale of goods acts 1930 deals with the law relating to sale of goods in India. The term goods mean every kind of movable property, other than money and actionable claims.The sale of goods act, 1930 is mainly based on the English sale of goods act, 1893, before the sale of goods act, 1930, the law relating to sale of goods was covered under the chapter VII of Indian contract act, 1872, the provision of which were found to be inadequate. The act explains the formation of the sale of goods act and describes different types of goods.

6.9 Glossary

Reasonable price: where the price is not determined in accordance with the above three modes, the buyer shall pay the seller a reasonable price.

Contingent goods: These are a type of goods of future goods, the acquisition of which by the seller depends upon a contingency which may or may not happen.

6.10 Answer to check your progress

Check your progress A

1. (d)

2. (c)

Check your progress B

1. (a)

2. (d)

6.11 Suggested readings

Garg, Sareen, Sharma, Chawla. *Mercantile Law*. Kalyani Publishers, 2010.

Kapoor, N.d. *Elements of Mercantile Law*. Sultan Chand & Sons, 2013.

6.12Model questions

1. Explain clearly the essential elements which must co-exist for constituting a valid sale of goods. In what respect does a sale differ from an agreement to sell?
2. Defied the term „goods". Distinguish between specific and unascertained goods.
3. Explain the rules regarding the ascertainment of price in a contract of sale.

Lesson 7

Conditions and Warranties

STRUCTURE

7.0 Learning Objectives

7.2 Meaning of Condition

7.3 Meaning of Warranty

7.4 Difference between Condition and Warranty

7.5 Difference between Transfer of Property (ownership) and Possession

7.6 caveat emptor

7.7 Doctrine of caveat emptor

7.8 Rights of an unpaid seller

7.9 Summary

7.10 Keywords

7.11 Answer to check your progress

7.12 Terminal Questions

7.13 Suggested readings

7.0 Learning Objectives

After reading this lesson you will be able to

a) Define the condition.

b) Define warranty.

c) Make differentiation between condition and warranty.

b) Differentiate between transfer of property and possession.

c) Discuss the rights of an unpaid seller.

7.1 Introduction

Before a contract of sale is entered into, a seller makes certain statements or representation with a view to induce buyer to buy goods to clinch the bargain. Such statements or representation are generally about the nature, quality of the goods and about their fitness for the buyer‟s purpose which are different in character and importance. Some statements are just opinion but not a part of contract. A statements which forms part of the contract of sale and affects the contracts called a‟ stipulation‟ which may be either a condition or a warranty. An unpaid seller is one who has not been paid or tendered the whole of the price or one who receivers a bill of exchange or other negotiable instrument 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

7.2 Meaning of Condition

Sec.12 (1A) states, “Stipulation in a contract of sale with reference to goods which are the subject thereof maybe a condition or warranty”.

Section 12(2) , “states that a condition is a stipulation which is essential to the main purpose of the contract”. The breach of a condition gives rise to a right to treat the contract as repudiated or broken.

A condition is a term (oral or written) which goes directly 'to the root of the contract', and it is essential that if it is broken the innocent party can treat the contract as discharged. That party will not therefore be bound to do anything further under that contract.

Example 1: By a charter party (a contract by which a ship is hired for the carriage of goods),it was agreed that ship P of 450 tons ” now in the port of Amsterdam” should proceed direct to Newport to load a cargo. In fact at the time of the time of the contract the ship was not in the port of Amsterdum and when the ship reached Newport, the charterer refused to load. Held, the words “now in the port of Amsterdum” amounted to a condition, the breach of which entitled the charterer to repudiate the contract.

Example 2 – Aruna bought hair oil from Varun that was advertised as pure coconut oil. Later she found out that the oil was not pure but are mixed with herbs. In this case Aruna can return the oil and also she can claim for the refund of price paid by her for that oil.

In a contract of sale there are two types of conditions, which are as follows:

- **Expressed Condition**: when there are the conditions that are clearly definite and agreed upon by the parties while entering into the contract. In this parties can agree expressly that some event must occur before a party‟s duty to perform arises. Usually, all the requirements of the express condition must be met before a duty to render the dependent performance arises.

  For example: If a contract for the sale of car requires that a down payment be made by a specific date as a condition of delivery‟s late payment discharges the duty to deliver.

- **Implied Condition**: As per the law there are some conditions that are supposed to be present while making contracts but when conditions which are not expressly provided, notwithstanding, these conditions can be deferred off through express agreement. Some examples of implied conditions are:

Condition relating to title of goods:

According to Sec. 14(a), “ In a contract of sale, unless the circumstances of contract are as to show different intention, there is an implied condition on the part of the seller that

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

b) In case of an agreement to sell, he will have a right to sell the goods at the time when the property is to pass”.

The term 'right to sell' expect not only that the seller has the title to what he purports to sell, but also that the seller has the right to pass the property. If the seller's title turns out to be defective, the buyer may reject the goods.

Example: Ram brought a car from Dinesh and used it for five months. Dinesh has no title to the car and consequently ram had to hand it over to the true owner. In this case Ram could recover the price paid.

Condition with respect to the quality and fitness of the goods:

As per Sec. 16(1), "Where the buyer, expressly or by implication, makes known the seller the precise purpose for which goods are needed so as to show that the buyer relies on the seller's ability or judgment and the goods are of a description which it is in the course of the seller's business to supply (whether or not as the manufacturer of producer), there is an implied condition that the goods shall be reasonably fit for such purpose".

In other words, this condition of fitness shall apply, if:

a. The buyer makes aware to the seller about the purpose for which the goods are required by buyer,
b. The buyer has reliance on the seller's ability or judgment,
c. The goods are of a description which sellers ordinarily supplies in the course of his business, and
d. The supplied goods are reasonably fit for the buyer's purpose.

Example 1 Suppose an order was being placed for some trucks to be used "for heavy traffic in a hilly area. The trucks supplied were unfit and broke down. In this case there is breach of condition as to fitness.

Example 2 Gopal purchased a coat which caused skin irritation to him. But in this case, the seller was not liable, the cloth being fit for anyone with a normal skin.

Example 3.Bikram told Manu, a car dealer, that he wanted a car which is comfortable for touring purpose. Manu recommended a „Bugatti car" and Bikram hence bought that one .The car was uncomfortable and unsuitable for touring purpose. In this case Bikram can reject the car and can claim for recovery of the price, and there mere fact that Bikram bought the car under its trade name did not necessarily exclude the condition of fitness.

- **Condition as to wholesomeness:**

In case of selling eatable foodstuff and provisions, there is one another implied condition as in case of merchantability that the goods shall be wholesome. So, the provisions or foodstuff must not only correspond to their description, but must also be merchantable and wholesome. By 'wholesomeness' it means that “goods must be for human consumption”.

For example: Falguni bought milk from Anita. The milk contained germs of typhoid fever. Falguni‟s father took the milk and got infection due to which she died. Held, Falguni could recover damages.

- **Sale by sample**

Sec.17, “ 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”. Usually, a sale by sample is implied when a sample is shown to the parties and the parties intend that the goods should be of the kind and quality as the sample is. There is an implied condition in sale by sample that the bulk shall correspond with the quality of the sample, the buyer can compare the bulk to the sample quality and the goods shall be free from any defect, rendering the un-merchantable. As sec 17(2) states “the defect should not however be apparent on a reasonable examination of the sample”.

Example: In a sale contract of brandy by sample, brandy coloured with a dye was supplied. In this case buyer was not bound to the contract even though the goods supplied were not equal to the sample as the defects were not apparent on a reasonable examination of sample.

- **Sale by description:**

As per Sec. 15,”In a contract for sale by description, there is an implied condition the goods supplied must correspond with the description”. A vast majority of cases where samples are shown, and sales by description

For example: A ship was contracted to be sold as a „copper-fastened vessel‟ to be taken with all faults, without any allowance for any defects whatsoever. The ship turned out to be „partially copper-fastened‟. Held the buyer was entitled to reject.

Activity A

A purchased hot water-bottle from a retail chemist shop .The water -bottle could stand hot water but not boiling water. When it was filled by A with boiling water, it burst and injured his wife. A sues for damages. Decide.

7.3 Meaning of Warranty

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

Example – A while selling his old car to B, stated the car gives a mileage of 12 km per litre in petrol. But later the car gives only 10 km per litre. B cannot reject the car. It is breach of warranty. He can only claim for the damages due to extra consumption of petrol.

A warranty may be for lifetime or for a limited time -period. It may be either implied which is not explicitly defined same as in case of conditions, but arises according to the nature of sale like or expressed, i.e., which is specifically defined.

Implied Warranty of Quiet Possession – Under Sec. 14 (b**), "**In every contract of sale, unless there is a contrary intention, there is implied warranties that the buyer shall have and enjoy quiet possession of the goods. If the buyer's right to possession and enjoyment of the goods is in any way disturbed as consequences of the seller's defective title, the buyer may sue the seller for damages for breach of this warranty".

Implied Warranty of Freedom from Encumbrances - Under Sec. 14(c**), "**The buyer is entitled to a further warranty that the goods shall be free from any charge or encumbrance in favour of any third party not declared or known to buyer before or at the time when the contract is made. If the buyer is required to discharge the amount of the encumbrance it shall be a breach of this warranty and the buyer shall be entitled to damages for the same".

Warranty as to quality or fitness by usage of trade: Under Sec. 16(4**), "** An implied warranty as to quality or fitness for a particular purpose may be annexed by the usage of trade".

Warranty to disclose dangerous nature of goods: Where a person intends to sells goods. After knowing that the goods are inherently dangerous or they are harmful to the buyer and the buyer remain ignorant of the danger, then he must warn the buyer of the probable danger, otherwise he will be liable for damages.

A condition becomes a warranty when – Under Sec.13

a) As per Sec. 13(1),"The buyer waives the conditions or opts to treat the breach of the condition as a breach of warranty "; or
b) As per Sec. 13(2),"The buyer accepts the goods or a part thereof, or is not in a position to reject the goods".

Activity B

A purchases some chocolates from a shop. One of the chocolate contains poisonous matter and as a result A"s daughter who has eaten it falls seriously ill. What remedy is available to A against the shopkeeper.

7.4 Difference between Condition and Warranty

The difference between warranty and condition are as follows:

1. A warranty is a surety given by the seller regarding the state of the product. A condition is an obligation which requires fulfilment before another proposition takes place.
2. The term „condition", is defined in section 12 (2) of the Indian Sale of Goods, Act 1930 whereas „warranty" is defined in section 12 (3).
3. Warranty is additional term whereas Condition is vital to the theme of the contract.
4. The breach of warranty may not result in the cancellation of the contract, but breach of any condition may result in the termination of the contract.
5. Violating a condition means violating a warranty too, but this is not the case with warranty.
6. In breach of warranty, the aggrieved party can only sue the other party for damages. On the other hand in case of breach of condition, the innocent party has the right to withdraw the contract as well as can claim for damages.

7.5 Difference between Transfer of Property (ownership) and Possession

Property is the „ownership". Transfer of property in the goods is another essential of contract of sale of goods

Ownership:

- The idea of ownership trails the idea of possession.
- The ownership is the recognition of the right over the property.
- Ownership is the subjective as well as objective. It signifies the externally and internally.
- The right of alienation is an essential feature of ownership.

- The concept of ownership is used in widest meaning.
- The owner has the right to consume, destroy and alienate with his or her will.
- The residuary power is vested in the owner.
- Ownership is the guarantee of the law.
- Ownership without possession is right, unaccompanied by that environment of fact in which it normally realizes itself.
- Ownership strives to realize itself in possession.
- The ownership is left to seek "proprietary remedies".
- The law of prescription determines the process by which, through the influence of time, ownership without possession withers away and dies.
- Transfer: the ownership generally can be transferred by the way of convincing and registration in case of immovable properties and by way of delivery in case of movable properties.
- "Ownership is a matter of multiple rights".
- Ownership is a legal concept.

Possession

- First the idea of possession came into existence in the human civilization.
- Possession is the exercise of a claim over the property.
- Possession is the objective realization of ownership. It is the external significance of ownership.
- This right is not seen in possession.
- The concept of possession is narrower in this sense. The possession has limited rights to consume, destroy and alienate.
- The residuary power is not given to possessor.
- Possession is the guarantee of the facts.
- Possession without ownership is the body of fact, uniformed by the spirit of right which usually accompanies it.
- Possession to Endeavour‟s to justify itself as ownership.
- The possessor is left with "possessory remedies".

- The law of prescription determines the process by which, through the influence of time, possession without title ripens into ownership.
- Transfer: the possession, comparatively, can easily be transferred. It does not require convincing.
- A right can only be owned, and it cannot be possessed.
- "Whereas possession in singular, but stronger".
- "Possession is both a legal and a non-legal or pre-legal concept".

7.6 Caveat emptor

Caveat is a maxim which means "let the buyer beware" i.e. the buyer must take care of his own interest while purchasing any goods.

Explanation: When any person buys goods, it is his or her duty to examine them carefully. When buyer is satisfied with its quality and his or her need then only buyer should purchase goods. So, the goods are purchased by the buyer at his own risk and to his best judgement. If the goods do not suit the purpose, he cannot blame anybody except himself. The buyer has to bear the consequences of his wrong selection of goods.

7.7 Doctrine of caveat emptor:

Let understand this term by example woolen manufacturer organized a sale by sample to tailor. The cloth was required for making liveries But the fact was not made known to the seller by buyer . On account of the latent defect in the cloth, liveries could not be made out of it. But there was nothing to show that it was unfit for other purposes. Held the buyer was without remedy due to non-communication of the purpose for which the cloth was required

Check your progress 1

State whether the following statements are true or false.

1. If a buyer once waives a condition, he cannot afterwards insist on its fulfilment.

2. Packing of goods is not an important consideration in judging their „merchantability".

3. In a contract by sale of a sample, the bulk of goods supplied may not correspond to the sample.

4. An article is sold under its patent name. There is no implied condition regarding fitness of goods.

7.8 Rights of an unpaid seller

UNPAID SELLER:-

Seller: - A person who sells the goods or agrees to sell the goods is called seller.

Unpaid: - It means payment is not made or without payment.

In simple words, "Unpaid seller" means a person who has sold the goods for a price but price has not been paid to him.
Sales act defines the "unpaid seller" as a person , "To whom the whole price has not been paid or tendered and where a bill of exchange or other negotiable instruments has been accepted by him as a condition on which it was received has not been fulfilled by reason of dishonour of the instrument or otherwise". It is also declares that any person who is in the position of a seller like agent is also considered seller.

Rights of Unpaid Seller or Lien of Unpaid Seller:-

As per Sec. 46(1), "*Where the property in the goods has passed to the buyer ,an unpaid seller has the rights against the goods****".***

An unpaid seller has two-fold rights as following

I. Rights of unpaid seller against the goods, and

II. Rights of unpaid seller against the buyer personally. We shall now examine these rights in detail.

Rights of unpaid Seller against the Goods:

An unpaid seller has the following rights against the goods notwithstanding the fact that the property in the goods has passed to the buyer:

1. Right of lien;
2. Right of stoppage of goods in transit;
3. Right of resale [Sec. 46 (1)]

1. Right of Lien:

Sec.46 (1) (a) states, "A lien is a right to retain possession of goods until payment of the price". For the recovery of price an unpaid seller has a right to keep the goods in his own possession". **Example: -** Mr. Hunny sells the goods to Mr. Abhijit for Rs. 10 lac. Mr. Abhijit pays 5 lac and promises to pay the remaining 5 lac after two month. Mr. Hunny has a right of lien on the goods.

2. Rights of stopping:

As per Sec. 50, "If buyer becomes insolvent, an unpaid seller has a right of stopping the goods in transit.

Example: - "X" sells 100 bales of cotton to "Y" but delivery will be two stages. "X" delivers 50 bales first. Later on he comes know that "Y" has become insolvent. "X" can stop delivery of bales in transit.

3. Right of resale:

An unpaid dealer is viewed as the proprietor of the goods until he is not paid by the purchaser. So he has a privilege to offer his products subject to few conditions.

The right of resale is a very valuable right in the hand of an unpaid seller. In the absence of this right, the unpaid seller‟s other rights against the goods, namely, „lien‟ and „stoppage in transit,‟ would not have been of much use because these rights only entitle the unpaid seller to retain the goods until paid by the buyer. As per Section 46(1) (c) and Sec. 54," the unpaid seller a limited right to resell the goods in the following cases:

Where the goods are of a perishable nature; or where such a right is expressly reserved in the contract in case the buyer should make a default".

Example: - "X" sells one horse to "Y" on credit. "Y" does not pay. "X" can resell to other person.

II. Rights of Unpaid Seller against the Buyer Personally

The unpaid seller has the following three rights of action against the buyer personally:

1. **Suit for price** (Sec. 55) , "Where property in goods has handed to the buyer; or where the sale price is payable „on a day certain", although the property in goods has not passed; and the buyer wrongfully neglects or refuses to pay the price according to the terms of the contract, the seller is entitled to sue the buyer for price, irrespective of the delivery of goods. Where the goods have not been delivered, the seller would file a suit for price normally when the goods have been manufactured to some special order and thus are un -saleable otherwise".

2. **Suit for damages for non-acceptance (Sec. 56), "**Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may sue him for damages for non-acceptance. The seller"s remedy in this case is a suit for damages rather than an action for the full price of the goods".

The damages are calculated in accordance with the rules contained in Section 73 of the Indian Contract Act, that is, " the measure of damages is the estimated loss arising directly and naturally from the buyer"s breach of contract. Where the goods have a ready market the principle applicable is that the seller may recover from the buyer damages equal to the difference between the contract price and the market price on the data of the breach of the contract". Thus, if the difference between the contract price and market price is nil, the seller can get only nominal damages. But where the goods do not have any ready market, the measure of damages will depend upon the facts of each case.

For instance, in ABC Ltd. Versus Tony's the damages were evaluated on the premise of benefits lost. All things considered, ABC Ltd., who were truck merchants, contracted to supply a truck to tony declined to acknowledge conveyance. It was found as a reality that the supply of trucks

surpassed the request at the season of rupture and thus it might be said there was no market cost on the date of break. Held, ABC Ltd., were qualified for harms for the loss of their deal viz., the benefit they would have made, as they had sold one truck short of what they generally would have sold. To take another outline, if the products have been fabricated to some extraordinary request and they are unsaleable have no an incentive at all for different purchasers, then the dealer may even be permitted the maximum of the merchandise as damages.

1. Suit for special damages and interest (Sec.61), " This Section entitles the seller to sue the buyer for „special damages‟ also for such loss "which the parties knew when they made the contract, to be likely to result from the breach of it." In fact the Section is only declaratory of the principle regarding „special damages‟ laid down in Section 73 of the Indian Contract Act. The Section also recognizes, " unpaid seller‟s right to get interest at a reasonable rate on the total unpaid price of the goods sold, from the time it was due until it is actually paid".
(a) Suit for Damages for Non-delivery: As per Section 57,"Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may sue the seller for damages for non-delivery.

(b) Suit for Specific Performance: As per Section 58, "In any suit for breach of contract to deliver specific or ascertained goods, the court may direct that the contract shall be performed specifically".
(c) Suit for Breach of Warranty: As per Section 59, "Where there is a breach of warranty by the seller, or where the buyer elects or is compelled to treat any breach of a condition on the part of the seller as a breach of warranty, the buyer is not by reason only of such breach of warranty entitled to reject the goods, but he may –

(i) Set up against the seller the breach of warranty in diminution or extinction of the price; or (ii) Sue the seller for damages for breach of warranty".

Case: X sold a second hand Radio to Y who spent Rs 500 on the repair of this Radio. This Radio was seized by the police as it was a stolen one. Y recorded a suit against X for recuperation of harms for rupture of guarantee of very ownership including the cost of repairs. It was held that Y was qualified for recover the same

(d) Right to Treat the Contract as Rescinded or Operative in Case of Repudiation of Contract by Seller before due Date: As per Section 60, "Where seller repudiates the contract before the date of delivery, the buyer may either treat the contract as subsisting and wait till the date of delivery, or he may treat the contract as rescinded and sue for damages for the breach".

(e) Suit for Interest: As per Section 61(2), " In case of breach of the contract on the part of the seller, the buyer may sue the seller for interest from the date on which the payment was made".

4. Right of delivery:

The unpaid seller has a right of withholding the delivery of goods where the property in the goods has not passed to the buyer.

An unpaid seller loses the lien in the following cases:

- Goods in buyer‟s possession:

When a buyer or his agent obtains the possession for goods lawfully, unpaid seller lien terminates.

- **Does Not Reserve The Right of Disposal:-** When unpaid seller fails to reserve the right of disposal of the goods at the times of delivery to the bailee for transferring it to the buyer. Then this right of lien terminates.
- Termination by waiver:

If an unpaid seller himself waives his right of lien then it will be terminated.

Check your progress 2

State whether the following statements are true or false.

1. A seller who has obtained a money decree for the price of the goods is not an unpaid seller even if the decree has not been satisfied.

2. The right of stoppage in transit is an extension of the right of lien.

3. Transit comes to an end where the carrier wrongfully refuses to deliver the goods to buyer or his agent.

4. The right of lien is available to an unpaid seller of the goods who is in possession of them and the term of credit has expired.

7.9Summary

To the conclusion it can be said that a condition is defined as a "representation made by the seller which is so important that its non-fulfilment conquests the very purpose of the buyer. Warranty is a representation made by the seller which is not of that importance as a condition". Sometimes, a condition is changed to the status of a warranty and in such cases; the buyer loses the right to reject the goods on the ground of breach of condition. Unpaid seller is a person who is not yet paid and in this regards he has the rights against goods sold and against the buyer. He can also exercise fis right of stoppage of goods in transit under some circumstances.

7.10 Keywords

Condition: It is defined as, " representation made by the seller which is so important that its non-fulfilment defeats the very purpose of the buyer".

Warranty: Warranty is the representation made by the seller which is not of that important as a condition.

Implied Condition: It is a condition, which the law implies into the contract of sale.

Express Warranty: It is a warranty expressly agreed upon by both the parties at the time of contract of sale.

Unpaid Seller: A person who remains unpaid by buyer after he has sold goods to that buyer, or has been un-paid partially.

Right of Lien: When the ownership of goods transferred to the buyer but the goods are in the possession of the seller and when seller of goods has not been paid, then seller has the right of retain the goods till he receives the price of goods from the buyer.

Stoppage in Transit: It is clear by its term that means stopping of the goods while they are in the course of its transit.

Breach of Contract of Sale: In the case where buyer fails to pay the price for goods or accept the goods, or the seller fails to deliver the goods, the breach is said to have occurred.

7.11 Answer to check your progress

Answer to check your progress 1

Ans.1 True

Ans.2 False

Ans.3 False

Ans.4 True

Answer to check your progress 2

Ans.1 False

Ans.2 True

Ans.3 True

Ans.4 True

7.12 Terminal Questions

1. When is a seller called an unpaid seller? Give details about the rights of an unpaid seller against the goods and the buyer personally?

2. Compare the unpaid seller‟s right of stoppage in transit and in lien .

3. In the Sales of Goods Act, 1930 describe the law relating to the right of resale available to an unpaid seller

4. Comment on “Sub sale by the buyer does not extinguish unpaid seller‟s right to the lien. “

5. What do you understand by the right of stoppage in transit in respect of sale of goods?

6. Define the term 'condition' and 'Warranty'. Explain the difference between the two.

7. Discuss the provision of the sales of Goods Act relating to the implied conditions in a contract of sale by description.

8. Comment on "Let the buyer beware".

9. State the conditions in a contract for the sale of goods (i) by description (ii) required for a particular purpose.

10. Describe the characteristics of an unpaid seller.

7.13 Suggested readings

1. R.S.N. Pillai and Bagavathi, Business Law, S. Chand & Co., New Delhi.
2. M.C. Shukla, a Manual of Mercantile Law, S. Chand & Co., New Delhi.
3. Avtar Singh, the Principles of Mercantile Law, Eastern Book Co., Lucknow.
4. S.C. Kuchhal, Mercantile Law, Vikas Publishing House, New Delhi.
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7. S.S. Gulshan & G.K. Kapoor, Business Law, New Age International Publishers, New Delhi.
8. S.C. Aggarwal, Company Law, Dhanpat Rai Publications, New Delhi.
9. G.K. Varshney, Elements of Business Law, S Chand & Co., New Delhi.
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Lesson 8

Negotiable Instrument

Structure

8.0 Learning Objectives:

8.1 Introduction

8.2 Meaning of Negotiable Instruments

8.3 Characteristics of Negotiable instrument

8.4 Types of Negotiable Instruments

- 8.4.1. Promissory Note
- 8.4.2 Bill of Exchange
- 8.4.3 Cheques

8.5 Difference between bill of exchange and Promissory Note

8.6 Difference between bill of Exchange and a Cheque

8.7 Rules Regarding the Crossing of Cheques

8.8 Dishonour of cheques

- 8.8.1 Kinds of dishonour of cheque

8.9 Liability of drawer in dishonouring of cheque

8.10 Liability of banker in dishonouring of cheque

8.11 Holder

8.12 Holder In Due Course

8.13 Summary

8.14 Keywords

8.15 Answer to check your progress.

8.16 Terminal questions

8.15 Suggested readings

8.0 Learning Objectives

After reading this lesson you should be able to

a) Define the Negotiable Instrument and its different types.

b) Make comparison among bills of exchange, promissory notes, and cheques.

c) Explain rules regarding the Crossing of Cheques, liability of banker and drawer and Dishonour of cheques.

8.1 Introduction

Every business is based on the exchange of goods and services. Goods are being purchased and sold on credit and for cash also. These all transactions have a requirement of cash flow, immediately and sometimes later. Now a days, in business a huge number of transactions are involved huge amount of money that take place on a daily basis. It is quite troublesome as well as quiet risky for any of the party to make and receive cash payments on time. To this problem there are certain documents which are freely used in transaction commercially as well as monetary dealings. So it is a general practices for businessmen to use of certain documents for making payment. If they satisfy certain conditions then these documents are called negotiable instruments. In this lesson we will study about these documents in detail.

8.2 Meaning of Negotiable Instruments

To understand the concept of negotiable instruments let us take a few examples:

Suppose Manish is a book publisher and has sold books to Vivek for Rs 20,000/- on three months credit. To make sure that Vivek will pay the amount after three months, Manish can give written order addressed to Vivek For value of goods received by him, Rs.20,000/- that he is supposed to pay after three months to Manish before Vivek for payment. To show his

acceptance Vivek must signed this written document. Now, Manish can keep the document with him for three months and on the due date or after the due date, he can collect the money from Vivek. He can also make use of it for meeting different business transactions need. For example, after a month, if he required, he can borrow money from Nakul for a period of two months by passing on this document to Nakul. He can write on the backside of the document an instruction to Vivek to pay money to Nakul, and signed it. After that Nakul becomes the owner of that document and he can claim money based on that document from Vivek on the due date. If it is required that Nakul, can again pass on the document to Amit after instructing and signing on the backside of the document as we mentioned previously. Till final payment is made this passing on process may continue. In the above example, Vivek who has bought books worth Rs. 20,000/- can also give an undertaking mentioned that after three month he will make payment to Manish. Now Manish can retain that document with himself till the end of three months period or pass it again on to others for meeting business obligation (like with Nakul, as discussed above) before the expiry of that three month.

Take an example of cheque. It is a document issued to a bank that entitles the person whose name it bears to claim the amount mentioned in the cheque. If he wants, he can transfer it in favour of another person. For example, if Sarika issues a cheque of Rs. 5,000/ - in favour of Bivan, then Bivan can claim Rs. 5,000/- from the bank, or he can transfer it to Chandel to meet any business obligation, like paying back a loan that he might have taken from Chandel. Once he does it, Chandel gets a right to Rs. 5,000/- and he can transfer it to Nitu, if required. Such transfers may continue till the payment is finally made to somebody.

In the above examples, we find that there are certain documents which are freely used in commercial deal; such documents are called Negotiable Instruments.
Thus, we can say negotiable instrument is a transferable document, where negotiable means transferable and instrument means document.

A **negotiable instrument** is a document guaranteeing the payment of a specific amount of money, either on demand, or at a set time, with the payer named on the document.

In simple words, all the law regarding negotiable instruments act is contained in the Negotiable Instruments Act.1881 states, "a negotiable instrument is a document, which entitles a person to a sum of money and which is transferrable from one to another person".

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, whether the word order or bearer appear on the instrument or not."

8.3 Characteristics of negotiable instrument

The characteristics of negotiable instrument are as follows

- **Free Transferability-** There is no need to make a transfer deed, any registration, pay for stamp duty, etc. in case of a negotiable instrument. A negotiable instrument is freely transferable. The ownership can be changed by simple delivery to the bearer by payable. Additionally, in the course of transferring it is also not required to give a notice to the previous holder.

- **Title of holder free from all defects -** A person taking an instrument bonafide and for value known as holder in due course, gets the instrument free from all defects in the title of the transferor. This all means person who receives a negotiable instrument has a undisputable and clear title to the instrument, only if he has got the instrument in good faith and for a consideration, the title of the receiver will be absolute. When the person , the receiver should have no knowledge of the previous holder about any defect in his title, is known as holder in due course.

  Example: Shayam sells goods to bobby. Bobby gives a promissory note to Shayam for the price. He refuses to pay the promissory note, claiming that the goods are not according to order specification. Shayam sues bobby on the note B‟s defence in good. But if he negotiates the note to harry, a holder in due course, bobby‟s defence will be of no avail.

  The holder in due course is not affected by certain defence, for example, fraud which might be available against previous holder, provided he himself is not a party to it.
- **Unconditional Order-** Every negotiable instrument is an unconditional promise for payment or order.

- **Must be in writing-** A negotiable instrument must be in written in any form like computer printout, handwriting etc.

- **Payment-** one cannot make a promissory note on assets, securities, or goods. The instrument contains payment of a certain sum of money.

- **Signature-** Without the signature of the drawer or the maker, the instrument shall not be a valid. So a negotiable instrument must bear the signature of its maker.

- **The time of payment must be certain-** The instrument must be payable at a time which is certain to arrive. If the time is mentioned as „when convenient" it is not a negotiable instrument.

- **Stamping-** "Stamping of Bills of Exchange and Promissory Notes is mandatory". This is required as per the Indian Stamp Act, 1899. The value of stamp depends upon the value of the bill and the time of their payment.
- **The payee must be a certain person-** The person in whose favour the instrument is made must be named or described with reasonable certainty. The term „person" includes individual, body corporate, trade unions, even secretary, director or chairman of an institution. The payee can also be more than one person.
- **Delivery-** Any negotiable instrument like a cheque or a promissory note is not complete till it is delivered to its payee. Delivery of the instrument is essential For example, you may issue a cheque in your brother"s name but it is not a negotiable instrument till it is given to your brother.
- **Right of file suit-** The transferee of a negotiable instrument is entitled to file a suit in his own name for enforcing any right or claim on the basis of the instrument.
- **Presumptions-** Certain presumptions apply to all negotiable instruments, for example consideration is presumed to have passed between the transferor and the transferee.
- **Number of transfer-** These instruments can be transferred indefinitely till they are at maturity.

- **Rule of evidence-** These instruments are in writing and signed by the parties, they are used as evidence of the fact of indebtness because they have special rules of evidence.
- **Notice of transfer-** It is not necessary to give notice of transfer of a negotiable instrument to the party liable to pay.
- **Exchange-** These instruments relate to payment of certain money in legal tender, they are considered as substitutes for money and are accepted in exchange off goods because cash can be obtained at any moment by paying a small commission.

8.4 Types of Negotiable Instruments

According to the Negotiable Instruments Act, 1881, " there are just three types of negotiable instruments i.e., promissory note, bill of exchange and cheque".

8.4.1. Promissory Note

Section 4 of the Negotiable Instruments Act, 1881 defines a promissory note as "an instrument in writing (not being a bank note or a currency note) containing an unconditional undertaking, signed by the maker, to pay a certain sum of money only to or to the order of a certain person or to the bearer of the instrument".

example of a Promissory Note

Rs. 50,000/- New Delhi

September 20, 2010

On demand, I promise to pay Rakesh, s/o Suresh of Gwalior or order a sum of Rs 50,000/- (Fifty Thousand only), for value received.

To , Ramesh Sd/ Sanjeev

Address…….. Stamp

Parties to a Promissory Note

There are primarily two parties involved in a promissory note.

They are:

i) The Maker or Drawer – "the person who makes the note and promises to pay the amount stated therein". In the above specimen, Sanjeev is the maker or drawer.

ii) The Payee – "the person to whom the amount is payable". In the above specimen it is Rakesh.

In course of transfer of a promissory note by payee and others, the parties involved may be –

a. The Endorser – "the person who endorses the note in favour of another person". In the above specimen if Rakesh endorses it in favour of Ramesh and Ramesh also endorses it in favour of ram , then Ram and Ramesh both are endorsers.

b. The Endorsee – "the person in whose favour the note is negotiated by endorsement". In the above, it is Ramesh then Ram

Features of a promissory note

i. It must contain an undertaking or promise to pay. Only acknowledgement of indebtedness is not enough. For example, if someone writes „I owe Rs. 5000/- to Om Prakash", it is not a promissory note.

ii. A promissory note may be payable on demand or after a certain date. For example, if it is written „three months after date I promise to pay Jatinder or order a sum of rupees Five Thousand only" it is a promissory note.

iii. A promissory note must be in writing, duly signed by its maker and properly stamped as per Indian Stamp Act.

iv. It must contain a promise to pay money only. For example, if someone writes „I promise to give Bhawna a Maruti car" it is not a promissory note.

v. The promise to pay must be conditional. For example, if it is written „I promise to pay Suresh Rs 5,000/- after my sister"s marriage", is not a promissory note.

vi. The sum payable mentioned must be certain or capable of being made certain. It means that the sum payable may be in figures or may be such that it can be calculated.

vii. The parties to a promissory note, i.e. the maker and the payee must be certain.

8.4.2 Bill of Exchange

Take an example of Rajesh; he has given a loan of Ten Thousand Rupees to Sumit, which Sumit has to return. Now, Rajesh also has to give some money to Varun. In this case, Rajesh can make a document directing Sumit to make payment up to that ten Thousand to Varun on demand or after expiry of a specified period. This document is called a bill of Exchange, which can be transferred to some other person‟s name by Varun.

Section 5 of the Negotiable Instruments Act, 1881 defines a **bill of exchange** as "an instrument in writing containing an unconditional order signed by the maker directing a certain person to pay a certain sum of money only to or to the order of a certain person or to the bearer of the instrument".

Specimen of bills of exchange

Rs. 10,000/-		New Delhi
		May 2, 2001
Five months after date pay Varun or (to his) order the sum of Rupees Ten Thousand only for value received.		
To	Accepted	Stamp
Sumit	Varun	S/d
Address		Rajesh

Parties to a bill of exchange

There are three parties involved in a bill of exchange.

They are

i. **The Payee** – The person to whom the payment is to be made. In the above case it is Varun. The drawer can also draw a bill in his own name and thereby he himself becomes the payee. Here the words in the bill would be Pay to us or order. In a bill where a time period is mentioned is called a Time Bill. But a bill may be made payable on demand also. This is called a Demand Bill.

ii. **The Drawee** – The person to whom the order to pay is made. He is generally a debtor of the drawer. It is Sumit in this case.

iii. **The Drawer** – The person who makes the order for making payment. In the above specimen, Rajesh is the drawer.

Features of a promissory Bills of exchange:

i. "A bill must be in writing, duly signed by its drawer, accepted by its drawee and properly stamped" as per Indian Stamp Act.

ii. The parties to a bill must be certain.

iii. It must contain an order to pay. Words like „please pay Rs 5,000/- on demand and oblige" are not used.

iv. The order must be to pay money and money alone.

v. The order must be unconditional.

vi. The sum payable mentioned must be certain or capable of being made certain.

Activity A

A bill is drawn, payable at 66 Lucknow Road. Kanpur but does not contain the name of the drawee. Vijay who resides there accepts the bill, Is it a valid bill?

8.4.3 Cheques

Cheque is a very common form of negotiable instrument. You can issue a cheque in your own name or in favour of others, if you have a savings bank account or current account in a bank, thereby directing the bank to pay the specified amount to the person named in the cheque. Therefore, a cheque may be regarded as a bill of exchange; the only difference is that the bank is always the drawee in case of a cheque. A cheque is a bill of exchange drawn upon a specified banker and payable on demand and it includes the electronic image of a truncated cheque and a cheque in the electronic form.

The Negotiable Instruments Act, 1881 defines a cheque," as a bill of exchange drawn on a specified banker and not expressed to be payable otherwise than on demand". Actually, a cheque is an order by the account holder of the bank directing his banker to pay on demand, the specified amount, to or to the order of the person named therein or to the bearer.

Features of a cheque

i. The cheque must bear a date otherwise it is invalid and shall not be honoured by the bank.

ii. The amount specified is always certain and must be clearly mentioned both in figures and words.

iii. A cheque must be in writing and duly signed by the drawer.

iv. It is issued on a specified banker only.

v. It contains an unconditional order.

vi. The payee is always certain. vi. It is always payable on demand.

8.5 Comparison between bill of Exchange and Promissory Note

Bill of Exchange	**Promissory Note**
1. It contains an unconditional order. 2. There are three parties – the x drawer, the drawee and the payee. 3. It is made by the creditor. 4. Acceptance by the drawee is a must. 5. The liability of the maker/drawer is secondary and conditional upon non-payment by the drawee.	1. It contains an unconditional promise. 2. There are two parties – the maker and the payee. 3. It is made by the debtor. 4. Acceptance is not required. 5. The liability of the maker/drawer is primary and absolute.

8.6 Comparison between a Cheque and a Bill of Exchange

Cheque	**Bill of Exchange**
1. It is drawn only on a banker. 2. The amount is always payable. 3. It can be crossed to end its negotiability. 4. Acceptance is not required.	1. It can be drawn on anybody including a banker. 2. The amount is payable on demand on demand after a specified period. 3. It cannot be crossed. 4. Acceptance is a must

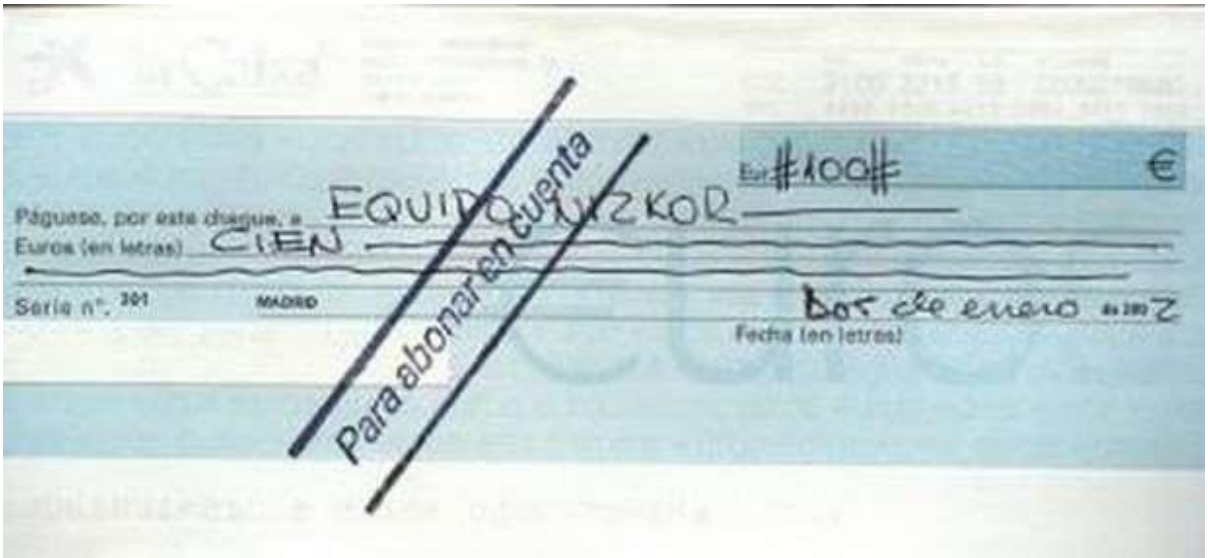
8.7 Rules Regarding the Crossing of Cheques

There are two types of cheques, open cheques and crossed cheques. A cheque which is payable in cash across the counter of a bank is called open cheque. A **crossed cheque** is one on which two parallel transverse lines with or without the words „& Co.‟ are drawn. A common instruction is to specify that it must be deposited directly into an account with a bank and not immediately cashed by a bank over the counter. The format and wording varies between countries, but generally two parallel lines and/or the words 'Account Payee' or similar may be placed either vertically across the cheque or in the top left hand corner. This cheque that has been marked to specify an instruction about the way it is to be redeemed. By using crossed cheques, cheque writers can effectively protect the cheques they write from being stolen and cashed.

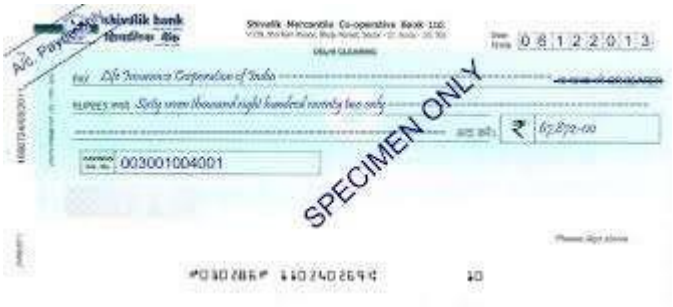
Types of crossing:

There are two types of crossing

1. **General crossing**: As per Sec.123 ,"Any cheque is said to be crossed generally where it bears across its face an addition of the words „& CO‟ or any other abbreviation thereof between two parallel lines either with or without the words non-negotiable or two parallel transverse lines simply either with or without the words not negotiable".



2. **Special crossing:** As per Sec.124 **,"**A cheque is specially crossed where a cheque bears across its face an addition of the name of a banker, either with or without the words „not negotiable" the cheque is deemed to be crossed specially". The transverse line is not necessary in this case. The payment of specially crossed cheque can be obtained through the particular banker whose name appears across the face of the cheque or between the transverse lines, if any.



As per sec.126, "A cheque may be crossed by drawer, holder and the banker".

8.8 Dishonour of cheques

Section 92 of the Act defines, "a cheque is said to be dishonoured by non-payment when the maker of the note, acceptor of the bill or drawee of the cheque makes default in payment upon being duly required to pay the same".

"Following are the some important reasons for dishonouring a cheque

- If the name of the payee is not written or not written clearly.
- If the ordered or crossed cheques are transferred without proper endorsement and delivery.
- If the date is not written or written incorrectly or the date given is of three months before or if the advance date is given.
- If the alteration made on the cheque is not proved by the drawer giving signature.
  If the account number is not mentioned or if it is not clear or if it is not mentioned clearly.
- If the amount is not written in words and figures or written incorrectly or if the amount written in words and figures does not match with each other.
- If the cheque is overwritten.
- If the signature is not given or if the signature given in the cheque does not match with the signature given on the signature specification card kept by the bank.

If the amount mentioned on the cheque is more than the amount that the drawer has in his bank account or if as per bank's rule the minimum balance in the account of the drawer cannot remain.

- If the bank balance remains shortage on account of not collecting the cheque deposited.
- If the bank has got the information regarding the death or insolvency or lunacy of the drawer of depositor.
- If the cheque is not found in proper condition or it is found wet, torn or spotted.
- If the drawer has given order to the bank to stop payment of the cheque.
- If the court of law orders the bank to stop payment of the cheque.
- If the drawer has closed his/her account before presenting the cheque".

8.8.1 Kinds of dishonour of cheque

1).Dishonour by non-acceptance:

Sec 91[14] of the act states, "dishonour of cheque by non-acceptance i.e. presentment for acceptance is needed and normally acceptance and payment go hand in hand and is payable after sight thus cheques are payable at sight".

2).Dishonour by non –payment:

When the drawee of a cheque makes default in payment and when the drawer of the cheques issues instructions to the bank not to make any payment of a particular cheque issued by him. A cheque is dishonoured by non-payment

8.9 Liability of drawer in dishonouring of cheque:

According to section 30 of the Negotiable Instrument Act 1881 "the drawer of the cheque is bound in case of dishonour by drawee to compensate the holder provided due notice of dishonour has been given to, or received by the drawer".

Section 138 of Negotiable Instrument Act states, "the payee to issue notice in written to drawer to make payment of check amount within 30 days of information from bank regarding the return of cheque as unpaid".

8.10 Liability of banker in dishonouring of cheque:

"When a cheque is dishonoured, the payee can take legal action against the drawer" under the Negotiable Instruments Act. The complainant needs to produce the dishonoured cheque and the bank advice as evidence. In case of dishonoured cheque is lost by the bank then drawee filed a consumer complaint in the District Forum.

8.11 HOLDER :-

Holder has three characteristics :

1. Document is in hand.

2. He is entitled to receive the amount written on the document.

3. He is entitled to sue against the refusal.

8.12 Holder In Due Course :-

Holder in due course should possess the feature :

1. A holder in due course must have become a holder of the instrument before the date of its maturity. He must be entitled to transfer it.

2. He must be a holder for a valuable consideration.

3. He must be valid holder of the instrument.

4. He must be a holder of the instrument in good faith.

5. Amount of document will be payable on that date when it will be presented.

6. He should be entitled to sue in case of refusal of payment.

7. He must have taken instrument complete and regular on the face of it.

Activity B

A company issue a cheque on its bankers. A receipt was appended to the cheque and it ordered the banker to make the payment" provided the receipt form at foot hereof is duly signed, stamped and dated." Is the cheque valid?

Check your progress

State whether the following statements are true or false:

1. Bill payable on demand must be presented for acceptance.
2. Any person can be an acceptor for honour.
3. A bill can be accepted for honour in the absence of noting or protest.
4. A bill can be accepted for honour without the consent of holder.
5. A promissory note can be accepted for honour.
6. All negotiable instruments are governed by Negotiable Instrument Act.
7. A cheque is always payable on demand.
8. A promissory note can be made originally payable to bearer.

9. A bills of exchange can be made originally payable to bearer.

10. A lost instruments is not presumed by law to have been duly stamped

8.13 Summary:

In conclusion we can say that Negotiable instruments are particular type of documents use in business transactions, the ownership of which can be freely transferred from one person to another. Types of Negotiable Instruments are Promissory note, Bill of exchange ,Cheque. Promissory note – "An instrument in writing containing an unconditional undertaking, signed by the maker, to pay a certain sum of money only to or to the order of a certain person or to the bearer of the instrument". Bill of exchange – "An instrument in writing containing an unconditional order, signed by the maker, directing a certain person to pay a certain sum of money only to or to the order of a certain person or to the bearer of the instrument". Cheque – "It is an order by the account holder of the bank directing his banker to pay on demand the specified amount, to or to the order of the person named therein or to the bearer".

8.14 Keywords:

Holder in due course: The Uniform Commercial Code (UCC) defines ," **holder in due course** as one who takes an instrument for value in good trust absent any notice that it is overdue, has been dishonoured, or is subject to any defence against it or claim to it by any other person".

Drawee:

A person or bank that is ordered by its depositor, a drawer, to withdraw money from an acco unt to pay a designated sum to a person according to the terms of a check or a draft.

Negotiable instrument: A negotiable instrument is a document guaranteeing the payment of a specific amount of money, either on demand, or at a set time, with the payer named on the document.

Cheque: A cheque is a bill of exchange drawn upon a specified banker and payble on demand and it includes the electronic image of a truncated cheque and a cheque in the electronic form.

Promissory note :promissory note as „an instrument in writing (not being a bank note or a currency note) containing an unconditional undertaking, signed by the maker, to pay a certain sum of money only to or to the order of a certain person or to the bearer of the instrument".

Bill of exchange: **bill of** exchange as „an instrument in writing containing an unconditional order, signed by the maker, directing a certain person to pay a certain sum of money only to or to the order of a certain person, or to the bearer of the instrument".

8.15 Answer to check your progress.

Ans.1 False

Ans.2 False

Ans.3 False

Ans.4 False

Ans.5 False

Ans.6 False

Ans.7 True

Ans.8 False

Ans.9 True

Ans.10 False

8.16 Terminal questions:

11) Mention two types of negotiable instruments which are commonly used.

12) Write difference between a promissory note and a cheque.

13) "A cheque need not bear a date." Do you agree? Give reason.

14) State any four essential features of a bill of exchange.

15) "A bill of exchange must contain an unconditional promise to pay." Comment.

16) Write the number of parties involved in a bill of exchange.

17) Define Promissory note with its any four important features.

18) Describe the important features of a bill of exchange.

19) Define „cheque". How does it differ from a promissory note?

20) What are the liability of bank in case of dishonouring of cheque?

8.15 Suggested readings

1. S.S. Gulshan & G.K. Kapoor, Business Law, New Age International Publishers, New Delhi.
2. N.D. Kapoor, Company Law, Sultan Chand & Sons, New Delhi.
3. P.P.S. Gogna, Mercantile Law, S.Chand & Company, New Delhi.
4. S.K. Aggarwal, Business Law, Galgotia Publishing Company, New Delhi.
5. S.C. Aggarwal, Company Law, Dhanpat Rai Publications, New Delhi.
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7. R.S.N. Pillai and Bagavathi, Business Law, S. Chand & Co., New Delhi.
8. K.R. Balchandari, Business Law for Management, Himalaya Publication House, New Delhi.
9. G.K. Varshney, Elements of Business Law, S Chand & Co., New Delhi.
10. S.C. Kuchhal, Mercantile Law, Vikas Publishing House, New Delhi.
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LESSON 9

RIGHT TO INFORMATION ACT, 2005

Structure

9.1 Objectives

9.2 Introduction

9.3 International Scenario

9.4 Indian Scenario

9.5 Right to Information Act, 2005: An Introduction

9.6 Salient Features of RTI Act, 2005.

9.7 Public Authority

9.8 Obligations of Public Authority & Designation of PIOs

9.9 Request for Obtaining Information

9.10 Disposal of Request for Obtaining Information

9.11 Exemption from Disclosure of Information

9.12 Severability

9.13 Third Party Information

9.14 The Central Information Commission

9.15 The State Information Commission

9.16 Powers and Functions of the Information Commissions, Appeal and Penalties

9.17 Summary

9.18 Glossary

9.19 Answers to check your progress

9.20 References

9.21 Terminal and Model questions

9.1 Objectives

After reading this lesson, you will be able to:

- Define RTI Act, 2005.
- Explain the important features of RTI Act, 2005
- Understand the powers and function of information commissions.

9.2 Introduction

Transparency and accountability are hallmark of any good democratic system. They are, in fact, the backbone of a democracy. Whenever a government is transparent, it ensures a greater accountability and thus reduces the levels of corruption. There is a presumption that whatever is done by the government is done for the betterment of the people. A government which is not open may be tempted to commit administrative misconduct. An open government on the other hand ensures reduction in the number of administrative faults. According to Justice P.N. Bhagwati, "open government is new democratic culture of an open society towards which every liberal society is moving and our society is no exception". Informed citizenry is an essential pre - requisite for bringing about transparency in governance and the same is possible only if there is easy access to information. Freedom of Information Acts is accordingly becoming standard good practice at the international level. Right to information generally means the right of citizens to access the information which is in the possession of the public authorities. Access to information empowers the citizens and allows them to participate in the governance process. Information also empowers them to make more meaningful decisions, form informed opinions and influence the policies affecting the society.

9.3 International Scenario

Efforts to promote the freedom of information go way back to 1893. It was then that a number of International Conventions of Journalists had been held at different places, but nothing concrete was achieved.

United Nations convened a Conference at Geneva in March 1948 on the subject matter of Freedom of Information. This Conference was attended by fifty four countries. A series of resolutions were passed for further consideration by the United Nations. It ultimately led to the United Nations General Assembly declaring Freedom of Information a fundamental human right.

Article 19 of the Universal Declaration of Human Rights declares:

> Everyone has right to freedom of opinion and expression; the right includes freedom to hold opinion without interference and to seek, receive and import information and ideas through media and regardless of frontiers.

In 1948, Sweden went on to become the first country to enact a provision for access to official information for the citizens. The Economic and Social Council of the United Nations adopted a derivative from Article 19 of the Universal Declaration of Human Rights in the year 1960.

The United States of America followed the Swedish example in 1966 and in 1970 Norway enacted the Right to Information Law. The number of countries having the Freedom of Information laws climbed to 13 and by 2010, 85 countries, including major developing countries like India and China had enacted national level Right to Information laws.

9.4 Indian Scenario

Justice P B Sawant, the Chairman of the Press Council of India and the Institute of Rural Development, Hyderabad prepared their respective drafts of the Right to Information Bill in 1996 and 1997 respectively. This resulted in the initiation of a debate for effective and responsive government. This forced the Government of India to appoint a Working Group on January 2, 1997 which was to dwell upon the necessity and possibility of enacting a Right to Information Bill.

The Working Group was of the conclusion that the Right to Information had already been made effective by virtue of Article 19 (1) (a) of the Constitution of India which guarantees the right to freedom of speech and expression. Accordingly, the Freedom of Information Bill, 2000 was introduced in the Lok Sabha on 25th July, 2000. The Bill was enacted as the Freedom of

Information Act in 2002, but the Act retained a number of restrictive provisions resulting in the denial of information to the public.

The new Right to Information Bill, having a wider scope, but subject to reasonable restrictions was introduced in May, 2005. The Right to Information Act, 2005 extends to the whole of India except the State of Jammu and Kashmir. The Act came partially into force on 15th June, 2005 and into full force on 12th October, 2005 (120th day of its enactment).

9.5 Right to Information Act, 2005: An Introduction

At the very outset, the Preamble of the Right to Information Act, 2005 states:

> An Act 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, in order to promote transparency and accountability in the working of every public authority, the constitution of a Central Information Commission State Information Commissions and for matters connected therewith or incidental thereto.

Check your progress 1:

1. *RTI ensures good governance. (True/ False)*
2. *In certain circumstances RTI proves to be a hindrance in corrupt activities. (True/ False)*

9.6 Salient Features of the Right to Information Act, 2005.

Preliminary:

The Right to Information Act, 2005 is thus a special legislation imposing obligations on every public authority to provide information to the person asking for it.

9.7 'Public authority' under the Act has been defined as any authority or body or institution of self- government established or constituted by or under the Constitution; by any other law made

by Parliament; by any other law made by State Legislature; by notification issued or order made by the appropriate government and includes any- body owned, controlled or substantially financed; non-Governmental Organization substantially financed directly or indirectly by funds provided by the appropriate Government.[1]

„Information" has been defined as any material in any form, including records, documents, memos, e-mails, opinions, advices, press releases, circulars, orders, logbooks, contracts, reports, 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.[2]

All citizens have the right to information subject to the conditions laid down in the Act.

9.8 Obligations of Public Authorities:

The Act states that every public authority is under obligation to maintain all its records duly catalogued and indexed and wherever possible, subject to availability of resources, the same be computerized within a reasonable time and connected through a network all over the country on different networks to facilitate their access. They were also required to publish within one hundred and twenty days from the making of the Act, the particulars of the organization, their functions and duties; the powers and duties of Public Information Officers; the names, designations and other particulars of the Public Information Officers. It mandates that the designation of Public Information Officer is to be done within one hundred days. Every public authority is also required to designate as many officers as Central Public Information or the State Public Information Officers, as the case may be. This has to be done in all administrative units or offices under it as may be necessary. Every public authority will also designate an officer at each sub-divisional level or other sub-district level as Central Assistant Public Information Officer or the State Assistant Public Information Officer, as the case may be, to receive the applications for information or appeals under this Act. The Central Public Information Officer or the State Public Information Officer can if need be seek the assistance of any other officer for the discharge of his

[1] Section 2 (h) of the Right to Information Act, 2005
[2] Section 2 (f) of the Right to Information Act, 2005

duties and such officer shall be treated as Central Public Information Officer or the State Public Information Officer as the case may be.[3]

9.9 Request for Obtaining Information:

Anybody desirous of seeking information under the Act has to make a request in writing or through electronic means declaring the particulars of the information required by him in English, Hindi or in the official language of the area where the information is being sought along with such fee as may be specified to the Central Public Information Officer or the State Public Information Officer as the case may be. No reason is to be given for seeking the information nor are any personal details required to be given. However information necessary for contacting the person seeking information is to be given. Whenever an application is made seeking information and the same is in possession of another authority or the subject matter falls in the domain of another authority, the authority to whom the request for information is given, will pass on the request to such authority in a maximum period of five days from the date such request had been received and information is also sent to the person seeking such information about such transfer.[4]

9.10 Disposal of request for information:

The Central Public Information Officer or the State Public Information Officer are under an obligation to dispose of this request for information as soon as possible, but not later than thirty days from the date such request was received, either by giving the information asked for on payment of prescribed fee or denying the same for the reasons as provided for in sections 8 and 9 of the RTI Act, 2005. Wherever life and liberty of a person is involved, the information requested for is to be provided in 48 hours of receiving any such request. In case of failure on the part of the Central Public Information Officer or the State Public Information Officer as the case may be, to give a decision on the request for information within the stipulated time, the Central Public Information Officer or the State Public Information Officer, as the case may be, shall be considered as refusal to the request.[5]

[3] Section 4&5 of the Right to Information Act, 2005

[4] Section 6 of the Right to Information Act, 2005

[5] Section 7 of the Right to Information Act, 2005

Once a decision has been taken for further fees to be paid towards the cost of providing information, Central Public Information Officer or the State Public Information Officer, as the case may be, shall send an information of the fee required and the calculations on the basis of which the amount required was reached. The period taken for the dispatch of the said intimation and payment of fees shall not be included in the calculation of period of thirty days during which this information is to be provided. The right of the applicant with regard to review of the decision as to the amount of fees charged or the way in which it can be accessed, etc. will also be provided to the applicant.[6]

When a decision has been taken to provide information with regard to any record or a part thereof to a person who is sensorily disabled, Central Public Information Officer or the State Public Information Officer, as the case may be shall provide assistance to make access to the Information possible, along with such assistance that may be reasonable for the inspection. However, where the person seeking information falls below the poverty line, as determined by the appropriate government, no fee shall be charged from him for providing the information. Information shall also be provided free of cost in cases where a public authority does not provide the information within the specified time period. Where an application for information has been turned down, the Central Public Information Officer or the State Public Information Officer as the case may be shall also communicate to the person requesting for information the reasons for such refusal; the time within which an appeal against such rejection can be made; and the particulars of the appellate authority.[7]

9.11 Exemption from disclosure of information:

There shall no obligation to give any citizen information, which prejudicially affects the sovereignty and integrity of India, its security, strategic, scientific or economic interests and relation with a foreign State or lead to incitement of an offence. Any information which is forbidden by any court of law or tribunal or which may constitute contempt of court or the giving of which would cause a breach of privilege of Parliament or State Legislature cannot be given.[8]

[6] *Id.*
[7] *Id.*
[8] Section 8 of the Right to Information Act, 2005

Information will also be not provided in those cases where commercial confidence, trade secrets or intellectual property, the disclosure of which will adversely affect the third party‟s competitive position unless the competent authority is satisfied that larger public interest warrants such disclosure. No information is provided where information is available to a person in his fiduciary relationship, unless the competent authority feels that public interest warrants giving of such information. Similarly, no information is given which is received in confidence from a foreign government or the disclosure of which would endanger the life or physical safety of any person or identify the source of information or assistance given in order to help law enforcement or security purposes or creates hurdles in the process of investigation or apprehension or prosecution of offenders.[9]

Information pertaining to cabinet papers including the records of deliberations of the Council of Ministers, Secretaries and other officers will not be given till the decision has been taken and the matter is complete.Information is not provided if it relates to personal information and its disclosure of has no relationship to any public activity or interest and would cause unwarranted breach of privacy. However, if the concerned authority feels that larger public interest justifies its disclosure, it may be given.Public authority may allow access to information in contravention of what the Official Secrets Act, 1923 says if it is of the opinion that the public interest in disclosure is much higher than the harm it is going to cause to the protected interest.A Central Public Information Officer or State Public Information Officer may also refuse to give any information which it feels may result is infringement of copyright subsisting in a person other than the State.[10]

9.12 Severability:

When the information is rejected on grounds of any exemption from disclosure, that part of the information may be given which does not fall within any exemption and can be easily severed from rest of the information. The Central Public Information Officer or State Public Information Officer, as the case may be, will inform the applicant about any severance, the reasons for such severance, the name and designation of the person who has taken this decision and the amount of

[9] *Id.*
[10] *Id.*

fee charged or the form of access provided, etc. in case any such part of the information has been given.[11]

9.13 Third Party Information:

Whenever any request for third party information is received and the Central Public Information Officer or State Public Information Officer, as the case may be, intends to give a third party information, a written notice has to be given to such third party about the request and the fact that the Central Public Information Officer or State Public Information Officer, or as the case may intends to disclose the information or record, or part thereof.[12]

Third party which is affected by the said request and the decision has the opportunity to make a representation against the proposed disclosure within ten days from the date of the receipt of such notice. The Central Public Information Officer or State Public Information Officer, as the case may be are required to give a decision within forty days after the request has been received as to whether or not to disclose the said information, or record or part thereof. It also has to give a written notice of this decision to the third party along with the statement that the third party can prefer an appeal against the said order.[13]

Check you progress 2:

Q.3 Third party information can be given under the RTI Act. (True/ False)

Q.4. In certain cases the Public Authority can deny disclosure of information. (True/ False)

9.14 The Central Information Commission

Constitution:

The Central Information Commission is a body constituted by the Central Government by notification in the Official Gazette. It is to exercise the powers conferred and perform the functions assigned to it under the Act. It shall comprise of the Chief Information Commissioner and such number of Central Information Commissioners may be deemed necessary. However

[11] Section 10 of the Right to Information Act, 2005
[12] Section 11 of the Right to Information Act, 2005
[13] *Id*

this number will not in any case exceed ten. They shall be appointed by the President on the recommendations of a Committee which will be consisting of the Prime Minister, who shall be the Chairperson of the Committee; the Leader of Opposition in the Lok Sabha; and a Union Cabinet Minister to be nominated by the Prime Minister. In case where the Leader of the Opposition in the House of People has not been recognized, the Leader of the single largest group in opposition of the Government in the House of People shall be deemed to be the Leader of the Opposition.[14]

The Chief Information Commissioner shall be vested with the general superintendence, direction and management of the affairs of the Central Information Commission and the Information Commissioners shall assist him and may exercise all such powers and do all such acts as may be exercised by the Central Information Commission autonomously. They will not be subject to directions by any other authority under the Act. Only persons of eminence in public life having wide knowledge and experience in law, science and technology, social service, management, journalism, mass media or administration and governance shall be appointed as the Chief Information Commissioner and the Information Commissioners. However, a person who happens to be a Member of Parliament or Member of the Legislature of any State or Union Territory, as the case may be or hold any office of profit or connected with any political party or carrying any business or pursuing any profession shall not be so appointed. Delhi shall be the headquarters of the Central Information Commission, but it may establish offices at other places in India with the previous approval of the Central Government.[15]

Term of office and conditions of service:

The term of the office of the Chief Information Commissioner shall be five years from the date on which he enters office or the time till he attains the age of sixty five years. He shall, however, not be eligible for reappointment. As far as the Information Commissioner is concerned, he shall hold office for a term of five years from the date on which he enters office or till he attains the age of sixty five years. He shall not be eligible for reappointment. However, he shall be eligible for appointment as Chief Information Commissioner on the condition that his term of office shall not be more than five years in aggregate as the Information Commissioner and the Chief

[14] Section 12 of the Right to Information Act, 2005
[15] *Id*

Information Commissioner. The Chief Information Commissioner and the Information Commissioners have to take an oath or affirmation before the President or any other person appointed by him in that behalf before entering their office. This is done according to the form set out for the purpose in the First Schedule.The Chief Information Commissioner and the Information Commissioners may leave office any time by tendering a written resignation addressed to the President. They can also be removed as per the provisions of Section 14 of the RTI Act, 2005. The Chief Information Commissioner shall be governed by the same terms and conditions as those of the Chief Election Commissioner for his salary and allowances and other terms of services. As far as the Information Commissioners salary allowances and other terms of conditions of service are concerned, they shall be similar to those of the Election Commissioners. In case they are in receipt of any pension, the same shall be deducted from their salary. However, their salaries, allowances and other conditions of service shall not be varied to their disadvantage. The Central Government shall provide such officers and employees as may required for performing their functions efficiently on such terms and conditions as may be prescribed to the Chief Information Commissioner and the Information Commissioners.[16]

Removal of Chief Information Commissioner and the Information Commissioners:

Chief Information Commissioner and the Information Commissioners may be removed from office only by order of the President on the ground of proved misbehavior or incapacity. This can be done only after the Supreme Court, on a reference made to it by the President, conducts an inquiry and reports that the Chief Information Commissioner or any Information Commissioner, as the case may be, should on such ground be removed. The President may, during the pendency of any enquiry against the Chief Information Commissioner or the Information Commissioner against whom any reference has been made to the Supreme Court suspend from office or prohibit such person from attending the office till he passes order after receiving the report of the Supreme Court. Apart from this, the Chief Information Commissioner or the Information Commissioner, as the case may be can also be removed by the President if adjudged insolvent or has been convicted of an offence which involves moral turpitude or engages during his term of office in any paid employment outside the duties of his office or unfit to continue in office by reason of infirmity of mind or body or has acquired such financial interest as is likely to affect

[16] Section 13 of the Right to Information Act, 2005

prejudicially his functions as the Chief Information Commissioner or an Information Commissioner. The Chief Information Commissioner or an Information Commissioner shall deemed to be guilty of misbehavior if they are concerned with or are interested in any contract or agreement made by or on behalf of the Government of India or participates in any way in the profit thereof. However, they are not adversely affected if they make any profit as a member and in common with the other members of an incorporated company.[17]

9.15 The State Information Commission

Constitution:

A State Information Commission shall be constituted by notification in the Official Gazette as …(Name of the State) Information Commission to exercise the powers conferred and to perform the assigned functions under the Act. It shall comprise of the State Chief Information Commissioner and such number of State Information Commissioners as may be deemed necessary. However, this number shall not exceed ten. The Governor appoints them on the recommendations of a Committee consisting of the Chief Minister, who shall be the Chairperson of the Committee; the Leader of Opposition in the Legislative Assembly; and a Cabinet Minister to be nominated by the Chief Minister. In case where the Leader of the Opposition in the Legislative Assembly has not been recognized, the Leader of the single largest group in opposition of the Government in the Legislative Assembly shall be deemed to be the Leader of the Opposition. The State Chief Information Commissioner shall be vested with the general superintendence, direction and management of the affairs of the State Information Commission. The State Information Commissioners shall assist him and may exercise all such powers and do all such acts as may be exercised by the State Information Commission autonomously. They will not be subject to directions by any other authority under the Act. Only persons of eminence in public life having wide knowledge and experience in law, science and technology, social service, management, journalism, mass media or administration and governance shall be appointed as the State Chief Information Commissioner and the State Information Commissioners. They shall, however, not be a Member of Parliament or Member of the Legislature of any State or Union Territory, as the case may be. They shall also not hold any office of profit or connected with any political party or carrying any business or pursuing any profession. The State Information

[17] Section 14 of the Right to Information Act, 2005

Commission shall have its headquarters at such place in the State as the State Government by notification in the Official Gazette specify. It may also with the previous approval of the State Government establish offices at other places in the State.[18]

Terms of office and conditions of service:

The term of office of the State Chief Information Commissioner shall five years from the date on which he enters office or till he reaches the age of sixty five years. He shall not be eligible for reappointment. Similarly the term of office of every State Information Commissioner shall be five years from the date on which he enters office or till he attains the age of sixty five years. He shall not be eligible for reappointment. However, he shall be eligible for appointment as State Chief Information Commissioner on the condition that his term of office shall not be more than five years in aggregate as the Information Commissioner and the Chief Information Commissioner. The State Chief Information Commissioner and the State Information Commissioners have to take an oath or affirmation before the Governor or any other person appointed by him in that behalf according before entering their office. The same has to be in consonance with the form set out for the purpose in the First Schedule. The State Chief Information Commissioner and the State Information Commissioners may relinquish office by resigning at any time by writing addressed to the Governor. They can also be removed as per the provisions of Section 17 of the RTI Act, 2005. The salary and allowances and other terms of services of the State Chief Information Commissioner shall be same as that of the Election Commissioner while that of the State Information Commissioners shall be similar to those of the Chief Secretary to the State. In case they are in receipt of any pension, the same shall be deducted from their salary. However, their salaries, allowances and other conditions of service shall not be changed to their disadvantage. Such officers and employees as may required shall be provided by the State Government to the State Chief Information Commissioner and the State Information Commissioners for performing their functions efficiently. These officers and employees shall be appointed on such terms and conditions as may be prescribed.[19]

Removal of Chief Information Commissioner and the Information Commissioners:

[18] Section 15 of the Right to Information Act, 2005
[19] Section 16 of the Right to Information Act, 2005

The Governor can remove the State Chief Information Commissioner and the State Information Commissioners from office only by order of on the ground of proved misbehavior or incapacity only after the Supreme Court, on a reference made to it by the Governor, has conducted an inquiry and reported that the State Chief Information Commissioner or any State Information Commissioner, as the case may be, need to be removed on such grounds. The State Chief Information Commissioner or the State Information Commissioner may also suspend from office or prohibited from attending the office by the Governor during the pendency of inquiry in respect of the person against whom a reference has been made to the Supreme Court till the Governor passes orders based on the report received from the Supreme Court. The Governor can also remove the State Chief Information Commissioner or the State Information Commissioner, as the case may be if adjudged insolvent or has been convicted of an offence which involves moral turpitude or engages during his term of office in any paid employment outside the duties of his office or unfit to continue in office by reason of infirmity of mind or body or has acquired such financial interest as is likely to affect prejudicially his functions as the State Chief Information Commissioner or State Information Commissioner. The State Chief Information Commissioner or a State Information Commissioner will be considered guilty of misbehavior if concerned or interested in any contract or agreement which is made by the Government of the State or on their behalf or participates in any way in the profit thereof. They will however not be adversely affected if they make profit as a member and in common with the other members of an incorporated company.[20]

9.16 Powers and Functions of the Information Commissions, Appeal and Penalties

Powers and functions of Information Commission:

The Central Information Commission or the State Information Commission, as the case may be, is duty bound to receive and inquire into a complaint made in consonance with the provisions of the RTI Act from any person who- has not been able to submit a request to a Central Information Officer or State Public Information Officer as the case may be as no person has been appointed as such under the Act. It could also be due to refusal by Central Assistant Public Information Officer or State Assistant Public Information Officer, as the case may be to accept his or her application for information or appeal under this Act for forwarding the same to the Central

[20] Section 17 of the Right to Information Act, 2005

Public Information Officer or State Public Information Officer or Senior Officer or the Central Information Commission or the State Information Commission as the case may be; has been denied access to any information requested under this Act; or no response has been given to a request for information or access to information within the time limits specified; or according to him/ her has been asked to pay an unreasonable amount of fee; or believes that incomplete, misleading or false information has been provided; An inquiry into any matter may be initiated by the Central Information Commission or State Information Commission as the case may be if it is satisfied that there are reasonable grounds to inquire into the matters. In doing so, it shall have the same powers as are vested in a civil court while trying a suit under the Code of Civil Procedure, 1908 with regard to summoning and enforcing the attendance of persons and compel them to give oral or written evidence on oath and to produce the documents or things; requiring the discovery and inspection of documents; receiving evidence on affidavit; requisitioning any public record or copies thereof from any court or office; issuing summons for examination of witnesses or documents. During the inquiry of any complaint under the Act, the Central Information Commission or State Information Commission may examine any record to which the Act applies and is under the control of the public authority. No such record may be withheld from it on any grounds irrespective of anything inconsistent contained in any other Act.[21]

Appeal:

An appeal can be made within thirty days from the expiry of the stipulated period or from the day on which the decision has been received by any person who does not receive a decision within the stipulated time as provided for in the Act or is aggrieved by a decision of the Central Public Information Officer or the State Public Information Officer, as the case may be. He can file an appeal to such officer who is senior in rank to the Central Public Information Officer or the State Public Information Officer, as the case may be, in each public authority. Such an appeal can also be admitted by the said officer after the expiry of the period of thirty days if according to him/her the appellant had a reasonable ground for not filing the appeal in time. In case the appeal relates to disclosure of third party information, the appeal can be made within thirty days from the date of the order by the concerned third party. A second appeal lies within ninety days from the date on which the decision should have been made or was actually received. An appeal

[21] Section 18 of the Right to Information Act, 2005

may be admitted even after the expiry of the period of ninety days if the Central Information Commission or State Information Commission, as the case may be, feels that there was sufficient cause preventing the appellant from filing an appeal within the stipulated time. The Central Public Information Officer or the State Public Information Officer, as the case may be will give a reasonable opportunity of being heard to the third party, if an appeal preferred relates to the decision of the Central Public Information Officer or the State Public Information Officer, as the case may be, regarding the third party information. In any appeal proceedings regarding any request having been denied, the onus is on the Central Public Information Officer or the State Public Information Officer, as the case may be, to prove that such denial of request was justified. An appeal is to be disposed of within thirty days of the receipt of an appeal or within such extended period, not exceeding a total of forty five days from the date of filing of an appeal. Reasons for the same are to be recorded in writing and the decision of the Central Information Commission or State Information Commission, as the case may be, shall be binding.

In its decision, the Central Information Commission or State Information Commission, as the case may be, can make any public authority to take such steps as may be necessary to secure compliance under the Act by providing access to information; appointing Central Public Information Officer or the State Public Information Officer, as the case may be; publishing information; making necessary changes with regard to maintenance, management and destruction of records; enhancing training of its officials and providing an annual report. It may also require compensation to be paid by the public authority to the complainant for any loss or detriment. It may also impose any of the penalties under the Act or reject the application. The Central Information Commission or State Information Commission, as the case may be, is required to give notice of its decision, including any right of appeal to both complainant and the public authority. It shall decide the appeal in accordance with the prescribed procedure.[22]

Penalties:

In case the Central Information Commission or State Information Commission, as the case may be, feel that the Central Public Information Officer or the State Public Information Officer, as the case may be, have been unjustified in denial of information or have acted in a malafide manner, it shall impose a penalty of two hundred and fifty rupees each day till application is received or

[22] Section 19 of the Right to Information Act, 2005

information is furnished. However, the total amount of such penalty shall not exceed twenty five thousand rupees. Central Public Information Officer or the State Public Information Officer, as the case may be, shall be given a reasonable opportunity of being heard and the burden of proving that he acted reasonably and diligently lies on the Central Public Information Officer or the State Public Information Officer, as the case may be. Central Public Information Officer or the State Public Information Officer, as the case may be, shall also be liable for disciplinary action under the service rules applicable to him for any malafide on his part.[23] However, no suit, prosecution or other legal proceeding shall lie against any other person for anything which is done in good faith.[24]

9.17 Summary

In a democratic set up, accountability and transparency are the two major hallmarks. We can say that these two are backbones of a good democratic system and the Right to Information Act is merely an instrument that lays down certain legal procedures to ensure transparency and accountability in the working of a democratic system. If this Act properly implemented, it will result in eradication of corruption and will enhance accountability and good governance.

9.18 Glossary:

- CIC- Central Information Commission
- SIC- State Information Commission
- RTI- Right to Information Act, 2005

9.19 Answers to check your progress: All statements in check your progress 1 and 2 are true

9.20 References:

- Universal‟s The Right to Information Act, 2005.
- Law In India Emerging Trends, Publication Bureau, Punjabi University, Patiala.
- Understanding Contemporary Issues in India, Civil Services Times.

9.21 Terminal and Model Questions:

[23] Section 20 of the Right to Information Act, 2005
[24] Section 21 of the Right to Information Act, 2005

1. What is the relevance of Right to Information Act, 2005 in the India scenario?
2. Discuss the role of Central Information Commission in upholding the spirit of the Right to Information Act, 2005.
3. Discuss the composition of the State Information Commission and the terms and conditions of service of its members.
4. Critically analyze the working of the Right to Information Act, 2005.
5. Discuss in detail the procedure for taking third party information and what are the circumstances in which it cannot be furnished? Are there any exceptions thereto?
6. What is the procedure for removal of Chief Information Commissioner and the Information Commissioners under the RTI Act, 2005.
7. Write a note on the significance of RTI Act, 2005.
8. Under what circumstances our government was forced to implement it?
9. What is being ensured by the RTI Act, 2005?
10. Is RTI helpful in good governance or does it pose hindrance in certain circumstances?
11. Describe the concept of public authority.
12. What are the obligations of public authority?
13. What is the procedure for filing an application under the RTI Act, 2005?
14. What are the circumstances in which the third party information is not given?

LESSON 10

CONSUMER PROTECTION ACT, 1986

Structure:

10.1 Objectives

10.2 Introduction

10.3 Objectives of the Consumer Protection Act:

10.4 The Consumer Protection Act, 1986

10.5 Definitions

10.6 Consumer Protection Councils

10.7 Procedure for meetings

10.8 Objects of the Central Council

10.9 The State Consumer Protection Councils

10.10 The District Consumer Protection Council

10.11 Consumer Disputes Redressal Agencies

10.12 District Forum

10.12.1 Composition of the District Forum

10.12.2 Jurisdiction of the District Forum

10.12.3 Manner in which complaint shall be made

10.12.4 Procedure on admission of complaint:

10.12.5 Finding of the District Forum

10.12.6 Appeal

10.13 State Commission

10.13.1 Composition of the State Commission

10.13.2 Jurisdiction of the State Commission

10.13.3 Procedure applicable to State Commission

10.13.4 Appeal

10.13.5 Hearing of appeal

10.14 National Commission

10.14.1 Composition of the National Commission

10.14.2 Jurisdiction of the National Commission

10.14.3 Appeal

10.14.3 Limitation Period

10.14.4 Dismissal of frivolous or vexatious claim

10.14.5 Protection of action taken in good faith

10.15 Summary

10.16 Glossary

10.17 Answers to check your progress

10.18 References

10.19 Terminal and Model questions

10.1 Objectives

After reading this lesson, you will be able to

- Define Consumer Protection and objectives of Consumer protection act
- Explain consumer protection councils

- Explain District forum
- Explain State commission
- Explain National commission

10.2 Introduction:

Initially there was nothing for the protection of the consumers and they were totally at the mercy of businessmen. Sometime they had no alternative but to accept whatever is supplied to them irrespective of the fact whether that corresponds to the terms of the contract or not. The position of the consumers was more vulnerable particularly in the service sector. Vast expansion has taken place in business and trade due to industrial revolution and the development in the international trade and commerce. All this has made it possible that a variety of goods appearing in the market to meet the needs of the consumers and number of services like insurance, transport, electricity, housing, entertainment, finance and banking have been made accessible to them. An organized sector comprising of manufacturers and traders possessing more knowledge of markets has come into existence, thus affecting the relationship between the traders and the consumers, making the principle of consumer freedom almost inapplicable. The publicity of different goods and services in the media by way of advertisements affect the demand irrespective of different types of drawbacks in them. In addition, so many firms producing close substitutes led to the consumers to think before they can purchase although they have little time to make a selection. For public welfare, excess of impure and below par commodities in the market have to be checked. There are various provisions providing protection to the consumers and providing for stringent action against impure and below par articles in the different laws like *the Code of Civil Procedure, 1908, Indian Contract Act, 1872, the Sale of Goods Act, 1930, Indian Penal Code, 1860, Standards of Weights and Measures Act, 1976 and the Motor Vehicles Act, 1988,* there is very little achievement in the field of consumer protection. *Monopolies and Restrictive Trade Practices Act, 1969 and the Prevention of Food Adulteration Act, 1954* have given relief to the consumers even then it is found necessary to protect the consumers from the exploitation and protect their interests. Therefore, it became necessary to protect the consumers and then the Consumer Protection Act came into force on 26th December, 1986 and the Act was further amended by the Consumer Protection (Amendment) Act no. 50 of 1993 with effect from 18th June, 1993.

10.3 Objectives of the Consumer Protection Act:

This Act has been enacted to give better protection to the interests of consumers and for achieving the same provides for Consumer Councils and other authorities for the settling of consumer disputes and for anything that is connected with it.

It also provides for promoting and protecting the rights of the consumers by ensuring that goods which are hazardous to both life and property are not marketed; protection against practices which are not fair; provide assurance and access to an authority of goods at competitive prices; provide right to be heard and assured that their interests will be redressed at appropriate forums; right to seek redressal against unfair trade practices and exploitation and right to consumer education.

10.4 The Consumer Protection Act, 1986-An Introduction

This Act extends to the whole of India except the State of Jammu and Kashmir. It is applicable to all the consumers defined under the Act since it came to effect. It shall apply to all goods and services, except as otherwise expressly provided by the central government by notification.

10.5 Definitions

"Appropriate Laboratory"[25]: It means a laboratory or an organization

1. Which the Central Government has recognized;
2. Which the State Government, subject to such guidelines as may be prescribed by the Central Government in this behalf, recognizes; or
3. Which is established by or under any other law for the time being in force and is maintained, financed or aided by the Central Government or the State Government for carrying out analysis or test of any goods. All this is done with a view to determine whether such goods suffer from any defect.

Elements of Appropriate Laboratory:

1. It should be recognized Central Government or State Government.
2. It should be maintained and financed or aided by the Central or the State Governments.

[25] Section 2(1)(a) of the Consumer Protection Act, 1986

3. The purpose of such laboratory is to carry out analysis or test of any goods for determining whether there is any defect in goods or not.

Branch Office[26]:

1. Any establishment which the opposite party describes as a Branch, or
2. Any establishment carrying on either the same or more or less the same activity as the head office of the establishment carries out.

In simple words, an establishment is a branch when it carries out the same activity as being carried in the Head Office of the establishment. It is also a branch when an opposite party describes it so.

Complainant[27]

1. Consumer, or
2. Any voluntary consumer association which is registered under the Companies Act, 1956 or under any other law for the time being in force.
3. The Central Government or any State Government is making the complaint on behalf of one or more consumers where there are numerous consumers having the same interest.

It is not necessary that the complaint is filed by the consumer himself. It may be filed by a voluntary consumer association or by one or more consumers who have a common interest. Complaint can also be made by the Central or any State government.

Complaint[28]

1. Any allegation in writing made by the complainant that
   (a) Any trader has indulged in an unfair trade practice or a restrictive trade practice;
   (b) The goods bought by him or agreed to be bought by him is having one or more defects;

[26] Section 1(1)(aa) of the Consumer Protection Act, 1986

[27] Section 2(1)(b) of the Consumer Protection Act, 1986
[28] Section 2(1)(c) of the Consumer Protection Act, 1986

(c) There is any deficiency in the services hired or availed of or agreed to be hired or availed of by him

(d) An excessive price, i.e. 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 has been charged as provided for in the complaint by the trader with a view to obtaining relief provided by or under this Act.

(e) Goods are being sold to the public which will be hazardous to life and safety and is in contravention of the provisions of any law for the time being in force making it mandatory for traders to display information in regard to the contents, manner and effect of use of such goods.

Elements of Complaint:

A complaint must consist of any of the following elements:

1. Trader adopts restrictive trade practice or unfair trade practice.
2. Goods suffer from defects
3. There is a deficiency in the services availed of or agreed to be availed of.
4. The trader charges excess price.
5. The trader sold the goods which are hazardous to life and safety in contravention of the provisions of law.

The complaint becomes infructutous in the absence of these elements.

Consumer[29]: Any person who

1. Has bought any goods for a price paid or promised or partly paid and partly promised or under any system of deferred payment and includes any person who has used such goods other than the person who bought such goods with the approval of such person. It, however, does not include any such person who obtains such goods in resale or for any commercial purpose.
2. Has hired or availed of any service for a price which has been paid or promised or partly paid and partly promised or under any system of deferred payment and includes any person who benefits from such services other than the person who has hired or availed of

[29] Sec.2 (1)(d) of the Consumer Protection Act, 1986

the services for a price paid or has been promised or partly paid or partly deferred or has been partly promised or under any system of deferred payment when such services have been made use of with the approval of the person mentioned first.

Test of Consumer:

The person who actually uses the goods or who avails of the services is a consumer under the CPA, 1986. Thus a buyer cannot be a consumer unless he actually uses the goods himself. The purchase of goods for the purpose of resale or any commercial purpose does not take the buyer a consumer under the Act.

Consumer Dispute[30]

It is a dispute where the person against whom a complaint has been made denies or contests the allegation made in the application.

Defect[31]

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

Deficiency[32] [Sec. 22(1)(g)]

It means any fault, imperfection, shortcoming or inadequacy in the quality, nature and manner of performance which is required to be maintained by or under any law for the time being in force or has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service.

In other words deficiency means the goods supplied or services rendered are inadequate in quality, nature and manner of performance which is required according to the terms of contract or under law for the time being in force.

[30] Sec.2 (1)(e) of the Consumer Protection Act, 1986

[31] Sec.2 (1)(f) of the Consumer Protection Act, 1986

[32] Sec.2 (1)(g) of the Consumer Protection Act, 1986

District Forum[33]

It means a Consumer Disputes Redressal Forum established under clause Sec. 9 (a).

Goods[34] has the same meaning as provided for in the Sale of Goods Act, 1930.

Manufacturer[35]

It means a person who makes or manufactures any goods or assembles parts thereof or does not make or manufacture any goods but assembles parts thereof made of or manufactured by others and claims the end product to be manufactured by himself or puts or causes to be put his own mark on any good made or manufactured by any other manufacturer and claims such goods to be goods made or manufactured by him.

Member[36]

It includes the President and a member of the National Commission or a State Commission or a District Forum as the case may be.

National Commission[37]

It means the National Consumer Disputes Redressal Commission established under Sec 9(c).

Person[38]

It includes a firm whether registered or not.

Hindu undivided family.

A cooperative society.

[33] Sec.2 (1)(h) of the Consumer Protection Act, 1986
[34] Sec.2 (1)(i) of the Consumer Protection Act, 1986
[35] Sec.2 (1)(j) of the Consumer Protection Act, 1986
[36] Sec.2 (1)(jj) of the Consumer Protection Act, 1986

[37] Sec.2 (1)(k) of the Consumer Protection Act, 1986
[38] Sec.2 (1)(m) of the Consumer Protection Act, 1986

Every other association of persons whether registered under the Societies Registration Act, 1860 or not.

Restrictive Trade Practices[39]

It means a trade practice which tends to bring about manipulations of price or its conditions of delivery or to affect flow of supplies in the market relating to goods or services in such a manner as to impose on the consumers" unjustified costs or restrictions.

Service[40]

It means service of any description which is made available to potential users and includes, but not limited to, the provision of facilities in connection with banking, finance, insurance, transport, processing, supply of electrical or other energy, board or lodging or both, housing construction, entertainment, amusement or the purveying of news or other information but does not include the rendering of any service free of charge or under a contract of personal service.

Unfair Trade Practice[41]

Any trade practice which has the intention of promoting sale, use or supply of any goods or for the provision of any service and adopts any unfair method or unfair or deceptive practice is called an unfair practice.

Check your progress 1

Q. 1. Consumer must file a complaint under the Consumer Protection Act personally. (True/ False)

Q.2. A complaint can be filed for redressal in case of deficiency in goods as well as service. (True/ False)

[39] Sec.2 (1)(nnn) of the Consumer Protection Act, 1986
[40] Sec.2 (1)(o) of the Consumer Protection Act, 1986
[41] Sec.2 (1)(r) of the Consumer Protection Act, 1986

10.6 Consumer Protection Councils

The Central Government shall establish by notification a Council known as the Central Consumer Protection Council and it shall be established from such date as specified in the notification. It shall consist of the Minister in charge of the consumer affairs in the Central Government, as its Chairman, and such other official or non official members representing such interests as may be provided for.[42]

10.7 Procedure for meetings

The Central Council shall meet whenever required but at least once in a year. It shall meet whenever the Chairman deems it fit at a place decided by him and shall observe the prescribed procedure.[43]

10.8 Objects of the Central Council

The Central Council shall promote and protect the rights of the consumers like;

1. Protection against goods and services which are hazardous
2. Information and protection against unfair trade practices.
3. Assurance of competitive prices
4. Hearing and assurance of receiving due consideration
5. Seeking redressal against unfair practices.

10.9 The State Consumer Protection Councils

The State Government shall establish by notification a Council known as the Consumer Protection Council from such date as specified in the notification. It shall be consisting of the Minister in charge of the consumer affairs in the State Government, who shall be its Chairman, and shall also comprise of such other official or non official members representing such interests as may be prescribed and nominated by the Central Government. However, this number shall not exceed ten. The Council shall meet as and when required. It shall have at least two meetings in a

[42] Sec. 4 of the Consumer Protection Act, 1986
[43] Sec. 5 of the Consumer Protection Act, 1986

year and it shall meet at such time and place as the Chairman decides. It shall observe such procedure as provided for by the State Government.[44]

10.10 The District Consumer Protection Council

The State Government shall establish, by notification, a District Consumer Protection Council in each district of the State from the date as specified in the notification. It shall consist of the Collector of the district, who shall be its Chairman and such number of other official and non official members as provided for by the State Government. It shall meet as and when necessary but at least twice in a year at such time and place as the Chairman may decide. It shall observe such procedure as may be prescribed by the State Government.[45]

10.11 Consumer Disputes Redressal Agencies

The following agencies shall be established for the purposes of the Act:

1. Establish a Consumer Disputes Redressal Forum to be known as the District Forum. It shall be established by a notification of the State Government for each district.
2. Establish a Consumer Disputes Redressal Commission to be known as the State Commission. It shall be established in the State by notification.
3. The Central Government shall establish a National Consumer Disputes Redressal Commission by notification[46].

10.12 District Forum

10.12.1 Composition of the District Forum

Each District Forum shall consist of[47]:

1. A person who is or has been or is qualified to be a District Judge as President.
2. Two other members, one being a woman who is not less than thirty-five years of age, possesses a bachelor‟s degree and is a person of ability, integrity and standing and having

[44] Sec. 7 of the Consumer Protection Act, 1986
[45] Sec. 8 & 8A of the Consumer Protection Act, 1986
[46] Sec. 9 of the Consumer Protection Act, 1986
[47] Sec. 10 of the Consumer Protection Act, 1986

adequate knowledge and experience of at least ten years in dealing with problems relating to economics, law, commerce, accountancy, industry, public affairs or administration.

A person shall, however, be disqualified for appointment as a member if he:

1. Has been convicted and sentenced to imprisonment for any offence which in the opinion of the State Government amounts to moral turpitude.
2. Is an undischarged insolvent.
3. Is of an unsound mind as declared by the competent court.
4. Has such financial interest as is likely to affect prejudicially his functioning as a member.
5. Has any such disqualification as prescribed by the State Government.

The State Government shall make all the appointments on the recommendations of a selection committee which shall comprise of the President of the State Commission who shall be its Chairman, Secretary, Law Department of the State as Member and Secretary, In-charge of the Department dealing with consumers of the State. When the President of the State is not able to attend the Selection Committee, the State government may refer the matter to the Chief Justice of the High Court for nominating a sitting judge of the High Court to act as a Chairman.

Every member of the District Forum shall hold office for a period of five years or up to the age of sixty five years, whichever is earlier. A member shall be eligible for reappointment for another term of five years or up to sixty- five years, whichever is earlier. However, it shall be subject to the condition that he fulfills all the qualifications and other conditions for appointment.

A member may resign from his office in writing under his hand addressed to the State Government and once this resignation is accepted, his office shall become vacant. It may be filled by appointment of a person who has the required qualifications.

The State Government shall prescribe the salary or honorarium and other allowances payable to and the other terms and conditions of service of the members of the District Forum. Moreover, the State Government on the recommendations of the President of the State Commission shall make appointment of the member on whole time basis taking into account all other factors as may be prescribed, including the workload of the District Forum.

10.12.2 Jurisdiction of the District Forum

The District Forum shall have jurisdiction to entertain complaints subject to the condition that the value of the goods or services and the compensation, if any, claimed does not exceed rupee twenty lakhs. A complaint shall be instituted in a District Forum within the local limits of whose jurisdiction the opposite party or all the opposite parties actually and voluntarily reside or carries on business or has a branch office or personally works for gains or the District Forum gives permission or the cause of action wholly or in part arises.[48]

10.12.3 Manner in which complaint shall be made

A complaint may be filed with the District Forum by the consumer in relation to any goods sold or delivered or agreed to be sold or delivered or any service provided or agreed to be provided. It can also be filed by any recognized consumer association irrespective of whether the consumer is a member of this association or not. A complaint can also be filed by one or more consumers with the permission of the District Forum on behalf of or for the benefit of all the consumers so interested or the Central Government or the State Government as the case may be either in its individual capacity or as a representative of interests of the consumers in general. Every complaint shall be accompanied by such fee as required. The said fee shall be payable in such form as may be prescribed and on such receipt, the District Forum may by order allow the complaint to be proceeded with or rejected. However, a complaint cannot be rejected without giving the complainant an opportunity of being heard. Ordinarily the complaint shall be decided within twenty-one days from the date on which the complaint was received and once the complaint has been admitted by the District Forum, it shall not be transferred to any other court or tribunal or any authority set up by or under any law for the time being in force.[49]

10.12.4 Procedure on admission of complaint:

The District Forum shall on admission of a complaint, if it relates to any goods-

Refer a copy of the admitted complaint, within twenty one days from the date of its admission, to the opposite party and direct him to give his version. This opposite party has to give its version within thirty days or such extended period not exceeding fifteen days as may be granted by the District Forum. The District Forum shall proceed to settle the dispute in case the opposite party

[48] Sec. 11 of the Consumer Protection Act, 1986
[49] Sec.12 of the Consumer Protection Act, 1986

denies any dispute or omits or fails to take any action to represent his case within the time given by it. Wherever the need is felt, the District Forum shall obtain sample of the goods from the complainant, refer it to the appropriate laboratory along with a direction that such laboratory make an analysis or test, whichever may be necessary for finding out whether such goods suffer from any defect. The District Forum may require the complainant to deposit such fees as may be specified before it refers the sample to the appropriate laboratory, and the same be remitted to the appropriate laboratory on receipt of the report. If the correctness of the findings of the appropriate laboratory is disputed by any party, the District Forum shall make the objections to be put in writing. Parties are given a reasonable opportunity of being heard in this regard. For the purposes of this Act, the District Forum has the same powers as are vested in the Civil Court under the Code of Civil Procedure, 1908.[50]

10.12.5 Finding of the District Forum

If after conducting the proceeding, the District Forum is satisfied that the goods complained against suffered from any of the defects specified in the complaint, it shall pass necessary orders[51]-

For removing the defect

For replacing the goods

For returning the price to the complainant

For paying such amount as may be awarded as compensation

For discontinuation with the unfair trade practices or the restrictive trade practices

For not offering hazardous goods for sale

For withdrawal of the hazardous goods from sale

For ceasing manufacture of hazardous goods

For payment of such sum as may be determined.

[50] Sec. 13 of the Consumer Protection Act, 1986
[51] Sec. 14 of the Consumer Protection Act, 1986

10.12.6 Appeal

Any person aggrieved by the orders of the District Forum may prefer an appeal with the State Commission within a period of thirty days from the date of the order, in the prescribed. An appeal can be entertained by the State Commission after the expiry of thirty days if it is satisfied that there is sufficient cause for not filing the appeal within the given period. However, the State Commission shall not entertain any such appeal where the appellant is to deposit any amount in terms of the orders of the District Forum and has not deposited fifty per cent of the said amount or twenty five thousand rupees whichever is less.[52]

Check your progress 2

Q. 3. President of a District Forum should be a person who is or has been or is eligible to be a District Judge. (True/ False)

Q. 4. A District Forum has the jurisdiction to try complaints where the value of the goods or services and the compensation claimed does not exceed rupees twenty lakhs. (True/ False)

10.13 State Commission

10.13.1 Composition of the State Commission

Each State Commission shall consist of a President and not less than two and not more than such members as prescribed and one of them shall be a woman. The President shall be a person who is or has been a Judge of a High Court and will be appointed by the State Government. However appointments shall be made only after consultation with the Chief Justice of the High Court. Members shall have the following qualifications[53]-

- Member should not be less than thirty five years of age
- Possess a bachelor‟s degree from a recognized university
- He is a person of ability, integrity and standing and having adequate knowledge and experience of at least ten years in dealing with problems relating to economics, law, commerce, accountancy, industry, public affairs or administration.

[52] Sec. 15 of the Consumer Protection Act, 1986

[53] Sec. 16 of the Consumer Protection Act, 1986

- Fifty per cent of the members shall be from people with judicial background.
- A person shall, however, be disqualified for appointment as a member if he:
- Has been convicted and sentenced to imprisonment for any offence which in the opinion of the State Government amounts to moral turpitude.
- Is an undischarged insolvent.
- Is of an unsound mind as declared by the competent court.
- Has been removed or dismissed from the service of the Government or a body corporate owned or controlled by the Government
- Has such financial interest as is likely to affect prejudicially his functioning as a member.
- Has any such disqualification as prescribed by the State Government.
- Every member of the State Commission shall hold office for a term of five years or up to the age of sixty five years, whichever is earlier. A member shall be eligible for reappointment for another term of five years or up to sixty- five years, whichever is earlier, subject to the condition that he fulfills all the qualifications and other conditions for appointment. A President is also eligible for reappointment.

10.13.2 Jurisdiction of the State Commission

A State Commission shall have jurisdiction to entertain complaints where the value of the goods or services and compensation, if any, claimed exceeds twenty lakh rupees but does not exceed rupees one crore and also entertains appeals against the orders of the District Forum within the State. It can call for the records and pass any orders in any consumer dispute pending before or decided by the District Forum.[54]

10.13.3 Procedure applicable to State Commission

The provisions related with the disposal of complaints by the Consumer Forum shall, with such modifications, be applicable to the disposal of disputes by the State Commission.[55]

10.13.4 Appeal

Any person aggrieved by the order of the State Commission may prefer an appeal against such order with the National Commission within a period of thirty days from the date of the order in

[54] Sec. 17 of the Consumer Protection Act, 1986
[55] Sec. 18 of the Consumer Protection Act, 1986

such form and manner as may be prescribed. National Commission may entertain any such appeal even after the expiry of the said period if it feels that the appellant was prevented by sufficient cause to do so within the specified time. However, the National Commission shall not entertain any such appeal where the appellant is to deposit any amount in terms of the orders of the State Commission and has not deposited fifty per cent of the said amount or thirty five thousand rupees whichever is less.[56]

10.13.5 Hearing of appeal

An appeal before the State Commission or the National Commission shall be heard as soon as possible and an endeavour should be to dispose of the appeal within a period of ninety days from the date of its admission. No adjournment shall ordinarily be granted by the State Commission unless there is sufficient cause and the same is to be recorded in writing.[57]

Check your progress 3

Q. 5. Jurisdiction of the State Commission to try complaints is for the goods or services and compensation claimed value exceeds rupees twenty lakhs but does not exceed rupees one crore. (True/ False)

Q. 6. Any person aggrieved by the order of the State Commission can file an appeal in the National Commission within thirty days from the date of the order. (True/ False)

10.14 National Commission

10.14.1 Composition of the National Commission

The National Commission shall consist of a person who is or has been a Judge of the Supreme Court, appointed by the Central Government, who shall be its President, provided that no appointment shall be made except after consultation with the Chief Justice of the Supreme Court. It shall have not less than four members and not more than such members as prescribed and one of them shall be a woman, and they shall have the following qualifications[58]-

[56] Sec. 19 of the Consumer Protection Act, 1986

[57] Sec. 19-A of the Consumer Protection Act, 1986

[58] Sec. 20 of the Consumer Protection Act, 1986

Member should not be less than thirty five years of age

Possess a bachelor‟s degree from a recognized university

Is a person of ability, integrity and standing and having adequate knowledge and experience of at least ten years in dealing with problems relating to economics, law, commerce, accountancy, industry, public affairs or administration.
Fifty per cent of the members shall be from amongst persons having judicial background.

A person shall, however, be disqualified for appointment as a member if he:

Has been convicted and sentenced to imprisonment for any offence which in the opinion of the State Government amounts to moral turpitude.

Is an undischarged insolvent.

Is of an unsound mind as declared by the competent court.

Has been removed or dismissed from the service of the Government or a body corporate owned or controlled by the Government

Has such financial interest as is likely to affect prejudicially his functioning as a member.

Has any such disqualification as prescribed by the State Government.

Every member of the State Commission shall hold office for a term of five years or up to the age of sixty five years, whichever is earlier. A member shall be eligible for reappointment for another term of five years or up to seventy years, whichever is earlier, subject to the condition that he fulfills all the qualifications and other conditions for appointment. A President is also eligible for reappointment.

10.14.2 Jurisdiction of the National Commission

A State Commission shall have jurisdiction to entertain complaints where the value of the goods or services and compensation, if any, claimed exceeds rupees one crore and also entertains

appeals against the orders of any State Commission. It can call for the records and pass any orders in any consumer dispute pending before or decided by any State Commission.[59]

10.14.3 Appeal

Any person aggrieved by the order of the National Commission in the exercise of its powers conferred may prefer an appeal against such order in the Supreme Court within a period of thirty days and the Supreme Court may entertain an appeal even after the lapse of thirty days if it is satisfied that there is enough justification for the delay in filing such appeal.[60]

Limitation Period

The District Forum, the State Commission or the National Commission shall not admit a complaint unless it is files within two years of the arising of the cause of action. They may however entertain a complaint after the lapse of the period if they feel that a sufficient reason exists, but they have to record reasons for condoning such delay.[61]

10.14.4 Dismissal of frivolous or vexatious claim

Whenever any frivolous or vexatious complaint is filed before the District Forum, the State Commission or the National Commission, it shall dismiss the complaint after recording reasons for the same and make an order that the complainant shall pay to the opposite party cost not exceeding ten thousand rupees, as may be specified in the order.[62]

10.14.5 Protection of action taken in good faith

No suit, prosecution or other legal proceeding shall lie against the members of the District Forum, the State Commission or the National Commission for any action taken in good faith by them.[63]

10.15 Summary

[59] Sec. 21 of the Consumer Protection Act, 1986
[60] Sec. 23 of the Consumer Protection Act, 1986
[61] Sec. 24-A of the Consumer Protection Act, 1986

[62] Sec. 26 of the Consumer Protection Act, 1986
[63] Sec. 28 of the Consumer Protection Act, 1986

Due to development in the international trade and industrial revolution, international trade and commerce have expanded to a large extent. Because of this market has become very wide and all this has promoted consumerism. It all has resulted in imperfect knowledge among the consumers and on the other side a well organized sector of manufacturers and traders having better knowledge of markets. This resulted in asymmetric information in the market. In these imperfect kind of markets, advertisements of goods and services through different mediums influence the demand of the commodities by the consumers about which they have a little knowledge, there may be manufacturing defects or any other imperfections in the commodities concerned. At the same time there are adulterated and substandard articles in the market. To check these practices and to protect the right of consumers and providing for stringent action against adulterated and sub standard articles in the different enactments like Code of Civil Procedure,1908, the Indian Contract Act, 1872, the Indian Penal Code, 1860, the Standards of Weights and Measures Act, etc. very little could be achieved in the field of consumer protection. So to protect the consumers from exploitation and to safeguard their interests, the Consumer Protection Act, 1986 has been enacted.

10.16 Glossary

- Act: The Consumer Protection Act, 1986.
- District Forum: Consumer Disputes Redressal Forum.
- Jurisdiction: Area falling under control.
- National Commission: National Consumer Disputes Redressal Commission.
- Notification: A notification published in the Official Gazette.
- State Commission: State Consumer Disputes Redressal Commission.

10.17 Answers to Check your Progress: 1-False, 2-6- True.

10.18 References:

- The Consumer Protection Act, 1996.
- Harpal Kaur Khera, Law in India Emerging Trends, *Publication Bureau, Punnjabi University, Patiala.*

10.19 Terminal and Model Questions

Q1. Discuss the District Forum under the Consumer Protection Act, 1986.

Q.2. Discuss the composition and jurisdiction of a State Commission and how can an appeal be filed by any person aggrieved by its orders.

Q. 3. Critically analyze the Consumer Protection Act, 1986**.**