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FOUR YEAR BACHELOR'S DEGREE COURSE

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SEMESTER IV

BUSINESS REGULATORY FRAMEWORK

COMMERCE



Maniram Dewan School of Management

KRISHNA KANTA HANDIQUI STATE OPEN UNIVERSITY

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COURSE INTRODUCTION

In business world the legal environment plays an important role. To monitor and control the functioning of the companies as well as to protect the consumers various Acts have been passed. The course *Business Regulatory Framework* has been designed to give the learners the knowledge of the legal formalities that have to be followed in the day to day business. The different aspects of formation of a contract, laws regarding sale of goods, partnership business, laws for protecting the interest of the consumers etc. will be discussed in this course. The Indian Contract Act, the Sale of Goods Act, the Consumer Protection Act, the Indian Partnership Act, the Information Technology Act etc. has been included in this course. The units will help the learners in understanding the various provisions of these Acts which are even useful in our daily life.

While going through a unit, you will notice that some along-side boxes, which have been included to help you know some of the difficult, unseen terms. Some ‘‘ACTIVITY’’ (s) has been included to help you to apply your own thoughts. Again, we have included some relevant concepts in ‘‘LET US KNOW’’ along with the text. At the end of sections, you will get ‘‘CHECK YOUR PROGRESS’’ questions. These have been designed to self-check your progress of study. It will be better if you solve the problems put in these boxes immediately after you go through the sections of the units and then match your answers with ‘‘ANSWERS TO CHECK YOUR PROGRESS’’ given at the end of each unit.

UNIT -1: INDIAN CONTRACT ACT, 1872

UNIT STRUCTURE

1.1 Learning Objectives

1.2 Introduction

1.3 Definition of Contract

1.4 Essential Elements of a Valid Contract

1.5 Classification of Contract

- 1.5.1 On the Basis of Enforceability
- 1.5.2 On the Basis of Formation
- 1.5.3 On the Basis of Performance

1.6 Free Consent

- 1.6.1 Coercion
- 1.6.2 Undue Influence
- 1.6.3 Fraud
- 1.6.4 Misrepresentation
- 1.6.5 Mistake

1.7 Let Us Sum Up

1.8 Further Reading

1.9 Answers to Check Your Progress

1.10 Model Questions

1.1 LEARNING OBJECTIVES

After going through this unit you will be able to:

- explain the meaning of contract and the essential elements of a valid contract under the Indian Contract Act, 1872
- discuss the different types of contract
- describe the capacities of parties to contract
- describe the significance of free consent to form a valid contract

1.2 INTRODUCTION

The law of contract is the oldest branch of the law relating to business. Just as the safety and security in the society depends upon the rules and law, so the security and safety of businesses depend on the law of contract. Every day we enter into a number of contracts. For these reasons the study of the law of contract is very important for businessmen as well as for common people. The law of contract in India is contained in the Indian Contract Act, 1872. In this unit we are going to discuss the various provisions of this Act.

1.3 DEFINITION OF CONTRACT

According to Section 2(h) of the Indian Contract Act, "An agreement enforceable by law is a contract".

According to Salmond- "A contract is an agreement creating and defining obligations between the parties." According to Sir William Anson- "A contract is an agreement enforceable at law made between two or more persons by whom rights are acquired by one or more to acts or forebearance on the part of the other or others."

From the definitions of the contract, we find that a contract is an agreement, the objective of which is to create a legal obligation. It essentially consists of two elements: (i) An agreement; and (ii) Legal obligation.

(i) **Agreement:** As per Section 2(e) "Every promise and every set of promises, forming the consideration for each other, is an agreement." Section 2(b) define the term promise "when the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal, when accepted, becomes a promise." An agreement, therefore, comes into existence only when one party makes a proposal or offer to the other party and that other party signifies his assent (gives his acceptance) thereto.

(ii) **Legal obligation:** To become a valid contract, an agreement must give rise to legal obligations between the parties. If an agreement is incapable of creating a duty enforceable by law, it is not a contract.

"All contracts are agreements but all agreements are not contract." Agreements of moral, social and religious nature are not contracts because they are not likely to create any legal obligation. For example, a promise to lunch together with friends, a promise to attend a marriage or religious ceremony etc. are not contracts as per the Contract Act.

1.4 ESSENTIAL ELEMENTS OF A VALID CONTRACT

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

Thus, to be a valid contract, the following elements should be present:

i. Offer and acceptance and intention to create legal obligations;
ii. Free consent of the parties;
iii. Capacity of the parties to enter in to contract;
iv. Lawful consideration;
v. Lawful object
vi. not expressly declared to be void

As the details of these essential conditions form the subject-matter of our discussion in subsequent units, we are discussing these in brief here:

i. **Offer and acceptance and intention to create legal obligations:** To be a contract, there must be an offer and the said offer must have been accepted. The party who makes the offer is called offeror and the other party to whom the offer is made is known as offeree. The offeror must communicate the offer to the offeree which is not an invitation and should be certain. Such offer and acceptance should create legal obligations between parties.

ii. **Free consent of the parties:** Free consent of all the parties to an agreement is another essential element of a valid contract. According to Sec.13 of the Indian Contract Act, 'consent' means that the parties

must have agreed upon the same thing in the same sense. Thus, consent involves meeting of minds or consensus ad-idem i.e. agreeing upon the same thing in the same sense. Consent is not treated as 'free consent' if it is induced by coercion, undue influence, fraud, misrepresentation or mistake.

iii. **Capacity of the parties to enter in to contract:** It is very essential to have sufficient capacity of the parties to make a contract valid. Section 10 of the Indian Contract Act, 1872, lay down that "all agreements are contract if they are made by the free consent of the parties competent to contract." The parties to an agreement must be competent to contract, otherwise it cannot be enforced by a court of law. According to Sec. 11 of The Indian Contract Act, 1872, a person who-

a. has not attained the age of majority,

b. is of unsound mind and

c. is disqualified from entering into a contract by any law to which he is subject, should be considered as not competent to enter in to any contract. Therefore, law prohibits a minor and a person of unsound mind and a person who is otherwise disqualified like an alien enemy, insolvents, convicts etc from entering into any contract.

Therefore, following persons are treated as incompetent to contract.

1) **Minor:** According to the Indian Majority Act, 1875, a minor is one who has not completed his or her 18 years of age. The law regarding minor's agreements may be summarized as under:

* **An agreement by a minor is void and inoperative as against him:** Law acts as the guardian of minors and protects their rights because minors are mentally immature. They do not possess the capacity to judge what is good or what is bad. In India an agreement with or by a minor is void ab-initio and inoperative. A minor is neither liable to perform what he has promised to do under a contract nor he is liable to repay money which he might have received under a contract.

In the leading case of Mohori Bibee V. Dharmodas Ghos a minor executed a mortgage for Rs.20,000, out of which he received Rs.8,000

from the mortgagee. Subsequently, the minor sued for setting aside the mortgage. The mortgagee claimed refund of Rs.8, 000 paid by him. The Privy Council held that a minor's agreement was absolutely void and the minor was not liable to return the money.

* **A Minor can be a Promisee or a Beneficiary:** A minor cannot be bound by contract but he can be a lawful beneficiary. Any agreement which is of some benefit to the minor and under which he is required to bear no obligation, is valid.

* **A minor's property is liable for necessaries:** Under Section 68 of the Indian Contract Act, if a person incapable of entering into a contract, or anyone whom he is bound to support, is supplied by another person, with necessaries suited to his condition in life, the person, who has furnished such supplies is entitled to be reimbursed from the property of such person. It is to be noted that only minor's property is liable, minor is not personally liable for necessaries supplied to him.

* **No ratification on attaining the age of majority:** Ratification means subsequent adoption and acceptance of an agreement. A minor's agreement being void ab-initio has no existence in the eye of law. Therefore, a minor who has entered into an agreement during his minority, cannot be ratified by the minor on attaining the age of majority.

* **No estoppel against a minor:** According to section 115 of the Indian Evidence Act estoppel means "When one person has, by his declaration, act or omission, intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative, to deny the truth of that thing." The rule of estoppel is only a rule of evidence i.e. a rule of formal law. This rule is not applicable to minors.

* **No specific performance of a minor's agreement:** Specific performance means the actual carrying out of the contract as agreed. Neither the minor nor the other party can ask for the specific performance of a minor's agreement as the agreement by a minor is absolutely void.

* **No insolvency for a minor:** A Minor is incapable of contracting debts and hence he cannot be adjudged insolvent. Even for necessaries supplied to him, he is not personally liable, only his property is liable.

* **A minor can be admitted to the benefits of partnership:** A minor cannot enter into an agreement of partnership, But under Section 30 of the Indian Partnership Act, 1932 with the consent of all the partners he can be admitted to the 'benefits of partnership'. Such minor will have a right to such share of the property or profits of the firm as may be agreed upon. The minor cannot participate in the management of the business and shall not share losses except when liability to third parties has been arisen but then too upto his share in the partnership asset.

* **A Minor can act as an agent:** A minor can become an agent, and by his acts done in the course of such an agency he shall bind the principal. However, a minor is not personally liable for negligence or breach of duty.

* **A minor cannot be member of a registered company:** A minor cannot be a shareholder of a company, since, he/she is incompetent to contract. A company can also refuse to transfer share in favour of a minor unless the shares are fully paid.

2) Persons of unsound mind: According to the Section 12 of the Indian Contract Act, 1872, a person is said to be of sound mind 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 judgment as to its effect upon its interests.

The Section 12 of the Indian Contract Act, 1872 declares idiots, lunatics and drunkards as persons of unsound mind. The Act clearly mentioned that in India a contract by a drunken person is absolutely void. Illustration (b) to Section 12 of the Act has very clearly stated that a sane man, who is delirious from fever or who is so drunk that he cannot understand the terms of a contract so as to form rational judgment as to its effect on his interest, cannot contract when such deliriousness or drunkenness lasts.

Example: A patient in a lunatic asylum who at intervals is of sound mind, may contract during those lucid intervals.

3) Persons disqualified by any law to which they are subject: - Some persons are absolutely or entirely disqualified from contracting by any law. Alien enemy, foreign sovereigns and ambassadors, convict, married women, insolvent, Joint Stock Company and corporation incorporated under a special Act are the example of partially disqualified persons from contracting by law.

iv. Lawful consideration: The next essential element of a valid contract is the presence of consideration. Consideration would generally mean compensation for doing or omitting to do an act or deed. An agreement is legally enforceable only when each of the parties to it gives something and gets something. The something given or obtain is the price for the promise and is called 'consideration'. Only valid considerations are lawful. The consideration is lawful, unless - it is forbidden by law; or is of such a nature that, if permitted it would defeat the provisions of any law; or involves or implies injury to the person or property of another; or is immoral; or is opposed to public policy. Every agreement of which the consideration is unlawful is void.

v. **Lawful object:** For the formation of a valid contract it is necessary that the parties to an agreement must agree for a lawful object. The object for which the agreement has been entered into must not be fraudulent or illegal or immoral or oppose to public policy or must not imply injury to the person or property of another.

vi. **Not declared to be void:** The agreement must not have been expressly declared to be void under the Act. The Contract Act 1872 treated the following agreement as void under different section of the Act.

a. Agreements made by incompetent parties. (Sec. 11).

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

c. Agreements with unlawful consideration or object. (Sec. 23).

d. Agreement whose consideration or object is unlawful in part and the illegal part cannot be separated from the legal part. (Sec. 24).

e. Agreements made without consideration. (Sec. 25).

f. Agreements in restraint of marriage. (Sec. 26).

g. Agreement in restraint of trade. (Sec. 27).

h. Agreement in restraint of legal proceedings. (Sec. 28).

i. Agreement the meaning of which is uncertain. (Sec. 29).

j. Agreements by way of wager. (Sec. 30).

k. Agreements contingent on impossible event. (Sec.36)

l. Agreements to do impossible acts. (Sec. 56).



CHECK YOUR PROGRESS

Q.1: What is meant by contract?

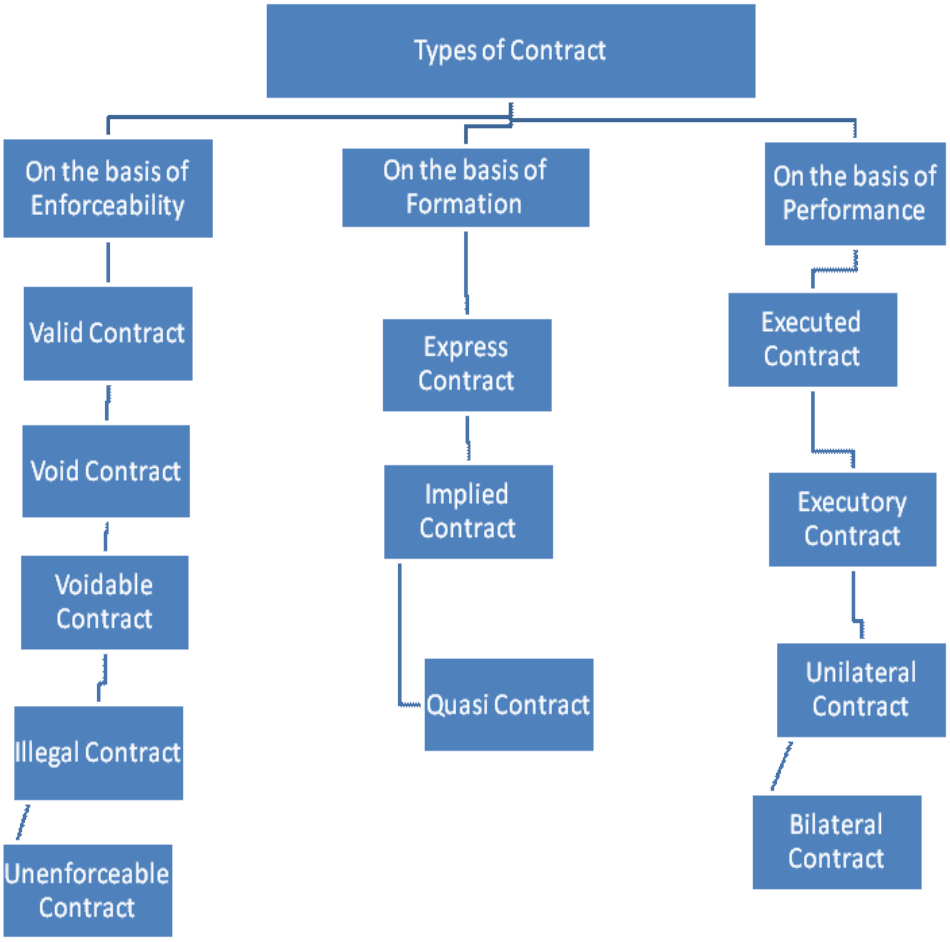
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Q.2: Mention two essential conditions of a valid contract.

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1.5 CLASSIFICATIONS OF CONTRACT

In terms of enforceability, formation and performance, contracts may be classified in the following way:

1.5.1 On the Basis of Enforceability

On the basis of enforceability, contract can be classified as follows:

- **Valid Contract:** The agreements which are enforceable in a court of law are called Valid Contracts. An agreement becomes enforceable by law when all the essential elements of a valid contract are present.
- **Void Contract:** An agreement not enforceable by law is said to be void. A void contract is a contract which ceases to be enforceable by law. A contract when originally entered into may

be valid and binding on the parties. It may subsequently become void.

- **Voidable Contract:** According to Section 2(i) "An agreement which is enforceable by law at the option of one or more of the parties thereto, but not at the option of other or others, is a voidable contract". However, the contract continues to be good and enforceable unless it is repudiated by the aggrieved party.

  Usually contract becomes voidable when the consent of one of the parties to the contract is obtained by coercion, undue influence, misrepresentation or fraud. Such a contract is voidable at the option of the aggrieved party i.e. the party whose consent was so obtained.

- **Illegal contract:** A contract is illegal if its objective or consideration: (a) is forbidden by law; or (b) is of such nature that, if permitted, would defeat the provisions of any law or (c) is fraudulent; or (d) involves or implies injury to a person or property of another, or (e) court regards it as immoral or opposed to public policy. These agreements are punishable by law. These are void-ab-initio i.e. unenforceable from the very beginning.

  Example: There is a contract between A and B according to which B has to murder C for a consideration of Rs. 100000/- from A. It is an illegal contract.

- **Unenforceable contract:** A contract which has not properly fulfilled legal formalities is called unenforceable contract. That means unenforceable contract suffers from some technical defect like insufficient stamp, absence of writing etc. After rectification of that technical defect, it becomes enforceable or valid contract.

1.5.2 On the Basis of Formation

On the basis of formation, contract can be classified as follows:

- **Express Contracts:** The contracts where both the offer and acceptance constituting an agreement enforceable at law are made in words spoken or written, it is an express contract. For example: A has offered to sell his house to B and B has given acceptance. It is Express Contract.
- **Implied Contract:** The contracts where both the offer and acceptance constituting an agreement enforceable at law are made otherwise than in words i.e. by act or conduct of the parties, it is an implied contract. Sitting in a bus can be taken as example to implied contract between passenger and owner of the bus.
- **Quasi Contract:** In case of quasi contract there will be no offer and acceptance. In fact, there will be no Contractual relations between the partners. Such a contract which is created by virtue of law is called quasi contract. Sections 68 to 72 of the Contract Act stated the situations where the court can create quasi contract.
  - Sec. 68: When necessaries are supplied
  - Sec. 69: When expenses of one person are paid by another person.
  - Sec. 70: When one party is benefited by the activity of another party.
  - Sec. 71: In case of finder of lost tools.
  - Sec. 72: When payment is made by mistake or goods are delivered by mistake.
- **When necessaries are supplied:** If a person, incapable of entering into a contract, or anyone whom he is legally bound to support, is supplied by another with necessaries suited to his condition in life, the person who has furnished such supplies is entitled to be reimbursed from the property of such incapable person. E.g. A supplies B, a lunatic, with necessaries suitable to his condition in life. A is entitled to be reimbursed from B's property.

- **When expenses of one person are paid by another person:** A person who is interested in the payment of money which another is bound by law to pay, and who therefore pays it, is entitled to be reimbursed by the other.

For example, B holds land in Bengal, on a lease granted by A, the Zamindar. The revenue payable by A to the government being in the arrears, his land is advertised for sale by the government under the revenue law. The consequences of such sale will be annulment of B's lease. B, to prevent the sale and the consequent annulment of his own lease, pays to the government the sum due from A. A is bound to make good to B the amount so paid.

When one party is benefited by the activity of another party: When a person lawfully does anything for another person or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the things so done or delivered.

For giving rise to right of action under this Section the following three conditions must be fulfilled:

(i) The thing must have been done lawfully in good faith.

(ii) The thing must have been done by a person not intending to act gratuitously, i.e. it must have been done with the intention of being paid for.

(iii) The person for whom the act is done must have enjoyed the benefit of the act.

Example (a) A, a trader, leaves goods at B's house by mistake. B treats the goods as his own. He is bound to pay for them to A.

Example (b) A saves B's property from fire. A is not entitled to compensation from B if the circumstances show that he intended to act gratuitously.

1.5.3 On the Basis of Performance

On the basis of performance contract can be classified as follows:

- **Executed Contract:** An executed contract is one where all the parties to the contract have fully performed their share of obligation and nothing remains to be done by any party under the contract.
- **Executory Contract:** An executory contract is a one where the terms, obligations and promises have not yet been performed. For example A agrees to let his house to B from first day of the next month and B in consideration promises to pay A Rs 5000 per month, the contract is executory because it is yet to be carried out.
- **Unilateral Contract:** Unilateral contract is one sided contract in which only one party has to perform his duty or obligation.
- **Bilateral Contract:** A bilateral contract is one where the obligation or promise is outstanding on the part of both the parties.



CHECK YOUR PROGRESS

Q.3: What is mean by void contract?

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Q.4: What is mean by implied contract?

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1.6 FREE CONSENT

According to Sec.13 of the Indian Contract Act, 'consent' means that the parties must have agreed upon the same thing in the same sense. According to Section 14 'Consent' is said to be free when it is not caused by

coercion, undue influence, fraud, misrepresentation or mistake. The various causes leading to flaw in consent will now be discussed in the following sub- sections-

1.6.1 Coercion

According to Sec. 15 of the Contract Act, "Coercion is the committing or threatening to commit, any act forbidden by Indian Penal Code, or the unlawful detaining or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter in to an agreement."

The following points can be derived from the above definition.

1. Coercion implies (a) committing or threatening to commit any act forbidden by Indian Penal Code, or (b) unlawful detaining or threatening to detain any property, with the intention of causing any person to enter into an agreement.

In Ranganayakamma Vs. Alwar Setti (1889) the question before the Madras High Court was regarding the validity of the adoption of a boy by a widow. A Madrasi gentleman died leaving a young widow. The relatives of the deceased threatened the widow to adopt a boy otherwise they would not allow her to remove the dead body of her husband for cremation. The widow adopted the boy and subsequently applied for cancellation of the adoption. It was held that her consent was not free but induced by coercion.

2. The act constituting coercion may be directed at any person, and not necessarily at the other party to the agreement. Likewise it may proceed even from a stranger to the contract.

   A threatens to shoot B if he does not sold his land to C. B agrees to sold his land to C. Here, B's consent has been caused by coercion.

3. It does not matter whether the Indian Penal Code is or is not in force in the place where the coercion is employed.

Effect of Coercion

A contract brought about by coercion is voidable at the option of the

party whose consent was so caused (Sec.19). This means that the aggrieved party may either exercise the option to affirm the transaction and hold the other party bound by it, or repudiate the transaction by exercising a right of rescission. As per Section 64, if the aggrieved party opts to rescind a voidable contract, he must restore any benefit received by him under the contract to the other party from whom received.

1.6.2 Undue Influence

According to Section 16(1) "A contract is said to be induced by undue influence where, (i) 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 (ii) he uses the position to obtain an unfair advantage over the other."

A person is deemed to be in a position to dominate the will of the other: (a) where he holds a real or apparent authority over the other, e.g. the relationship between master and the servant, police officer and the accused; (b) where he stands in a fiduciary relation to the other. Such relationship is exist in the following cases: father and son, guardian and ward, solicitor and client, doctor and patient, trustee and beneficiary etc. (c) Where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress.

Difference between Coercion and Undue Influence

Now let us discuss the differences between coercion and undue influence-

Nature of Action: Coercion involves physical force and sometimes only threat. Undue influence involves only moral pressure.

Involvement of criminal action: Coercion involves committing or threatening to commit any act prohibited or forbidden by law, or detaining or threatening to detain a person or property. In undue influence there is no such illegal act involved.

Criminal liability: The party exercising coercion exposes himself or herself to criminal liability under Indian Penal Code. There is no criminal liability in case of undue influence.

Exercise by whom: Coercion need not proceed from the promissory. It also need not be directed against the promisee. Undue influence is always exercise by one on the other, Who are parties to the contract.

Enforceability: Where there is coercion, the contract is voidable. Where there is undue influence the contract is voidable or court may set aside or enforce it in a modified form.

1.6.3 Fraud

According to Section 17, Fraud means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract-

(a) the suggestion, as a fact, of that which is not true, by one who does not believe it to be true;

(b) the active concealment of a fact by one having knowledge or belief of the fact;

(c) a promise made without any intention of performing it;

(d) any other act fitted to deceive;

(e) any such act or omission as the law specially declares to be fraudulent.

Can Silence be Fraudulent?

The explanation to Section 17 declares that "mere silence as to facts likely to affect the willingness of a person to enter in to a contract is not fraud, unless:

(i) The circumstances of the case suggest that it is the duty of the person keeping silence to speak, or

(ii) Silence is, in itself, equivalent to speech"

It therefore follows that:

a. As a rule mere silence is not fraud because there is no duty cast by law on a party to a contract to make a discloser to the other party, of material facts within his knowledge.
b. Silence is fraudulent, if the circumstances of the case are such that 'it is the duty of the person keeping silence to speak'

(iii) Silence is fraudulent where the circumstances are such that 'silence is, in itself equivalent to speech.' For example, X says to Y "if you do not deny it, I shall assume that the car is in good condition." Y says nothing. Hence, Y's silence is equivalent to speech. If the car is not in good condition Y's silence is fraudulent.

Effect of Fraud

A party, who has been induced to enter into a contract by fraud, has the following remedies available to him:

a) He can rescind the contract i.e. he can avoid the performance of the contract,
b) He can ask for restitution and insist that the contract shall be performed, and that he shall be put in the position in which he would have been, if the representation made had been true.
c) The aggrieved party can also sue for damages, if any. Fraud is a 'civil wrong' hence compensation is payable.

1.6.4 Misrepresentation

Misrepresentation is the giving of false information by one party (or his/her agent) to the other before the contract is made, which induces them to make the contract.

According to Section 18 "Misrepresentation" means and includes-

(a) the positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;
(b) any breach of duty which, without an intent to deceive, gains an advantage of the person committing it, or any one claiming under him, by misleading another to his prejudice, or to the prejudice of any one claiming under him;

(c) causing, however innocently, a party to an agreement, to make a mistake as to the substance of the thing which is the subject of the agreement.

Difference between fraud and misrepresentation

a) In case of fraud the person making the representation knows it fully well that his statement is false. In case of misrepresentation, the person making the statement believes it to be true which might later turn out to be untrue.

b) Fraud is a civil wrong which entitles a party to claim damages in addition to the right of rescinding the contract. Misrepresentation gives only the right to avoid the contact and there can be no suit for damages

c) In case of misrepresentation, the fact that plaintiff had means of discovering the truth by exercising ordinary diligence can be a good defence against the repudiation of the contract, whereas a defence cannot be set up in case of fraud other than fraudulent silence.

Explanation.-Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, regard being had to them, it is the duty of the person keeping silence to speak2, or unless his silence, is, in itself, equivalent to speech.

1.6.5 Mistake

According to Section 20 of the Indian Contract Act, 1872, mistake means "an erroneous belief about something". If the agreement is made under an erroneous belief it cannot be said that the parties enjoyed free consent i.e. both the parties shall understand the same thing in the same sense.

Elements of Mistake

1. Mistake must be bilateral. Unilateral mistake is no mistake.
2. The mistake must be in relation to some fact.

3. The fact concerned must be essential to the agreement.
4. As regards mistake of law, if there is mistake of about Indian Law then it is not considered as a mistake of fact to an Indian. But a mistake of law of foreign country is a mistake of fact.

Types of Mistake

Mistake may be of two types: Mistake of law and Mistake of fact.

Mistake of Law

Mistake of law may be of following types:

a) A mistake of law of the country or
b) A mistake of law of foreign country.

a) A mistake of law of the country: Everyone is deemed to be abide by law of his country. "Ignorance of law is no excuse", therefore mistake of law is no excuse and it does not give right to the parties to avoid the contract. Section 21 of the Contract Act declares that "A contract is not voidable because it was caused by a mistake as to any law in force in India." Accordingly no relief can be granted on the ground of mistake of law of the country.
b) Mistake of foreign law: Mistake of foreign law stands on the same footing as the mistake of fact.

Mistake of Fact

Mistake of fact may be of two types viz. bilateral mistake and unilateral mistake.

Bilateral Mistake: Where the parties to an agreement misunderstood each other and are at cross purposes, there is a bilateral mistake. According to Section 20 "where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement shall be void". Thus for declaring an agreement void ab-initio under this section, the following three conditions must be fulfilled:

i. Both the parties must be under a mistake;

ii. Mistake must relate to some fact and not to judgment or opinion etc;

iii. The fact must be essential to the agreement.

b) Unilateral Mistake: When only one of the contracting parties is mistaken as to a matter of fact, the mistake is a unilateral mistake. Section 22 provides that "a contract is not voidable merely because it was caused by one of the parties to it being under a mistake as to a matter of fact." Unilateral mistakes do not affect the validity of the contract unless they concern some fundamental fact and the other party is aware of the mistake. An unilateral mistake may be:

- Mistake as to the nature of the transaction: A contract shall be void if a party to the contract without any fault of his own makes a mistake about the very nature of the contract. It may be because of blindness, illiteracy, or servility of the person signing the contract or due to the trick or fraudulent misrepresentation as to the nature of the document.
- Mistake as to identity of the contracting parties: The person or with whom the contract is to be made must be identified correctly by the other party. It is a fundamental mistake on the part of the other party not to recognise the correct person. The principle of the contract holds good only when the identity of the contracting party is given importance.



CHECK YOUR PROGRESS

Q. 5: What is meant by misrepresentation?

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Q.6: What is meant by bilateral mistake?

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1.7 LET US SUM UP

In this unit we have discussed the following points of the law of contract:

- Contract is an agreement enforceable by law.
- To become a valid contract an agreement must have the essential elements like- Offer and acceptance; Intention to create legal relationship; Capacity of the parties; Consideration; Free consent; Lawful object etc.
- Contracts may be classified in terms of enforceability, formation and performance.
- Consent is said to be free when it is not caused by coercion, undue influence, fraud, misrepresentation or mistake.



1.8 FURTHER READING

1. Commercial Law (including Company Law and Industrial Law); by Arun Kumar Sen and Jitendra Kumar Mitra
2. Principles of Mercantile Law; by R.P Maheshwari and S.N. Maheshwari
3. Elements of Mercantile Law; by N.D Kapoor
4. Business Regulatory Framework; by K. C Garg, V. K. Sareen and Mukesh Sharma



1.9 ANSWERS TO CHECK YOUR PROGRESS

Ans. to Q. No. 1: A contract is an agreement enforceable by law.

Ans. to Q. No. 2: Two essential elements of a valid contracts are (a) Offer and acceptance and intention to create legal obligations; (b) Free consent of the parties.

Ans. to Q. No. 3: A void contract is a contract which ceases to be enforceable by law.

Ans. to Q.No.4: The Contracts where both the offer and acceptance constituting an agreement enforceable at law are made otherwise then in words i.e. by act or conduct of the parties, it is an implied contract.

Ans. to Q. No. 5: Misrepresentation is the giving of false information by one party (or her or his agent) to the other before the contract is made, which induces them to make the contract.

Ans. to Q. No. 6: Where the parties to an agreement misunderstood each other and are at cross purposes, there is a bilateral mistake.



1.10 MODEL QUESTIONS

Q.1: Define contract.

Q.2: What is meant by capacities of parties to enter into contract?

Q.3: What is meant by void contract?

Q.4: Classify the contracts on the basis of formation.

Q.5: Define fraud.

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UNIT 2 : OFFER, ACCEPTANCE AND CONSIDERATION

UNIT STRUCTURE

2.1 Learning Objectives

2.2 Introduction

2.3 Concept of Offer

2.4 Legal Rules Regarding a Valid Offer

2.5 Lapse and Revocation of Offer

2.6 Concept of Acceptance

2.7 Legal Rules of a Valid Acceptance

2.8 Communication of Offer, Acceptance and Revocation

2.9 Concept of Consideration

2.10 Legal Rules of Consideration

2.11 Exception to the rule “No Consideration, No Contract”

2.12 Let Us Sum Up

2.13 Further Reading

2.14 Answers to Check Your Progress

2.15 Model Questions

2.1 LEARNING OBJECTIVES

After going through this unit you will be able to

- explain the concept of offer
- discuss the legal rules to offer
- describe the concept of acceptance
- explain the legal rules to acceptance
- explain the modes of communication, acceptance and revocation
- describe the concept of consideration
- discuss the legal rules of consideration

2.2 INTRODUCTION

In the previous unit we have discussed that to be a contract there must be a ‘lawful offer’ made by one party and a ‘lawful acceptance’ of the

offer by the other party. Another essential condition of a valid contract is the presence of lawful consideration. Consideration forms foundation of a contract. For example, if Mr. A offers to sell his house to Mr. B for Rs. 20,000 and Mr. B accept the offer, a contract came into existence. In this contract, Mr.A made the offer, Mr. B accepted the offer. The 'house' is the consideration for Mr. B and Rs. 20, 000 is the consideration for Mr. A.

In this unit, we will discuss the legal rules regarding offer, acceptance and consideration.

2.3 CONCEPT OF OFFER

The words 'proposal' and 'offer' mean one and the same thing and are used interchangeably. According to Section 2(a) of the Indian Contract Act, "when one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal". The definition reveals the following three essential ingredients to an offer:

(i) It must be an expression of the willingness to do or to abstain from doing something;

(ii) The expression of willingness to do or to abstain from doing something must be to another person. There can be no proposal by a person to himself;

(iii) The willingness must be expressed with a view to obtain the assent of the other party to whom the proposal is made.

The person making the *proposal* or *offer* is called the *promisor* or *offeror*, the person to whom the offer is made is called the *offeree*. After accepting the offer, the offeree is called the *promisee* or *acceptor.*

2.4 RULES REGARDING A VALID OFFER

A valid offer must keep conformity with the following rules:

a. An offer may be express or implied: An offer may be either by words or by conduct. When an offer is expressed by words, spoken or in writing, is called an express offer and the one which is inferred from the conduct of a person or the circumstances of the case is called an

'implied offer.' Thus stepping into a taxi creates implied promise to pay for service availed.

b. **Creating legal relations:** The offer should create a legal relation. If the offer does not intend to give rise to legal consequences, the offer is not valid in the eyes of law. An offer to a friend to dine at the offeror's place, or an offer to one's wife to show her a movie is not a valid offer and as such cannot give rise to a binding agreement, even though it is accepted and there is consideration, because in social agreements or domestic arrangements the presumption is that the parties do not intend legal consequences to follow the breach of agreement.

c. **Terms of an offer must be definite and certain:** The terms of an offer should not be vague or indefinite. If the terms of the offer are not definite and certain, it does not amount to a lawful offer.

d. **Offer may be specific or general:** A specific offer is one which is made to a particular person or persons. Such an offer can be accepted only by the person or the persons to whom it is made. On the other hand, a general offer is made to the world at large. Therefore, it can be accepted by any person.

e. **Offer must be communicated to the offeree:** An offer must be communicated to the person to whom it is made. A person can accept the offer only when he knows about it. Until the offer is made known to the offeree, there can be no acceptance.

f. **An invitation to offer is not an offer:** An offer is different from an 'invitation to receive offer.' In the case of an 'invitation to receive offer' the person sending out the invitation does not make an offer but only invites the other party to make an offer. His object is merely to circulate information that he is willing to deal with anybody who, on such information, is willing to open negotiations with him. Such invitations for offers are therefore not offers. Quotation, catalogues of price, or display of goods with price marked there on do not constitute an offer. The shopkeeper in such cases is not making an offer so that you can accept it. He is on the other hand, inviting you to make an offer which he may or may not accept.

g. **Offer should not contain a term the non- compliance of which would amount to acceptance:** An offer cannot say that if acceptance is not communicated up to a certain date, the offer would be assumed to have been accepted. In such a case if the offeree does not reply, there is no contract, no obligation to reply can be imposed on him, on the ground of justice.

h. **Offer can be made subject to any terms and conditions:** The offeror may attach any terms and conditions to the offer he makes. The offeror may even prescribe the mode of acceptance. The offeree will have to accept all the terms of the offer. As regards mode of acceptance, it must be noted that in case of deviated acceptance, for example, if the offeror asks for sending the acceptance 'by telegram' and the offeree sends the acceptance 'by post' the offeror may decline to treat that acceptance as valid acceptance.

i. **Two identical cross- offers do not make a contract:** Sometimes two parties make similar offers to each other, in ignorance of each other's offer, these are called cross offers. In such a case, no binding contract will be created as no one has accepted the offer made by the other. For example- X of Guwahati by a letter makes an offer to Y of Jorhat to sell his car for Rs. 20,000. At the same time Y of Jorhat makes a similar offer to X of Guwahati to buy his (X's) car for Rs. 10,000. Offers of both X and Y cross each other in the post. These offers are called cross offers. Such offers do not constitute acceptance of one's offer by another.



CHECK YOUR PROGRESS

Q. 1: What is an offer?

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Q. 2: What is meant by express offer?

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2.5 LAPSE AND REVOCATION OF OFFER

In the following circumstances an offer lapses and become invalid.

a. **By lapses of time:** When the proposer prescribes a time limit within which the proposal must be accepted, the proposal lapses as soon as the time expires or if no time is prescribed, within a reasonable time. What is reasonable time is a question of fact depending upon the circumstances of each case.

b. **By death or insanity:** An offer lapses by the death or insanity of the offeror, if the fact of his death or insanity comes to the knowledge of the acceptor before acceptance [Sec.6(4)]. From the above line, it may be inferred that an acceptance in ignorance of the death or insanity of the offeror, is a valid acceptance, and give rise to a contract.

c. **By rejection**: An offer lapses if it has been rejected by the offeree. The rejection may be express i.e., by words spoken or written, or implied. Implied rejection is one: (a) where either the offeree makes a counter offer, or (b) where the offeree gives a conditional acceptance.

X offered to sell his car to Y for Rs 90,000. Y offered Rs 80,000 for which price X refused to sell. Subsequently Y offered to purchase the car for Rs 90,000. X declined to adhere to his original offer. Y filed a suit to obtain specific performance of the alleged contract. Dismissing the suit, the court held that X was justified because no contract had come into existence, as Y, by offering Rs 80,000, had rejected the original offer.

A, offered to sell his motorcar to B for Rs 85,000. B said that he accepted the offer if he was appointed as General Manager of A's factory. B's acceptance is a 'conditional acceptance' which amounts to rejection of A's offer and there is no contract.

d. **By revocation**: An offer is revoked when it is retracted back by the offeror. An offer may be revoked, at any time before acceptance, by the communication of notice of revocation by the offeror to the other party [Sec. 6(1)]. For example, at an auction sale, A makes the highest bid. But he withdraws the bid before the fall of the hammer. There

cannot be a concluded contract because the offer has been revoked before acceptance.

e. **Revocation by non-fulfillment of a condition precedent to acceptance: According to** Section-6(3) an offer stands revoked if the offeree fails to fulfill a condition precedent to acceptance. Thus, where A, offers to sell his car to B, for Rs 4 Lakh, if B joins Lions Club within a week. If B fails to join the Lions Club, the offer stand revoked and cannot be accepted.

f. **An offer lapses by subsequent illegality or destruction of subject matter**: An offer lapses if it become illegal after it is made, and before it is accepted. Thus, where an offer is made to sell 20 bags of sugar for Rs 8000/ and before it is accepted, a law is enacted which prohibit selling of sugar by private individuals, the offer comes to an end. An offer may lapse if the thing, which is the subject matter of the offer, is destroyed or substantially impaired before acceptance.



LET US KNOW

Cross offer and Counter offer

Where two parties formulate identical offer to each other by ignoring offer of each other, this offer is called cross offers. Cross offers are identical. In the case of cross offers, the court cannot construe one offer as the offer and the other as acceptance and as such there is no contract.

A counter offer is an offer made in response to a previous offer by the other party during negotiations for a final contract. It is a new offer made in response to an offer received. Making a counter offer automatically rejects the prior offer, and requires an acceptance under the terms of the counter offer or there is no contract.

For example: if X asks Y, Will you buy my car for Rs. 80,000? and Y says No, but for Rs. 50,000 he can buy the car from Y. There is said to be counter offer.

2.6 CONCEPT OF ACCEPTANCE

According to Section 2 (b) of the Indian Contract Act, "A proposal when accepted becomes a promise" and define acceptance as "when the person to whom proposal is made signifies his assent thereto, the proposal is said to be accepted."

Example: M offers to sell his car for Rs. 1, 50,000/- to N. N agree to purchase the car at Rs. 1,50,000 from "M". Here N accepts the offer made by M.

2.7 LEGAL RULES OF A VALID ACCEPTANCE

Following are the legal rules which are immensely important to make a valid acceptance.

- **Acceptance must be given only by the person to whom the offer is made:** An offer can be accepted only by the person or persons to whom it is made and with whom it imports an intention to contract. It cannot be accepted by another person without the consent of the offeror. The rule of law is clear that "if you propose to make a contract with A then B can't substitute himself for A without your consent." An offer made to a particular person can be validly accepted by him alone. Similarly an offer made to a class of persons (i.e., teachers, lawyers) can be accepted by any member of that class. An offer made to the world at large can be accepted by any person who has knowledge of the existence of the offer.
- **Absolute and Unconditional:** To make a valid acceptance, it must be unconditional as well as unqualified. According to the Section 7 (1) an acceptance to be valid must be absolute and unqualified. It will be not a contract, if there is any difference between the terms and conditions of offer and the terms and conditions of acceptance. Example: A offered to sell a plot of land at Rs. 5, 00,000 to B. B replied accepting the offer of A and enclosing Rs. 2, 00,000 and promises to pay the remaining Rs. 3, 00,000 by monthly payment of installments of Rs. 50,000 each. It is not an acceptance. Because, B accepted the

offer of A subject to payment in installments, which was not in the offer.

- **Acceptance must be communicated by the acceptor:** For an acceptance to be valid, it must be communicated to the offeror. No contract can be formed if the offeree(acceptor) fails to communicate the acceptance to the offeror.
- **Acceptance must be given within a reasonable time and Before the offer lapse or revoked:** Acceptance must be given within a reasonable time limit. Generally, this time is given by the offeror. But, if there is no specific time given by the offeror, then it must be within a reasonable time because an offer cannot be kept open indefinitely. Acceptance must be given before the offer is revoked. It implies that acceptance must be made while the offer is in force, i.e. before the offer is revoked or lapsed. If the offer lapse then there is nothing to accept.
- **Acceptance according to mode:** According to the Section 7(2) of the Indian Contract Act 1872, when the offeror prescribes a particular mode of acceptance, then the acceptor should follow that mode. Where no mode of acceptance is prescribed by the proposer, the acceptance must be communicated according to some usual and reasonable mode. Example: “M” sends an offer to “N” by posting a letter of proposal. Where M does not mention about the mode of acceptance, then N should make the acceptance in the “usual and reasonable manner”. That usual manner may be posting a letter of acceptance within a reasonable time.
- **Acceptance must succeed the offer**: Acceptance must be given after receiving the offer. It should not precede the offer. In a company shares were allotted to a person who had not applied for them. Subsequently he applied for shares being unaware of the previous allotment. It was held that the allotment of shares previous to the application was invalid.



CHECK YOUR PROGRESS

Q. 3: Define acceptance.

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2.8 COMMUNICATION OF OFFER, ACCEPTANCE AND REVOCATION

When the offeror and offeree are face to face and negotiated in person, there is direct communication of offer and acceptance. The moment the offeree gives his absolute and unqualified acceptance to the proposal made by the offeror, a valid contract comes into existence.

But where services of the post office are utilized by the offeror and offeree for communicating among themselves because of distance from one another, it is not always easy to ascertain the exact time at which an offer or an acceptance is made or revoked. In these cases the following rules, as laid down in section 4 and 5, will be applicable;

a) **Communication of an offer:** The communication of an offer is complete when it comes to the knowledge of the person to whom it is made, i.e., when the letter containing the offer reaches the offeree.

b) **Communication of an acceptance:** The communication of an acceptance has two aspects, viz., as against the proposer and as against the acceptor. The communication of an acceptance is complete (a) as against the proposer, when it is put in a course of transmission to him, so as to be out of power of the acceptor, and (b) as against the acceptor, when it comes to the knowledge of the proposer i.e., when the letter of acceptance is received by the proposer.

c) **Communication of revocation:** The communication of an acceptance has two aspects, (a) as against the person who makes it, when it is put into a course of transmission to the person to whom it is made, so as to be out of power of the person revoking. i.e. when the letter of revocation is posted, and (b) as against the person to whom it is made, when it comes to his knowledge i.e. when the letter of revocation is received by him.

2.9 CONCEPT OF CONSIDERATION

Consideration is one of the essential elements of a valid contract. The term 'consideration' means something accepted or agreed upon, as a return or equivalent for the promise made in contract. According to Pollock "Consideration is the price for which the promise for other is bought and the promise thus given for value is enforceable." Moreover, consideration is defined in the famous English case "Currie Vs Misa" as some right, interest, profit or benefit accruing to one party or some forbearance, detriments, loss or responsibility, given suffered or undertaken by the other. In the word of Justice Patterson, "Consideration means something which is of some value in the eye of law…. It may be some benefit to the plaintiff or some detriment to the defendant."

Under section 2 (d) of the Indian Contract Act, consideration is defined as "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 or promise is called a consideration for the promise".

Consideration can be defined as the price paid by the promisee for the obligation created. Consideration can be used in the sense of "quid pro quo", which implies something in return. It is the price for which a promise is bought.

Example: M agrees to sell his house to N for Rs. 1, 00,000. In this case, for M's promise the consideration is Rs. 1, 00,000/- and for N's promise the consideration is the house.



CHECK YOUR PROGRESS

Q. 4: Define consideration.

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2.10 LEGAL RULES OF CONSIDERATION

To be a valid consideration following legal requirements should be fulfilled.

- **At the desire of the promisor*:*** In order to constitute legal consideration the act or abstinance forming the consideration for the promise must be done at the desire or request of the promisor. Thus acts done or services rendered voluntarily, or at the desire of the third party, will not amount to valid consideration so as to support a contract. Example: 'A' sees that B's house is on fire and helps in extinguishing it. 'B' did not ask for his help. 'A' cannot demand for the payment (consideration) of his service.
- **Consideration must be real:** From the legal point of view, the consideration must have some value. Consideration must not be illusory or non-existing goods. If consideration is physically impossible, illegal, uncertain or illusory, it is not real and therefore shall not be a valid consideration.
- **Public duty:** In case of promise, which is already under the public duty, express promises to perform such duty will not a consideration. Example: X promise to Y for the construction of a particular road against the payment of Rs. 50,000/- to X, which has been already planned for construction by the PWD. So, there will be no consideration and hence no contract.
- **Promise to stranger:** In case of a promise, which is made to a stranger or unknown person to perform contract is enforceable because of the fact that the promisor undertakes a new obligation upon himself which can be enforced by the stranger.

  Example: X promise to Y to pay Rs. 1, 00,000, if Y marries Q. The fulfillment of Y's contract with Q was considered to support X's promise to Pay Rs. 1, 00,000/-.
- **Consideration need not be adequate:** Under Section 20 of the Indian Contract Act, 1872, an agreement to which the consent of the party is freely given is not void merely because the consideration is inadequate. But the inadequacy of the consideration may be taken into account by

the court in determining the question whether the consent of the promisor was freely given.

Example: "A" agrees to sell his motor car worth of Rs. 1, 00,000 for Rs 100. If A's consent to the agreement was freely given, then this agreement will be a contract notwithstanding the inadequacy of the consideration.

- **Consideration must not be illegal, immoral or opposed to public policy*:*** To make a contract valid, the consideration for the agreement must be lawful. Unlawful consideration makes the agreement void. In the following cases the consideration of an agreement is treated as unlawful:
  a. If it is forbidden by law.
  b. If it is of such nature that permission made to it would defeat the provision of any law.
  c. If it is fraudulent.
  d. If it involves or implies injury to the person or property of other.
  e. If the court regards it as immoral or opposed to public policy.

  Example: X promises to offer an opportunity of employment to Y in the public service and Y promises to pay Rs. 1, 00,000 to X. The agreement will be void. The consideration of Rs. 1, 00,000 is unlawful.
- **Consideration may be past, present or future:** According to the Indian Law, there may be three types of consideration, such as- past, present and future. Consideration can be defined as, at the desire of the promisor, the promisee or any other person has done or abstained from doing or does or abstain from doing or promises to do or abstain from doing something. Here the words "has done or abstained from doing "means that the consideration is an act which has already been done at the desire of the promisor i.e. for the present promise the consideration already taken place. It is termed as past consideration.

On the other hand, the word "does or abstains from doing "means the consideration is an act which a promisee or any other person does in present at the desire of the promisor. Here the promisor receives consideration simultaneously with his promise. It is termed as present

promise. The words, "promises to do or to abstain from doing" means an act which a promisee or any other person promises to do at some future time. It is termed as future consideration.

Past consideration: When something is done or suffered before the date of agreement, at the desire of the promissor, it is called past consideration. Past consideration is good consideration only if it is given by the promisee at the desire of the promisior. E.g. A teaches the son of B at B's request in the month of February, and in March B promises to pay a sum of Rs.2000 for his service. The service of A will be past consideration.

Present consideration: Consideration which moves simultaneously with the promise, is called present consideration or executed consideration. It should, however, be noted that consideration is said to be present consideration when at the time of the agreement it is executed on one side and executor on the other. For example, A sells and delivers a mobile to B, upon B's promise to pay for it at a future date. The consideration moving from A is present consideration since A has done his act of delivering the mobile simultaneously with the promise of B.

Future consideration: When the consideration on both sides is to move at a future date the consideration is called future consideration. For example, A promises to sell and deliver 5 bags of Rice to B for Rs.5000 after a week, upon B's promise to pay the agreed price at the time of delivery. The promise of A is supported by promise of B and the consideration is executory on both sides.

- **Consideration may move from the promisee or from any other person: -** According to the Indian Law, consideration may move from the promisee or any other person. It indicates that inspite of the consideration that moved from the third party, a person can sue on a contract.

  Example:- X has granted his property to his wife Y and directs her to pay an annual allowance to his brother Z. Y also entered into an agreement with promising to pay the allowance to Z. This can be enforced by X even though no part of consideration is received by X moved from Y.

- **Consideration must be of some value in the eye of law: -**
  Consideration must be something to which law attach a value. Consideration must be of some value in the eye of law. It must be real and competent.
  Example:- "A" promises to pay a sum of money to a police officer for investigation into a crime will be without consideration because he is already bound to do so by law.

2.11 EXCEPTION TO THE RULE "NO CONSIDERATION, NO CONTRACT"

"An agreement made without consideration is void." But there are a few exceptions to the rule, where an agreement without consideration will be perfectly valid and binding. These exceptions are as follows:

- Agreement made on account of natural love and affection[Sec 25(i)] :
  An agreement made without consideration is enforceable. If it is:
  (i) Expressed in writing
  (ii) Registered under the law for the time being in force for the registration of documents
  (iii) Is made on account of natural love and affection
  (iv) Between parties standing in a near relation to each other.
- **Agreement to compensate for past voluntary service (Sec.25 (2)].**
  A promise made without consideration is also valid, if it is a promise to compensate, wholly or in part, a person who has already voluntarily done something for the promisor, or done something which the promisor was legally compelled to do.
  For example, A found B's purse and gaven it to him. B promises to pay a reward of Rs. 50 to A. Later on, B cannot refuse payment on the ground that there was no consideration.

In order to attract this exception, the following points should be noted:

(i) The service should have been rendered voluntarily for the promisor. If it is not voluntary but rendered at the desire of the promisor, then it is covered under 'past consideration' [as per Sec. 2(d) and not under this exception].

(ii) The promisor must be in existence at the time the service was rendered. Thus where services were rendered by a promoter for a company not then in existence, a subsequent promise by the company to pay for them could not be brought within the exception. (Ahmedabad Jubilee Spinning Co. vs Chhotalal).

(iii) The promise must be to compensate a person who has himself done something for the promisor and not to a person who has done nothing for the promisor. Thus, where B treated A during his illness but refused to accept payment from A; they being friends; and A in gratitude promises to pay Rs 1,000 to B's son D, the agreement between A and D is void for want of consideration as it is not covered under the exception.

(iv) The intention of the promisor ought to be to compensate the promisee. A promise given for any motive other than the desire to compensate the promisee would not fall within the exception. (Abdulla Khan vs Parshottam)

(v) The promisor to whom the service has been rendered needed competence to contract at the time the service was rendered. Thus a promise made after attaining majority to pay for goods supplied voluntarily to the promisor during his minority has been held valid and the promisee could enforce it ,(Karam Chand vs Basant Kaur).

(vi) The service rendered must also be legal. Thus past cohabitation will not make a promise to pay for it enforceable under this exception (Sabava vs Yamanappa).

- **Agreement to pay a time-barred debt** Sec. 25 (3): Where there is an agreement, made in writing and signed by the debtor or by his authorized agent, to pay wholly or in part a debt barred by the law of limitation, the agreement is valid even though it is not supported by any consideration. A time barred debt cannot be recovered and therefore a promise to repay such a debt is without consideration, hence the importance of the present exception.

For example**:** *A* owes *B* Rs 1,000, but the debt is barred by the Limitation Act. *A* signs a written promise to pay *B Rs* 500 on account of the debt. This is a valid contract.

- **Completed gift.** Any gift actually made is valid. A gift does not require consideration in order to be valid. In order to attract this exception there need not be natural love and affection or nearness of relationship between the donor and done. The gift must, however, be complete.
- **Contract of agency.** Section 185 of the Contract Act lays down that no consideration is necessary to create an agency.



2.12 LET US SUM UP

In this unit we have discussed the following aspects-

- An offer is an expression of the willingness to do or to abstain from doing something.
- There can be no proposal by a person to himself;
- Offer is made to obtain the assent of the offeree to accept or reject the offer.
- There are two parties to an offer- offeror and the offeree. After accepting the offer, the offeree is known as the *promisee* or *acceptor.*
- The legal rules to an offer like, the offer must be express or implied, intention to create a legal relationship; terms of an offer must be definite and certain etc.
- The offer may become invalid on account of lapse of time, death or insanity, rejection or revocation
- The legal rules to acceptance like, acceptance must be given only by the person to whom the offer is made, it must be absolute and unconditional, it must be communicated by the acceptor etc.
- Consideration means something accepted or agreed upon, as a return or equivalent for the promise made in contract.

- Legal rules to consideration like, consideration must be real, consideration need not be adequate, consideration must not be illegal, immoral or opposed to public policy, consideration may be past, present or future etc.

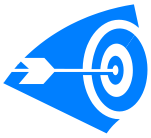


2.13 FURTHER READING

1) Kuchnal, M.C. & Prakash, D. 3rd ed. "Business legislation for Management", Vikas Publishing House Pvt. Ltd.

2) Kapoon, N.D. "Mescuntile Law" Sultan Chand & Sons, New Delhi.

3) Mahuhwari, R.P. & Maheshwari S.W. "Principles of Mercantile Law", Vikas Publishing House Pvt. Ltd.



2.14 ANSWERS TO CHECK YOUR PROGRESS

Ans. to Q. No.1: The words 'proposal' and 'offer' mean one and the same thing and are used interchangeably. According to Section 2(a) of the Indian Contract Act, "when one person signifies to another his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal".

Ans. to Q. No.2: When an offer is expressed by words, spoken or in writing, is called an express offer.

Ans. to Q. No. 3: "when the person to whom proposal is made signifies his assent thereto, the proposal is said to be accepted."

Ans. to Q. No. 4: The term 'consideration' means something accepted or agreed upon, as a return or equivalent for the promise made in contract.



2.15 MODEL QUESTIONS

Q.1: Define offer.

Q.2: What is meant by acceptance?

Q.3: Define consideration.

Q.4: Discuss the legal rules to an offer.

Q.5: Discuss the exceptions to the rule “No Consideration, No Contract”.

Q.6: Discuss the legal rules to consideration.

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UNIT 3: PERFORMANCE, DISCHARGE AND REMEDIES OF BREACH OF CONTRACT

UNIT STRUCTURE

3.1 Learning Objectives

3.2 Introduction

3.3 Meaning of Performance of Contract

3.4 Essentials of a Valid Tender of Performance

- 3.4.1 By Whom Contract must be Performed
- 3.4.2 Persons Entitled to Demand Performance

3.5 Performance of Joint Promises

3.6 Legal Provisions regarding the Time, Place and Manner of Performance of a Contract

3.7 Contracts which need not be performed

3.8 Meaning of Discharge of Contract

3.9 Mode of Discharge of Contract

- 3.9.1 By Performance
- 3.9.2 By Agreement or Consent
- 3.9.3 By Impossibility of Performance
- 3.9.4 By lapse of Time
- 3.9.5 By operation of law
- 3.9.6 By breach of contract

3.10 Breach of Contract and its Remedies

3.11 Let Us Sum Up

3.12 Further Reading

3.13 Answers to Check Your Progress

3.14 Model Questions

3.1 LEARNING OBJECTIVES

After going through this unit you will be able to

- discuss the provisions regarding performance of a contract
- explain the different ways of performing a contract

- describe the essentials of a valid tender of performance
- discuss the meaning and modes of discharge of a contract
- explain the remedies available for breach of a contract.

3.2 INTRODUCTION

After forming the contract, the stage of fulfillment of the object of the contract comes. The object of a contract is fulfilled when the parties to the contract do what they had agreed to do. This is called performance of respective obligations by the parties to the contract. In this unit we will discuss various provisions of Contract Act relating to performance of contract, discharge of contract and remedies of breach of contract.

3.3 MEANING OF PERFORMANCE OF CONTRACT

Regarding the performance of contract, Section 37 of the Act states that "The parties to a contract must either perform, or offer to perform, their respective promises, unless such performance is dispensed with or excused under the provisions of this Act, or of any other law." There are mainly two ways of performing a contract such as –

i. Actual performance

ii. Attempted performance or tender of performance

When the parties to the contract fulfill all his obligations under the contract, the contract is said to have been actually performed. Actual performance brings the contract to an end.

It is clearly stated in Sec-37 that the parties to a contract must either perform or offer to perform their respective promises. When the party who is bound to perform a promise under a contract is ready and willing to perform it at the proper time and place, but is unable to do so because the other party does not accept the performance. This willingness of the party is known as 'Attempted performance' or 'Offer to perform' or 'Tender'.



CHECK YOUR PROGRESS

Q.1: State the meaning of performance of a contract.

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3.4 ESSENTIALS OF A VALID TENDER OF PERFORMANCE

Under Section 38, a tender must have the following essentials to be valid:

i) It must be unconditional

ii) It must be for the whole obligation. It must not be installments, if the contract requires it in full.

iii) It must be by a person who is in a position and is willing to perform the promise.

iv) It must be at the proper time and place. A tender of goods after the business house or before the done date will not be valid.

v) It must be in proper form.

vi) It must be made to a proper person i.e. to the promisee or his authorized agent.

vii) In case of the tender of goods the promisee must be given a reasonable opportunity to inspect the goods.

viii) It may be made to one of the several joint promisees.

3.4.1 By whom contract must be performed

According to Sec-40 of the Indian Contract Act, "If it appears from the nature of the case that it was the intention of the parties to any contract that any promise contained in it should be performed by the promisor himself, such promise must be performed by the promisor. In other cases, the promisor or his representative may employ a competent person to perform it."

A contract can be performed by the following persons: –

i) **Promisor himself*:*** It is the nature of the contract which determines the person by whom it should be performed. If it appears from the nature that the intention of the parties was that promise should be performed by the promisor himself, then it should be performed by him. Such contracts are usually those where the personal skill of the promisor is vital. Such contracts come to an end if the promisor dies.

Example: X promises to sketch a site map of Y's house. X will have to perform this promise himself. Because it requires the skill of X.

ii) **Agent:** According to Para 2 of the Section 40, the promisor may employ a competent person such as agent to perform the promise, if the contract is not formed on personal condition.

iii) **Representative:** The contracts which do not involve any personal skill of the promisor may be performed by legal representatives of the promisor if he dies before performance, unless a contrary intention appears from the contract. The promisee can compel the legal representative to perform.

Example: M promises to sell his car for Rs. 1, 00,000/- to N after a week. But, M dies after 5 days of the contract. M's representative will be liable to sell the car to N and N will be liable to pay Rs. 1, 00,000/- to M's representative.

iv) **Third Parties:** According to the section 41, if a promisee accepts the performance of the promise by a third person he cannot afterwards enforce it against the promisor. In such a case the contract comes to an end and the promisor is discharged from further liability.

3.4.2 Persons Entitled to Demand Performance

i) **Promisee:** Performance of a contract can be demanded only by a person to whom the promise is made. It is only the promisee for whom the contract is performed. Only the

promisee can demand the performance of the promise under a contract.

Example: X promises Y to pay Z Rs. 10,000/- . X does not pay the sum to Z Here Z cannot bind X for the payment. It is only promisee Y who can enforce the promise against the promisor X.

ii) **Legal Representative:** In case of death of the promisee his legal representatives can demand performance unless a contrary intention appears from the contract. The promisor can compel the legal representative to perform.

Example: A agrees to marry B. But, before marriage take place B dies. The legal representative of B cannot demand performance of the promise from A.



CHECK YOUR PROGRESS

Q. 2: State the parties who must perform a contract.

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Q. 3: State the parties who can demand performance of a contract.

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3.5 PERFORMANCE OF JOINT PROMISES

When a promise is made by two or more persons jointly, it is called a joint promise. Following are the provisions of Contract Act regarding performance of joint contract:

i. **The joint promisors or their representatives must jointly perform the promise**: When two or more persons have made a joint promise, then, unless a contrary intention appears by the contract, all such persons must jointly fulfill the promise. When any one of the joint promisors dies, his legal representatives must, jointly with the surviving

promisors, fulfill the promise. On the death of all the original promisors, the legal representatives of all of them jointly must fulfill the promise (Sec. 42).

ii. **Any one of the joint promisors may be compelled to perform:** In case of a joint promise, the promisee is entitled to compel any one or more of such joint promisors to fulfill the whole of the promise, in the absence of express agreement to the contrary.

iii. **Each promisor may compel contribution:** For performance of the promise each of the joint promisors may compel other joint promisors to contribute equally with him. i.e. if any one of the joint promisor has been compelled to perform the whole of the promise, he can require other joint promisors to make equal contribution to the performance of the promise.

iv. **Sharing of loss by default in contribution:** If any one of the joint promisors makes a default in making contribution, if any, the remaining joint promisors must bear the loss arising from such default in equal shares

v. **The promisee may release any one joint promisors:** Sometimes the promise may release one of the joint promisors. But this does not release other promisors. This release does not free the joint promisor so released from responsibility to contribute to the other promisors.

3.6 LEGAL PROVISIONS REGARDING THE TIME, PLACE AND MANNER OF PERFORMANCE OF A CONTRACT

Various legal provisions are laid down under Section 46 to 50 regarding the time, place and manner of performance of a contract. So, as far as the time, place and manner of performance of a contract are concerned, it must be agreed upon by the parties to the contract themselves. The legal provisions regarding these are given below –

1. *Under Section 46, performance within a reasonable time:* According to Section *46*, a promisor is to perform his promise within a reasonable time. On the other hand, reasonable time will depend upon the

circumstance of the case, the usage of trade or on the intention of the parties entering into the contract.

Example: A has given an order of supplying of books in July which should be performed within 4 to 5 days of the month of July.

2. *Under Section 47, specified time and place for performance:* If the promise is to be performed on a certain day, the promisor may undertake to perform it without application of the promisee. According to the Section 47, "In such a case the promisor may perform the promise at any time during the usual hours of business on such day and at the place at which the promise ought to be performed.
3. *Under Section 48, performance on a certain day:* If the promise is to be performed on a certain day the promisor may undertake to perform it after the application by the promisee to that effect.
4. *Under Section 49, performance of promise when no place is fixed and without application:* If the promise is to be performed without application by the promisee and where no place is mentioned to be performed of the contract then it is the duty of the promisor to apply to the promisee to provide a reasonable place for the performance of the promise and to perform it at such place.

   Example: M takes to deliver 2,000 kilos of rice to N on a fixed day. M must apply to appoint a reasonable place for the purpose of receiving it and must deliver it to him at such place.

5) *Under Section 50, performance as prescribed by the promisee:* According to Section 50, the performance of any promise may be made in any manner or at any time, which the promisee prescribes.

   Example: T owes S Rs. 20,000/- to accept T's car value of Rs. 10,000/- in reduction of the debt. The delivery of the car will amount to a part payment of the debt.

3.7 CONTRACTS WHICH NEED NOT BE PERFORMED

Following are the circumstances under which contracts need not be performed:

a. According to Section 62, if parties to a contract agree to Novation, Rescission, or Alteration, the original contract need not be performed. In such a case the original contract is substituted by a new contract.
b. According to Section 63, if parties to a contract agree to dispense with or remit performance of promise either wholly or in part, the original contract stands discharged.
c. According to Section 64, when a person at whose option a contract is voidable rescinds it, the other party thereto need not perform his promise.
d. According to Section 67, if any promisee neglects or refuse to afford the promisor reasonable facilities for the performance of his promise, the promisor is excused for the non-performance of the contract.

3.8 MEANING OF DISCHARGE OF CONTRACT

Discharge of contract implies termination of the contractual relationship between the parties. A contract is discharged if it ceases to operate and when the rights and obligations created by it come to an end. Sometimes, other rights and obligations may arise as a result of discharge of the contract. These are independent of the original contract.

3.9 MODE OF DISCHARGE OF CONTRACT

Different modes of discharge of contract have been provided under different sections of the Act. These are:

3.9.1 Discharge by Performance

Each party to the contract is bound to perform his part of the obligation. After the parties to the contract made due performance of the contract, their liabilities under the contract come to an end. In such a case, the contract is said to be discharged by performance. Performance must be completed according to the real intentions of the agreement. Performance must be done according to time and manner prescribed.

Performance of contract may be of two types. Such as –

1) *Actual performance:-* When all parties to the contract perform their respective promises, the contract is said to be discharged and the contract comes to an end. Performance done by the parties must be according to time and terms of contract.
2) *Attempted performance:-* When the promisor offers to perform his obligation under the contract, but is unable to do so because the promisee does not accept the performance, it is called attempted performance or tender. Tender is not an actual performance. It is only an offer to perform.

3.9.2 By Agreement on Consent

The rights and obligations created by an agreement can be discharged without performance by means of another agreement between the parties. In such a case original contract need to be performed. Section 62 and 63 deal with this subject and provide for the following methods of discharging a contract by mutual agreement:

(i) Novation: Substitution of a new contract in place of the old existing one is known as 'novation of contract'. New contract may be either between the same parties or between different parties, the consideration being mutually the discharge of the old contract.

(a) Substitution of a contract with new terms for an old contract between the same parties.

(b) Substitution of a new party for an old one, the contract remaining the same. Promisee will now look to the third party for the performance of the contract. Original promisor is released of the obligations under the old contract.

(ii) Alteration: Alteration means change in one or more terms of the contract. In alteration original contract is not wholly rescinded. Only some terms of the original contract are varied and made inoperative. The alteration must be made with the

consent of all the parties. A valid alteration discharges the original contract and parties become bound by a new contract.

(iii) Rescission: Rescission means cancellation of the contract. A contract can be rescinded by any of the following ways:

By mutual consent: Parties may enter into a simple agreement to rescind the contract before it's breach.

By the aggrieved party : Where a party has committed a breach of the contract, the aggrieved party can rescind the contract without in any way effecting his right of getting compensation for the breach of contract.

By the party whose consent is not free: In case of a voidable contract, one of the parties has the option to rescind it.

A contract may also be taken to be impliedly rescinded. This happens when the parties do not perform their promises and remain silent without complaining of non-performance for a long period.

(iv) Remission: Remission means acceptance of a lesser sum than what was contracted for or a lesser fulfillment of the promise made. *Example:*A owes B Rs. 5,000. A pays to B and B accepts in satisfaction of whole debt Rs. 2,000 paid at the time and place where Rs. 5,000 were payable. The whole debt is discharged.

(v) Waiver: Waiver means the deliberate abandonment of a right which a party is entitled to under a contract, where upon the other party to the contract is released from his obligation.

Example: A promises to paint a picture for B.B afterwards forbids him to do so. A is no longer bound to perform the promise.

3.9.3 By Impossibility of Performance

A contract may be discharged if its performance becomes impossible. The rule of impossibility of performance is based on the following maxims. Such as i) the law does not recognize what is

impossible and ii) what is impossible does not create an obligation. According to the Section 56 of the Act, "an agreement to do an act impossible in itself is void."

There are two types of impossibility of performance such as –

i) Impossibility existing at the time of contract.

ii) Impossibility arising subsequent to the formation of contract.

i) Impossibility existing at the time of contract: There is no question of discharge of a contract which is entered into to perform something that is obviously impossible. Such impossibility may be either known or unknown to the parties at the time of entering in to the agreement. Example: A agreed to sell his horse to B. But unknown to both the parties that the horse had already died. The contract is void on the ground of impossibility.

ii) Impossibility arising subsequent to the formation of contract: In some cases it may so happen that the performance of a contract may become impossible subsequent to the formation of a contract. This is called subsequent impossibility of performance. The contract becomes void on the ground of subsequent impossibility only if the following conditions are fulfilled:

   a) The act should have become impossible,

   b) The impossibility should have been caused by circumstance beyond the control of the parties,

   c) The impossibility should not be result of the act of the parties.

3.9.4 By lapse of Time

According to the Limitation Act, 1963 a contract must be performed within a specified time. If it is not performed within this specific time limit and against which if no action is taken by the promisee in the Court of Law within specified time, then the promisee is debarred from instituting a suit in a court of law. In such cases,

the contract is discharged. Thus, in certain situations lapse of time may also lead to discharge of a contract.

3.9.5 By operation of law

A contract can be discharged by the operation of law. The operation of law by which contract can be discharged are as following –

i) *By death:-* If the contracts depend on the personal skill or ability then such contract may be discharged on the death of the promisor.

ii) *By insolvency:-* A person, after being adjudged insolvent, is released from all his liability incurred prior to his adjudication. A contract is discharged by the insolvency of one of the parties to it when an Insolvency Court passes an 'order of discharge'.

iii) *Merger:-* When an inferior right contract merges with into a superior right contract, the inferior right contract stands discharged automatically. E.g. when a part-time lecturer is made full-time lecturer, the contract of part-time lectureship is discharged by merger.

iv) *Unauthorized alteration of the terms of a contract:-* If one party makes any material alteration in the contract without the consent of the other party, then the other party can avoid the contract.



CHECK YOUR PROGRESS

Q. 4: What is mean by attempted performance?

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Q. 5: State the meaning of impossibility of performance of a contract.

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3.10 BREACH OF CONTRACT AND ITS REMEDIES

All parties to a contract are expected to perform their promises. Breach of contract takes place when one party to the contract, without lawful

excuse, does not fulfill his contractual obligation or by his own act makes it impossible that he should perform his obligation under it. The other party or parties are called aggrieved or injured party or parties. There are various types of remedies for the injured parties. Such as –

i) Rescission of the contract.

ii) Suit for specific performance.

iii) Suit for injunction

iv) Suit for quantum merit and

v) Suit for damages.

1) Rescission of the contract: - If there is breach of contract by one party, then the other party may rescind the contract and thereby he is absolved from his all obligations under the contract.

Example:- M promises N to deliver him a motor car on 1st January 2017, and N promises to pay for the motor car on 1st January 2017. M does not deliver the car on that date. N is discharged from the liability to pay the price.

The court may grant rescission:

a) Where the contract is voidable by the plaintiff; or

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

2) Suit for specific performance: - In some specific cases if the damages are not an adequate remedy, then the court can direct the party in breach for the specific performance of the contract. In such case, the promise is carried out as per terms and conditions of the contract. This is a direction by the court for specific performance of the contract at the suit of the party not in breach.

Generally in the following cases, the *court grants specific performance*:

i) When the act agreed to be done is such that compensation in money for its non performance of the act agreed to be done is not measurable.

ii) When it is probable that compensation in money is an inqdequate relief got for the non performance of the act agreed to be done.

iii) When there is no standard for ascertaining the actual damage caused by the non-performance of the act agreed to be done.

On the other hand, *the court does not grant specific performance* in the following cases:

i) Damages are an adequate remedy.

ii) The contract is not certain.

iii) The contract is inequitable to either party.

iv) The contract is of revocable nature.

v) The contract is made by the trustee in breach of trust.

vi) The contract is of personal nature i.e. contract to marry.

vii) The contract made by a company beyond its power (ultra-vires of its memorandum of association).

viii) The court cannot supervise its carrying out.

3) Suit for injunction: - Injunction is an order passed by a competent court restraining a person from doing some act. Injunction can be defined as a mode of securing the specific performance of the negative terms of a contract. Negative terms of contract imply doing something, which a party has promised not to do. Injunction is an order which is granted by the court restraining the person to do what he had promised not to do.

The court may order injunction in the following cases –

i) if the contract is voidable.

ii) if the contract becomes void or

iii) on discovering the contract as void.

4) Suit for quantum meruit:- The claim for quantum meruit may be arise if a contract performed by one party has become discharged by breach of the other party. The meaning of the phrase “quantum meruit” is ‘as much as earned’. The claim is not for the original contract that has been discharged or void, but on an implied promise by the other party to pay for what he has done.

Quantum meruit arises in the following circumstances.

a) If a contract is found to be void.

b) If something is done without any intention to do so gratuitously.

c) If one party abandons or refuses to perform the contract.

d) If a contract is divisible.

e) If a contract is performed badly.

5) Suit for damages: Damages are a monetary compensation awarded by the court to the injured party for the loss or injury suffered by him. As per contract, one party can claim damages if other party breach the contract. The main purpose of awarding the damages is to make good the loss suffered by him. It is known as doctrine of restitution. The Section 73 of the Indian Contract Act, 1872 deals with the compensation for loss or damages caused by a party for breach of contract. There are mainly four types of damages, such as-

i) Ordinary damages

ii) Special damages

iii) Vindictive or exemplary damages and

iv) Nominal damages.

i) Ordinary damages: When a contract has been broken, the injured party can, as a rule, always recover from the guilty party ordinary or general damages. Ordinary damages are such damages as may fairly and reasonably be considered as arising naturally and directly in the usual course of things from the breach of the contract itself.

ii) Special Damages: Special damages are such damages which occur due to some special or unusual reasons affecting the plaintiff. Such damages cannot be claimed as a matter of right. These can be claimed only in the special circumstances which would results in a special loss in case of a breach of a contract are brought to the notice of the other party.

iii) Vindictive or exemplary damages: Damages which are awarded with a view to punishing the guilty party for the breach and not by way of compensation for the loss suffered by the aggrieved party. But the cardinal principle of the law of damages for the breach of a contract are given by way of compensation for loss suffered, and not by way of punishment for wrong inflicted. Hence, vindictive or exemplary damages have no place in the law of contract as they are punitive in nature. However, there are two exceptions to this rule i.e. the court may award exemplary damages:

a) Breach of a contract to marry,

b) Dishonour of a cheque by a banker when there are sufficient funds to the credit of the customer.

iv) Nominal damages: Nominal damages are awarded only for the name sake, where the injured party has not actually suffered any loss by reason of the breach of a contract. The damage recoverable by the injured party is nominal, i.e. very small. This merely signifies that the plaintiff has won the case.



CHECK YOUR PROGRESS

Q. 6: State the meaning of breach of a contract.

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Q. 7: When the court may order for injunction.

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3.11 LET US SUM UP

In this unit we have discussed the following aspects –

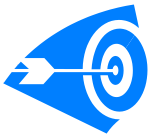
- A contract may be performed by actual performance or attempted performance or tender of performance.
- The essentials of a valid tender of performance are – it must be unconditional; it must be for the whole obligation; It must be by a person who is in a position and is willing to perform the promise; it must be at the proper time and place etc.
- The parties who can perform a contract
- The parties who can claim performance of a contract.
- The legal provisions regarding the time, place and manner of performance of a contract.

- Discharge of contract means termination of the contractual relationship between the parties.
- The different remedies available for discharge of a contract are- rescission of the contract, claim for specific performance, claim for injunction, claim for quantum merit and claim for damages.



3.12 FURTHER READINGS

1) Kuchhal, M.C. & Prakash, D., 3rd ed. “Business legislation for Management”, Vikas Publishinng House Pvt. Ltd.
2) Kapoor, N.D. “Mercantile Law” Sultan Chand & Sons, New Delhi
3) Maheshwari, R.P. & Maheswari, S.N. “Principles of Mercantile Law”, Vikas Publushing House Pvd. Ltd.



3.13 ANSWERS TO CHECK YOUR PROGRESS

Ans. to Q. No. 1: When the parties to the contract fulfill all his obligations under the contract, the contract is said to have been actually performed.

Ans. to Q. No. 2: A contract can be performed by the promissory, agent, representatives and third party.

Ans. to Q. No. 3: Persons Entitled to Demand Performance are promisee and his legal representative.

Ans. to Q. No. 4: When the promisor offers to perform his obligation under the contract, but is unable to do so because the promisee does not accept the performance, it is called attempted performance or tender.

Ans. to Q. No. 5: A contract may be discharged if its performance becomes impossible. The rule of impossibility of performance is based on the following maxims. Such as i) the law does not recognize what is impossible and ii) what is impossible does not create an obligation.

Ans. to Q. No. 6: Breach of contract takes place When one party to the contract, without lawful excuse, does not fulfill his contractual obligation or by his own act makes it impossible that he should perform his obligation under it.

Ans. to Q. No. 7: The court may order injunction in the following cases –

i) if the contract is voidable.

ii) if the contract becomes void or

iii) on discovering the contract as void.



3.14 MODEL QUESTIONS

Q.1: Define performance of contract.

Q.2: State the essential conditions of a valid tender of performance

Q.3: State the legal provisions regarding the time, place and manner of performance of a contract.

Q.4: Discuss the different modes of discharge of a contract.

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UNIT 4: SPECIAL CONTRACTS

UNIT STRUCTURE

4.1 Learning Objectives

4.2 Introduction

4.3 Contract of Indemnity

4.4 Contract of guarantee

4.4.1 Kinds of guarantee

4.5 Bailment

4.5.1 Kinds of bailment

4.6 Pledge

4.7 Let Us Sum Up

4.8 Further Reading

4.9 Answers To Check Your Progress

4.10 Model Questions

4.1 LEARNING OBJECTIVES

After going through this unit, you will be able to-

- Discuss the concept of contract of Indemnity
- Discuss the concept and kinds of contract of Guarantee
- Discuss the difference between contract of Indemnity and contract of Guarantee
- Explain the concept and kinds of Bailment
- Discuss the rights and duties of Bailor and Bailee
- Explain the concept of pledge and discuss the valid elements of pledge
- Discuss the right and duties of pledger and pledge.

4.2 INTRODUCTION

Special contracts are contained in sections 124 to 238 of the Indian Contract Act. These special contracts are Indemnity, Guarantee , Bailment, Pledge and Agency. In this unit we are going to discuss about contract of

indemnity, guarantee, bailment and plege. The contract of indemnity and guarantee are the special types of contract which help from protection against loss in the form of a promise to pay for loss of money or goods. Section 124 to 147 of the Indian Contract Act, 1872 discuss about contract of Indemnity and Guarantee. Through this unit, you will also be able to know the kinds of guarantee and also understand about the concept of surety and creditor. Thus, through this unit, you will able to know the detail concept of special type of contract indemnity and guarantee, bailment and pledge as stipulated under the Indian Contract Act, 1872.

4.3 CONTRACT OF INDEMNITY

The contract of indemnity is the compensation of security against loss of money or goods. The principles of general law of contract are equally applicable for it as under the Indian Contract Act, 1872. Under contract of indemnity the person who indemnifies or pays the loss is known as 'indemnifier' and in whose favor such promise is made to pay the loss is known as 'indemnified' or 'indemnity holder'. Under Section 124 of the Indian Contract Act, 1872 define a contract of indemnity as 'a contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself or by conduct of any other person'. Thus, it is valid when-

- there is a promise
- to save another person from loss or make good the loss
- which may be caused by the conduct of the promisor himself or by the conduct of any other person
- the promisor undertakes to make good the loss
- it covers indemnity for loss caused by human only

P contract to indemnify a sum of Rs 5000 to Q for the loss which may be caused or any proceeding which may be carried on by R against Q. This is a contract of indemnity.

Hence, indemnity for loss caused due to fire or in the death of a person or expiry of stipulated period as in case in insurance do not fall under

Sec 124 of the Indian Contract Act, 1872. It is because the life of a person cannot be valued and the question for amount of loss suffered by the assured does not arise.

Definition is not exhaustive

The definition of contract of indemnity given by Sec. 124 of the Contract Act is not exhaustive. Contract of indemnity includes:

(a) only express promise to indemnify and

(b) cases where loss is caused by the conduct of the promisor himself or by the conduct of any other person.

It does not include:

(a) implied promise to indemnify and

(b) cases where the loss is caused by accident and event not depending on the conduct of the promisor or any other person.

Rights of the indemnity-holder when sued

The indemnity holder is entitled to the following rights:

1. Indemnity-holder is entitled to recover all damages which he might have been compelled to pay in any suit in respect of a matter covered by the contract.
2. Indemnity holder is entitled to recover all costs incidental to the institution or defending of the suit. But the party indemnified cannot recover costs when he has not acted as a prudent man in defending the action against him or has not been authorised by the indemnifier to defend the suit or where the costs incurred have been unreasonable in amount.
3. Indemnity holder is entitled to recover all sums paid under any compromise of any such suit, provided the compromise was not contrary to the directions of the promisor and it has been made on the best available terms. Promisee must have acted prudently in making such a promise. (Sec. 125).

It is to be noted that a contract of indemnity being a type of the general contract and therefore, must satisfy all essentials of a valid contract such as competent parties, free consent, lawful object etc., otherwise it will not be valid.



CHECK YOUR PROGRESS

Q 1: Define indemnity.

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Q 2: Who is indemnifier?

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4.4 CONTRACT OF GUARANTEE

The term 'contract of guarantee' defines under Section 126 of the Indian Contract Act, 1872 as –

"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."

It is a contract to discharge the liability of third person when the third person makes default to perform. The object of contract of guarantee is to provide additional security by the surety to the creditor in the form of promise to fulfill certain obligation if the principal debtor unable to perform it.

Example: P promise to pay Q Rs 2000 on behalf of R, if, R make default in returning Rs 2000 to Q, P will pay.

Here,

Q is creditor

R is principal debtor and

P is surety

Thus, for a contract of guarantee the following features must be present-

- A contract of guarantee may be either oral or written
- There should be principal debt
- Benefit to the principal debtor is sufficient consideration
- Consent of the surety should not have been obtained by misrepresentation or concealment.

Requisites of a valid guarantee

(a) Essentials of a valid Contract: The essentials of a valid contract like offer, acceptance, free consent, valid consideration, capacities of parties etc. must be present in the contract of guarantee.

(b) There must be someone primarily liable: There has to be a primary liability of a person who is other than the surety to the contract of guarantee. The surety becomes liable only if the principal debtor is unable to discharge his obligation. If there is no principal debtor, there cannot be a contract of guarantee. Guarantee given for the minor's debt is an exception to this rule.

(c) There should be no misrepresentation: A guarantee should be obtained after disclosing all the material facts that may affect the degree of responsibility of the surety. The surety must know all the facts of the case because if he neglects to do his duty he is responsible for the consequences. Under Section 142 & 143 any guarantee that is obtained by misrepresentation or concealment of facts by the creditor is invalid.

(d) Contract may be Oral or in Writing: As given in section 126 of the Contract Act a contract of guarantee may be either oral or written.

There are distinction between contract of indemnity and contract of guarantee:

S. No.	Contract of indemnity	Contract of guarantee
1	A contract of indemnity is defined as 'a contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself or by conduct of any other person'.	A 'contract of guarantee' is a contract to perform the promise, or discharge the liability, of a third person in case of his default.
2	Under contract of indemnity, there are two parties 'indemnifier' and 'indemnity holder'.	Under contract of guarantee, there are three parties 'creditor ', 'principal debtor 'and 'surety'.
3	The contract of indemnity protects the promisee from the loss.	The contract of guarantee is for the surety of the creditor.
4	In contract of indemnity, the primary liability is of the promisor.	In contract of guarantee, the primary liability is of principal debtor.

5	In contract of indemnity, there is only one agreement i.e the agreement between indemnifier and indemnity holder.	In case contract of guarantee, there three agreements i.e viz. agreement between- 1.) the creditor and the principal debtor; 2.)the creditor and surety and 3) the principal debtor and surety.
6	Indemnifier cannot sue a third party for the loss suffered.	Surety can sue the principal debtor.

4.4.1 Kinds of guarantee

In case of contract of guarantee, surety has to perform the promise or discharge the liability of the principal debtor in case of his default. This contract of guarantee may be specific guarantee or continuous guarantee.

Specific guarantee is a contract of guarantee where the surety guarantees against the conduct of the principal debtor in respect of a particular transaction.

Example: A guarantee to pay B Rs 15000 on behalf of C as repayment of loan, if, C make default in returning the same to B. It is a specific guarantee where the surety 'A' guarantees against the default in returning the loan by the principal debtor 'C' in respect of the particular transaction to the creditor 'B'.

In case of continuous guarantee, the guarantee extends to a series of transactions. The continuous guarantee may extend to a series of transactions during a fixed period e.g. for two years.

Example: P guarantee (surety) to pay Q (creditor) the dealer of tea Rs 1000 for supply of tea from time to time within two year to R (principal debtor). R (principal debtor) paid Rs 1000 for the tea supplies to Q (creditor) within first year. Thus, P (surety) has to pay Q (creditor) Rs 1000 on default of payment by R.

But say, in the second year Q (creditor) the dealer of tea supply tea from time to time to R (principal debtor) in Rs 1200. Now,

P (surety) has to pay Q (creditor) Rs 1000 on default of payment by R not Rs 1200.

Creditor

Under contract of guarantee, there are three parties 'creditor', 'principal debtor 'and 'surety' and they enter three agreements viz. creditor with the principal debtor, creditor with surety and principal debtor with surety to perform the promise, or discharge the liability, of the principal debtor in case of his default. The creditor has the right to sue either principal debtor or surety or both to recover the amount made default in payment by the principal debtor. In certain cases, the creditor shall not act upon the guarantee of the surety until another person joined as co-surety and the creditor has the right to sue either principal debtor or sureties as he prefer. But if creditor loses the securities taken at the time of contract of surety ship, the creditor is entitled to recover the amount to that extent. In case of securities received by the creditor after the contract of guarantee, the sureties have no rights on those securities or otherwise the sureties has the rights on the securities received by the creditor at the time of contract of suretyship entered for the payment made due to default made by the principal debtor.

Surety

In case of contract of guarantee, the surety is the person who makes good the loss which may arise due to promise and default made by the principal debtor to the creditor. The Section 128 of the Indian Contract Act, 1872 define the liability of surety as– "The liability of surety is co-extensive with that of principal debtor, unless it is otherwise provided by the contract." It means the liability of surety is exactly the same as that of the principal debtor. The liability of the creditor can recover from the hand of surety all what he could recover from the principle debtor only. As stated in the example above, P guarantee (surety) to pay Q (creditor) the dealer of tea Rs 1000 for supply of tea from time to time within two year to R (principal debtor). Thus, P (surety) has to pay Q (creditor) Rs 1000 only on default of payment by R.

If the liability of principal debtor is reduced for any payment made to the creditor by the principal debtor than the liability of surety will also reduce accordingly. Now, say R paid Rs 200 to Q, than the liability remaining payable to Q on default of R by P is Rs 800 only.

On the other hand, the liability arise for default caused to the creditor by the principal debtor for illegal contract which is enforceable at law, the surety cannot be held liable.

Besides, if the principal debtor makes any default than the creditor has option to sue either principal debtor or surety or both.

Limit on surety's liability by contract:

As stated above that the liability of surety is co-extensive with that of principal debtor, unless it is otherwise provided by the contract i.e if the contract between the parties so provides, the liability of the surety may be less as that of the liability of the principal debtor if he make any default. E.g, P guarantee (surety) to pay Q (creditor) the dealer of tea Rs 600 for supply of tea from time to time within a year to R (principal debtor) where R is liable to pay Rs 1500. Thus, P (surety) has to pay Q (creditor) Rs 600 only on default of payment by R not Rs 1500.

Co-surety and its liability:

In certain cases, the creditor shall not act upon the guarantee of the surety until another person joined as co-surety. Thus, in such contract surety can be made liable only if such co-surety join the contract, otherwise not. As stated above the liability of surety is co-extensive with that of principal debtor, unless it is otherwise provided by the contract i.e this same principle is applicable and hence, the rights and liabilities of sureties are same and thus, if the contract between the parties so provides, the liability of the sureties may less as that of the liability of the principal debtor. Besides, if the principal debtor makes any default than the creditor has option to sue either principal debtor or sureties or all and the co-surety cannot insist the creditor to choose any of them for proceeding.

The rights of surety

The right of surety may be classified under following three heads:

(a) Right against the principal debtor;

(b) Right against the creditor;

(c) Right against the co-sureties.

A. Right against the principal debtor

- Rights of subrogation: When the surety makes payment upon default of principal debtor against guaranteed debt, he gets all the rights which the creditor has against the principal debtor.
- Right to indemnity: In every contract of guarantee, there is an implied promise of the principal debtor to indemnify the surety and the surety can recover from the principal debtor whatever sum rightfully paid under the said guarantee. If he sustains any damage beyond the amount paid, he can recover that damage also.

B. Right against the creditor

- Right to claim security: According to section 141 of the Act, the surety has the right of subrogation after performing his duty or making a payment to the creditor. All the rights of the creditor are passed on to the surety. Accordingly the surety gets the right to the benefit of every security, which the creditor has against the principal debtor even if the surety has no knowledge of the existence of such securities. If the creditor loses the security, the surety is discharged of his responsibilities limited to the value of his security.
- **Right of Set off:** Set-off implies a counter claim or deduction from the amount of loan. If the creditor sues the surety, he can claim set-off or counter claim, which the debtor had against the creditor.
- **Right to Share Reduction:** If the surety has paid the amount to the creditor on behalf of the principal debtor and the debtor becomes insolvent, the amount has to be recovered from him, then the surety can claim from the creditor a reduction in his

liability to the extent of the amount of dividend that is claimed by the creditor from the official receiver of the debtor.

- **Right to ask the Creditor to Terminate the Debtor's Services:** When a person gives a guarantee for the honest performance of another employee and the employee defaults, the surety has a right to demand that the employee be dismissed. Such dismissals are usually in the case of fidelity contracts, for example contracts relating to insurance.

C. Right against the co-sureties

- **Right to Contribution:** Under Section 146 of the Indian Contract Act, wherever there are co-sureties for the same amount, they are liable to share an equal amount of the debt which remains unpaid by the principal debtor. If a surety pays more than his share he has the right to ask the other sureties to participate in contributing an equal amount towards the debt.
- **Bound in Different Sums:** If co-sureties are bound in different sums their liability will be shared equally, subject to the maximum amount guaranteed by each of them.
- **Right to share benefits of security:** If at the time of guarantee, one of the co-sureties receives a security from the principal debtor, or on payment of the debt, he receives security from the creditor. In such a case, the co-sureties are entitled to share the benefits of security.

Discharge of surety from liability:

The mode of discharge of surety from his liability may be:

- Revocation by the surety: The surety can revoke a continuing guarantee by giving notice to the creditor for the future transactions.
- By surety's death: A continuing guarantee revoked automatically from surety's death as to future transaction.
- By variance in the terms of contract: It is expected that the liability which is agreed to be paid due to default of the principal debtor under certain terms, it should remain unchanged for

that particular period and if it changes without consent of the surety, the surety is discharged from the contract of guarantee.

- Discharge of principal debtor: As principal debtor is discharged from his debt, the surety is also discharged from the contract of guarantee.
- When creditor compounds with, gives time to or agrees not to sue the principal debtor: If the surety gives his assent on such contract where the creditor promise to give time to pay debt or agrees not to sue the principal debtor, the surety is discharged from his liabilities.
- By loss of the securities by the creditor: When creditor loses the securities which the creditor has taken at the time of contract of suretyship, the surety is discharged from his liabilities to that extent.



CHECK YOUR PROGRESS

Q 3: Define **guarantee**.

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Q 4: Who is **surety**?

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4.5 BAILMENT

The contract of indemnity is the compensation of security against loss of money or goods. Section 148 of the Indian Contract Act, 1872 defines Bailment as “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.” The person delivering the goods is called the “bailor”, the person to whom they are delivered is called the “bailee”. Thus, bailment involves two main essentials:

a. Delivery of goods by one person to another for some purpose upon a contract

b. When the purpose is accomplished the goods shall be returned or otherwise disposed of according to the directions of the person delivering them

1. Delivery of goods by one person to another for some purpose upon a contract

It means goods delivered or transferred from one person to another. This delivery may or may not be actual according to Section 148 of the Indian Contract Act, 1872. A person may possess the goods as bailee for another contract and the owner as bailor although the good is not delivered under bailment. For example, P sells his horse to Q. But P asked to keep for a month the horse with him on Q's behalf. Before this sale P keep the horse as owner, but now he keep the horse as bailee for Q.

2. When the purpose is accomplished the goods shall be returned or otherwise disposed of according to the directions of the person delivering them

The delivery or transfer of goods from one person to another is only for some purpose or otherwise disposed of according to the directions of the person delivering them. Thus it is different from sale or gift. Here the goods have to be returned in same or altered form.

4.5.1 Kinds of bailment

Bailment may be classified on the basis of Benefit and Reward. On the basis of benefit bailment may be classified in to following three types:

a. Bailment for the exclusive benefit of bailor: When the delivery of goods by the bailor to the bailee is done for the exclusive benefit of the bailor and the bailee gets nothing in return, that is consideration does not pass between the bailor and the bailee. E.g. when goods are delivered to a neighbour or someone else for safe custody without any charge.

b. Bailment for the exclusive benefit of bailee: When the delivery of goods by the bailor to the bailee is done for the exclusive benefit of the bailee and the bailor gets nothing in return. Hence consideration does not pass between bailor and the bailee. E.g. delivery of a car to a friend to go somewhere.

c. For the mutual benefit of both the bailor and the bailee: When the delivery of goods by the bailor to the bailee is done for the mutual benefit of both the parties. In this case consideration passes between the bailor and the bailee.

On the basis of reward bailment may be classified in to following types:

a. Gratuitous Bailment: In this case no consideration passes between the bailor and the bailee. Here, neither the bailor nor the bailee is entitled to any remuneration.

b. Non-Gratuitous Bailment: In this case consideration passes between the bailor and the bailee. The bailment for the mutual benefit of the bailor and the bailee is a non-gratuitous bailment. E.g. letting out a bike for hire.

Duties of Bailor

In the following paragraphs we shall discuss the duties of the bailor:

a) To disclose the faults in the goods bailed: The bailor should disclose the known faults about the goods, which he/she has bailed to the bailee. If the bailor does not disclose the defects then he/she is liable for any damage caused to the bailee due to such defects in the goods, whether he/she was or was not aware of the existence of such faults in the goods.

b) Repay necessary expenses: In case of gratuitous bailment, the bailor has to repay to the bailee all necessary expenses incurred by him for the purpose of bailment. In case of non-gratuitous bailment, the bailor is held responsible to bear only extra-ordinary expenses.

c) **To indemnify the bailee:** If a gratuitous bailment is terminated by the bailor before the specified time then any loss the bailee incurs due to such termination shall not be borne by the bailor. However if the loss suffered by the bailee exceeds the benefit he/she has derived from bailment then in such a case the bailor shall indemnify the bailee.

d) **To receive back the goods:** Once the purpose for which the goods were bailed out has been fulfilled, it becomes the duty of the bailor to receive back his/her goods from the bailee. If the bailor refuses to take back the goods then he is liable to pay compensation to the bailee who incurs expenses in keeping the goods in his/her custody.

e) **Responsibility for any loss due to defect in title:** If the title of the good is defective and due to that the bailee suffers a loss then the bailor is responsible to the bailee for the loss suffered by him/her.

Duties of Bailee

In the following paragraphs we shall discuss the duties of the bailee:

a) **To take reasonable care of the goods:** According to section 151 of the Indian Contract Act 1872 “the bailee is to take care of the goods as a man of ordinary prudence would, under similar circumstances, take care of his own goods of the same bulk, quality and value as the goods bailed”. Section 152 states that if, in spite of taking all reasonable care, the goods are damaged or destroyed in any way, then the bailee is not liable for the loss, destruction or the deterioration of the goods bailed.

b) **Not to make unauthorized use of goods:** The bailee is not to use the goods in a manner, which is inconsistent with the terms of the contract. If bailee uses the goods in an inconsistent manner then he/she is liable to make compensation to the bailor for loss of or any damage arising to the goods from such use.

c) **Not to mix goods bailed with his/her own goods:** The bailee should not mix the goods bailed with his/her own goods. If the bailee mixes the goods with his/her goods-

(i) With the Bailor's consent- in such a case both the bailor and the bailee shall have a proportionate interest in the mixture produced due to the mixing of the goods.

(ii) Without the bailor's consent the goods can be separated: In this case the bailee is liable to bear the expenses of separation as well as the damage caused to the bailed goods due to such a mixture.

d. To return the goods bailed: According to Section 160, it is the duty of the 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." Again according to Sec.165, "where there are several joint bailors, the bailee may return the goods to any one of the joint owners"

e. To return increase or profit accrued: According to Section 163, in the absence of any contract to the contrary, the bailee is bound to deliver to the bailor, or according to his directions, any increase or profit which may have accrued from the goods bailed.

Rights of Bailor

Following are the rights of bailor:

a. Right to sue: The bailor has the right to sue the bailee for the enforcement of the duties and liabilities of the bailee.

b. Right to terminate: According to section 153 of the Indian Contract Act "the bailor can at any time terminate the contract of bailment if he/she finds that the bailee has done an act which is inconsistent with the terms of the contract of bailment."

c. Right to demand return of goods at any time: According to section 159 of the Indian Contract Act, in case the bailor has lent the goods gratuitously to the bailee, the bailor has a right to terminate the contract anytime before the expiry of the period.

However if the termination causes loss to the bailee and the loss is in excess of the benefit derived by him/her then the bailor has to indemnify the bailee's loss.

d. **Unauthorized use of goods by the bailee:** 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.

e. **Claim damages:** Bailor has the right to claim damages for loss, destruction, or deterioration of the goods bailed, owing to bailee's negligence.

f. **Suit against wrongdoer:** According to section 180 of the Indian Contract Act if a third person wrongfully deprives the bailee from the rightful use or possession of bailed goods or does them any injury or damage then the bailor or the bailee can bring a suit against that person for such deprivation or injury.

g. **Right to claim increase in value or profits:** Bailor has the right to get any increase or profit from the goods bailed.

Rights of Bailee

The duties of the bailor are the rights of the bailee which we are all ready discuss in this unit.

4.6 PLEDGE

Pledge is a special kind of contract where assets are delivered as security for the repayment of a debt. According to section 172 of the Indian Contract Act, when bailment of goods is done as security for payment of a debt or performance of a promise it is called a pledge. In case of a contract of pledge the bailor is called the pledger or pawnor and the bailee is called the pledgee or pawnee.

Example: A borrow a sum of Rs.100000 from B and keep his car as security for repayment of the debt. This bailment is called pledge or pawn. Here, A is the pawnor and B the pawnee.

Essential elements of pledge

Following are the essentials of pledge:

a. **Delivery of goods:** The goods must be delivered by the borrowers to the lenders as a security for repayment of the debt or for performance of a promise.

b. **Possession of the goods:** The possession of the goods passes from one person to another person but ownership remains with the original owner.

c. **Moveable goods only:** Only moveable goods can be pledged. Immoveable properties like-share, debenture, document of title to goods etc. cannot be pledged.

d. **Return of goods:** The goods pledged with the pawnee, to be returned on receipt of his full dues.

Duties of pawnor/pledger

Following are the duties of a pawnor under the contract of pledge:

a. **Duty to pay debt:** It is the duty of the pawnor to repay the loan taken from the pawnee within the time and the manner specified in the contract.

b. **Duty to compensate:** It is the duty of the pawnor to compensate pawnee for any extra ordinary expenses incurred by him.

c. **Duty to pledge:** It is the duty of the pawnor to pledge only those goods for which he has good's title. If the pawnor's title is defective and this fact is not in the knowledge of the Pawnee, the Pawnee has good's title.

Rights of pawnor/pledger

Following are the rights of a pawnor under the contract of pledge:

a. **Right to get goods back:** After returning the debt along with interest or charges thereon or after performing the promise, the pawnor is entitled to get his goods back.

b. **Right to redeem debt: According to the provisons of Section 177,** In case the pledger fails to repay the debt or does not perform the

promise within the stipulated time, then he/she may still redeem the goods pledged at any subsequent time before the actual sale of the goods take place. However the pawnor has to pay any expenses which have arisen due to his / her default.

c. **Right for preservation and maintenance of goods:** The Pawnor has a right to see that his/ her goods are kept safely with the Pawnee, i.e. whether the Pawnee preserves the goods and properly maintains them or not.

d. **Expenses of separation**: If the Pawnee has mixed the goods of the pawnor with some one else goods not belonging to pawnor without the consent of the pawnor, the pawnor has a right to recover the expenses of separation and cost of damage if any from the Pawnee.

Rights of pawnee/pledgee

Following are the rights of a pawnee under the contract of pledge:

a. **Right of retainer:** According to section 173 of the Indian Contract Act the Pawnee has the right to retain the goods pledged with him /her –

(i) if the Pawnor does not repay the dues or does not perform the promise.

(ii) the Pawnee may also retain the goods till the Pawnor pays the interest due on the debt.

b. **Right of retainer for subsequent advances:** According to section 174 of the Indian Contract Act if the pawnee lends money to the same pawnor after the date of the pledge then the pawnee's right of retention of goods extends to subsequent advances also.

c. **Right to extraordinary expenses:** According to section 175 the Pawnee is entitled to receive from the pawnor the reimbursement of extraordinary expenses incurred by him for the safe keeping of the goods pledged with him. Though he has no right to retain the goods for non-payment of such expenses, yet he/she can sue the Pawnor for the recovery of such expenses.

d. **Right in case of default pawnor:** In case the pawnor fails to repay the debt or fails to perform the promise, the pawnee will have the following rights:

(i) He can file a suit against the pawnor for the debt,

(ii) He can retain the goods pledged as a collateral security,

(iii) He can sue for realization of the amount,

(iv) He can sale the goods pledged after giving the pawnor a reasonable notice of the sale.

e. Right against true owner, when the Pawnor's title is defective: According to section 178-A, "if the Pawnor has got the possession of goods which he /she has pledged with the Pawnee under a voidable contract (by fraud, misrepresentation, undue influence and coercion) and the contract has not been rescinded at the time of the pledge, the Pawnee acquires a good title to the goods. The Pawnee gets a good title only when he acts in good faith and does not have the knowledge of the Pawnor's defect of title".

Duties of pawnee/pledgee

Following are the duties of a pawnee under the contract of pledge:

a. It is the duty of the Pawnee to take reasonable care of goods pledge with him.

b. It is the duty of the Pawnee, not to make any unauthorized use of the goods pledge with him.

c. The Pawnee cannot change the form of the goods pledge with him. If he so, the pawnor can claim for damage.

d. The Pawnee cannot mix the goods pledged by the pawnor with his own goods.

e. If the Pawnee has earned any profit from the use of the goods pledge with him, whom he cannot use according to the terms of the contract, he must return such profit to the pawnor.



CHECK YOUR PROGRESS

Q 5: Who is a bailor?

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Q 6: Define pledge.

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4.7 LET US SUM UP

In this unit we have discussed the following:

- The contract of indemnity is the compensation of security against loss of money or goods.
- A contract of guarantee is a contract to perform the promise, or discharge the liability, of a third person in case of his default.
- This contract of guarantee may be specific guarantee or continuous guarantee.
- 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.
- Pledge is a special kind of contract where assets are delivered as security for the repayment of a debt.



4.8 FURTHER READINGS

1) The Indian Contract Act, 1872; (Bare Act)
2) Law of Contract Part I, R K Bangia
3) Law of Contract Part II, R K Bangia



4.9 ANSWERS TO CHECK YOUR PROGRESS

Ans. to Q. No. 1: The contract of indemnity is the compensation of security against loss of money or goods.

Ans. to Q. No. 2: Under contract of indemnity the person who indemnifies or pays the loss is known as indemnifier.

Ans. to Q. No. 3: Guarantee is a contract to perform the promise or discharge the liability, of a third person in case of his default.

Ans. to Q. No. 4: In a contract of guarantee, the person who gives the guarantee is called the surety.

Ans. to Q. No. 5: In a contract of bailment, the person delivering the goods is called the bailor.

Ans. to Q. No. 6: Pledge is a contract where assets are delivered as security for the repayment of a debt.



4.10 MODEL QUESTIONS

Q 1: Define 'contract of guarantee'. Discuss different types of guarantee.

Q 2: Define pledge. Discuss the rights and duties of pledger and pledgee.

Q 3: Discuss different kinds of bailment.

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UNIT-5 : THE SALE OF GOODS ACT, 1930

UNIT STRUCTURE

5.1 Learning objectives

5.2 Introduction

5.3 Essentials of Contract of Sale

5.4 Difference between Sale and Agreement to Sell

5.5 Condition and Warranty

5.6 Passing of property in Goods

5.7 Transfer of Title by non- owners

5.8 Performance of Contract of Sale

5.9 Rights of Unpaid seller

5.10 Breach of Contract of sale

5.11 Auction sale

5.12 Let us Sum Up

5.13 Further Reading

5.14 Answer to Check your progress

5.15 Model Questions

5.1 LEARNING OBJECTIVES

After going through this unit you will be able to:

- explain the essentials of a contract of sale
- explain the meaning of conditions and warranties
- explain the passing of property in goods and transfer of title by non-owners
- describe about the performance of contract of sale and rights of unpaid seller
- explain the breach of contract of sale and auction sale

5.2 INTRODUCTION

In the previous unit the Indian Contract Act 1872, we have discussed the essential aspects of the Contract Act. In the present unit, we will discuss

various important matters of Sale of Goods Act, 1930. Contract for the sale of goods are subject to the general legal principles of the Contract Act, which are offer, acceptance, capacity of the parties, free consent, consideration etc. Of course, the application of the principle of contract Act in the sale of goods is not inconsistent with the express provisions of the Sale of Goods Act (Section 4). The contract of sale includes both a sale and an agreement to sell.

5.3 ESSENTIALS OF CONTRACT OF SALE

In this section we will discuss the essentials of a contract of sale. The following are the essentials of contract of sale-

1) **Movable Goods –**The sale of Goods act only relates to movable goods. Under section 2 (7) of the Act, “goods” is defined as every kind of movable property except actionable claims and money. Things attached to the earth are not movable. But growing crops and grass which can easily be separated from the earth before sale are included in the definition of Goods.

2) **Two Parties: -** A sale of goods is a bilateral contract. To execute a sale, there must be buyer and seller. A person never can buy his own goods. Of course, a part owner may sell to another part owner. Likewise, a partner may sell goods to his firm or a firm may sell to a party.

3) **Consideration:** In order to make a valid contract of sale of goods, the consideration must be in terms of money. An exchange of goods for goods cannot be defined as sale. But if the exchange is made partly for goods and partly for money then it can be regarded as sale. Mere non existence of consideration will be treated as gift.

4) **Valid Contract:** To be a contract of sale, it must satisfy all the essentials of a valid contract such as valid offer, a valid acceptance, free consent of the parties, a valid and lawful consideration etc.

5) **Agreement to transfer the ownership:** By the contract of sale, the seller must agree to transfer his goods to buyer with or without physical possession of the goods.

6) **Method of formation of contract:** To make a contract of sale under section 5 (2) it must be in writing or by word of mouth or implied from the acts of the parties.

7) **Terms of Contract:** On the basis of time, place and mode of delivery of goods, the parties will agree upon any term. The terms include both essential and non-essential terms. The essential term implies the conditions and a non-essential term implies warranties. So in case of all contracts of sale, certain conditions and warranties are to be implied.



CHECK YOUR PROGRESS

Q.1: Mention two essentials of contract of sale.

(i) .....

.....

(ii) .....

.....

5.4 DIFFERENCE BETWEEN SALE AND AGREEMENT TO SELL

Now let us discuss the distinction between sale and an agreement to sale as under:

1. **Nature:** A sale is an executed contract. But, an agreement to sell is an executory contract. A sale is called an executed contract because of the fact that in sale, considerations and delivery of goods takes place simultaneously. On the other hand, an agreement to sale is called an executory contract because the consideration is given at a future date and goods are delivered to the buyer at a future date.

2. **Transfer of ownership:** In case of sale, the ownership of the goods is transferred to the buyer immediately. So, the buyer in case of sale becomes the owner of the goods. But, an agreement to sell becomes a sale only when the ownership of the goods is transferred to the buyer. The ownership of the goods is transferred to the buyer at some future date.
3. **Transfer of risk:** In case of sale, the buyer will have to bear the loss, even though the goods are in possession of the seller. Because, in case of sale the risk is associated with ownerships. But in case of an agreement to sell, the seller is to bear the risk of loss, even though the goods are in the possession of the buyer.
4. **Consequence of the breach:** In case of breach of an agreement to sell by the seller, the buyer can recover the damages from the seller. If the buyer fails to pay the consideration the seller can sue and recover for damages from the buyer. But incase of breach of the contract by the seller, the buyer can sue for the delivery of goods and sue for damages.
5. **Insolvency of the buyer:** In case of sale, if the buyer becomes an insolvent before paying the price, the seller shall have to deliver the goods to the Official Assignee or Receiver except where he has a lien over the goods. But in case of agreement to sell, the seller can refuse to deliver the goods to the Official Assignee or Receiver until he is paid the full price of the goods.
6. **Insolvency of the seller:** In case of sale, if the seller becomes insolvent, the buyer can recover the goods from the official receiver or assignee as the property of goods is with the buyer. But in case of agreement to sell, if the buyer can claim only a ratable dividend and not the goods, if the seller becomes insolvent and goods are taken from him by the receiver or Official Assignee, the buyers cannot recovers the goods from the Receiver or Official Assignee as he is not the owner of the goods.
7. **General and particular property:** By the contract of sale, a right is created against the whole world. This means that the buyer has

the right to use the parties to use the goods against others. But, by the agreement to sell, the buyer gets the rights over the goods only against the seller.

8. **Right of Re-Sale:** The seller cannot re-sell the goods in case of sale though the possession of goods sold remains with the seller. But, the hire purchaser cannot re-sell till the time he pays all the installment of hire.

5.5 CONDITION AND WARRANTY

At the time of selling of goods, the seller makes certain statements or representations with a view to induce the buyer to purchase the goods. These statements may form a part of contract of sale and the buyers rely upon them. These representations are called 'stipulation'. When these stipulations have become most important for the formation of a contract of sale is known as 'condition'. Again if these are lesser important for the formation of a contract of sale is, known as 'warranty'.

According to section 12 (2) of the Sale of Goods Act, a condition is a stipulation essential to the main purpose of the contract, the breach of which gives rise to a right to treat the contract as repudiated. There are mainly three essentials of a condition, such as

I) Condition is essential to the main purpose of the contract.

II) The cause of non-fulfillment of condition is irreparable damage to the aggrieved party.

III) As a result of breach of a condition the aggrieved party will get the right to rescind the contract and recover the damages for breach of condition.

According to section 12 (3) , a warranty has a stipulation collateral to the main purpose of the contract, the breach of which gives rise to a claim for damages but not to a right to reject the goods and treat the contract repudiated.

Like condition, the warranty is to fulfill three essentials, such as-

I) Warranty is collateral to the main purpose of the contract.

II) The breach of warranty does not breach the main purpose of the contract and it causes damages to the aggrieved party.

III) The aggrieved party can only claim damages for breach of warranty.

Example:

P went to Q and asked him to show a horse which could run at a speed of 35 m. p. h. Q pointed out at a particular horse and said that it will suit his purpose. P bought and discovered that the horse run at a speed of 20 m. p. h. Now, P may reject the horse as the representation made by Q which is the condition of sale is not fulfilled.

Distinguish between a condition and a warranty:-

i) Essential of Contract: - Under section 12 (2) of the Sale of Goods Act 1930, a condition is defined as a stipulation which is essential to the main purpose of the contract.

On the other hand, warranty is defined under section 12 (3) as a stipulation that is collateral to the main purpose of the contract.

ii) Effect on breach: The breach of condition give rise to a right to treat the contract as repudiated. But the breach of warranty gives rise to the claim for damages but not to a right to reject the goods and treat the contract as repudiated.

iii) Option of treatment: In case of condition, a breach of condition can be treated as a breach of warranty as an option on the part of the aggrieved party. But, in case of breach of warranty no such option is essential to the aggrieved party. So the breach of warranty can not be treated as breach of condition.

The distinctions between condition and warranty can be easily more understood from the example given below.

Example: P went to Q and asks to show a healthy horse which could run at a speed of 35 m. p. h. Q pointed out at a particular horse and said that it will suit his purpose. P bought and discovered that the horse run at a speed of 20 m. p. h. and weak. Now, P may reject the horse as the representation made by Q, which is the condition of sale is not fulfilled.



LET US KNOW

The Sale of Goods Act, 1930 deals with the law relating to sale of goods in India only. 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 was 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 except the State of Jammu and Kashmir.



CHECK YOUR PROGRESS

Q.2: Mention two differences between sale and agreement to sell.

(i) .....

.....

(ii) .....

.....

5.6 PASSING OF PROPERTY IN GOODS

A contract of sale can be performed by the two ways.

1. Property in goods or ownership of goods and
2. Possession of the goods.

A person may have possession of goods but he may not be the owner e.g. a servant, agent etc. On the other hand, a person may be the owner but may not have the possession of goods. In the contract of sale, when the ownership of goods is transferred to the buyer from the sellers, he becomes the owner of the goods.

As per general rule, the transfer of ownership depends on the intention of the parties to the contract. But sometimes the intention of the parties cannot be ascertained from the contract. In that case, the intention of the parties is ascertained on the basis of provisions laid down in sections 18 to 24 of the Sale of Goods Act. These provisions are discussed as under—

1) Incase of the unascertained goods (section 18 and 23);
2) Incase of specific goods (section 20 to 22) and
3) Incase of sale on approval (section 24)

TRANSFER OF OWNERSHIP IN CASE OF UNASCERTAINED GOODS:

a) *Unascertained Goods:* Under section 18 of the Sale of Goods Act, the unascertained goods are not transferred unless the goods are ascertained. Theses goods are not specifically identified at the time of contract of sale. It is identified and is set apart for the purpose of delivering to the buyer.

b) *The Intention of the parties:* Under section 19 the transfer of ownership depends upon the intention of both the parties and ownership transfer from the seller to the buyer at the time fixed by the parties.

c) *Unascertained or future goods:* Under section 23, in sale of unascertained or future goods, goods are passed to the buyer by description. When goods of that description in a deliverable state are unconditionally appropriated to the contract, then the property in goods passes to the buyer. It is to be done by the seller with the assent of the buyer or by the buyer with the assent of the seller.

Example: “A” agrees to sell “B” 200 kg of Rice out of a large quantity of A’s godown, whatever the price that is to be paid on the specific day under the contract. Otherwise the 100 kg of Rice that was separated from the godown of ‘A’ will not pass from A to B.

TRANSFER OF OWNERSHIP IN CASE OF SPECIFIC GOODS:

a) *Specific goods:* - Under section 20, the goods that are at a deliverable state and the ownership of which is transferred from the seller to the buyer at the time of making of contract of sale.

b) *When seller has something to do:-* Under section 21 in case of sale of specific goods if the goods are not in a deliverable state and the seller has to do something to put the goods in a deliverable state, the ownership does not passes until such thing is done and the buyer has noticed thereof.

c) *When goods are to be measured, tested:* Under section 22, in case of a contract of sale of specific goods and the goods are in a deliverable state but, the seller has to weight, measure, test or perform some other act or thing with reference to the goods for ascertaining the price, the ownership does not pass until such act or thing is done and the buyer has noticed thereof.

TRANSFER OF OWNERSHIP IN CASE OF SALE ON APPROVAL:

a) *Goods sent on approval: -* In case of sale on approval or sale on return, the buyer has an option to return the goods to the seller within a reasonable period of time. Thus, the ownership transferred to the buyer when he accepts the goods. If the buyer does not return the goods within the reasonable time, the seller can recover the price of the goods from the buyer.

In case of sale on approval, the ownership to the buyer is transferred in three ways:

- When the goods are accepted by the buyer, or ceptance of the buyer, or
- When the buyer performs some acts which indicates implied acceptance of the buyer, or
- The buyer fails to return the goods within a reasonable time Under section 24, when goods are sold under a contract of sale or return or on approval, the sale is a conditional sale. As a result of significance of the buyer's approval, the goods will pass to the buyer.

b) *Reservation of Right of Disposal:* Under section 25, reservation of the right of disposal is defined as any action made by the seller, where it is expressed that an intention on his part not to part with control over the

goods until certain condition are fulfilled. Then, the property will be passed subject to fulfillment of these conditions.

Example: 'A' supplies 100 bags of Rice to 'B' by a trunk, where no reservation of the right of disposal was there. In this case, the rice will pass to B immediately after goods are handed over to the carrier.

5.7 TRANSFER OF TITLE BY NON-OWNERS

According to the general rule, "the seller cannot transfer to the buyer of goods a better title than he himself has." If the title of the seller is defective, then the buyer's title will also become defective. Under section 27, it is laid down that. "Where goods are sold by a person who is not the owner thereof and who does not sell them under the authority or with the consent of the owner the buyer acquires no better title to the goods than the seller had…" The rule is expressed by the maxim "Nemo Det Quod Non Habet", which implies that no one can give what he has not got.

Of course, there are some exceptions to the above rule. So, though a person is not the owner of the goods, he may sell the goods and pass a better title than he himself has. Following are the exceptions to this rule.

1. **Sale by a mercantile agent:** If a mercantile agent is authorized by the owner of the goods to sell on his behalf, then such sale shall be valid. In such cases, the buyer can acquire a good title of the goods. This exception will be implemented subject to fulfillment of the following conditions:-
   - i) The person must be in possession of goods or documents of title to the goods in his capacity as a mercantile agent and with the consent of his owner.
   - ii) The person must sell the goods while acting in the ordinary course of business.
   - iii) The buyer must act in good faith without having any notice, at the time of contract that the mercantile agent has no authority to sell the goods.
2. **Transfer of title by Estoppels:** This exception is based on the principle of personal estoppels. Sometime, the real owner may lead

the buyers by virtue of his conduct or words or by act to believe that the seller is the owner of the goods or has the authority to sell them. In such case, he may not thereafter deny the seller's authority to sell.

3. **Sale by a joint owner:** If there are several joint owners of goods, one of them has sole possession of the goods by permission of the co-owners, then the property in goods may be transferred to any person who buys them from such joint owner. In order to apply this exception following conditions must be fulfilled.
   i) One of the several owners must be in sole possession of the goods.
   ii) The joint owner must have permission of co-owners.
   iii) The buyer must purchase goods in good faith.
   iv) The buyer should not have notice regarding the matter that the seller has no authority to sell.

4) **Sale by person in possession under voidable contract: -** According to the Section 29, a person in possession of goods under a voidable contract which is not rescinded, can transfer a good title to the buyer. The buyer should purchase the goods in good faith and without notice of the seller's defective title.

5) **Sale by seller in possession after sale: -** Under section 30 (1), it is laid down that where a person has sold goods but he continues in possession of goods or of the documents of title to the goods, he may sell them to a third person and if such person obtains delivery thereof in good faith and without notice of the previous sale, the person can get a good title to them. In order to apply this exception, the seller must be in possession after sale of goods and there must be delivery or transfer of the goods or documents of title by the seller.

6) **Sale by buyer in possession after sale:-** Under section 30 (2), it is laid down that where a buyer having bought or having agreed to buy goods, obtain with the consent of the seller the possession of the goods or documents of title to the goods can and resells the

goods to a bonafide transfer. If at the time of this sale, buyer was not in possession, then this exception will not apply.

7) **Sale by an unpaid seller: -** If the unpaid seller has exercised right of lien or stoppage in transit, resells the goods, then the buyer acquires a good title as against the original buyer, even though the resale is not justified in the circumstances.

8) **Exception under other Acts: -** According to some Acts, a person although he is not the owner of the goods may sell the goods and pass a better title than he himself has. As for example-

   i) Under section 169 of the Contract Act, a finder of the goods has the right to sell.

   ii) Under section 176 of the Contract Act, a pawnee of goods has the right to sell the goods pawned subject to satisfying some conditions.

   iii) In certain cases, a special right of sale is given to officers of court, liquidators of the companies, receivers of insolvents estate; custom officers for duties remaining unpaid etc.

   iv) A person who takes a negotiable instrument in good faith and for value becomes the true owner even if he takes it from a thief or finder.

9) **Sale in market overt:** According to the English law, there is an exception of the rule that a person cannot make a valid sale of goods, which does not belong to him. It is to be found in the case of sales made in market overt of course; this rule does not apply in India.

5.8 PERFORMANCE OF CONTRACT OF SALE

Under section 2 (2) of the Sale of Goods Act, the term 'delivery' is defined as a voluntary transfer of possession from one person to another. According to Sir Frederick Pollock, delivery is voluntary dispossession in favour of another. There are three modes of delivery, such as actual, symbolic and constructive delivery. Actual delivery is occurred in case of goods are delivered themselves physically to the buyer. Symbolic delivery is occurred

where the goods are not physically delivered but delivered by indicating or giving a symbol, e.g. delivery of documents of title to the goods etc. Constructive delivery is occurred where the third person acknowledge the holding the goods on behalf of the buyer, e.g. A sold to B 50 bags of tea where P hold begs which is a warehouse and it is ordered by A to P to do so.

Rules regarding delivery:

Various rules regarding and other matters relating to the performance of the contract of sale are provided under different sections, which are as below-

1. **Mode of Delivery:** Under Section 33, 'deliveries of goods' may be done by performance of anything which, the party's agreement shall be treated as delivery or the effect of the putting of goods in the possession of the buyer or of any person authorized to hold them on his behalf. Thus the delivery of goods may be either actual or symbolic or constructive.
2. **Delivery and payment are concurrent condition:-**
   Under Section 32, payment of price and the delivery of the goods is a concurrent conditions unless otherwise agreed. If the buyer is not willing to pay the price, no delivery will be given or no need to pay the price by the buyer unless the seller is ready and willing to give delivery.
   Example: P agrees to supply goods to Q, where Q will have to pay on delivery. So, P, unless Q is ready, need not deliver the goods.
3. **Effect of party delivery:** Under Section 34, a part of delivery of goods sold may be equal to the delivery of the whole, if it is so intended and agreed. But, in case of the fact where the part is intended to serve the whole, then the delivery of that part does not equal to delivery of the whole.
   Example: X has sold 100 kg of wheat to Y. The wheat are remaining in the godown of X. After selling, Y again sold 20 kg of wheat to Z

and as per desire of X; Y sent this 20 kg of wheat to Z. This is a legal effect of delivery of the whole.

4. **Buyer to apply for delivery: -** Under Section 35, the seller is not bound to deliver goods, unless agreed otherwise till the buyer applies for delivery.
5. **Place of Delivery:** Under Section 36 (i), at which place the delivery is to be made will be mentioned in the agreement between the parties. Apart from any such contract the goods will be delivered at the place at which they are sold.
6. **Time of Delivery:** Under section 36 (2) and (4), of the Contract of Sale of Goods Act, where the seller is bound to send the goods to the buyer , but no time for sending them in fixed the seller is bound to send them within a reasonable time and at a reasonable hour.
7. **Manner of Delivery:** Under Section 36(3), at the time of sale, if the goods are in the possession of a third person then there is no delivery by the seller to buyer till such third person acknowledges to the buyer that he holds the good on himself. The transfer of document of title of goods operates as delivery inspite of possession of goods by third party and this will not apply in such case.
8. **Expenses of delivery:** Under Section 36 (5) the buyer is to bear the expenses of or incidental to receive the delivery. But, any expense of putting the goods into a deliverable state is to be borne by the seller. If there is any agreement between the parties with respect to the cost of putting the goods in a deliverable state or of expenses incidental to putting into the deliverable state, then this agreement will determine the right of the parties.
9. **Delivery of wrong quantity:** Under Section 37, it is a duty of seller to comply with the order of the buyer regarding kind, quality and quantity of goods. Delivery should be according to the specification of order. In case of defective delivery the buyer can reject the goods.

10. **Installments of deliveries: -** Under Section 38, the buyer is not bound to receive the goods of delivery by installments unless otherwise mentioned in the agreement. The performance of the contract can be split up with mutual consent. Where payment is made in installments in a contract, than failure of such payment of installment, breach the contract.
11. **Delivery of carrier:** Under Section 39, it is provided that if the seller is authorized to send the goods to the buyer, then the seller must take all safety measure to protect the goods. It is the duty of seller to contract with the carrier. In case of sending goods by sea route, the seller must inform the buyer to insure them against sea perils.
12. **Goods delivered at a distance place:** Under Section 40, in case of agreement, where seller agrees to deliver the goods at his own risk the buyer shall bear the loss of deterioration of the goods in transit.
13. **Examining the goods on delivery:** Under Section 41, if the buyer had not examined the goods, the seller will not deliver the goods until the buyer has availed the opportunity of examining the goods. The buyer must give a reasonable opportunity of examining the goods in order to determine whether they are as per contract, otherwise the buyer may reject the goods.
14. **Acceptance complete on delivery:** Under Section 42, the buyer is deemed to have accepted the goods in case the buyer intimates to the seller that he accepted that goods or goods was delivered to the buyer and he perform anything pertaining to them. More over, the buyer retains the goods beyond a reasonable time without intimation of rejection to the seller.
15. **Buyer not bound to return rejected goods:** Under Section 43, it is laid down that in case of goods delivered to the buyer and if the buyer refuses to accept the goods, then he may not return the goods to the seller. This intimation to seller is sufficient that he

refuses to accept the goods. This rule will be applicable subject to the condition of contract between the parties.

16. Liability of buyer for neglecting or refusing delivery of goods: Under Section 44, for any loss occurred due to neglect of buyer or a reasonable charge for the care and custody of the goods, the buyer will be liable, where the seller is willing to deliver the goods and request the buyer to accept his delivery. It is further-provided by section 44, that the seller can exercise the right mentioned above inspite of the neglect to refusal made by the buyer to receive the delivery and it will amounts to a repudiation of the contract.



LET US KNOW

A contract sale involves reciprocal promises, because, the seller promising to deliver the goods and the buyer to undertake to pay for the goods. The delivery of goods and payment of price are concurrent conditions, on the contrary, there are implied promises on the part of the seller to deliver goods without delay and an undertaking on the part of the buyer to accept the goods and pay the price. So, it is the duty of seller to deliver the goods to the buyer. Of course, he cannot do so until the buyer applies for delivery.



ACTIVITY

1) M is an owner of a car. M has handed over his car to N, a mercantile agent, for sale at not less than Rs. 10,000/-. N sells it to O for Rs. 8,000/- and runs away with the money. M asks N to give him his car. Can M recover the car from O.

2) A is the godown-keeper of a gas company. The manager B of the gas agency issues the delivery orders to A for 100 cylinders in favour of “C”. C goes to A with the delivery order. A agrees to deliver 100 gas cylinders the next day. Can the gas agency stop A from delivering the gas cylinders to C?



CHECK YOUR PROGRESS

Q. 3: State true or false:

i) The risk of loss also passes with the ownership of the goods from the seller to the buyer. (True / False)

ii) The individuality of the thing to be delivered must be established before property in it can passes from seller to the buyer. (True / False)

iii) Delivery is a bilateral act. (True / False)

iv) Symbolic delivery is made where goods are small and light. (True / False)



CHECK YOUR PROGRESS

Q.4: Fill up the blanks:

I. A contract of sale can be performed by the _____ ways (two/three).

II. Under section _____ reservation of the right of disposal is defined as any action made by the seller (24/25)

III. There are _____ types of modes of delivery (three/four).

IV. In case of defective delivery the buyer _____ reject the goods (can/can not).

5.9 RIGHTS OF UNPAID SELLER

The seller of goods is called unpaid seller, when the whole of the price has not been paid or tendered or where a bill of exchange or other negotiable instrument is received as a conditional payment. After all, the seller remains unpaid till the price or any portion of the price remain the unpaid.

The rights of an unpaid seller can be classified mainly into two categories. Such as-

I. Right of unpaid seller against the goods.

II. Right of unpaid seller against the buyer personally.

I. The right of unpaid seller against the goods: Inspite of passing the property in the goods to the buyer, the unpaid seller has the following rights against the goods.

a. *Right of Lien:* Lien implies such type of right, which can retain possession of goods and refuse to deliver them to the buyer till the price is paid. The unpaid seller can exercise his right of lien in three cases as mentioned below-

i) Where the goods are sold without any stipulation as to credit.

ii) Where the goods are sold on credit, but the term of credit has expired.

iii) Where the buyer becomes insolvent, but the time of credit is not expired.

If the buyers become insolvent, the lien exists inspite of goods is sold on credit and period of credit is not yet expired. In case of goods sold on credit, it is presumed that the buyer shall keep his credit good. So, before payment if the buyer becomes insolvent, the seller will be entitled to play this right and hold the goods as security for the price.

b. Right of stoppage of goods in Transit: The right of stoppage implies the right of stopping the goods while they are with a carrier for the purpose transmission to the buyer. So right of stoppage can be defined as an extension of the right of lien as because it entitles the seller to retain the possession of the goods even the seller has parted with the possession. According to section 50, unpaid sellers can exercise this right only on the following conditions.

i) When the buyer becomes insolvent.

ii) When the property has passed to the buyer.

iii) When the goods are in the course of transit.

Further, under section 51, it is laid down that the right of stoppage in transit can be exercised only so long as the goods are in the course of transit. But, the right of stoppage cannot be exercised when the transit comes to an end. As per section 51 the goods are deemed to be in course of transit from the time when they are delivered to a carrier or other bailee for the purpose of transmission to the buyer. Until the buyer or his agent takes delivery of them. On the other hand, the transit is deemed to be at an end in the following cases-

i) When the buyer takes the delivery after the goods have reached destination.

ii) When the buyer obtains delivery of goods before arrival of the goods at the appointed destination

iii) When the goods have arrived at the destination and the carrier acknowledges to the buyer that he holds the goods on his behalf.

iv) When the goods are arrived at their destination but the buyer requests the carrier, instead of taking delivery request the carrier to carry the goods to some further destination and if the carrier agrees to take them to the new destination.

v) When the carrier wrongly refuses to give delivery of the goods to the buyer.

c) *Right of Resale:* Besides the above two rights, the unpaid seller can also exercise the right of resale. Under section 54, some circumstances are provided where the right of resale can be exercised. These are-

i) Goods must be of a perishable nature.

ii) The unpaid seller must exercise the right of lien and stoppage in transit.

iii) The seller must give a notice to the buyer regarding his intention to resale.

The seller can recover the loss of resale if any, from the defaulting buyer. The seller can keep a surplus on the resale with him. The unpaid seller has a right of withholding delivery of goods which are the subject matter of the contract. This right can be exercised by the unpaid seller even if the sale was on credit or in case of specific and unascertained goods.

II. Rights of unpaid seller against the buyer personally: The right of unpaid seller can be discussed as follows-

a) *Suit for price:* Under section 55 in case of property of goods passing to the buyers and wrongfully the buyer neglects or refuses to pay for the goods, then the seller may sue with for price of the goods.

Under section 55 (2), in case of the price of goods is payable by the buyers to the seller on a certain day irrespective of the delivery of goods and the buyer neglects or refuses to pay such price, then the seller can sue him for the price of goods, even though the ownership of the goods are not transferred to the buyer.

b) *Suit for damages for non-acceptance:* In case, where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may sue him for damages for non-acceptance. Under the provision laid down in the section 73 of the Indian Contract Act, such damages are measured. These provision are given below-

i) In case of having available market for the goods in question, the difference between the contract price and the market price on the date of breach will be measure of damages.

ii) In case of having no such availability of market, the measures will be the estimated loss suffered directly or indirectly resulting in the ordinary cause of events from such breach.

5.10 BREACH OF CONTRACT OF SALE

In case of contract of sale, where one party repudiates the contract by refusing to perform his obligation, then he is said to have committed a

breach of the contract. As soon as party commits a breach of the contract; the other party becomes entitled to any one of the following remedies.

Remedies to seller:

In case of breach of contract of sale, the following remedies are available to the seller-

i) Suit for price.
ii) Suit for damages for non-acceptance of the goods
iii) Suit for interest.
iv) Suit for damages for repudiation of contract by the buyer before the due date.

Moreover, the seller has two more remedies, if a contract of sale is repudiated by the buyer before the due date of delivery.

i) The seller may treat the contract as subsisting and he can wait till the date of delivery.
ii) The seller may treat the contract as rescinded and he can sue for damages for the breach.

Remedies to buyer:-

In case of breach of the contract of sale by the seller, the buyer has the following remedies-

i) He can sue for damages for non-delivery of the goods.
ii) He can sue for specific performance.
iii) He can sue for breach of warranty.
iv) He can sue for damages for repudiation of contract by the seller before due date.

In case of breach of condition the buyer can reject the goods. Of course he cannot reject the goods under the following cases.-

i) Buyer waives the breach of condition and elects to treat it as a breach of warranty.
ii) If the contract is not reversible and the buyer has accepted the goods or part of the goods.
iii) The contract is for specific goods and the property has passed to the buyer.

On the other hand, in case of breach of warranty, the buyer can do any one of the following—

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 (Section59)

In case of breach of warranty damages are measured by estimating loss arising directly and naturally from the breach.

5.11 AUCTION SALE

Auction sale is a manner of sales, where property is auctioned usually to the highest bidder by public competition. The auctioneer is an agent of the seller. The auctioneers can auction his own property. In fact there is no need to express that he is selling, so contract is formed between auctioneer and the buyer in case of sale by auction. Some liabilities are incurred by this contract. Of course, all of these liabilities are not for the seller. Under Section 64 certain rules are provided regarding auction sale. These are mentioned below-

i) Auction sale is – in lots and every lot is prima facie deemed to be the subject of a separate contract of sale.

ii) When the auctioneer announces its completion by the fall of the hammer or by other customary manner, then the sale by auction will be complete.

iii) It may be reserved as a right to bid expressly by or on behalf of the seller.

iv) The seller or other may bid at the auction on behalf of him if the right to bid is so reserved.

v) It will be not lawful, if sale is not notified to be subject to a right to bid on behalf of the seller for two cases. Firstly, for the seller to bid himself or to employ any person. To bid at such sale or secondly, for the auctioneer knowingly to take the bid from the seller or any other such person.

vi) It should be notified as a sale by auction subject to a reserved or upset price. A reserved price can be fixed by the seller to protect him against "knockout' agreement.

vii) In case of making use of pretended bidding to raise the price by the seller, the sale will be avoidable.

If the auctioneer sells goods then he must take impliedly the following obligations.

i) Auctioneer warrants his authority to sell.

ii) Auctioneer warrants that he does not know of any defect in his principal's title.

iii) Auctioneer gives the possession of the goods against the price paid into his hands.



LETS US KNOW

1) Where goods are sold on credit, the seller is not unpaid until the price becomes due.
2) According to the usual practice a proposed auction is duly advertised and a printed catalogue of goods with conditions of sale is circulated.



CHECK YOUR PROGRESS

Q.5: Choose the correct option from the following:

i) Which of the following is not a characteristic of an unpaid seller-

a) He must sell goods on cash terms.

b) He must be unpaid either wholly or partly.

c) He must refuse to accept payment when tendered.

d) He must not refuse to accept payment when tendered.

……

ii) Which of the following is the right of unpaid seller against the buyer personally?

a) Suit for price.

b) Right of lien.

c) Right of stoppage.

d) Right of Re-sale.

……

iii) Which of the following are the rights of unpaid seller against the goods?

a) Suit for damages for non-acceptance.

b) Suit for special damages and interest.

c) Right of stoppage in transit.

d) Repudiation of contract.

……



5.12 LET US SUM UP

According to the section 4 (3) of the Sale of Goods Act, 1930, in a contract of sale, the property in goods is transferred from the seller to the buyer. The essentials of a contract of sale are –

i) Movable Goods,

ii) Two parties

iii) Consideration etc.

The contract of sale includes both a sale and an agreement to sell. A sale is an executed contract, but an agreement to sell is an executory contract. In sale, ownership of goods is transferred immediately to buyer but in an agreement to sell, the goods will remain with the seller till it becomes sale.

Under section 12 (1), it is laid down that on the basis of essentiality, some stipulations are called conditions which are essential for main purpose and some are called warranties; which are collateral to the main purpose of the contract.

A contract of sale can be performed by the two ways. One is transfer of possession where the goods are not transferred and another is transfer of ownership of goods, where ownership is transferred from seller to buyer.

Under section 27, it is laid down that where goods are sold by a person who is not the owner thereof and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had. This rule is known as *nemo dat quod non habet*. Of course, there are exceptions to this rule.

According to the section 2 (2) delivery is a voluntary transfer of possession from one person to another. There are three modes of delivery, such as actual, symbolic and constructive delivery.

Where the whole of the price has not been paid, the seller is called unpaid seller." There are two types of rights of unpaid seller, such as – i) Right of unpaid seller against the goods. ii) Right of unpaid seller against the buyer personally.

In case of contract of sale, where one party repudiated the contract by refusing to perform his obligation, he is said to have committed a breach of the contract. As a result of breach of contact, both the seller and buyer are entitled to enjoy some remedies.

Auction sale is a manner of sale, where property is sold by bids usually to the highest bidder by public competition.



5.13 FURTHER READING

1. Mercantile Law, By M.C. Shukla.
2. Commercial Law, By R.C. Chawta and K.C. Garg.
3. Mercant Law, By V.K. Batra 2 N.K. Kalra
4. Mercantile Law, By D. Chandra Bose.
5. Elements of Mercantile Law By N.D. Kapoor.
6. Mercantitle Law, By S.K. Dasgupta.
7. Business Regulatory Framework, By K.C. Garg, V.K. Sareen and Mukesh Sharma.

5.14 ANSWER TO CHECK YOUR PROGRESS

Ans. to Q. No. 1:

i) There must be buyer and seller in a contract of sale.

ii) The contract of sale covers only movable goods.

Ans. to Q. No. 2:

i) In case of sale, ownership of goods is transferred from the seller to the buyer immediately and in case of agreement to sell, the ownership of goods is transferred from the seller to the buyer at a future date.

ii) A contract of sale is an executed sale. But an agreement to sale is an executor sale.

Ans. to Q. No. 3:

(i) True (ii) True (iii) True (iv) False

Ans. to Q. No. 4:

(i) Two (ii) 25 (iii) Three (iv) Can

Ans. to Q. No. 5:

(i) c (ii) a (iii) c

5.15 MODEL QUESTIONS

Q 1. What is a contract of sell? What are its essential elements?

Q 2. Distinguish between sale and agreement to sell?

Q 3. Define a condition and a warranty. Distinguish between the condition and warranty?

Q 4. Explain the various rules regarding passing of property in sale of goods?

Q 5. Nemo Dat Quod Non Habet (No one can give who possesses not). Explain this rule. Also mention the exception to this rule?

6. Define the term Delivery. Discuss the rules relating to delivery in the Sale of Goods Act.
7. Who is an unpaid seller? What are the rights of an unpaid seller?
8. Discuss the different remedies available to seller and buyer in case of breach of a contract of sale.
9. What is an Auction sale? Discuss the rules regarding the Auction sale.

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UNIT-6: CONSUMER PROTECTION ACT, 1986

UNIT STRUCTURE

6.1 Learning Objectives

6.2 Introduction

6.3 Definitions under the Act

6.4 Redressal Agencies under the Act

6.5 Powers of Redressal Agencies

6.6 Procedure of Filing a Complaint

6.7 Consumer Protection Councils

6.8 Penalties under the Act

6.9 Let Us Sum Up

6.10 Further Reading

6.11 Answers To Check Your Progress

6.12 Model Questions

6.1 LEARNING OBJECTIVES

After going through this unit you will be able to:

- discuss the various terms used in the Act
- discuss about the consumer disputes redressal agencies and their powers
- explain the procedure of filing a complaint with consumer disputes redressal agencies
- describe the objectives of establishing consumer protection councils
- explain the provisions of penalties under the Act

6.2 INTRODUCTION

In business, consumers occupy a very important place. The producers produce goods on the basis of tastes, likings, preferences etc. of the consumers. Consumer is the central point around which business activities revolves. Inspite of great importance of consumers they may be the victims of immoral businessmen. An important aspect is that there is

lack of knowledge on the part of consumers and they are not organized as opposed to the sellers who are well informed and organized. To protect the consumers from unscrupulous businessmen and to provide easy remedy for their complaints, the Consumer Protection Act was passed in the year 1986. The Act extends to the whole of India except the State of Jammu and Kashmir. After completion of this unit you will be able to understand some important definitions under this Act as well as the various provisions under which consumers are given wide legal power to resolve their complaints. We will also discuss the various consumer forums created under this Act as redressal agencies for consumer grievances along with the procedure of filing a complaint in consumer forums, consumer protection councils, penalties for not complying with the orders of forums etc.

6.3 DEFINITIONS UNDER THE ACT

The Act has been passed to protect the interests of consumers and to establish the consumer councils and other authorities to settle the consumers' disputes and other related matters. Before discussing the provisions of this Act, it is better to have an idea about the different terms used in this Act like, consumer, consumer dispute etc. In this section, we will discuss some of the definitions as given by this Act which is essential to interpret the provisions of the Act. Let us begin with the definition of 'consumer'.

Consumer

According to Section 2 (1) (d) of the Act 'consumer' means any person who

i. *Buys any goods for a consideration, which has been paid or promised or partly paid and partly promised. It also includes*
   a) *User of such goods who is using the goods with permission of the buyer or*
   b) *Person who has obtained goods under any system of deferred payment. Person who has obtained goods for resale or for commercial purposes is not covered under this section.*

ii. *Hires or avails any services for a consideration, which has been paid or promised or partly paid and partly promised. It also includes*

a) *Beneficiary of services who has availed the services with approval of the person who has hired the services*

b) A person who has hired or availed services under any system of deferred payment.

An important aspect of this definition is that those persons who buy goods for commercial purposes are not considered as 'consumer' under this Act. But if a person buys goods for self- employment that will not be treated as commercial purpose and therefore, that person will be considered as 'consumer' under this Act. Therefore, a 'consumer' under this Act will include person-

- who buys any goods for personal use or avails services for consideration;
- who uses such goods or services with the permission of the buyer;
- who obtains goods or avail services on deferred payment basis;
- who obtains goods for self- employment.

Consumer Dispute

According to Section 2 (1)(e) of the Act, 'Consumer Dispute' *means a dispute where the person against whom a complaint has been made, denies or disputes the allegations contained in the complaint.*

If the person agrees to the complaint, there is no consumer dispute.

Complainant

According to Section 2 (1) (b) complainant means

i. *a consumer; or*

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

iii. *the Central Government or any State Government, who or which makes a complaint*

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

v. *In case of death of a consumer, his legal heirs or representative, who or which makes a complaint.*

From the definition of 'complainant' it is clear that an individual consumer as well as consumer associations can make a complaint.

Defect

According to section 2 (1) (f) of the Act, 'defect' means *any fault, imperfection or shortcoming in the quality, quantity, potency, purity or standard which is required to be maintained by or under any law for the time being in force or under any contract, express or implied, or as is claimed by the trader in any manner whatsoever in relation to any goods.*

Deficiency

According to section 2 (1) (g) of the Act, 'deficiency' means *any fault, imperfection or shortcoming in the quality, quantity, potency, purity or standard that 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.*

Services

Section 2 (d) of the Act defines 'services' as

Service of any description, which is made available to potential users and includes any provision of facilities in connection with banking, financing, insurance, transport, processing, supply of electrical or other energy, board or lodging or both, housing construction, entertainment, amusement or the purveying a news or other information, but does not include rendering of any service free of charge or under a contract of personal service.

Goods

'Goods' under this Act has the same meaning as per the Sale of Goods Act, 1930, which we have discussed in unit 14 (Sale of Goods Act, 1930).



CHECK YOUR PROGRESS

Q.1: State whether the following statements are true or false-

i. A person who uses the goods with the permission of the buyer is not a consumer as per The Consumer Protection Act.

ii. A person who buys goods for commercial purpose is a consumer as per The Consumer Protection Act.

iii. A voluntary consumer association can not file a complaint.

iv. Consumer disputes can not arise in case of goods obtained or services availed on deferred payment basis.

6.4 REDRESSAL AGENCIES UNDER THE ACT

In the above section, you have come across certain definitions of the Act. It has already been mentioned that this particular Act has been passed to protect the consumers and for that purpose certain agencies will be established under the Act. In this section, we will discuss these agencies. The Act provides for the establishment of three consumer forums at three levels i.e.

- District Forum at district level
- State Consumer Disputes Redressal Commission at state level
- National Commission at the national level.

Let us first discuss district forum-

- **District Forum**

A District Forum will be established in each district and the responsibility of establishing district forums lies with the respective State Governments.

Jurisdiction of District Forum

Jurisdiction: The legal power to apply the law.

The district forum has jurisdiction to decide consumer disputes where the



Jurisdiction : The legal power to apply the law

value of goods and services and the compensation claimed does not exceed Rs. 20 lakhs.

Composition of District Forum

According to the provisions the Act, each district forum shall consist of –

- a President, who has been or is qualified to be a district judge; and
- two other members, one of whom must be a woman. The members shall be of not less than 35 years of age ; possess a bachelor degree from a recognized university and persons of ability, integrity and standing having knowledge or experience of problems relating to economics, law, commerce, accountancy, industry, public affairs or administration.

The salary and other terms and conditions of the job of the members are prescribed by the State Government.

Tenure of the members

All the members of district forum shall be in office for 5 years or up to the age of 65 years, whichever is earlier. Any member can resign his office by addressing the letter to State Government.

- **State Consumer Disputes Redressal Commission**

The State Consumer Disputes Redressal Commission or State Commission is established by the State Governments in the respective states by notification [section 9(b)].

Jurisdiction of State Commission

The State Commission has original jurisdiction to decide consumer disputes where the value of goods and services and the compensation claimed exceed Rs. 20 lakhs but does not exceed Rs. 1 crore.

The Commission has appellate jurisdiction against the orders of the district forums within the state.

Revisional jurisdiction empowers the Commission to call for records and pass appropriate orders in any consumer dispute that is pending or has been decided by district forum, if the State Commission is of the view that district forum is exercising jurisdiction not vested in it or not exercising the jurisdiction.

Composition of the State Commission

According to the provisions of the Act, each State Commission shall consist of –

- a President, who has been or is qualified to be a judge of High Court; and
- two other members, one of whom must be a woman [section 10(1)]. The members shall be persons of ability, integrity and standing having knowledge or experience of problems relating to economics, law, commerce, accountancy, industry, public affairs or administration.

The salary and other terms and conditions of the job of the members are prescribed by the State Government.

Tenure of the members

All the members of State Commission shall be in office for 5 years or up to the age of 67 years, whichever is earlier. Any member can resign his office by addressing the letter to the State Government [section 16(3)].

- **National Commission**

The Central Government has established a National Commission at national level to redress consumer disputes [section 9(c)].

Jurisdiction of National Commission

The National Commission has original jurisdiction to decide consumer disputes where the value of goods and services and the compensation claimed exceed Rs. 1 crore.

The National Commission has appellate jurisdiction against the original orders of any State Commission.

The National Commission has revisional jurisdiction to call for records and pass appropriate orders in any consumer dispute that is pending or has been decided by any State Commission, if the National Commission is of the view that the State Commission is exercising jurisdiction not vested in it or not exercising the jurisdiction.

Composition of the National Commission

According to the provisions the Act, the National Commission shall consist of –

- a President, who has been or is qualified to be a judge of Supreme Court; and
- four other members, one of whom must be a woman. The members shall be not less than 35 years of age, posses a bachelor's degree from a recognized university and persons of ability, integrity and standing having knowledge or experience of problems relating to economics, law, commerce, accountancy, industry, public affairs or administration. Provided that not more than fifty percent of the member shall be from amongst the persons having a judicial background (section 20).

The salary and other terms and conditions of the job of the members are prescribed by the Central Government.

Tenure of the members

All the members of the National Commission shall be in office for 5 years or up to the age of 70 years, whichever is earlier [section 20(2)]. Any member can resign his office by addressing the letter to the Central Government.

Appeal against original orders of National Commission can be made with Supreme Court.



CHECK YOUR PROGRESS

Q 2: State whether the following statements are true or false-

(i) A member of National Commission can hold office for a period of 5 years or up to the age of 60, whichever is earlier.

(ii) District Forums are established by State Government.

(iii) State Commissions are established by Central Government.

(iv) National Commission is composed of one president and three members.

(v) District Forums can decide consumer disputes where the value of goods and services and compensation claimed does not exceed Rs.1 crore.

6.5 POWERS OF REDRESSAL AGENCIES

Let us discuss the powers of the redressal agencies under the Act. You are aware that District Forum, State Commission and National Commission are the consumer disputes redressal agencies under the Act.

- These redressal agencies have the powers of civil court like,
  - summoning and enforcing attendance of witnesses and examining the witness on oath;
  - discovery and production of any document or other material as evidence;
  - receiving evidence on affidavits;
  - requisitioning report of test or analysis from concerned laboratory;
  - issuing commission for examination of witnesses;
  - any other matter that may be prescribed by Central or State Government by rules.
- The redressal agencies have the power to require a person to produce before them books of account, documents or commodities.
- The agencies can authorize a person to seize books of account, documents or commodities required for purposes of the Act.
- The agencies have no power to declare any statutory order as illegal.

6.6 PROCEDURE OF FILING A COMPLAINT

In this section, we will go through the procedure of filing a complaint in the consumer forums. A complaint can be filed by a complainant. We have already come across the definition of 'complainant' under the Act in our section 15.3. The complainant can file the complaint within two years from the date on which the cause of the dispute arose. However, the consumer forums i.e. District Forum, State Commission or National Commission can accept any complaint even after such period, if sufficient cause exists for such delay.

On receipt of a complaint, the District Forum/ State Commission/ National Commission sent a copy of the complaint to the opposite party. The opposite party is asked to give his reply within 30 days, which can further be extended by another 15 days.

If the nature of defect in goods is such that it can not be properly determined without laboratory testing, the redressal agency will sent the defected goods to the appropriate laboratory.



Aggrieved Party : The person whose personal or property rights have been adversely affected by a court judgement.

Aggrieved Party: The person whose personal or property rights have been adversely affected by a court judgement.

If no laboratory testing is required in respect of the complaint, then the redressal agency will decide the case on the basis of the evidence submitted by the complainant and the opposite party.

If the complaint is made to the District Forum i.e. when the value of goods and services and the compensation claimed does not exceed Rs. 20 lakhs and if any of the party to the complaint is not satisfied with the order given by the Forum, then the aggrieved party can make an appeal within 30 days against such order to the State Commission. However, the State Commission can extend the period if sufficient cause exist for not filing the appeal within 30 days. The order made by the State Commission in respect of the appeal is final and no further appeal can be made against the order of the State Commission to the National Commission.

If a complaint is directly filed with the State Commission i.e. where the value of goods and services and the compensation claimed exceed Rs. 20 lakhs but does not exceed Rs. 1 crore, then an appeal against the order of the State Commission can be made to the National Commission. In such cases, the order of the National Commission is final and no further appeal can be made.

If a complaint is directly made to the National Commission i.e. where the value of goods and services and the compensation claimed exceed Rs. 1 crore, then an appeal against the order of the National Commission can be made to the Supreme Court.



LET US KNOW

In filing a complaint, the complainant can personally file the complaint or it can be sent by post. The complaint must contain names and addresses of the complainant and the opposite party, facts relating to complaint, documents in support of such complaint and compensation being claimed. The complainant is not required to pay any fee.

If the opposite party fails to give a written reply, he can make an oral representation of his case.



CHECK YOUR PROGRESS

Q.3: Mention two powers of State Commission.

i. ……

ii. ……

Q.4: Select the correct answer:

i) The maximum age limit of a member of the district forum is-

a. 65 years c. 70 years

b. 67 years d. 75 years

……

ii) National Commission can complaint claiming-

a. upto Rs. 20 lakh c. upto Rs. 1 crore

b. upto Rs. 50 lakh d. exceeding Rs. 1 crore

……

iii) The maximum age limit of a member of National Commission is-

a. 65 years c. 75 years

b. 70 years d. 80 years

……

iv) The number of Dispute Redressal agencies under the Consumer Protection Act is-

a. 2 c. 4

b. 3 d. 6

.....

6.7 CONSUMER PROTECTION COUNCILS

Establishment of consumer protection councils is another important provision of the Consumer Protection Act. The consumer protection councils are in addition to the consumer disputes redressal agencies. The Act provides for the formation of Central Consumer Protection Council at National level and State Consumer Protection Councils in each state. The Councils are advisory in nature.

The principal object of the Councils is to protect the rights of the consumers like,

- Right of protection against marketing of hazardous goods;
- Right to be informed about quality, quantity, potency, purity, standard and price of goods or services;
- Right to access to variety of goods and services at competi tive rates;
- Right to be heard in appropriate forums; etc.

6.8 PENALTIES UNDER THE ACT

The consumer disputes redressal agencies decides the consumer disputes on the basis of the evidences brought by the complainant as well as the opposite party. Under the provisions of the Act, the consumer disputes redressal agencies can impose penalties on the trader, if found guilty. At the same time the Act provides for imposing penalties on the complainant, if the complaint is found to be frivolous.

If the trader against whom an order has been passed by the consumer forum and if he fails to comply with such order, he shall be

punishable with imprisonment for a term not less than one month but not more than three years and/ or with fine of minimum Rs. 2, 000 and maximum up to Rs. 10, 000 or with both (section 27). If an order imposing penalty is made by State Commission or National Commission, no appeal can be made against such order.



6.9 LET US SUM UP

In this unit we have discussed the following aspects –

- According to the provisions of the Act the 'consumer' is the person who buys goods or services for consideration or under deferred payment basis as well as the person who uses such goods or services with the permission of the buyer.
- A person who buys goods for commercial purpose is not a consumer under the Act.
- The Act provides for the formation of the following forums for settling consumer disputes-

Consumer Disputes Redressal Agencies

At district level	**At state level**	**At national level**
District forums	State Commission	National Commission

- An individual consumer or any registered consumer association can file a complaint with such agencies.
- The redressal agencies pass the necessary order after following the procedure prescribed by the Act for the settlement of the consumer disputes.
- The redressal agencies have the powers of civil court.

- Besides the consumer disputes redressal agencies, the Act provides for the establishment of Consumer Protection Councils at central and state levels. These councils are advisory in nature.
- The Act provides for penalties for the immoral trader as well as for the complainant if any false complaint is made.



6.10 FURTHER READING

Students' Guide to Economic Laws by V.S. Datey



6.11 ANSWERS TO CHECK YOUR PROGRESS

Ans. To Q. No. 1:

i. False.
ii. False.
iii. False.
iv. False.

Ans. To Q. No. 2:

i. False.
ii. True.
iii. False.
iv. False.
v. False.

Ans. To Q. No. 3:

i. The State Commission can authorize a person to seize books of account, documents or commodities required for purposes of the Act;

ii. The State Commission can summon and enforce the attendance of witnesses and examine the witnesses on oath.

Ans. To Q. No. 4:

i) a.

ii) d.

iii) b.

iv) b.



6.12 MODEL QUESTIONS

Q 1: What are the consumers disputes redressal agencies under the Act? Discuss the jurisdiction of district forums.

Q 2: Discuss the powers of State Commission.

Q 3: Discuss the procedure of filing a complaint in district forum.

Q 4: Write short notes-

i. National Commission

ii. Consumer under Consumer Protection Act

****

UNIT 7 : THE INDIAN PARTNERSHIP ACT, 1932

UNIT STRUCTURE

7.1 Learning Objectives

7.2 Introduction

7.3 Definition under the Act

7.4 Defination of “Partnership”, “Partner”, “Firm” and “Firm-Name” (Sec. 4)

7.5 Essential Characteristics of Partnership

7.6 Registration of a Partnership Firm

- 7.6.1 Penalty for Furnishing False Particulars (Sec. 70)
- 7.6.2 Alterations
- 7.6.3 Effects of Non-Registration (Sec. 69)

7.7 Partnership and Other Associations

- 7.7.1 Distinction between Partnership and HUF
- 7.7.2 Distinction between Company and Partnership

7.8 Types of Partnership

- 7.8.1 On the Basis of Duration
- 7.8.2 On the Basis of Liability of Partners

7.9 Types of Partners

7.10 Rights and Duties of Partners

7.11 Liabilities of a Partnership to Third Parties

7.12 Dissolution of Partnership and Dissolution of Firm

- 7.12.1 Dissolution of Partnership
- 7.12.2 Dissolution of Firm
- 7.12.3 Modes of Dissolution of Firm
- 7.12.4 Sales of Good will after Dissolution

7.13 Let Us sum Up

7.14 Further Reading

7.15 Answers To Check Your Progress

7.16 Model Questions

7.1 LEARNING OBJECTIVES

After going through this unit, you will able to :

- understand the meaning of partnership,
- discuss the essential characteristics of a partnership,
- know how a partnership is formed,
- distinguished between partnership and other forms of organisations,
- know about various rights and duties of a partner,
- know how a partnership is dissolved.

7.2 INTRODUCTION

You are aware of the fact that one of the form in which business can be carried out is partnership. In India partnership forms of business is widespread. Partnership business in India is governed by the Indian Partnership Act, 1932, which came in to effect from 1st October, 1932, Except Section 69 relating to registration of firm which came in to force on 1st October, 1933. This Act repeals Sec. 239 to Sec. 266 of the existing Contract Act. The Act extends to the whole of India except the state of Jammu & Kashmir.

In this chapter we will discuss about various provisions of partnership Act. Which deal with formation of partnership, rights and liabilities of parterner, dissolution of partnership etc.

7.3 DEFINITION UNDER THE ACT

In the Act, unless there is anything repugnant in the subject or context,

a) an “act of a firm” means any act or omission by all the partners, or by any partner or agent of the firm which gives rise to a right enforceable by or against the firm;
b) “business” includes every trade, occupation and profession;
c) “prescribed” means prescribed by rules made under this Act; (c-1) “Registrar” means the Registrar of Firms appointed under sub-section (1) of section 57 and includes the Deputy Registrar of Firms

and Assistant Registrar of Firms appointed under sub-section (2) of that section;

d) "third party" used in relation to a firm or to a partner therein means any person who is not a partner in the firm.

7.4 DEFINITION OF "PARTNERSHIP", "PARTNER", "FIRM" AND "FIRM-NAME" (Sec-4)

"Partnership" is the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all. Persons who have entered into partnership with one another are called individually, "partners" and collectively "a firm", and the name under which their business is carried on is called the "firm-name".

A partnership firm has no separate legal entity distinct from its members. Hence, unlike a company which has a separate legal entity distinct from its member, a partnership firm cannot posses property. While selecting the name of the firm the partners need to keep in mind the following points :

1) The name must not be too identical to the name of another existing firm doing similar business.
2) The name must not contain words like King, Queen, Crown, Emperor, Empress, Empire, Imperial, Royal or words expressing or implying, the sanction, approval or patronage of government except when the state government signifies its consent to the use of such words as part of the firm name by order in writing.

7.5 ESSENTIAL CHARACTERISTICS OF PARTNERSHIP

After having understood the meaning of the term partnership as defined in section 4 of the Act, let us discuss the essential characteristic of a partnership, which are discussed as under :

A) Agreement : Partnership is the outcome of an agreement or contract between persons. The relation of partnership arises from the

formation of a contract and not from status or birth. The agreement may be oral or in writing but it must satisfy all the essentials of a valid contract. If a proprietor gives a share in profits to his employee it will not be called a partnership unless there is an agreement of partnership between the two.

B) **Association of two or more Persons :** To form a partnership there must be at least two persons. According to Sec 11 of the Indian Partnership Act, 1932, the maximum number of persons in a partnership should not exceed 10 in case of banking business and 20 in other types of business. If the number of partners exceeds the prescribed limit, it would become an illegal association of persons. A firm cannot become a partner of another firm though its partners can join any other firm as partners.

C) **Carrying on of Business :** A partnership can be formed only for the purpose of carrying on a business. An association of persons who jointly own a house without carrying on a business is not partnership. Moreover, the business carried on by the partners must be lawful. Illegal acts such as theft, dacoity, smuggling, etc., cannot be called partnership. Associations created for charitable, religious or social purpose are not regarded as partnership because such organisations are not associated with business. It may also be noted that an agreement to carry on business at a future time does not result in partnership unless that time arrives and the business is started. [R R Same, vs. Heuberr] Another point which is worth noting is whether business should be temporary or permanent. So long there is a valid agreement to carry on legal business there exist a partnership. An agreement for Partnership can be for a specified period, specified project or for an undefined period or purpose.

Example : Two brothers were living together with their father. The father who was a proprietor of a business dies. The sons inherited the business but does not become partners automatically after death of their father unless there is an agreement between them expressed or implied to carry on the business as partners.

D) **Sharing of Profits :** The agreement between the partners must be to share the profits of business. There can be no partnership without the intention of mutual gain. The profits must be distributed among the partners in an agreed ratio. The section does not insist upon loss sharing. Thus a, provision for loss sharing is not essential [Walker West Development vs. FJ Emmett (1978)252EG1171] However, sharing of profits is not a conclusive proof of partnership. For example, a manager may be given a share in profits of the firm, it does not mean that the manager is a partner of the firm.

E) **Mutual Agency :** Partnership business can be carried on by all the partners or by any of them acting on behalf of the others. In other words, every partner is an implied agent of the other partners and of the firm. Each partner is liable for acts performed by other partners on behalf of the firm. The use of the words 'carried on by all or any of them acting for all' in Sec 4 clearly emphasizes the agency relationship. The partners are agent for each other and principals for themselves. Their relationship is governed by the law of agency. The partners are largely regulated by the law of Principal and agent. The above mentioned features are the real tests of partnership.

F) **Utmost Good Faith :** The relations between partners are based upon mutual trust and confidence. Every partner is expected to act in the best interests of other partners and of the firm as a whole. He must observe utmost good faith in all the dealings with his co-partners. He must render true accounts and make no secret profits from the business. The concept of utmost good faith is stressed in section 9 of the Partnership Act which lays down general duties of a partner. Section 9 lays down that partners are bound to carry on the business of the firm to the greatest common advantage to be just and faithful to each other and to render true accounts and full information of all things affecting the firm to any partner or his legal representatives. This we will be discussing in subsequent section dealing with right and duties of partners.

G) **Unlimited Liability :** Every partner is jointly and severally liable to an unlimited extent for the debts of the partnership firm. In case the assets of the firm are insufficient to pay the debts in full, the personal property of each partner can be used to pay the creditors of the firm.

H) **Restriction on Transfer of Interest :** No partner can transfer his share in the partnership without the prior consent of all other partners. As per Section 29 a partner cannot assign his rights and interest in the firm to an outsider so as to make him the partners of the firm. He can however, assign his share in the profits and share in the assets of the firm. But the transferee will not be entitled to take part in the business of the firm, but in the share of profit only.



CHECK YOUR PROGRESS

Q.1 : Mention four Characteristics of Partnership.

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7.6 REGISTRATION OF A PARTNERSHIP FIRM

According to the Partnership Act, 1932 it is not legally compulsory to register the firm for its formation. But if the registration is not done then there may arise some difficulties. So, it is always useful to get the firm registered. The Partnership Act, 1932 provides that if the partners so desire, may register their firm with the "Registrar of Firms" of the state in which the partnership firm is situated.

In order to get itself registered, a partnership firm must submit an application in a prescribed form along with the prescribed fee to the "Registrar of Firms". The application must contain the following details:

- Name of the firm
- The head office of the business
- Names of the other places where the firm has business
- Full names and addresses of the partners

- Date of entry of the partners in the firm
- Period of the firm, if any
- Signatures of every partner or his representatives.

When the Registrar of the Firm, after scrutiny, is satisfied with the statements, he shall make entry of the firm in the register of firms and the firm gets registered and certificate which is called "Certificate of Registration" which is issued by the Registrar. After getting the certificate, the firm becomes a registered firm.

7.6.1 Penalty for Furnishing False Particulars (Section 70)

Any person who signs any statement, amending statement, notice or intimation under this Chapter containing any particular which he knows to be false or does not believe to be true or containing particulars which he knows to be incomplete or does not believe to be complete, shall be punishable with imprisonment which may extend to three months, or with a fine or with both.

7.6.2 Alterations

Any alterations, subsequent to Registration shall be notified to the registrar.

- **Change in firm name and principal place of business (Section 60)** shall require sending of a new application form to the registrar along with the prescribed fee, duly signed and verified by all the partners.
- **Change relating to opening and closing of branches. (Section 61) :** When a registered firm discontinues business at any place or begins to carry on business at any place, such place not being its principal place of business, any partner or agent of the firm may send intimation thereof to the Registrar.
- **Change in the name and permanent address of any partner (Section 62) :** When any partner in a registered firm alters his name or permanent address, an intimation of the alteration may be sent by any partner or agent of the firm to the Registrar

- Under Section 63(2), when a minor who has been admitted to the benefits of partnership in a firm attains majority and elects to become or not to become a partner, he or his agent specially authorized in this behalf, may give notice to the Registrar that he has or has not become a partner.

7.6.3 Effect of Non-Registration (Section 69)

Through registration of partnership firm in not necessery. But a non registered. firm canont avail some fecility. These are discuss bellow:

- A partner of an unregistered firm cannot file a suit in any court against the firm or other partners for the enforcement of any right arising from a contract or right conferred by the Partnership Act unless the firm is registered and the person suing is or has been shown in the Register of Firms as a partner in the firm.
- No suits to enforce a right arising from a contract shall be instituted in any Court by or on behalf of a firm against any third party unless the firm is registered and the persons suing are or have been shown in the Register of Firms as partners in the firm.
- An unregistered firm or any of its partners cannot claim a set off (i.e. mutual adjustment of debts owned by the disputant parties to one another) or other proceedings in a dispute with a third party. Hence, every firm finds it advisable to get itself registered sooner or later. However, non-registration of a Partnership firm shall not affect.
  - The rights of third parties to sue the firm and/or its partners.
  - The firms or partners in the firms which have no place of business in the territories to which this Act extends, or whose places of business in the said territories are situated in areas to which the act does not apply.
  - The enforcement of any right to sue for the dissolution of a firm or for accounts of a dissolved firm, or any right or power to realise the property of a dissolved firm.

- The powers of an official assignee, receiver or Court under the Presidency-towns Insolvency Act, 1909 (3 of 1909), or the Provincial Insolvency Act, 1920 (5 of 1920), to realise the property of an insolvent partner.

7.7 PARTNERSHIP AND OTHER ASSOCIATIONS

7.7.1 Distinction Between Partnership and HUF

Partnership and Hindu Undivided Family (HUF) : In Hindu Undivided Family business all members of an Undivided Hindu family are engaged in the business. The business is manage and controlled by the eldest male member of the family. Following are

Point of	Partnership	HUF
Differences Regulation	Partnership business is governed by the provisions of the Indian Partnership Act, 1932	A Joint Hindu Family business is governed by the principles of Hindu law (Succession) Act, 1956.
Mode of creation	A partnership arises out of a contract between the partners.	A Joint Hindu Family business arises by the operation of law and is not the result of a contract.
Admission of new members	For admission of a new partner in a partnership consent of all the existing partners is required,	In the case of a Joint Hindu Family business a new member is admitted just by birth.
The position of females	In a partnership women can be full-fledged partners.	While in a Joint Hindu Family business membership is restricted to male members only.

Number of members	In partnership the maximum number of partners is 10 for banking business and 20 for other business.	There is no such maximum limit of members in the case of joint Hindu family business.
Liability of members	In partnership, the liability of the partners is joint and unlimited. Each partner is personally and jointly liable to an unlimited extent and in case the partnership fail to pay its debts each partner's separate personal property is liable for the debts of the firm.	In a joint Hindu family business only the 'Karta' is personally liable to an unlimited extent. Other coparceners' liability is limited to the extent of their interest in the joint family property and they do not incur any personal liability.
Share in profits	In a partnership business each partner is entitled to claim his separate share of profits.	A member of a joint Hindu family business has no such right.
Effect of death of a member	A partnership business is dissolved on the death of a partner.	A joint Hindu family firm is not dissolved on the death of a coparcener.

7.7.2 Distinction Between Company and Partnership :

Company	Partnership
i) A Company is treated as an artificial legal person.	Partnership is not a legal person.
ii) Company has perpetual succession.	Partnership firm does not have perpetual succession.

Company	Partnership
iii) Registration of a Company under Companies Act is mandatory.	For a partnership firm registration is not compulsory. It is guided by Indian Contract Act and Partnership Act.
iv) A Private Limited Company shall have at least 2 members and maximum 50 members. Public Ltd Company shall have minimum 7 members and there is no maximum limit.	Partnership firm shall have at least 2 members and maximum 20 members and for banking business, maximum 10 members.
v) Shares of a company can be transferred with ease.	Partners can transfer his share but the assignee does not become a partner. He is only entitled to share of Profits.
vi) Liability of a member is limited by shares or guaranty.	Liability of partners is unlimited.
vii) Ordinary members cannot take part in management of a company. Only director members can take part in management	All Partners can take part in management of a firm.
viii) Private limited company shall have a minimum paid up capital of Rupees One Lakh and public limited company of Rupees Five Lakh.	There is no minimum paid up capital for a partnership firm.
ix) Member cannot bind the company by his act.	Partner is an agent of firm and other partners.Partner can bind the firm by his act.



CHECK YOUR PROGRESS

Q2 : Write two differences between partnership and company.

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7.8 TYPES of PARTNERSHIP

Various types of partnership can be classified on the basis of duration of partnership and liability of partners. They are :

7.8.1 On the Basis of Duration

- **Partnership at Will :** When a partnership is formed which is not for a specific period of time or for a particular project but for an indefinite period of time such partnership is termed as partnership at will. Continuity of such partnership depends on the will of the partners. It may be dissolved, if any partner gives notice of withdrawing from the partnership.
- **Particular Partnership :** When a partnership is formed to complete a particular venture, trade or project, such partnership is called particular partnership. As soon as the objective of forming the partnership is achived the partnership comes to an end. For example, if a partnership is formed to construct a bridge, it will be the case of a particular partnership and it will come to an end as soon as the construction of the bridge is completed.

7.8.2 On the Basis of Liability of Partners

- **General Partnership :** In a general partnership, partners have unlimited liability and they enjoy the right to participate in the management of the firm. Partners are bound together with mutual agency. Withdrawal of any partner from the partnership due to death, lunacy or any other reason leads to dissolution of the firm.

- **Limited Partnership :** In a partnership where all the partners except one, have their liability limited to the capital invested by them such partnership is known as limited liability partnership. A limited partner has no right to participate in the management of the firm. Death, lunacy or insolvency of a limited partner has no effect on the existence of the partnership firm.

7.9 TYPES of PARTNERS

There are various types of partners in a partnership firm. They are as follows :

a) **Active Partner :** An active partner is one who not only contributes capital in the firm but also takes active part in management and day to day functioning of the firm. He may also be called 'actual' or 'ostensible' partner. He is an agent of the other partners in the ordinary course of business of the firm and considered as a full fledged partner in the real sense of the term. His liability is unlimited for all the debts of the firm.

b) **Nominal Partner :** A nominal partner neither contributes any capital nor shares in the profits or take part the management of the firm. He only allows the firm to use his name and the firm take advantage of the goodwill of that person. Though he is not given any right in the firm but he is liable to the third parties for all the liabilities of the partnership.

c) **Sleeping or Dormant Partner :** A sleeping or dormant partner does not take any active part in the management of the business. He contributes capital and shares the profits which are usually less than that of the active partners. A sleeping partner has unlimited liability for the debt of the firm but his relationship with the firm is not disclosed to the general public.

d) **Partner in Profits only :** A partner who shares in the profits only without being liable for the losses is known as partner in profits. He does not take part in the management of the firm but his liability for all the debts of the firm is unlimited.

e) **Secret Partner :** Partners who contributes capital and actively participate in the activity of the firm but his association with the firm is not disclosed to the public such partners are known as secret partner. His liability for all the debts of the firm is unlimited.

f) **Partner by Estoppel :** When a person falsely represents himself as a partner or acts in such a way that others have on impression that he is a partner of the partnership firm, such a person is called partner by estoppel. The third parties who deal with such a partner and suffers loss, can held the partner by estoppel liable for the less. For example : A and B are partners in a pertnership firm and if C (an outsider) represents himself as a partner of the firm and transacts with X (third party) and if X suffers loss, he can held C liable for such loss.

g) **Partner by Holding out :** If the partners of a partnership firm declares another person as a partner of the firm and the person remains silent, such a partner is called partner by holding out. Any third party transacting with the firm on the pritext that the partner by holding out is a real partner of the firm, the third party can held the partner by holding out liable for any loss. For example : A and B are partners in a partnership firm and declares C as a paertner and C remains silent, C is called the partner by holding out.

h) **Minor Partner :** A partner is called a minor partner if his age is less than 18 years. Partnership arises from contract and a minor is not competent to enter into contract. Therefore, strictly speaking, a minor cannot be full-fledged partners. But with the consent of all the partners he can be admitted into partnership for benefits only. He is not personally liable for the debts of the firm, his liability is limited only to the amount he has invested in the firm as capital. He has no right to buy or sell goods or sign any contract with any other party on behalf of the firm. During minority a minor has right to receive agreed share of profit, right to have access and copy of the account of the firm. Section 30 lays down the rights and liabilities of a minor who has been admitted in the partnership which are:

1) The minor is entitled to receive his agreed share of the property and of the profits of the firm.
2) The minor has the right to inspect and take copies of the books of accounts of the firm. However, he has no such right in respect of books other than accounts.
3) The minor is not personally liable to the third parties for the debts of the firm, but his liability is limited only up to his share in the partnership assets and profit. If the assets of partnership fall short in discharging the debts of the firm the personal property of the minor cannot be applied for payment of the firm debt.
4) The minor is not entitled to take part in conduct of the business as he has no representative capacity to bind the firm.
5) The minor cannot bring about any suit against the partners for an account or payment of his share of the property or profits of the firm except when he severs his connection with the firm.
6) On attaining majority, if he continues as a partner, his liability will become unlimited with effect from the date of his original admission into the firm and he will be having all the rights which are available to a normal partner. For this, he has to give his consent or public notice or declaration that he wants to continue in the firm as a partner. If he does not give his consent it will be assumed that he wants to continue as a partner and in that case his liability will be unlimited.
7) Where the minor does not become a partner:
   i) His rights and liabilities continue to be those of a minor up to the date of his giving public notice;
   ii) After the date of the public notice his share is not liable for any acts of the firm;
   iii) He can sue the other partners for his share of the property and profit in the firm;
8) After attaining majority but before choosing to become a partner If, the minor represents or knowingly permits himself to be represented as a partner in the firm, he will be personally liable

to anyone who has on the faith of such representation granted credit to the firm on the ground of 'holding out'.



CHECK YOUR PROGRESS

Q.3 : Who is a sleeping partner?

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7.10 RIGHTS AND DUTIES OF PARTNERS: MUTUAL RIGHTS AND DUTIES

"Subject to the provisions of this Act, the mutual rights and duties of the partners of a firm may be determined by contract between the partners, and such contract may be express or may be implied by a course of dealing.

Rights of Partners : The Partnership Act confers the following rights upon the partners of a firm:

1) **Right to take part in the conduct of the business** [Sec. 12 (a)]. Every partner, irrespective of the amount of capital contribution, has an inherent right to take part in the conduct of the business of the firm. Although one may not to participate in the management of the business.
2) **Right to express opinion** [Sec. 12 (c)]. Every partner has a right to be consulted and heard before any matter is decided. Any difference arising as to ordinary matters connected with the business may be decided by a majority of the partners. But no change may be made in the nature of the business or the constitution of the partnership, e.g., admission of a new partner, without the consent of all the partners.
3) **Right of access to books** [Sec. 12(d)]. Every partner has a right to have access to and to inspect and copy any of the books of the firm.
4) **Right to share the profits** [Sec. 13(b)]. Every partner, irrespective of the amount of capital contribution or business expertise, has a right to share equally in the profits earned by the firm.

5) **Right to interest on capital** [Sec. 13(c)]. Where a partner is entitle to interest on capital subscribed by him, such interest shall be payable only out of profits.

6) **Right to interest on advances** [Sec. 13(d)]. Where a partner makes, for the purpose of the business, any payment or advance beyond the amount of capital he has agreed to subscribe, he is entitled to interest thereon at the rate of six per cent per annum.

7) **Right to indemnity** [Sec. 13(e)]. Every partner has a right to claim indemnity from the firm in respect of payments made or liabilities incurred by him (a) in the ordinary and proper conduct of the business, and (b) in doing such act, in an emergency, for the purpose of protecting the firm from loss, as would be done by a person of ordinary prudence in his own case under similar circumstances.

Duties of Partners : For the sake of clarity we shall be studying the duties of partners inter se under the following two heads: ‘

I) Absolute duties.

II) Qualified duties.

I) Absolute Duties : These duties are mandatory in nature imposed by law and are not subject to a contract to the contrary. Being mandatory in nature, these duties are applicable to all partnership and cannot be varied by agreement among the partners. The following are the absolute duties of partners:

1) *Duty to carry on the business to the greatest common advantage* (Sec. 9). Every partner is bound to carry on the business of the firm to the greatest common advantage. It implies that every partner must use his knowledge and skill for the benefit of the firm and not for his personal gain.

2) *Duty to be just and faithful inter-se* (Sec. 9). An ideal partnership is one where there is mutual trust and confidence, and spirit of helpfulness and goodwill among the partners. As such every partner must be just and faithful to his co-partners.

3) *Duty to render true accounts* (Sec. 9). Every partner must render true and proper accounts to his co-partners. It implies that each

partner must be ready to explain the accounts of the firm and produce vouchers in support of the entries. No partner should think of making a secret profit at the expense of the firm.

4) *Duty to provide full information* (Sec. 9). Every partner must give full information of all things affecting the firm to his co-partners.
5) *Duty to indemnify for loss caused by fraud* (Sec. 10). A partner can cause loss to the firm by hi's neglect or want of skill or omission or fraud while acting in the ordinary course of business. The general practice is that where a partner acts bona fide the loss caused by his neglect or want of skill or omission is borne by the firm. But when the loss is caused by fraud committed against a third party by a partner, the same must be recovered from the guilty partner and cannot be shared among all the partners.
6) *Duty to be liable jointly and severally* (Sec. 25). Every partner is liable, jointly with all other partners and also severally, to third parties for all acts of the firm done while he is a partner. The liability of all the partners is not only joint and several but is also unlimited.
7) *Duty not to assign his interest* (Sec. 29). No partner can assign or transfer his partnership interest to any other person so as to make him a partner in the business without the consent of all other partners. He can, however, assign his share of the profit and his share in the assets of the firm but the transferee shall not have any right to interfere in the conduct of the business.

II) Qualified Duties : Qualified duties are those which depend upon the contract between the paartners and it is only in the absence of a contract to the contrary that these duties, as laid down by the Partnership Act, are applicable. In other words, the partners are free to vary these duties by mutual agreement, express or implied, and if the partnership agreement is silent then only the duties contained in the Partnership Act will be the duties of the partners. Subject to

contract between the partners, the Partnership Act prescribes the following duties of partners :

1) *Duty to attend diligently to his duties* [Sec. 12(b)]. Every partner is bound to attend diligently to his duties in the conduct of the business.
2) *Duty to work without remuneration* [Sec. 13(a)]. A partner is not entitled to receive remuneration for taking part in the conduct of the business.
3) *Duty to contribute to the losses* [Sec. 13(b)]. The partners are bound to contribute equally to the losses sustained by the firm, irrespective of the amount of capital contribution by each one of them.
4) *Duty to indemnify for willful neglect* [Sec. 13(/)]. Every partner is under a duty to indemnify the firm for any loss caused to it by his wilful neglect in the conduct of the business of the firm. The expression 'wilful neglect' means the failure to perform a duty, or to do something which a partner ought to have done, intentionally and deliberately. An act done in good faith and bona fide or a mere error of judgment cannot be termed as wilful neglect.
5) *Duty to use firm 's property exclusively for the firm* (Sec. 15). It is the duty of every partner to use the property of the firm exclusively for the purposes of the business. No partner should use property of the firm for his personal benefit.
6) *Duty to account for personal profits derived* [Sec. 16(a)]. If a partner derives any profit for himself from any transaction of the firm or from the use of the property or business connection of the firm or the firm name, he must account for that profit and pay it back to the firm.
7) *Duty not to compete with the business of the firm* [Sec. 16(b)]. A partner must not carry on any business which is similar to or likely to compete with the business of the firm. If he does that, he is bound to account for and pay to the firm all profits made by

him in that business. A partner may, however, carry on a non-competing business and may retain the profits of that business to himself.



CHECK YOUR PROGRESS

Q.4: Mention two rights of a partner.

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Q.5: Mention two duties of a partner.

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7.11 LIABILITIES OF A PARTNER / PARTNERSHIP TO THIRD PARTIES

i) **Liability of a Partner for Acts of the Firm (Sec. 25) :** Every partner is liable, jointly and severally with all other partners for all acts of the firm done while he is a partner. Further, the liability of all the partners is unlimited. Because of this liability, the creditor of the firm can sue all the partners jointly or individually.

ii) **Liability of the Firm for Wrongful Act of a Partner (Sec. 26) :** If any loss or injury is caused to any third party or any penalty is imposed because of wrongful act or omission of a partner, the firm is liable to the same extent as the partner. However, the partner must act in the ordinary course of business of the firm or with authority of his partners.

iii) **Liability of the Firm for Misutilisation by Partners (Sec. 27) :** Where (a) a partner acting within his apparent authority receives money or property from a third party and misutilises it, or (b) a firm receives money or property from a third party in the course of its business and any of the partners misutilises such money or property, then the firm is liable to make good the loss.

iv) **Liability of an Incoming Partner :** An incoming partner is liable for the debts and acts of the firm from the date of his admission into the firm. However, the incoming partner may agree to be liable for debts prior to his admission. Such agreeing will not empower the prior creditor to sue the incoming partner. He will be liable only to the other co-partners.

v) **Liability of a Retiring Partner :** A retiring partner is liable for the acts of the firm done before his retirement. But a retiring partner may not be liable for the debts incurred before his retirement if an agreement is reached between the third parties and the remaining partners of the firm discharging the retiring partner from all liabilities. After retirement the retiring partner shall be liable unless a public notice of his retirement is given. No such notice is required in case of retirement of a sleeping or dormant partner.

7.12 DISSOLUTION OF PARTNERSHIP AND DISSOLUTION OF FIRM

7.12.1 Dissolution of Partnership

Dissolution of partnership refers to the change in the existing relations of the partners. The firm continues its business after being reconstituted. This may happen on admission, retirement or death of a partner or change in profit sharing ratio in the firm. Example:

L, M and N are three partners in a firm. M retires. The partnership between L M N comes to an end and new partnership between M and N comes into existence. This new partnership between M and N shall be known as reconstituted firm'. Thus, on retirement of partner, the old partnership stands dissolved but the firm continues its business with remaining partners M and N. This is a case of dissolution of partnership.

Partnership may be dissolved in the following circumstances :

a) At the time of admission of a new partner;

b) On the retirement/death of an old partner;

c) At the time of change in profit sharing ratio among existing partners;
d) If any partner is declared insolvent;
e) On the expulsion of any partner;
f) On the expiry of the period of partnership.

Thus this is clear from the above discussion that in the case of dissolution of the partnership the firm may continue under a new agreement whereas in the case of dissolution of partnership firm the business of the firm comes to an end.

7.12.2 Dissolution of Firm

Dissolution of a firm means the dissolution of partnership between all the partners of a firm. In such a situation, the business of the firm is discontinued, its assets are realised, the liabilities are paid off and the surplus (if any) is distributed among the partners according to their rights.

7.12.3 Modes of Dissolution of Firm

A partnership firm can be dissolved in any of the following ways :

A) By the order of the Court : Any partner to firm may apply to the court for getting the firm dissolved. On getting such application by any of the partner the court may proceed to order the dissolution of the firm in the following circumstances: (Sec. 44)

i) If any of the partner becomes insane. [Sec. 44(a)]
ii) If a partner, other than the partner filing the suit has become disabled to perform his duties as a partner. [Sec. 44(b)]
iii) If a partner, other than the partner filing the suit is guilty of misconduct. [Sec. 44(c)]
iv) If a partner, other than the partner filing the suit is guilty of intentionally and persistently committing a breach of the partnership agreement. [Sec. 44(d)]

v) If a partner, other than the partner filing the suit has transferred whole of his interest in the firm to a third party without the consent of the other partners.[Sec. 44(e)]

vi) If the court is satisfied that the business of the firm cannot be carried on except with a loss. [Sec. 44(e)]

vii) If the court considers it just and equitable to dissolve the firm due to some other reasons. [Sec. 44(f)]

B) Without the Intervention of the Court

i) Dissolution by Agreement : A firm may be dissolved with the consent of all the partners or in accordance with a contract between the partners.

ii) Compulsory Dissolution : (Sec. 41) A firm is compulsorily dissolved under any of the following circumstances:

a) When all the partners or all except one partner, become insolvent or insane making them incompetent to sign a contract;

b) Where the business becomes illegal;

c) Where all the partners except one decide to retire from the firm;

d) Where all the partners or all except one partner dies;

e) Where the partnership deed includes any provision regarding the happening of the following :

i) Expiry of the period for which the partnership was formed;

ii) Completion of the specific venture or project for which the firm was formed.

C) Dissolution on the Happening of Certain Contingencies (Sec. 42) : Subject to contract between the partners a firm is dissolved:

a) if constituted for a fixed term, by the expiry of that term;

b) if constituted to carry out one or more adventures or undertakings, by the completion thereof;

c) by the death of a partner; and

d) by the adjudication of a partner as an insolvent.

D) Dissolution by Notice of Partnership at Will (Sec. 43) : Where the partnership is at will, the firm may be dissolved by any partner giving notice in writing to all the other partners of his intention to dissolve the firm. The firm is dissolved as from the date mentioned in the notice as the date of dissolution or, if no date is so mentioned, as from the date of the communication of the notice.

7.12.4 Sales of Good will after Dissolution

The provisions relating to sales of good will after dissolution of a firm are as follows :

1) In settling the accounts of the firm after dissolution, the good will shall, subject to contract between the partners, be included in the assets, and it may be sold either separately or along with other property of the firm.
2) Where the goodwill of the firm is sold after dissolution, a partner may carry on a business competing with that of the buyer and he may advertise such business, but, subject to agreement between him and the buyer, he may not– (a) use the firm name, (b) represent himself as carrying on the business of the firm, or (c) solicit the custom of the person who were dealing with the firm before its dissolution.



7.13 LET US SUM UP

- Partnership business in India is governed by the Indian Partnership Act, 1932, which came in to effect from 1st October, 1932.
- "Partnership" is the relation between persons who have agreed to share the profits of a business carried on by all or any of them acting for all.

- Essential characteristics of a partnership firm are presence of agreement, association of two or more persons, sharing of profit, unlimited liability, utmost good faith etc.
- Registration of a partnership firm is not mandatory. But, provisions in the Indian Partnership Act has been made in such a way, that if a firm is registered, the firm avail certain privileges and firms which are not registered they cannot avail those privileges.
- Depending upon nature of participation and functions partners are classified as active partner, sleeping partner, silent partner, partner for profit only, partner by estoppels etc.
- With the consent of all the partners a minor can be admitted into partnership for benefits only.
- A partnership firm can be dissolved in any of the two ways: A) By the order of the court; B) without the intervention of the court.



7.14 FURTHER READING

1) *Indian Partnership Act*, 1932, (2014). New Delhi : Lawmann's.
2) Kapoor, N. D., *Elements of Mercantile Law*. New Delhi : S. Chand & Co. ltd.
3) Shukla, M. C. (2007), *Mercantile Law*, New Delhi : S. Chand & Co. Ltd.



7.15 ANSWERS TO CHECK YOUR PROGRESS

Ans. to Q. No. 1 : Four essential characteristics of a partnership firm are presence of an agreement, association of two or more persons, sharing of profit, unlimited liability.

Ans. to Q. No. 2 : Following are the two differences between company and partnership firm :

i) A Company is treated as an artificial legal person but Partnership is not a legal person.

ii) Company has perpetual succession but Partnership firm does not have perpetual succession.

Ans. to Q. No. 3 : A sleeping or dormant partner does not take any active part in the management of the business.

Ans. to Q. No. 4 :

i) Right to take part in the conduct of the business

ii) Right to express opinion.

Ans. to Q. No. 5 :

i) Duty to work without remuneration

ii) Duty to attend diligently to his duties.



7.16 MODEL QUESTIONS

Q.1 : Define partnership. What are the essential elements of a partnership?

Q.2 : What are the differences between partnership and joint stock company?

Q.3 : Discuss the various kinds of partners in a partnership firm?

Q.4 : Can a minor be admitted to a partnership? Discuss.

Q.5 : What is the procedure for the registration of a firm? What are the consequences of non-registration of a firm?

Q.6 : What are the mutual rights and duties in between the partners in a partnership firm?

Q.7 : What are the different modes in which a firm may be disolved?

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UNIT 8 : THE INFORMATION TECHNOLOGY ACT-2000

UNIT STRUCTURE

8.1 Learning Objectives

8.2 Introduction

8.3 Brief History

8.4 Objectives of the Act

8.5 Definitions Under the Act

8.6 Provisions Relating to Digital Signature and Electronic

8.7 Electronic Records

8.8 Attribution, Acknowledgement and Dispatch of Electronic Records

8.9 Regulation of Certifying Authorities

8.10 Electronic Signature Certificates

8.11 The Cyber Appellate Tribunal

8.12 Offences and Penalties Under the Act

8.13 Let Us Sum Up

8.14 Answers To Check Your Progress

8.15 Model Questions

8.1 LEARNING OBJECTIVES

After going through this unit you will be able to:

- discuss about the objectives of IT Act
- discuss the various terms used in the Act
- know the Provisions relating to digital signature and electronic signature
- explain the Provisions relating to electronic records
- discuss the composition and powers of Cyber appellate tribunal
- discuss about Regulation of certifying authorities
- know about the Offences and penalties under the Act.

8.2 INTRODUCTION

In the 21st century Information Technology has become the lifeline of the human civilization. Keeping in view the growing use and importance of & Information Technology, Government of India decided to bring the area of Information Technology under the preview of law. Accordingly The Information Technology Act, 2000 was enacted. In this chapter we will discuss about The Information Technology Act, 2000. This Act give legal recognition to digital records and other activities carried out electronically. This has a great bearing over e-commerce and e-business.

After going through this unit you will have a broad idea about uses and applicability of The Information Technology Act, 2000.

8.3 BRIEF HISTORY

The use of computer, internet and Information Technology has changed the lifestyle of the people of 21st century. Today paper based communication is replaced by e-communication, paper based transaction is replaced by e-commerce and paper based governance by e- governance. Use of IT and computer bring some new word to use, such as cyber world, e-communication, e- business, e-commerce, e-banking, e-contract, e-tendering, e-certificate, e-library etc. Despite making the life easy and fast, use of IT by criminals as a weapons of offence has threaten the world. Accordingly a new branch of law emerged to tackle the problems of cyber-crime in the cyber space i.e. Cyber Law or Information Technology Act.

So far Business is concern, now a days most of the business transactions are done with the help of computer and information technology. Business activities carried out through electronic form are known as electronic commerce or e-commerce. It reduces the need for paper based transactions. The hurdle faced by e-commerce and e-governance is its legal recognition i.e. signature over the document. But, there are laws governing paper base records and documents which bears signature.

In the given situation, for the first time in the year 1996, The United Nations Commission on International Trade and Law (UNCITRAL) adopted

a model law on e-commerce. This was adopted by the General Assembly of the UN by passing a resolution in the year 1997, where India was also a signatory. Further the Government of India felt the need for a separate law and amendments in the existing laws giving legal recognition to digital signature and electronic records for facilitating e-commerce and e-governance. This gave birth to the Information Technology Bill, 1999. The Bill was passed in both the house of the parliament in May, 2000, and it receives assent of the President of India in August, 2000 and come to be known as Information Technology Act, 2000. The Act further amended in the year 2008 to suit the need of the hour.

The Act has a major impact on e-commerce and e-governance, therefore it is important to study various provisions of The Information Technology Act, 2000.

8.4 OBJECTIVES OF THE ACT

The Information Technology Act, 2000 was enacted with the following Objectives:

- To legalise transactions carried out electronically
- To give legal recognition to digital signatures
- To facilitate electronic filing of documents with government departments
- To facilitate electronic storage of data
- To facilitate and give legal recognition of electronic fund transfers between banks and financial institutions
- To amend the Indian Penal Code, the Indian Evidence Act, 1872; The Banker's Book Evidence Act, 1891 and Reserve Bank of India Act, 1934.

8.5 DEFINITIONS UNDER THE ACT

Before going to the provisions of the Act in detail, it will be better to know the meaning of some terms used in the Act. This will help us in understanding the provisions of the Act in a better way. In the following section we will discuss some definition included in the sec.2 of the Act.

Appropriate Government

According to Sec 2 (1) (*e*) of the Act "appropriate Government" means as respects any matter,

(i) enumerated in List II of the Seventh Schedule to the Constitution;

(ii) relating to any State law enacted under List III of the Seventh Schedule to the Constitution, the State Government and in any other case, the Central Government;

Asymmetric Crypto System

According to Sec 2 (1) (*f*) "asymmetric crypto system "means a system of a secure key pair consisting of a private key for creating a digital signature and a public key to verify the digital signature.

Communication Device

According to Sec. 2 (1) (*ha*)"communication device" means cell phones, personal digital assistance or combination of both or any other device used to communicate, send or transmit any text, video, audio or image.

Computer

According to Sec. 2 (1) (*i*) "computer" means any electronic, magnetic, optical or other high-speed data processing device or system which performs logical, arithmetic, and memory functions by manipulations of electronic, magnetic or optical impulses, and includes all input, output, processing, storage, computer software, or communication facilities which are connected or related to the computer in a computer system or computer network;

Computer network

According to Sec. 2 (1) (*j*) "computer network" means the interconnection of one or more computers or computer systems or communication device through—

(i) the use of satellite, microwave, terrestrial line, wire, wireless or other communication media; and

(ii) terminals or a complex consisting of two or more inter-connected computers or communication device whether or not the interconnection is continuously maintained.

Computer resource

According to Sec. 2 (1) (*k*)"computer resource" means computer, computer system, computer network, data, computer database or software.

Computer system

According to Sec. 2 (1) (*l*) "computer system" means a device or collection of devices, including input and output support devices and excluding calculators which are not programmable and capable of being used in conjunction with external files, which contain computer programmes, electronic instructions, input data, and output data, that performs logic, arithmetic, data storage and retrieval, communication control and other functions.

Cyber security

According to Sec. 2 (1) (*nb*) "cyber security" means protecting information, equipment, devices, computer, computer resource, communication device and information stored therein from unauthorised access, use, disclosure, disruption, modification or destruction.

Data

According to Sec. 2 (1) (*o*) "data" means a representation of information, knowledge, facts, concepts or instructions which are being prepared or have been prepared in a formalized manner, and is intended to be processed, is being processed or has been processed in a computer system or computer network, and may be in any form (including computer printouts, magnetic or optical storage media, punched cards, punched tapes) or stored internally in the memory of the Computer.

Digital signature

According to Sec. 2 (1) (*p*) "digital signature" means authentication of any electronic record by a subscriber by means of an electronic method or procedure in accordance with the provisions of section 3.

Digital Signature Certificate

According to Sec. 2 (1) (*q*) "Digital Signature Certificate" means a Digital Signature Certificate issued under sub-section (4) Of section 35;

Electronic form

According to Sec. 2 (1) (*r*)"electronic form" with reference to information means any information generated, sent, received or stored in media, magnetic, optical, computer memory, micro film, computer generated micro fiche or similar device;

Electronic Gazette

According to Sec. 2 (1) (*s*) "Electronic Gazette" means the official gazette published in the electronic form.

Electronic record

According to Sec. 2 (1) (*t*) "electronic record" means data, record or data generated, image or sound stored, received or sent in an electronic form or micro film or computer generated micro fiche.

Electronic signature

According to Sec. 2 (1) (*ta*) "electronic signature" means authentication of any electronic record by a subscriber by means of the electronic technique specified in the Second Schedule and includes digital signature.

Function

According to Sec. 2 (1) (*u*) "function" in relation to a computer, includes logic, control, arithmetical process, deletion, storage and retrieval and communication or telecommunication from or within a computer.

Information

According to Sec. 2 (1) (*v*) "information" includes [data, message, text,] images, sound, voice, codes, computer programmes, software and databases or micro film or computer generated micro fiche.

Intermediary

According to Sec. 2 (1) (*v*) "intermediary" with respect to any particular electronic records, means any person who on behalf of another person receives, stores or transmits that record or provides any service with respect to that record and includes telecom service providers, network service providers, internet service providers, web hosting service providers, search engines, online payment sites, online auction sites, online market places and cyber cafes.

Key pair

According to Sec. 2 (1) (*x*) "key pair", in an asymmetric crypto system, means a private key and its mathematically related public key, which are so related that the public key can verify a digital signature created by the private key.

Electronic Governance

Electronic governance refers to the use of Information Technology in the functioning of government machinery. Use of Information Technology in the functioning of government can bring transparency and promptness. It involves electronic filing of documents with the government departments and agencies, creating a network of e-services and making services available through online. From 16th September, electronic filing using digital signature has been made compulsory for companies. This will allow companies to file any documents in the electronic form and make payments of fee by using Internet banking and credit/debit card.

Keeping in view, the importance of e-governance the Information Technology Act 2000, gives legal recognition to electronic records, digital signatures and electronic dealings with government officials and agencies. The Act laid down the following provisions to facilitate e-governance.



CHECK YOUR PROGRESS

Q 1: Define Digital signature under IT Act.

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Q 2: Define Data under IT Act.

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8.6 PROVISIONS RELATING TO DIGITAL SIGNATURE AND ELECTRONIC

In the earlier section of the unit we have discuss about various definitions that we help us in understanding the provisions of the Act. In this

section we will discuss about provisions of the Act regarding digital signature and electronic signature which is given in the Sec.3 of the Act.

8.6.1 Authentication of electronic records

According to Sec 3 of the Information Technology Act, any subscriber may authenticate an electronic record by affixing his digital signature. The authentication of the electronic record shall be effected by the use of asymmetric crypto system and hash function which envelop and transform the initial electronic record into another electronic record.

Explanation — for the purposes of this sub-section, "hash function" means an algorithm mapping or translation of one sequence of bits into another, generally smaller, set known as "hash result" such that an electronic record yields the same hash result every time the algorithm is executed with the same electronic record as its input making it computationally infeasible—

(a) to derive or reconstruct the original electronic record from the hash result produced by the algorithm;

(b) that two electronic records can produce the same hash result using the algorithm.

Any person by the use of a public key of the subscriber can verify the electronic record. The private key and the public key are unique to the subscriber and constitute a functioning key pair

8.6.2 Electronic signature

The provisions related to Electronic Signature has been laid down in the Act under Sec 3A, which prescribes-

Not with standing anything contained in section 3, but subject to the provisions of sub-section (2), a subscriber may authenticate any electronic record by such electronic signature or electronic authentication technique which—

(a) is considered reliable; and

(b) may be specified in the Second Schedule.[Sec 3A(1)]

For the purpose of this section any electronic signature or electronic authentication technique shall be considered reliable if—

(a) the signature creation data or the authentication data are, within the context in which they are used, linked to the signatory or, as the case may be, the authenticator and to no other person;

(b) the signature creation data or the authentication data were, at the time of signing, under the control of the signatory or, as the case may be, the authenticator and of no other person;

(c) any alteration to the electronic signature made after affixing such signature is detectable;

(d) any alteration to the information made after its authentication by electronic signature is detectable; and

(e) it fulfills such other conditions which may be prescribed.[Sec3A(2)].

The Central Government may prescribe the procedure for the purpose of ascertaining whether electronic signature is that of the person by whom it is purported to have been affixed or authenticated. [Sec3A(3)].

The Central Government may, by notification in the Official Gazette, add to or omit any electronic signature or electronic authentication technique and the procedure for affixing such signature from the Second Schedule; Provided that no electronic signature or authentication technique shall be specified in the Second Schedule unless such signature or technique is reliable. [Sec 3A(4)].

Every notification issued under sub-section (4) shall be laid before each House of Parliament [Sec3A(5)].

8.7 ELECTRONIC RECORDS

According to Sec. 2 (1) (*t*) “electronic record” means data, record or data generated, image or sound stored, received or sent in an electronic form or micro film or computer generated micro fiche. We have already

discussed about provisions relating to Authentication of electronic records. Now, we will discuss other provisions related to Electronic Records in the following paragraph.

8.7.1 Legal recognition of electronic records (Sec.4)

Where any law provides that information or any other matter shall be in writing or in the typewritten or printed form, then, notwithstanding anything contained in such law, such requirement shall be deemed to have been satisfied if such information or matter is—

(a) rendered or made available in an electronic form; and

(b) accessible so as to be usable for a subsequent reference.

8.7.2 Legal recognition of electronic signatures

According to Sec-5 of the Act, Where any law provides that information or any other matter shall be authenticated by affixing the signature or any document should be signed or bear the signature of any person then, notwithstanding anything contained in such law, such requirement shall be deemed to have been satisfied, if such information or matter is authenticated by means of electronic signatures affixed in such manner as may be prescribed by the Central Government.

Explanation — For the purposes of this section, "signed", with its grammatical variations and cognate expressions, shall, with reference to a person, mean affixing of his hand written signature or any mark on any document and the expression "signature" shall be construed accordingly.

8.7.3 Use of electronic records and electronic signatures in Government and its Agencies

According to Sec-5 of the Act, Where any law provides for the filing of any form, application or any other document with any office, authority, body or agency owned or controlled by the

appropriate Government in a particular manner;and the issue or grant of any licence, permit, sanction or approval by whatever name called in a particular manner; and the receipt or payment of money in a particular manner, then, notwithstanding anything contained in any other law for the time being in force, such requirement shall be deemed to have been satisfied if such filing, issue, grant, receipt or payment, as the case may be, is effected by means of such electronic form as may be prescribed by the appropriate Government. The appropriate Government may, by rules, prescribe—

(a) the manner and format in which such electronic records shall be filed, created or issued;

(b) the manner or method of payment of any fee or charges for filing, creation or issue any electronic record under clause (a) stated above.

8.7.4 Retention of electronic records

Section 7 of the Act provides that Where any law provides that documents, records or information shall be retained for any specific period, then, that requirement shall be deemed to have been satisfied if such documents, records or information are retained in the electronic form, if—

(a) the information contained therein remains accessible so as to be usable for a subsequent reference;

(b) the electronic record is retained in the format in which it was originally generated, sent or received or in a format, which can be demonstrated to represent accurately the information originally generated, sent or received;

(c) the details which will facilitate the identification of the origin, destination, date and time of dispatch or receipt of such electronic record are available in the electronic record:

Provided that this clause does not apply to any information which is automatically generated solely for the purpose of enabling

an electronic record to be dispatched or received. These provisions will not apply to any law that expressly provides for the retention of documents, records or information in the form of electronic records.

8.7.5 Power to make rules by Central Government in respect of electronic signature

Section 10 of the IT Act empowered the Central Government to make rules in respect of electronic signature prescribing:

(a) the type of electronic signature;

(b) the manner and format in which the digital signature shall be affixed;

(c) the manner or procedure, which facilitates identification of the person affixing the electronic signature;

(d) control processes and procedures to ensure adequate integrity, security and confidentiality of electronic records or payments; and

(e) any other matter which is necessary to give legal effect to electronic signatures.

8.8 ATTRIBUTION, ACKNOWLEDGEMENT AND DISPATCH OF ELECTRONIC RECORDS

8.8.1 Attribution of electronic records

According to section 11 of the IT Act an electronic record shall be attributed to the originator, if it was sent by the originator himself; or by a person who had the authority to act on behalf of the originator in respect of that electronic record; or by an information system programmed by or on behalf of the originator to operate automatically.

8.8.2 Acknowledgment of Receipt of Electronic Records

Section 12 of the IT Act provides that where the originator

has not agreed with the addressee that the acknowledgment of receipt of electronic record be given in a particular form or by a particular method, an acknowledgment may be given by any communication by the addressee, automated or otherwise; or any conduct of the addressee, sufficient to indicate to the originator that the electronic record has been received. [Sec-12(1)].

Where the originator has stipulated that the electronic record shall be binding only on receipt of an acknowledgment of such electronic record by him, then unless acknowledgment has been so received, the electronic record shall be deemed to have been never sent by the originator [Sec-12(2)].

Where the originator has not stipulated that the electronic record shall be binding only on receipt of such acknowledgment, and the acknowledgment has not been received by the originator within the time specified or agreed or, if no time has been specified or agreed to within a reasonable time, then the originator may give notice to the addressee stating that no acknowledgment has been received by him and specifying a reasonable time by which the acknowledgment must be received by him and if no acknowledgment is received within the aforesaid time limit he may after giving notice to the addressee, treat the electronic record as though it has never been sent[Sec-12(3)].

8.8.3 Time and place of dispatch and receipt of electronic record

According to Section 13 of the Act unless otherwise agreed between the originator and the addressee, the dispatch of an electronic record occurs when it enters a computer resource outside the control of the originator [Sec-13(1)].

Unless otherwise agreed between the originator and the addressee, the time of receipt of an electronic record shall be determined as follows:

(a) if the addressee has designated a computer resource for the purpose of receiving electronic records— receipt occurs at the time when the electronic record enters the designated computer resource; or if the electronic record is sent to a computer resource of the addressee that is not the designated computer resource, receipt occurs at the time when the electronic record is retrieved by the addressee;

(b) if the addressee has not designated a computer resource along with specified timings, if any, receipt occurs when the electronic record enters the computer resource of the addressee [Sec-13(2)].

Save as otherwise agreed between the originator and the addressee, an electronic record is deemed to be dispatched at the place where the originator has his place of business, and is deemed to be received at the place where the addressee has his place of business[Sec-13(3)].

The provisions of sub section (2) shall apply notwithstanding that the place where the computer resource is located may be different from the place where the electronic record is deemed to have been received under sub-section (3) [Sec-13(4)].

For the purposes of this section,

(a) if the originator or the addressee has more than one place of business, the principal place of business, shall be the place of business;

(b) if the originator or the addressee does not have a place of business, his usual place of residence shall be deemed to be the place of business;

(c) “usual place of residence”, in relation to a body corporate, means the place where it is registered.

8.8.4 Secure electronic record

Where any security procedure has been applied to an

electronic record at a specific point of time, then such record shall be deemed to be a secure electronic record from such point of time to the time of verification. **(Sec-14)**

8.8.5 Secure electronic signature

An electronic signature shall be deemed to be a secure electronic signature if the signature creation data, at the time of affixing signature, was under the exclusive control of signatory and no other person; and the signature creation data was stored and affixed in such exclusive manner as may be prescribed Explanation. In case of digital signature, the "signature creation data" means the private key of the subscriber. **(Sec-15)**

8.9 REGULATION OF CERTIFYING AUTHORITIES

8.9.1 Appointment of Controller and other officers

Under section 17 of the IT Act, the Central Government may, by notification in the Official Gazette, appoint a Controller of Certifying Authorities for the purposes of this Act and may also by the same or subsequent notification appoint such number of Deputy Controllers Assistant Controllers, other officers and employees as it deems fit.

8.9.2 Functions of Controller

Under section 18 of the IT Act, the Controller may perform all or any of the following functions, namely:

(a) exercising supervision over the activities of the Certifying Authorities;

(b) certifying public keys of the certifying authorities;

(c) laying down the standards to be maintained by the Certifying Authorities;

(d) specifying the qualifications and experience which employees of the Certifying Authorities should possess;

(e) specifying the conditions subject to which the Certifying Authorities shall conduct their business;

(f) specifying the contents of written, printed or visual material and Advertisements that may be distributed or used in respect of a Digital Signature Certificate and the Public Key;

(g) specifying the form and content of a Digital Signature Certificate and thekey;

(h) specifying the form and manner in which accounts shall be maintained by the Certifying Authorities;

(i) specifying the terms and conditions subject to which auditors may be appointed and the remuneration to be paid to them;

(j) facilitating the establishment of any electronic system by a Certifying Authority either solely or jointly with other Certifying Authorities and regulation of such systems;

(k) specifying the manner in which the Certifying Authorities shall conduct their dealings with the subscribers;

(l) resolving any conflict of interests between the Certifying Authorities and the subscribers;

(m) laying down the duties of the Certifying Authorities;

(n) maintaining a database containing of disclosure record of every Certifying Authority containing such particulars as may be specified by regulations, which shall be accessible to public.

8.9.3 Recognition of foreign Certifying Authorities

Subject to such conditions and restrictions as may be specified by regulations, the Controller may with the previous approval of the Central Government, and by notification in the Official Gazette, recognise any Foreign Certifying Authority as a Certifying Authority for the purposes of this Act. Where any Certifying Authority is recognized, the Electronic Signature Certificate issued by such Certifying Authority shall be valid for the purposes of this Act.

The Controller may, if he is satisfied that any Certifying Authority has contravened any of the conditions and restrictions

subject to which it was granted recognition he may, for reasons to be recorded in writing, by notification in the Official Gazette, revoke such recognition.(Sec-19)



CHECK YOUR PROGRESS

Q 3: What is secured electronic record under IT Act.?

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Q 4: Mention two functions of the controller.

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8.9.4 Licence to issue Electronic Signature Certificates

Subject to the provisions of this Act, any person may make an application, to the Controller, for a licence to issue Digital Signature Certificates.

No licence shall be issued under the Act, unless the applicant fulfills such requirements with respect to qualification, expertise, manpower, financial resources and other infrastructure facilities, which are necessary to issue Digital Signature Certificates as may be prescribed by the Central Government.

A licence granted under this section shall be valid for such period as may be prescribed by the Central Government; not transferable or heritable and subject to such terms and conditions as may be specified by the regulations (Sec-21).

8.9.5 Application for Licence

(1) Every application for issue of a licence shall be in such form as may be prescribed by the Central Government and shall accompanied by:

(a) a certification practice statement;

(b) a statement including the procedures with respect to identification of the applicant;

(c) payment of such fees, not exceeding twenty five thousand rupees as may be prescribed by the Central Government;

(d) such other documents, as may be prescribed by the Central Government. **(Sec-22)**

8.9.6 Renewal of Licence

An application for renewal of a licence shall be in such form and accompanied by such fees, not exceeding five thousand rupees, as may be prescribed by the Central Government and shall be made not less than forty five days before the date of expiry of the period of validity of the licence:

Provided that an application for the renewal of the licence made after the expiry of the licence may be entertained on payment of such late fee, not exceeding five hundred rupees, as may be prescribed. **(Sec-23)**

8.9.7 Suspension of Licence

The Controller may, if he is satisfied after making such inquiry, as he may think fit, that a Certifying Authority has,

(a) made a statement in, or in relation to, the application for the issue or renewal of the licence, which is incorrect or false in material particulars;

(b) failed to comply with the terms and conditions subject to which the licence was granted;

(c) failed to maintain the procedures and standards specified in section 30;

(d) contravened any provisions of this Act, rule, regulation or order made thereunder.[Sec-25(1)]

However, no licence shall be revoked unless the Certifying

Authority has been given a reasonable opportunity of showing cause against the proposed revocation.

The Controller may, if he has reasonable cause to believe that there is any ground for revoking a licence under sub-section (1), by order suspend such licence pending the completion of any inquiry ordered by him.

However, no licence shall be suspended for a period exceeding ten days unless the Certifying Authority has been given a reasonable opportunity of showing cause against the proposed suspension.[Sec-25(2)]

Further, No Certifying Authority whose license has been suspended shall issue any Electronic Signature Certificate during such suspension.[Sec-25(3)]

8.9.8 Procedures to be followed by Certifying Authority

Every Certifying Authority shall

(a) make use of hardware, software, and procedures that are secure from intrusion and misuse:

(b) provide a reasonable level of reliability in its services which are reasonably suited to the performance of intended functions;

(c) adhere to security procedures to ensure that the secrecy and privacy of the electronic signatures are assured; be the repository of all Electronic Signature Certificates issued under this Act or publish information regarding its practices, Electronic Signature Certificates and current status of such certificates; and observe such other standards as may be specified by regulations(Sec-30).

8.9.9 Surrender of licence

Every Certifying Authority whose licence is suspended or revoked shall immediately after such suspension or revocation, surrender the licence to the Controller. Where any Certifying Authority fails to surrender a licence, the person in whose favour a licence is

issued, shall be guilty of an offence and shall be punished with imprisonment which may extend up to six months or a fine which may extend up to ten thousand rupees or with both **(Sec-33)**.

8.10 ELECTRONIC SIGNATURE CERTIFICATES

8.10.1 Certifying Authority to issue Electronic Signature Certificate

Any person may make an application to the Certifying Authority for the issue of an Electronic Signature Certificate in such form as may be prescribed by the Central Government. Every such application shall be accompanied by such fee not exceeding twenty five thousand rupees as may be prescribed by the Central Government, to be paid to the Certifying Authority. Every such application shall be accompanied by a certification practice statement or where there is no such statement, a statement containing such particulars, as may be specified by regulations.

On receipt of an application, the Certifying Authority may, after consideration of the certification practice statement or the other statement and after making such enquiries as it may deem fit, grant the Electronic Signature Certificate or for reasons to be recorded in writing, reject the application.

Provided that no application shall be rejected unless the applicant has been given a reasonable opportunity of showing cause against the proposed rejection. (Sec-35)

8.10.2 Representations upon issuance of Digital Signature Certificate

Sec 36 of the I T Act provides that a Certifying Authority while issuing a Digital Signature Certificate shall certify that

(a) it has complied with the provisions of this Act and the rules and regulations made there under;

(b) it has published the Digital Signature Certificate or otherwise made it available to such person relying on it and the subscriber has accepted it;

(c) the subscriber holds the private key corresponding to the public key, listed in the Digital Signature Certificate;

(ca) the subscriber holds a private key which is capable of creating a digital signature

(cb) the public key to be listed in the certificate can be used to verify a digital signature affixed by the private key held by the subscriber;

(d) the subscriber's public key and private key constitute a functioning key pair;

(e) the information contained in the Digital Signature Certificate is accurate; and

(f) it has no knowledge of any material fact, which if it had been included in the Digital Signature Certificate would adversely affect the reliability of the representations made in clauses (a) to (d).

8.10.3 Suspension of Digital Signature Certificate (Sec-37)

Section 37 of the IT Act provides that Certifying Authority which has issued a Digital Signature Certificate may suspend such Digital Signature Certificate,

(a) on receipt of a request to that effect from

(i) the subscriber listed in the Digital Signature Certificate; or

(ii) any person duly authorised to act on behalf of that subscriber;

(b) if it is of opinion that the Digital Signature Certificate should be suspended in public interest.

A Digital Signature Certificate shall not be suspended for a period exceeding fifteen days unless the subscriber has been given

an opportunity of being heard in the matter. On suspension of a Digital Signature Certificate under this section, the Certifying Authority shall communicate the same to the subscriber.



CHECK YOUR PROGRESS

Q 5: When Digital Signature Certificate is suspended?

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8.10.4 Revocation of Digital Signature Certificate

Section 38 of the IT Act discuss about revocation of Digital Signature Certificate.

(1) A Certifying Authority may revoke a Digital Signature Certificate issued by it

- (a) where the subscriber or any other person authorised by him makes a request to that effect; or
- (b) upon the death of the subscriber; or
- (c) upon the dissolution of the firm or winding up of the company where the subscriber is a firm or a company.

(2) Subject to the provisions of sub-section (3) and without prejudice to the provisions of sub-section (1), a Certifying Authority may revoke a Digital Signature Certificate which has been issued by it at any time, if it is of opinion that

- (a) a material fact represented in the Digital Signature Certificate is false or has been concealed;
- (b) a requirement for issuance of the Digital Signature Certificate was not satisfied;
- (c) the Certifying Authority's private key or security system was compromised in a manner materially affecting the Digital Signature Certificate's reliability;
- (d) the subscriber has been declared insolvent or dead or

where a subscriber is a firm or a company, which has been dissolved, wound up or otherwise ceased to exist.

(3) A Digital Signature Certificate shall not be revoked unless the subscriber has been given an opportunity of being heard in the matter.

(4) On revocation of a Digital Signature Certificate under this section, the Certifying Authority shall communicate the same to the subscriber.

8.10.5 Notice of suspension or revocation (Sec-39)

Where a Digital Signature Certificate is suspended or revoked under section 37 or section 38, the Certifying Authority shall publish a notice of such suspension or revocation, as the case may be, in the repository specified in the Digital Signature Certificate for publication of such notice. Where one or more repositories are specified, the Certifying Authority shall publish notices of such suspension or revocation, as the case may be, in all such repositories.

8.11 THE CYBER APPELLATE TRIBUNAL

8.11.1 Establishment of Cyber Appellate Tribunal

The Central Government shall, by notification, establish one or more appellate tribunals to be known as the Cyber Appellate Tribunal. The Central Government shall also specify the matters and places in relation to which the Cyber Appellate Tribunal may exercise jurisdiction.

Cyber Appellate Tribunal has been setup under the IT Act under the aegis of Controller of Certifying Authorities. Initially the Tribunal was known as the Cyber Regulations Appellate Tribunal, which started functioning from October 2006. The Cyber Regulations Appellate Tribunal is renamed as Cyber Appellate Tribunal after the amendment of the IT Act in the year 2008. **(Sec-48)**

8.11.2 Composition of Cyber Appellate Tribunal

(1) The Cyber Appellate Tribunal shall consist of a Chairperson and such number of other Members, as the Central Government may, by notification in the Official Gazette, appoint.Provided that the person appointed as the Presiding Officer of the Cyber Appellate Tribunal under the provisions of this Act immediately before the commencement of the Information Technology (Amendment) Act, 2008 shall be deemed to have been appointed as the Chairperson of the said Cyber Appellate Tribunal under the provisions of this Act as amended by the Information Technology (Amendment) Act, 2008.

(2) The selection of Chairperson and Members of the Cyber Appellate Tribunal shall be made by the Central Government in consultation with the Chief Justice of India.

(3) Subject to the provisions of this Act

  (a) the jurisdiction, powers and authority of the Cyber Appellate Tribunal may be exercise by the Branches thereof;

  (b) a Bench may be constituted by the Chairperson of the Cyber Appellate Tribunal with one or two Members of such Tribunal as the Chairperson may deem fit;

  (c) the Benches of the Cyber Appellate Tribunal shall sit at New Delhi and at such other places as the Central Government may, in consultation with the Chairperson of the Cyber Appellate Tribunal, by notification in the Official Gazette, specify;

  (d) the Central Government shall, by notification in the Official Gazette, specify the areas in relation to which each Bench of the Cyber Appellate Tribunal may exercise its jurisdiction.

(4) Not with standing anything contained in sub-section (3), the Chairperson of the Cyber Appellate Tribunal may transfer a

Member of such Tribunal from one Bench to another Bench.

(5) If at any stage of the hearing of any case or matter it appears to the Chairperson or a Member of the Cyber Appellate Tribunal that the case or matter is of such a nature that it ought to be heard by a Bench consisting of more Members, the case or matter may be transferred by the Chairperson to such Bench as the Chairperson may deem fit. **(Sec-49)**

8.11.3 Qualifications for appointment as Chairperson and Members of Cyber Appellate Tribunal

(1) A person shall not be qualified for appointment as a Chairperson of the Cyber Appellate Tribunal unless he is, or has been, or is qualified to be, a Judge of a High Court.

(2) The Members of the Cyber Appellate Tribunal, except the Judicial Member to be appointed under sub-section (3), shall be appointed by the Central Government from amongst persons, having special knowledge of, and professional experience in, information technology, telecommunication, industry, management or consumer affairs. Provided that a person shall not be appointed as a Member, unless he is, or has been, in the service of the Central Government or a State Government, as has held the post of Additional Secretary to the Government of India or any equivalent post in the Central Government or State Government for a period of not less than one year or Joint Secretary to the Government of India or any equivalent post in the Central Government or State Government for a period of not less than seven years.

(3) The Judicial Members of the Cyber Appellate Tribunal shall be appointed by the Central Government from amongst persons who is or has been an member of the Indian Legal Service and has held the post of Additional Secretary for a period of not less than one year or Grade I post of that Service for a period of not less than five years. **(Sec-50)**

8.11.4 Term of office, conditions of service, etc., of Chairperson and Members

(1) The Chairperson or Member of the Cyber Appellate Tribunal shall hold office for a term of five years from the date on which he enters upon his office or until he attains the age of sixty five years, whichever is earlier.

(2) Before appointing any person as the Chairperson or Member of the Cyber Appellate Tribunal, the Central Government shall satisfy itself that the person does not have any such financial or other interest as is likely to affect prejudicially his functions as such Chairperson or Member.

(3) An officer of the Central Government or State Government on his selection as the Chairperson or Member of the Cyber Appellate Tribunal, as the case may be, shall have to retire from service before joining as such Chairperson or Member. **(Sec-51)**

8.11.5 Appeal to Cyber Appellate Tribunal

Section 57 of the IT Act prescribes the procedures of making an apple to the Tribunal.

(1) Save as provided in sub-section (2) any person aggrieved by an order made by an adjudicating officer under this Act may prefer an appeal to a Cyber Tribunal having jurisdiction in the matter.

(2) No appeal shall lie to the Cyber Appellate Tribunal from an order made by an adjudicating officer with the consent of the parties.

(3) Every appeal under sub-section (1) shall be filed within a period of forty five days from the date on which a copy of the order made by the controller or the adjudicating officer is received by the person aggrieved and it shall be in such form and be accompanied by such fee as may be prescribed. Provided that the Cyber Appellate Tribunal may entertain an appeal after

the expiry of the said period of forty five days if it is satisfied that there was sufficient cause for not filing it within that period.

(4) On receipt of an appeal under sub-section (1) the Cyber Appellate Tribunal may, after giving the parties to the appeal, an opportunity of being heard, pass such orders thereon as it thinks fit, confirming, modifying or setting aside the order appealed against.

(5) The Cyber Appellate Tribunal shall send a copy of every order made by it to the parties to the appeal and to the concerned controller or adjudicating officer.

(6) The appeal filed before the Cyber Appellate Tribunal under sub-section (1) shall be dealt with by it as expeditiously as possible and endeavor shall be made by it to dispose of the appeal finally within six months from the date of receipt of the appeal.

8.11.6 Procedure and powers of the Cyber Appellate Tribunal

(1) The Cyber Appellate Tribunal shall not be bound by the procedure laid down by the Code of Civil Procedure, 1908 (5 of 1908) but shall be guided by the principles of natural justice and, subject to the other provisions of this Act and of any rules, the Cyber Appellate Tribunal shall have powers to regulate its own procedure including the place at which it shall have its sittings.

(2) The Cyber Appellate Tribunal shall have, for the purposes of discharging its functions under this Act, the same powers as are vested in a civil court under the Code of Civil Procedure, 1908 (5 of 1908), while trying a suit, in respect of the following matters, namely:

(a) summoning and enforcing the attendance of any person and examining him on oath;

(b) requiring the discovery and production of documents or other electronic records;

(c) receiving evidence on affidavits;

(d) issuing commissions for the examination of witnesses or documents;

(e) reviewing its decisions;

(f) dismissing an application for default or deciding it ex parte;

(g) any other matter which may be prescribed.

(3) Every proceeding before the Cyber Appellate Tribunal shall be deemed to be a judicial proceeding within the meaning of sections 193 and 228, and for the purposes of section 196 of the Indian Penal Code and the Cyber Appellate Tribunal shall be deemed to be a civil court for the purposes of section 195 and Chapter XXVI of the Code of Criminal Procedure, 1973 (2 of 1974). **(Sec-58)**

8.11.7 Civil court not to have jurisdiction

No court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which an adjudicating officer appointed under this Act or the Cyber Appellate Tribunal constituted under this Act is empowered by or under this Act to determine and no injunction shall be granted by any court or other authority in respect of any action taken or to be taken in pursuance of any power conferred by or under this Act. **(Sec-61)**

8.11.8 Appeal to High court

Any person aggrieved by any decision or order of the Cyber Appellate Tribunal may file an appeal to the High Court within sixty days from the date of communication of the decision or order of the Cyber Appellate Tribunal to him on any question of fact or law arising out of such order. Provided that the High Court may, if it is satisfied that the appellant was prevented by sufficient cause from filing the appeal within the said period, allow it to be filed within a further period not exceeding sixty days. **(Sec-62)**

8.12 OFFENCES AND PENALTIES UNDER THE ACT

8.12.1 Tampering with computer source documents

Whoever knowingly or intentionally conceals, destroys or alters or intentionally or knowingly causes another to conceal, destroy or alter any computer source code used for a computer, computer programme, computer system or computer network, when the computer source code is required to be kept or maintained by law for the time being in force, shall be punishable with imprisonment up to three years, or with fine which may extend up to two lakh rupees, or with both.

For the purposes of this section, “computer source code” means the listing of programmes, computer Commands, design and layout and programme analysis of computer resource in any form. **(Sec-65)**

8.12.2 Computer related offences

If any person, dishonestly or fraudulently, does any act referred to in section 43, he shall be punishable with imprisonment for a term which may extend to three years or with fine which may extend to five lakh rupees or with both.

Explanation, For the purpose of this section,

(a) the word “dishonesty” shall have the meaning assigned to it in section 24 of the Indian Penal Code (45 of 1860).

(b) the word “fraudulently” shall have the meaning assigned to it in section 25 of the Indian Penal Code (45 of 1860).(Ses-66)

8.12.3 Punishment for sending offensive messages through communication service, etc.

Any person who sends, by means of a computer resource or a communication device,

(a) any information that is grossly offensive or has meaning character, or

(b) any information which he knows to be false, but for the purpose of causing annoyance, inconvenience, danger, obstruction, insult, injury, criminal intimidation, enmity, hatred or ill will, persistently by making use of such computer resource or a communication device; or

(c) any electronic mail or electronic mail massage for the purpose of causing annoyance or inconvenience or to deceive or to mislead the addressee or recipient about the origin of such massage,shall be punishable with imprisonment for a term which may extend to three years and with fine.

Explanation, For the purposes of this section, terms "electronic mail" and "electronic mail message" means a message or information created to transmitted or received on a computer, computer system, computer resource or communication device including attachments in text, image, audio, video and any other electronic record, which may be transmitted with the message.[Sec-66(A)]

8.12.4 Punishment for dishonestly receiving stolen computer resource or communication device

Whoever dishonestly receives or retains any stolen computer resource or communication device knowing or having reason to believe the same to be stolen computer resource or communication device, shall be punished with imprisonment of either description for a term which may extend to three years or with fine which may extend to rupees one lakh or with both. [Sec-66(B)]

8.12.5 Punishment for identity theft

Whoever, fraudulently or dishonestly make use of the electronic signature, password or any other unique identification feature of any other person, shall be punished with imprisonment of

either description for a term which may extend to three years and shall also be liable to fine which may extend to rupees one lakh. [Sec-66(C)]

8.12.6 Punishment for cheating by personation by using computer resource

Whoever, by means of any communication device or computer resource cheats by personation, shall be punished with imprisonment of either description for a term which may extend to three years and shall also be liable to fine which may extend to one lakh rupees. [Sec-66(D)]

8.12.7 Punishment for violation of privacy

Whosoever, intentionally or knowingly captures, publishes or transmits the image of a private area of any person without his or her consent, under circumstances violating the privacy of that person, shall be punished with imprisonment which may extend to three years or with fine not exceeding two lakh rupees, or with both. [Sec-66(E)]

Explanation, For the purposes of this section

(a) ”transmit” means to electronically send a visual image with the internet that it be viewed by a person or persons;

(b) ”capture”, with respect to an image, means to videotape, photograph, film or record by any means;

(c) ”private area” means the naked or undergarment clad genitals, public area, buttocks or female breast;

(d) ”publishes” means reproduction in the printed or electronic form and making it available for public;

(e) ”under circumstances violating privacy” means circumstances in which a person can have a reasonable expectation that

  (i) he or she could disrobe in privacy, without being concerned that an image of his private area was being captured; or

(ii) any part of his or her private area would not be visible to the public regardless of whether that person is in a public or private place.

8.12.8 Punishment for cyber terrorism

Whosoever, with intent to threaten the unity, integrity, security or sovereignty of India or to strike terror in the people or any section of the people by

(i) denying or cause the denial of access to any person authorised to access computer resource; or

(ii) attempting to penetrate or access a computer resource without authorization or exceeding authorised access; or

(iii) introducing or causing to introduce any computer contaminant, and by means of such conduct causes or is likely to cause death or injuries to persons or damage to or destruction of property or disputes or knowing that it is likely to cause damage or disruption of supplies or services essential to the life of the community or adversely affect the critical information infrastructure specified under section 70; or knowingly or intentionally penetrates or accesses a computer resource without authorisation or exceeding authorised access, and by means of such conduct obtains access to information, data or computer database that is restricted for reasons of the security of the state or foreign relations; or any restricted information, data or computer database, with reasons to believe that such information, data or computer database so obtained may be used to cause or likely to cause injury to the interests of the sovereignty and integrity of India, the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence, or to the advantage of any foreign nation, group of individuals or otherwise, commits the offence of cyber terrorism.

Whoever commits or conspires to commit cyber terrorism shall be punishable with imprisonment which may extend to imprisonment for life. [Sec-66(F)]

8.12.9 Punishment for publishing or transmitting obscene material in electronic form

Whoever publishes or transmits or causes to be published or transmitted in the electronic form, any material which is lascivious or appeals to the prurient interest or if its effect is such as to tend to deprave and corrupt persons who are likely, having regard to all relevant circumstances, to read, see or hear the matter contained or embodied in it, shall be punished on first conviction with imprisonment of either description for a term which may extend to three years and with fine which may extend to five lakh rupees and in the event of a second or subsequent conviction with imprisonment of either description for a term which may extend to five years and also with fine which may extend to ten lakh rupees. [Sec-67]

8.12.10 Punishment for publishing or transmitting of material containing sexually explicit act, etc., in electronic form

Whoever publishes or transmits or causes to be published or transmitted in the electronic form any material which contains sexually explicit act or conduct shall be punished on first conviction with imprisonment of either description for a term which may extend to five years and with fine which may extend to ten lakh rupees and in the event of second or subsequent conviction with imprisonment of either description for a term which may extend to seven years and also with fine which may extend to ten lakh rupees. [Sec-67(A)]

8.12.11 Punishment for publishing or transmitting of material depicting children in sexually explicit act, etc., in electronic form

Whoever, (a) publishes or transmits or causes to be published or transmitted material in any electronic form which depicts children engaged in sexually explicit act or conduct; or

(b) creates text or digital images, collects, seeks, browses, downloads, advertises, promotes, exchanges or distributes material in any electronic form depicting children in obscene or indecent or sexually explicit manner; or

(c) cultivates, entices or induces children to online relationship which one or more children for and on sexually explicit act or in a manner that may offend a reasonable adult on the computer resource; or

(d) facilitates abusing children online; or

(e) records in any electronic form own abuse or that of others pertaining to sexually explicit act with children, shall be punished on first conviction with imprisonment of either description for a term which may extend to five year and with fine which may extend to ten lakh rupees and in the event of second or subsequent conviction with imprisonment of either description for a term which may extend to seven years and also with fine which may extend to ten lakh rupees;

Provided that provisions of section 67, section 67A and this section does not extend to any book, pamphlet, paper, writing, drawing, painting representation or figure in electronic form—

(i) the publication of which is proved to be justified as being for the public good on the ground that such book, pamphlet, paper, writing, drawing, painting representation or figure is in the interest of science, literature, art or learning or other objects of general concern; or

(ii) which is kept or used for bona fide heritage or religious purpose.

Explanation, For the purpose of this section, “children” means a person who has not completed the age of 18 years. [Sec-67(B)]

8.12.12 Indian Computer Emergency Response Team to serve as national agency for incident response

(1) The Central Government shall, by notification in the Official Gazette, appoint an agency of the Government to be called the Indian Computer Emergency Response Team.

(2) The Central Government shall provide the agency referred to in sub-section (1)with a Director General and such other officers and employees as may be prescribed .

(3) The salary and allowances and terms and conditions of the Director General and other officers and employees shall be such as may be prescribed.

(4) The Indian Computer Emergency Response Team shall serve as the national agency for performing the following functions in the area of cyber security-

  (a) collection, analysis and dissemination of information on cyber incidents;

  (b) forecast and alerts of cyber security incidents;

  (c) emergency measures for handling cyber security incidents;

  (d) coordination of cyber incidents response activities;

  (e) issue guidelines, advisors, vulnerability notes and whitepapers relating to information security practices, procedures, prevention, response and reporting of cyber incidents;

  (f) such other functions relating to cyber security as may be prescribed.

(5) The manner of performing functions and duties of the agency referred to in sub-section (1) shall be such as may be prescribed.

(6) For carrying out the provisions of sub-section (4), the agency referred to in sub-section (1) may call for information and give direction to the service providers, intermediaries, data centers, body corporate and any other person.

(7) Any service provider intermediaries, data centers, body corporate or person who fails to provide the information called for the comply with the direction under sub-section (6), shall be punishable with imprisonment for a term which may be extend to one year with fine which may extend to one lakh rupees or with both.

(8) No court shall take cognizance of any offence under this section, except on a complaint made by an officer authorised in this behalf by the agency referred to in sub-section (1).]

8.12.13 Penalty for misrepresentation

Whoever makes any misrepresentation to, or suppresses any material fact from, the Controller or the Certifying Authority for obtaining any licence or Electronic Signature Certificate, as the case may be, shall be punished with imprisonment for a term which may extend to two years, or with fine which may extend to one lakh rupees, or with both. (Sec-71)

8.12.14 Penalty for breach of confidentiality and privacy

Save as otherwise provided in this Act or any other law for the time being in force, any person who, in pursuant of any of the powers conferred under this Act, rules or regulations made the reunder, has secured access to any electronic record, book, register, correspondence, information, document or other material without the consent of the person concerned discloses such electronic record, book, register, correspondence, information, document or other material to any other person shall be punished with imprisonment for a term which may extend to two years, or with fine which may extend to one lakh rupees, or with both.(Sec-72)

8.12.15 Punishment for disclosure of information in breach of lawful contract

Save as otherwise provided in this Act or any other law for the time being in force, any person including an intermediary who, while providing services under the terms of lawful contract, has secured access to any material containing personal information about another person, with the intent to cause or knowing that he is likely to cause wrongful loss or wrongful gain discloses, without the consent of the person concerned, or in breach of a lawful contract, such material to any other person, shall be punished with imprisonment for a term which may extend to three years, or with fine which may extend to five lakh rupees, or with both.[Sec-72(A)]

8.12.16 Penalty for publishing Electronic Signature Certificate false in certain particulars

No person shall publish an Electronic Signature Certificate or otherwise make it available to any other person with the knowledge that

(a) the Certifying Authority listed in the certificate has not issued it; or

(b) the subscriber listed in the certificate has not accepted it; or (c) the certificate has been revoked or suspended, unless such publication is for the purpose of verifying an electronic signature created prior to such suspension or revocation.

Any person who contravenes this provisions shall be punished with imprisonment for a term which may extend to two years, or with fine which may extend to one lakh rupees, or with both.(Sec-73)

8.12.17 Publication for fraudulent purpose

Whoever knowingly creates, publishes or otherwise makes

available an Electronic Signature Certificate for any fraudulent or unlawful purpose shall be punished with imprisonment for a term which may extend to two years, or with fine which may extend to one lakh rupees, or with both. (Sec-74)

8.12.18 Confiscation

Any computer, computer system, floppies, compact disks, tape drives or any other accessories related thereto, in respect of which any provision of this Act, rules, orders or regulations made thereunder has been or is being contravened, shall be liable to confiscation. *Provided* that where it is established to the satisfaction of the court adjudicating the confiscation that the person in whose possession, power or control of any such computer, computer system, floppies, compact disks, tape drives or any other accessories relating thereto is found is not responsible for the contravention of the provisions of this Act, rules, orders or regulations made thereunder, the court may, instead of making an order for confiscation of such computer, computer system, floppies, compact disks, tape drives or any other accessories related thereto, make such other order authorised by this Act against the person contravening of the provisions of this Act, rules, orders or regulations made thereunder as it may think fit.(Sec-76)



8.13 LET US SUM UP

- The Information Technology Act, 2000 was enacted in year 2000 and it was further amended in Year 2008 by IT Amendment Act, 2008.
- The Act aims to provide the legal infrastructure for e-commerce in India. The Act also aims to provide for the legal framework so that legal sanctity is accorded to all electronic records and other activities carried out by electronic means.

- The IT Act gives a scheme for Regulation of Certifying Authorities. The Act envisages a Controller of Certifying Authorities who shall perform the function of exercising supervision over the activities of the Certifying Authorities as also laying down standards and conditions governing the Certifying Authorities as also specifying the various forms and content of Electronic Signature Certificates. The Act recognizes the need for recognizing foreign Certifying Authorities and it further details the various provisions for the issue of license to issue Electronic Signature Certificates.
- The IT Act laid down various provisions for penalties, Compensation and adjudication for various offences.
- The IT Act laid down provisions for establishment of the Cyber Appellate Tribunal, which shall be an appellate body where appeals against the orders passed by the Adjudicating Officers, shall be preferred.



8.14 ANSWERS TO CHECK YOUR PROGRESS

Ans to Q No 1: According to Sec. 2 (1) (*p*) "digital signature" means authentication of any electronic record by a subscriber by means of an electronic method or procedure in accordance with the provisions of section 3.

Ans to Q No 2: According to Sec. 2 (1) (*o*) "data" means a representation of information, knowledge, facts, concepts or instructions which are being prepared or have been prepared in a formalized manner, and is intended to be processed, is being processed or has been processed in a computer system or computer network, and may be in any form (including computer printouts, magnetic or optical storage media, punched cards, punched tapes) or stored internally in the memory of the Computer.

Ans to Q No 3: According to Sec 14 of the Act, Where any security procedure has been applied to an electronic record at a specific point of time, then such record shall be deemed to be a secure electronic record from such point of time to the time of verification.

Ans to Q No 4: (a) exercising supervision over the activities of the Certifying Authorities;

(b) certifying public keys of the certifying authorities;

Ans to Q No 5: a Digital Signature Certificate may suspend,

(a) on receipt of a request to that effect from the subscriber listed in the Digital Signature Certificate; or any person duly authorised to act on behalf of that subscriber;

(b) if it is of opinion that the Digital Signature Certificate should be suspended in public interest.

A Digital Signature Certificate shall not be suspended for a period exceeding fifteen days unless the subscriber has been given an opportunity of being heard in the matter. On suspension of a Digital Signature Certificate under this section, the Certifying Authority shall communicate the same to the subscriber.



8.15 MODEL QUESTIONS

Q 1: Explain briefly the objectives of the Information Technology Act 2000 as amended.

Q 2: What are the conditions subject to which electronic record may be authenticated by means of affixing electronic signature?

Q 3: Discuss theprovisions ofthe Information Technology Act 2000 as amended to facilitate E-governance

Q 4: What are the regulations relating to the appointment and powers of the certifying authorities underInformation Technology Act 2000 as amended?

Q 5: Explain the duties of a certifying authority under Information Technology Act 2000 as amended?

Q 6: Describe the composition and powers of Cyber appellate tribunal.

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UNIT 9: REGULATORY FRAMEWORK FOR INSURANCE

UNIT STRUCTURE

9.1 Learning Objectives

9.2 Introduction

9.3 Concept and Importance of Insurance

9.4 Evolution and Development of Insurance in India

9.5 Fundamental Principles of Insurance

9.6 Double Insurance and Reinsurance

9.7 Concept and Importance of Life insurance

9.8 Concept of Marine Insurance

9.9 Concept and Features of Fire Insurance

9.10 Let Us Sum Up

9.11 Further Reading

9.12 Answers to Check Your Progress

9.13 Model Questions

9.1 LEARNING OBJECTIVES

After going through this unit you will be able to

- discuss the concept and importance of insurance
- explain the evolution and stages of development of insurance in India
- explain the principles of insurance
- discuss the rights of insurer and policy holder
- differentiate between double insurance and reinsurance
- explain the concept and importance of Life, Marine and Fire Insurance.

9.2 INTRODUCTION

In our day to day life we all anticipate and face various kinds of risks. No one can foresee the loss he may suffer in future. He who walks on road, works in office, fields, shops etc may anticipate variety of risks. Similarly,

there can be loss due to floods, earthquakes, disease, fire etc. Every risk may result in loss of one or the other kind, wherever there is uncertainty to a probable loss of one or of the other kind. If it is small, he may bear it. But if it is large he may not be in a position to bear it at its own. It is possible to take precautions again such events. Hence, it would be wise to adopt a device or plan to provide help to those who suffer a loss. Such a device is 'Insurance' which safeguards the person from various risks which he anticipates.

9.3 CONCEPT AND IMPORTANCE OF INSURANCE

The aim of all kinds of insurance is to provide help to those who happen to suffer a loss. Most of the losses can be identified in terms of money. The risk of loss can not be averted but loss occurred can be distributed among the agreed persons. Insurance is an assurance that if a particular kind of event happens, the insured person will be paid the money. The person who seeks such protection against such a risk is called the 'insured' or 'assured' and who undertakes to protect such person from financial loss or some mishappening is called the 'insurer' or 'assurer or 'underwriter', and the consideration collected by the insurer companies to provide such security is called the 'premium' or 'premia'. The document containing term and conditions of contract is called the 'policy' or 'insurance policy'.

It is the universally accepted phenomenon that what is created will be destroyed. No one can predict or foresee the time of destruction or loss he may suffer in future. Every risk result in loss of one or other kind. The risk cannot be eliminated but loss can be. This desire to protect a person from uncertain loss brings the business of insurance into existence.

The function of insurance is to protect the insured from variety of risks he anticipates by spreading the loss to persons who agreed to co-operate each other at the time of loss by making contributions to the common fund.

Illustration:

In a town, there are 500 car owners. Each car can be valued Rs.3,00,000. Every year 1 car is lost due to theft. If all the 500 car owners agree to come together and each one contribute Rs.600 annually, the common fund would be Rs. 3,00,000 a year. This would be sufficient to pay Rs. 3,00,000 to the Contributor whose car is lost due to theft. Thus, the risk of one contributor is distributed amongst the 500 contributors of the town.

Definition of Insurance

The definition of insurance can be classified under two categories:

I. *Functional Definitions* - According to Allen C. Mayerson, " Insurance is a device for the transfer of certain risks of economic loss to an insured, that would otherwise be borne by the insured."

As per Disnadle, " Insurance is an instrument of distributing the loss of few among many."

II. *Contractual definition*- According to E.W.Patterson, " Insuance is a contract by which one party, for a considertion called premium, assumes a particular risk of the other party and promises to pay to him or his nominee a certain or ascertainable sum of amount on a specified contingency."

According to MacLean "Insurance is a method of spreading over a large number of persons a possible financial loss too serious to be conveniently borne by an individual.

There are various Forms of Insurance. Such as -

I) Marine Insurance

II) Fire Insurance

III) Life Insurance and

IV) Miscellaneous Insurance.



CHECK YOUR PROGRESS

Q. 1: Define insurance

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Importance of Insurance

Human beings, his family and properties are always exposed to different kinds of risks. Risk involve the losses. Insurance is a tool which reduces the cost of loss or effect of loss caused by variety of risk. It accumulates funds to meet individual losses. It is not device to prevent unwanted event of happening or cause of loss but protects them against that loss by compensating which is lost. The role and importance of insurance are discussed as follows:

1. *Insurance provides security*

Insurance provides safety and security against the loss on a particular event. Life insurance provides security against death and old age sufferings. Fire insurance protects against loss due to fire while Marine insurance provides protection and safety against loss of ship and cargo. For personal accident and sickness insurance financial protection is given when the individual is unable to earn. In other insurance too, this security is provided against the loss at a given contingency.

2. Insurance reduces business risk or losses

In Business, commerce and industry, huge properties are employed. Because of slight negligence, the property may be turned in to ashes. A person may not be sure of his life, health and cannot continue the business up to the longer period to support his dependents. With the help of insurance, he can be sure of his earning, because the insurance company will pay a fixed amount at the time of death, damage by fire, theft, accident and other perils.

3. Insurance provides peace of mind

Insurance removes the tensions, fears, anxiety, frustration and weakness of the human mind associated with the future uncertainty. By providing financial support and promise to compensate losses arising out from various risk, it provides peace of mind and stimulates more and better work performance of an individual.

4. Life insurance encourages saving

In some specified life insurance policies, the insured has an obligation to pay premium regularly and cannot be withdrawn easily before

the expiry of the term of policy. Life insurance encourages the habit of regular and systematic saving through premium and after a certain period, it would be a part of necessary saving of the insured person.

5. Insurance accelerates the economic growth of the country

To develop the economic growth of the country, insurance provides strong hand and mind, with protection against loss of property and capital to produce more wealth. It provides protection against different kinds of loss caused by risk. It accumulates the capital from the insured and utilizes for the development of country. Thus, the insurance meets all the requirements for the economic growth of a country.

6. Insurance provides credit facilities

The insured person can get loan by pledging insurance policy and the interest will not exceed the cash value of policy charged by insurer. In case of death of insured person, the policy can be utilized for setting of the loan with interest. Business person can take loan on the basis of insurance documents from the bank also.

7. Insurance helps to reduce inflation

Inflation created from over supply of money and on less production entities. Insurance can help to reduce the inflationary pressure in two ways. Firstly, it collects money as an amount of premium which controls over supply of money and secondly, it provides sufficient funds for increase production entities. Thus, it reduces the impact of inflation.

8. Insurance makes security and welfare of employees

The security and welfare of employees is the responsibility of employer. These security and welfare can easily be met by life insurance, accident and sickness benefit and pension which are generally covered by group insurance. The premium for group insurance is normally bear by the employer. Insurance is the simple method for employer to fulfill their responsibility. Due to these benefits, employees will devote their maximum capacities to complete their job.

9. Other Importances of Insurance

a) Insurance helps to promote foreign trade providing protection again trade risk.

b) Insurance increases business efficiency eliminating the loss of damage, destruction, or disappearance of property of goods.

c) Insurance protects the social wealth providing protection against social evil.

d) Development of insurance business helps to solve the evil of unemployment, generating employment opportunity in the country.

e) The insured gets tax benefit in life insurance.



CHECK YOUR PROGRESS

Q. 2: State the importance of insurance.

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9.4 EVOLUTION AND DEVELOPMENT OF INSURANCE IN INDIA

The development of insurance sector in India has been phenomenon. The insurance industry has undergone massive change over the last millennium extending to nearly 200 years. There are numerous private and governmental insurance companies in India that offered a diversified product portfolio and excellent services. As a result, many of the insurance companies in India have managed to make their presence into almost every Indian household by one way or the other

In Indian scenario the roots of Insurance has their origin in the era of Sage Manu (Rishi Manu) and later in Maurya Dynasty in the era of Kautilya (i.e. Chanakya) who has written the rules of Arthshastra (Economics). “Manav Dharma Shastra” (Laws of Manu) of Manu contained rules for “Sea-Form” contracts which were practised for doing international trade. In Kautilya’s Arthshastra one of the chapters has mentioned about the protection of State to the people against any natural calamity, theft or any act of Anti-Social-Elements. In this way India has the origin of Insurance thousands of years back and later it has evolved in present codified form in the Influence of English Rule which was prevailing all over the world at one point of time.

To understand the Development of Insurance in India we have to look into the development of Insurance Laws in India. Since it's a necessity and compulsion on Business doers to evolve-conceptualize-amend their policies/strategies in accordance with the Laws of the Land to do hassle-free business.

The Indian Insurance Scenario has changed gradually in the following manner:

1938 – This is the year when a comprehensive Act called The Insurance Act, 1938 has been introduced.

1939 – In this year the Insurance Rules were framed for effectuating the Insurance Act.

1956 – This year has witnessed a huge change in the Indian Insurance Sector since the Government of India took over all life insurance companies.

1968 – In 1968 The Insurance Act, 1938 was amended to provide for social control, minimum solvency margin and a Tariff Advisory Committee (TAC) has also been established.

1972 – This year witnessed the Nationalization of General Insurance Companies and for this General Insurance Business (Nationalization) Act, 1972 was passed.

1973 – The General Insurance Corporation of India (GIC) came into existence as a Government Company.

1974 – A year later 107 insurers practising General Insurance business were grouped and merged to form four subsidiaries of GICs namely – National Insurance Co. Ltd., The New India Assurance Co. Ltd., The Oriental Insurance Co. Ltd. and United India Insurance Co. Ltd.

1991 – The Public Liability Insurance Act 1991 and Public Liability Insurance Rules 1991 were introduced as another milestone in the series of Public Welfare Laws in India.

1994 – The Malhotra Committee submitted its report in January 1994 (set up by Govt. in 1993 under Chairmanship of Shri R.N. Malhotra, former Governor of RBI, to examine potential reforms that could be undertaken in the insurance sector and complement them with

reforms initiated in the other sectors) submitted its report in January 1994 and recommended establishment of a strong and effective insurance regulatory authority.

1998 – Insurance Ombudsman Redressal of Public Grievances Rules, 1998 were issued to provide Consumers a Forum with minimal formalities to get their grievances resolved.

1999 – This year has the great relevance in the history of Indian Insurance Sector because of establishment of the Insurance Regulatory and Development Authority (IRDA) to regulate, promote and ensure orderly growth of the insurance and reinsurance business in India on the basis of Malhotra Committee Report.

2001 – The year of 2001 brought another transformation in the Insurance Business of India because in addition to the existing Government insurance companies, Private Sector Companies were also licensed by IRDA to conduct general insurance business in India.

2002 – An important amendment was made in General Insurance Business (Nationalization) Amendment Act, 2002 by which the subsidiaries of GIC were restructured as independent companies and GIC was converted into National Re-insurer.

2003 – This year witnessed the introduction of Broker for first time in Indian Insurance Market to boost up the business in more widened manner.

2015 – The Insurance Laws (Amendment) Act, 2015 was passed to increase the Ceiling of FDI from 26% to 49% and in this manner the Insurance Business in India has been widely opened for Foreign Giants of Insurance.

9.5 THE FUNDAMENTAL PRINCIPLES OF INSURANCE

(i) ***Principle of Utmost Good Faith***

A contract of insurance is based on the principle of utmost good faith to be observed by both the parties – the insured and the insurance company – towards each other. If one party conceals any material

information from the other party, which may influence the other party's decision to enter into the contact of insurance; the other party can avoid the contract.

The principle of utmost good faith is equally applicable to both the parties. However, the onus (i.e. burden) of making a full and fair disclosure of all material facts usually rests primarily upon the insured; because the insured is supposed to have an intimate knowledge of the subject-matter of insurance.

The duty of disclosing material facts is not a continuing obligation i .e. the insured is under no obligation to disclose any material fact which comes to his knowledge after the conclusion of the contract of insurance.

(ii) ***The Principle of Indemnity***

Except life insurance, all other contracts of insurance are contacts of indemnity; which means that in the event of the loss caused to the subject matter of insurance, the insured can recovery only the actual amount of loss-subject to a maximum of sum assured.

Suppose A insured his house against fire with an insurance company for Rs. 1, 00,000. The loss caused to the house due to fire is Rs. 80, 000 only. A can recovery only Rs.80, 000 from the insurance company.

(iii) ***Principle of Insurable Interest***

The principle of insurable interest is the foundation of a contract of insurance. In the absence of insurable interest, the contract of insurance is a mere gamble and not enforceable in a court of law.

Insurable interest may be defined as follows:

A person is said to have insurable interest in the subject matter of insurance; when with respect to the subject matter he is so situated that he will benefit from its existence and lose from its destruction.

Insurable interest must exist in life, fire and marine insurances, as per the following rules:

(1) In case of life insurance; insurable interest must exist at the time of making the contract.

(2) In case of fire insurance; insurable interest must exist both at the time of making the contract and also at the time of loss.

(3) In case of marine insurance; insurable interest must exist, at the time of loss.

(iv) ***Principle of Contribution***

The principle of contribution applies in cases of double-insurance. In case of double insurance, each insurer will contribute to the total payment in proportion to the amount assured by each. In case, one insurer has paid the full amount of loss; he can claim proportionate contribution from other insurers.

Suppose, A insures his house against fire with two insurance companies, X and Y, for Rs.40, 000 and Rs.80, 000 respectively. If the houses catches fire and the actual loss amount to Rs.48, 000, then

X will pay Rs. 16,000 to A

And Y will pay Rs.32, 000 to a

i.e. the loss of Rs.48, 000 is divided between X and Y in the ratio of 40, 000: 80,000 or 1:2.

If X pays the whole loss of Rs.48, 000 to A; it can recover Rs.32, 000 from Y. And if Y pays Rs.48, 000 to A; it can recover Rs. 16,000 from X.

The principle of contribution does not apply to life insurance; where each insurer will pay the full amount of policy to the insured; because life insurance is a sort of investment and life insurance contract is not a contract of indemnity.

(v) ***Principle of Subrogation***

According to the principle of subrogation, after the insurance company has compensated for the loss caused to the insured; the insurance company steps into the shoes of the insured i.e. the insurance company acquires all the rights of the insured, in respect of the damaged property.

Suppose A insures his house for Rs.2, 00,000 against fire. The house is fully damaged by fire and the insurance company pays Rs.2, 00,000 to A. Later on, the damaged house is sold for Rs.25, 000. The insurance company is entitled to receive this sum of Rs.25, 000. Suppose further, it is found that someone tried to put the house on fire.

The insurance company can take action against that person also;

because the insurance company acquires all the rights and remedies available to the insured i.e. Mr. A.

Implications of the principle of subrogation are:

(1) The insurance company gets the rights of the insured, only after compensating for the loss caused to the insured.

(2) This principle does not apply to life insurance.

(vi) ***Principle of Cause Proxima (i.e. the Proximate Cause)***

According to this principle, we find out the proximate cause or the nearest cause of loss to the insured property. If the nearest cause of loss is a factor which is insured against; then only the insurance company is liable to compensate for the loss, otherwise not. This principle is significant in cases when the loss is caused by a series of events.

Suppose X has taken a marine insurance policy against loss or damage to goods caused by sea water. During the voyage rats made a hole in the bottom of the ship, through which sea water seeped into the ship and caused damaged to the goods.

Here, the insurance company is liable to compensate for loss caused to goods; because the proximate cause of loss is sea-water against which insurance is affected. Making of a hole in the bottom of the ship by rats is only the remote cause of loss.

(vii) ***Principle of Mitigation of Loss:***

(Mitigation means making something less harmful). According to the principle of mitigation of loss, it is the duty of the insured to take all possible steps to minimize the loss caused to the property covered by the insurance policy. He should behave as a prudent person and must not become careless after taking the insurance policy.

Suppose a house is insured against fire and a fire breaks out. The owner must immediately inform the Fire Brigade department and do each and every thing to extinguish fire; as if the house were not insured. That is, he must make all efforts to minimize the loss caused by fire.



CHECK YOUR PROGRESS

Q. 3: State the Principle of Utmost Good Faith.

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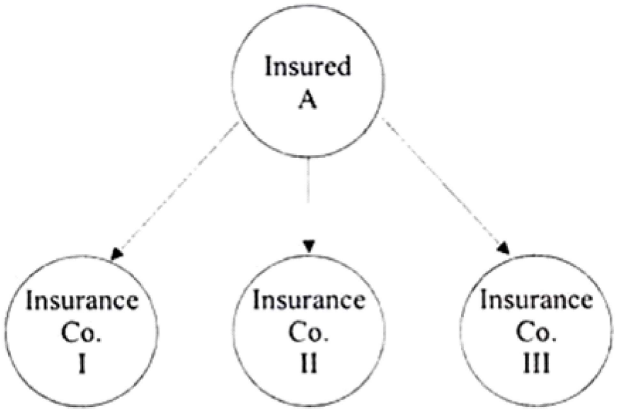
Q. 4: State the Principle of Indemnity.

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9.6 DOUBLE INSURANCE AND REINSURANCE

It is quite possible for a person to take more than one insurance policy to cover the same risk. This is known as double insurance



In the case depicted above, Mr. A, the insured has taken three insurance policies for the same subject matter of risk, with three insurance companies -I, II & III.

The implications of double insurance are:

(a) In Case of Life Insurance:

In case of life insurance, the insured or his dependents can claim the full amount of policy from each insurance company. This is so because life insurance is a sort of investment; and a person can take any number of insurance policies on his life and claim full amount under each policy.

(b) In Case of Other Types of Insurances:

In case of fire or marine insurance, the insured cannot recover more than the amount of actual loss from all insurance companies, taken together;

because he is not allowed to make any profit out of the transaction of insurance.

Suppose Mr. A insures his house against fire from three insurance companies-I, II & III for Rs.50, 000, 1, 00,000 and 1,50,000 respectively. His house is destroyed by fire entailing a loss of Rs.60,000. He can claim in all Rs.60,000 the actual amount of loss in the ratio of 1:2:3 i.e. Rs. 10,000, Rs.20,000 and Rs.30,000 from insurance companies I, II and III respectively.

If he claims the full amount of loss i.e. Rs.60, 000 from Insurance Co. II then insurance company II can claim proportionate contribution from Insurance Co. I and III i.e. Rs. 10,000 from Co. I and Rs. 30,000 from Co. III.

Re-insurance

When an insurance company finds that the risk it has undertaken is too heavy for it; it may get itself insured with some other insurance company. This is called re-insurance.



In this case, there are two contracts of insurance:

(i) One between the insured and the insurance company called the contact of insurance.

(ii) The other between the insurance company and the re-insurance company called the contact of re-insurance.

The implications of re-insurance are:

(1) The insured has no relationship with the re-insurance company. He can claim loss only from the insurance company, with whom he has entered into a contract of insurance.

(2) The insurance company can claim loss (paid by it to the insured) from the re-insurance company.

Differences between Double Insurance and Reinsurance

The concept of double insurance differs from the concept of reinsurance in the following respects: (a) MEANING: The reinsurance business is entered into by the original insurer with the other insurers. But in double insurance, the insured gets the same subject matter insured with more than one insurer or under more than one policy with the same insurer. (b) FILLING CLAIM: In reinsurance, the insured cannot claim any part of the loss from the reinsurer. But in the double insurance, the insured can claim the actual loss from each of the insurers up to the amount insured with them. (C). CONTRIBUTION: In reinsurance, the reinsured will claim a part of the loss proportionate to the risk reinsured by the him with the reinsurers. But in double insurance, each insurer is liable to contribute on pro-rata basis towards the loss suffered by the insured.



CHECK YOUR PROGRESS

Q. 5: What is reinsurance?

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Q. 6: State two points of difference between reinsurance and double insurance.

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9.7 CONCEPT AND IMPORTANCE OF LIFE INSURANCE

A life insurance policy is a contract with an insurance company. In exchange for premium payments, the insurance company provides a lump-sum payment, known as a death benefit, to beneficiaries upon the insured's death.

There is currently no statutory definition of life insurance. The Supreme Court of India held that although there is no statutory definition of Life insurance but it has been defined as a contract of Insurance whereby the insured agrees to pay certain sums, called premiums, at specified times,

and in consideration thereof the insurer agrees to pay certain sums of money on certain conditions and in specified way, upon happening of a particular event contingent upon the duration of human life.

In Dalby v. India and London life Assurance Co. , the definition of life insurance is well explained as, " a contract to pay a certain sum of money on the death of a person in considering of the due payment of a certain annuity for his life calculated according to the probable duration of life."

In Joseph v. Law Integrity Insurance Co. , it was observed by Bunyon J., that, " A contract of life insurance may further be defined to be that in which one party agrees to pay a given sum of money upon the happening of a particular event contingent upon the duration of human life in consideration of immediated payment of a smaller sum or other equivalent periodical payment by the other."

Nature and Scope of Life Insurance:

It is impossible for a human being to foretell or prevent many serious hazards such as fire, disability and premature death etc. It is the function of insurance in its numerous forms to enable individuals to safeguard themselves against such misfortunes by spreading the loss to persons who agreed to co- operate each other at the time of loss by making contributions to the common fund.

Life insurance policy is required to protect against losses in death. Life insurance is a contract whereby for a stipulated compensation, called the premium, one party (the insurer) agrees to pay the other (the insured), or his beneficiary, a fixed sum upon the happening of death or some other specified event.

Although the basic nature of life insurance is to provide risk coverage, when the contract period extends over a long time, premium payments serves two- fold purposes-the immediate or short-range and the remote or long-range. The immediate purpose is served by paying a definite sum or amount at damage or death of the insured.

So, question may arise that, if the time of the death is non-speculative, isn't the nature of life insurance amounts to gambling? The justified answer can be- nothing is more uncertain than life and life insurance policy offers

the sure method of changing the uncertainty into certainty. So, we can say that insurance is just opposite of gambling. In the gambling, a person exposes himself to the risk, the risk of losing whereas in the insurance , the insured is always opposed to risk.

The second query that may come is whether the nature of life insurance is a charity or not. The answer is no, as the charity is given without consideration whereas in life insurance, consideration is given in the form of a contribution called the 'premium'.

9.8 CONCEPT OF MARINE INSURANCE

The basic principle of a contract of marine insurance is that the indemnity recoverable from the insurer is the pecuniary loss suffered by the insured under the contract in a manner and to the interest thereby agreed.

Section 3 of the Marine Insurance Act, 1963 gives a very comprehensive definition of " marine insurance" as : " A contract of marine insurance is a contract whereby the insurer undertakes to indemnify the assured, in manner and to the extent thereby agreed, against marine losses, that is to say, the losses incident to marine adventure."

Types of Marine insurance Policies

There are various types of marine insurance policies which are offered to the clients by insurance companies so as to provide the clients with flexibility while choosing a marine insurance policy. The availability of a wide variety of marine insurance policies gives a client a wide arena to choose from, thus enabling him to get the best deal for his ship and cargo. The different types of marine insurance policies are detailed below:-

Voyage and Time Policy.-

(i) A voyage policy is that kind of marine insurance policy which is valid for a particular voyage irrespective of the time involved in it. In this case the risk attaches only when the ship starts on the voyage and terminates at the port of destination. It is mandatory to describe accurately in the voyage policy about the voyage risk insured, i.e., the limits of risk. It is generally done by specifying the port where the voyage

is to commence (terminus quo) and the port where the voyage is concluded (terminus ad quem).

When the contract is to insure the subject matter for a definite period of time, the policy is called a time policy. A contract for both voyage and time may be included in the same policy. A time policy which is made for any time exceeding twelve months is invalid.

(ii) Mixed Policy.-

A marine insurance policy which offers a client the benefit of both time and voyage policy is recognised as a mixed policy.

(iii) Valued Policy.-

In this type of policy, the value of the cargo and consignment is ascertained and is mentioned in the Policy document beforehand thus making clear about the value of the reimbursements in case of any loss to the cargo and consignment. The value is to be determined according to the rules provided in Section 18 of The Marine Insurance Act, 1963.

(iv) Un-Valued Policy.-

In this type of marine insurance policy, the value of the cargo and consignment is not put down in the policy beforehand. Therefore, reimbursement is done only after the loss to the cargo and consignment is inspected and valued. In mordern practice, these policies are rarely in existence.

(v) Port Risk Policy.-

This kind of marine insurance policy is taken out in order to ensure the safety of the ship while it is stationed in a port.

(vi) Wagering Policy.-

A wagering policy is one where there are no fixed terms of reimbursement mentioned. If the insurance company finds the damage worth the claim then the reimbursement are provided, else there is no compensation offered.

(vii) Floating Policy.-

A marine insurance Policy where only the amount of claim is specified and all other details are omitted till the time the ship embarks on its journey, is known as floating policy.



CHECK YOUR PROGRESS

Q. 7: Define marine insurance.

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9.9 CONCEPT AND FEATURES OF FIRE INSURANCE

Fire insurance means insurance against any loss caused by fire. Section 2(6A) of the Insurance Act defines fire insurance as follows: "Fire insurance business means the business of effecting, otherwise than incidentally to some other class of business, contracts of insurance against loss by or incidental to fire or other occurrence customarily included among the risks insured against in fire insurance policies."

What is 'Fire'?

The term fire in a Fire Insurance Policy is interpreted in the literal and popular sense. There is fire when something burns. In English cases it has been held that there is no fire unless there is ignition. *Stanley v. Western Insurance Co*. Fire produces heat and light but either o them alone is not fire. Lighting is not fire. But if lighting ignites something, the damage may be covered by a fire-policy. The same is the case with electricity.

Characteristics of Fire Insurance

- Fire insurance is a *contract of indemnity*. The insurer is liable only to the extent of the actual loss suffered. If there is no loss there is no liability even if there is a fire.
- Fire insurance is a contract of good faith. The policy-holder and the insurer must disclose all the material facts known to them.
- Fire insurance policy is usually made for one year only. The policy can be renewed according to the terms of the policy.
- The contract of insurance is embodied in a policy called the fire policy. Such policies usually cover specific properties for a specified period.
- A fire policy is valid only if the policy-holder has an insurable interest in the property covered. Such interest must exist at the time when the loss occurs. In English cases it has been held that the following persons

have insurable interest for the purposes of fire insurance- owner; tenants, bailees, including carriers; mortgages and charge-holders.

- In case of several policies for the same property, each insurer is entitled to contribution from the others. After a loss occurs and payment is made, the insurer is subrogated to the rights and interests of the policy-holder. An insurer can reinsure a part of the risk.
- Fire policies cover losses caused proximately by fire. The term loss by fire is interpreted liberally. Example: A women hid her jewellery under the coal in her fireplace. Later on she forgot about the jewellery and lit the fire. The jewellery was damaged. Held, she could recover under the fire policy.
- Nothing can be recovered under a fire policy if the fire is caused by a *deliberate act* of policy-holder. In such cases the policy-holder is liable to criminal prosecution.
- Fire policies generally contain a condition that the insurer will not be liable if the fire is caused by riot, civil disturbances, war and explosions. In the absence of any specific expectation the insurer is liable for all losses caused by fire, whatever may be the causes of the fire.
- Assignment: According to English law a policy of fire insurance can be assigned only with the consent of the insurer. In India such consent is not necessary and the policy can be assigned as a chose-in-action under the Transfer of Property Act. The insurer is bound when notice is given to him. But the assignee cannot recover damages unless he has an insurable interest in the property at the time when the loss occurs. A stranger cannot sue on a fire policy.
- **Payment of Claims:** Fire policies generally contain a clause providing that upon the occurrence of fire the insurer shall be immediately notified so that the insurer can take steps to salvage the remainder of the property and can also determine the extent of the loss. Insurance companies keep experts on their staff of value the loss. If in a policy there is an international over valuation of the property by the policy-holder, the policy may be avoided on the ground of fraud.



CHECK YOUR PROGRESS

Q. 8: State two characteristics of fire insurance.

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9.10 LET US SUM UP

In this unit we have discussed the following aspects-

- The aim of all kinds of insurance is to provide help to those who happen to suffer a loss.
- In a contract of insurance, there are mainly two parties- 'insured' – who seeks the protection against a risk and 'insurer'- who undertakes to protect such person from financial loss on some mishappening.
- The consideration collected by the insurer to provide security is called the 'premium'. The document containing terms and conditions of the contract is called the 'insurance policy'.
- Insurance is important as it provides security, reduces business risk or losses, it accelerates the economic growth of the country etc.
- Insurance is based on certain principles like, Principle of Utmost Good Faith, The Principle of Indemnity, Principle of Insurable Interest, Principle of Contribution, Principle of Subrogation, Principle of Cause Proxima, Principle of Mitigation of Loss.
- The differences between reinsurance and double insurance.
- The importance of life, marine and fire insurance.



9.11 FURTHER READING

1) Kuchhal M. C. (2009). Mercantile law. Vikas Publishing House Pvt. Ltd., New Delhi.

2) ICSI (2014). Insurance Law and Practice. ICSI, New Delhi



9.12 ANSWERS TO CHECK YOUR PROGRESS

Ans. to Q. No. 1: Insurance is to protect the insured from variety of risks he anticipates by spreading the loss to persons who agreed to co-operate each other at the time of loss by making contributions to the common fund.

Ans. to Q. No. 2: a) Insurance provides security

Insurance provides safety and security against the loss on a particular event. Life insurance provides security against death and old age sufferings. Fire insurance protects against loss due to fire while Marine insurance provides protection and safety against loss of ship and cargo.

b) Insurance reduces business risk or losses

In Business, commerce and industry, huge properties are employed. Because of slight negligence, the property may be turned in to ashes. A person may not be sure of his life, health and cannot continue the business up to the longer period to support his dependents. By the help of insurance, he can be sure of his earning, because the insurance company will pay a fixed amount at the time of death, damage by fire, theft, accident and other perils.

Ans. to Q. No. 3: A contract of insurance is based on the principle of utmost good faith to be observed by both the parties – the insured and the insurance company – towards each other. If one party conceals any material information from the other party, which may influence the other

party's decision to enter into the contact of insurance; the other party can avoid the contract.

The principle of utmost good faith is equally applicable to both the parties. However, the onus (i.e. burden) of making a full and fair disclosure of all material facts usually rests primarily upon the insured; because the insured is supposed to have an intimate knowledge of the subject-matter of insurance.

Ans. to Q. No. 4: Except life insurance, all other contracts of insurance are contacts of indemnity; which means that in the event of the loss caused to the subject matter of insurance, the insured can recover only the actual amount of loss-subject to a maximum of sum assured.

Ans. to Q. No. 5: When an insurance company finds that the risk it has undertaken is too heavy for it; it may get itself insured with some other insurance company. This is called re-insurance.

Ans. to Q. No.6: The reinsurance business is entered into by the original insurer with the other insurers. In double insurance, the insured gets the same subject matter insured with more than one insurer or under more than one policy with the same insurer.

In reinsurance, the insured cannot claim any part of the loss from the reinsurer. In double insurance, the insured can claims the actual loss from each of the insurers up to the amount insured with them.

Ans. to Q. No.7: According to Section 3 of the Marine Insurance Act, 1963 Marine insurance is "A contract of marine insurance is a contract whereby the insurer undertakes to indemnify the assured, in manner and to the extent thereby agreed, against marine losses, that is to say, the losses incident to marine adventure."

Ans. to Q. No.8: (a) Fire insurance is a *contract of indemnity*. The insurer is liable only to the extent of the actual loss suffered. If there is no loss there is no liability even if there is a fire.

(b) Fire insurance is a contract of good faith. The policy-holder and the insurer must disclose all the material facts known to them.



9.13 MODEL QUESTIONS

Q. 1: Define insurance.

Q. 2: Discuss the importance of insurance.

Q. 3: Discuss the principles of insurance.

Q. 4: Discuss the importance of life insurance.

Q. 5: Differentiate between double insurance and reinsurance.

Q. 6: Discuss the characteristics of fire insurance.

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UNIT10: FOOD SAFETY AND STANDARDS (PACKAGING AND LABELLING) REGULATIONS, 2011

UNIT STRUCTURE

10.1 Learning Objectives

10.2 Introduction

10.3 Short title and commencement

10.4 Definitions under the Act

10.5 Product specific requirements

10.6 Labelling

- 10.6.1 General Requirements of labelling
- 10.6.2 Labelling of Pre-packaged Foods

10.7 Manner of declaration

- 10.7.1 General Conditions
- 10.7.2 Principal display panel

10.8 Specific Requirements/ Restrictions on manner of labeling

- 10.8.1 Labelling of infant milk substitute and infant food
- 10.8.2 Labelling of edible oils and fats
- 10.8.3 Labelling of permitted food colours

10.9 Specific restrictions on Product labels

10.10 Exemptions from labelling requirements

10.11 Let us Sum Up

10.12 Further Reading

10.13 Answers to Check Your Progress

10.14 Model Questions

10.1 LEARNING OBJECTIVES

After going through this unit you will be able to:

- discuss the various terms used in the Act,
- discuss about rules with regards to packaging,
- explain the various requirements in the labels of the packages,

- describe the different ways of labeling different categories of food products,
- explain the different restrictions on product labels.

10.2 INTRODUCTION

The link between food packaging and consumer protection is of high significance. A package is a vehicle of safety and achieves the objective of delivering safe, wholesome, nutritious food to the consumer. To safeguard the interests of the consumer and the society at large, Packaging Laws and Regulations have been introduced by the Government. The Indian Regulatory System falls under the category of compulsory legislations formulated by the various ministries and voluntary standards framed by various organizations to serve the country.

10.3 SHORT TITLE AND COMMENCEMENT

These regulations may be called the Food Safety and Standards (Packaging and labelling) Regulations, 2011. These regulations shall come into force on or after 5th August, 2011

10.4 DEFINITIONS UNDER THE ACT

In these regulations unless the context otherwise requires:

1. **"Best before"** means the date which signifies the end of the period under any stated storage conditions during which the food shall remain fully marketable and shall retain any specific qualities for which tacit or express claims have been made and beyond that date, the food may still be perfectly safe to consume, though its quality may have diminished. However the food shall not be sold if at any stage the product becomes unsafe.
2. "**Date of manufacture**" means the date on which the food becomes the product as described;
3. "**Date of packaging**" means the date on which the food is placed in the immediate container in which it will be ultimately sold;

4. **"Infant"** means a child not more than twelve months of age;

5. **"Lot number"** or "**code number**" or **"batch number"** means the number either in numericals or alphabets or in combination thereof, representing the lot number or code number or batch number, being preceded by the words "Lot No" or "Lot" or "code number" or "Code" or Batch No" or "Batch" or any distinguishing prefix by which the food can be traced in manufacture and identified in distribution.

6. **"Multipiece package"** means a package containing two or more individually packaged or labelled pieces of the same commodity of identical quantity, intended for retail either in individual pieces or packages as a whole.

7. **"Non- Vegetarian Food"** means an article of food which contains whole or part of any animal including birds, fresh water or marine animals or eggs or products of any animal origin, but excluding milk or milk products, as an ingredient;

8. **"Prepackaged" or "Pre-packed food"**, means food, which is placed in a package of any nature, in such a manner that the contents cannot be changed without tampering it and which is ready for sale to the consumer.

   Note: The expression "package" wherever it occurs in these Regulations, shall be construed as package containing pre-packed food articles.

9. **"Principal Display Panel"** means that part of the container/package which is intended or likely to be displayed or presented or shown or examined by the customer under normal and customary conditions of display, sale or purchase of the commodity contained therein.

10. **"Wholesale package**" means a package containing —

    (*a*) a number of retail packages, where such first mentioned package is intended for sale, distribution or delivery to an intermediary and is not intended for sale direct to a single consumer; or

    (*b*) a commodity of food sold to an intermediary in bulk to enable such intermediary to sell, distribute or deliver such commodity of food to the consumer in smaller quantities.

10.5 PRODUCT SPECIFIC REQUIREMENTS

1. Packaging requirements for Milk and Milk Products

(a) Bottling or filling of containers with heat-treated milk and milk product shall be carried out mechanically and the sealing of the containers shall be carried out automatically.

(b) Wrapping or packaging may not be re-used for dairy products, except where the containers are of a type which may be re-used after thorough cleaning and disinfecting.

(c) Sealing shall be carried out in the establishment in which the last heat-treatment of drinking milk or liquid milk-base products has been carried out, immediately after filling, by means of a sealing device which ensures that the milk is protected from any adverse effects of external origin on its characteristic. The sealing device shall be so designed that once the container has been opened, the evidence of opening remains clear and easy to check.

(d) Immediately after packaging, the dairy products shall be placed in the rooms provided for storage.

2. Packaging requirements for Fruits and Vegetables Products

(*i*) Every container in which any fruit product is packed shall be so sealed that it cannot be opened without destroying the licensing number and the special identification mark of the manufacture to be displayed on the top or neck of the bottle.

(*ii*) For Canned fruits, juices and vegetables, sanitary top cans made up of suitable kind of tin plates shall be used.

(*iii*) For Bottled fruits, juices and vegetables, only bottles/ jars capable of giving hermetic seal shall be used.

(*iv*) Juices, squashes, crush, cordials, syrups, barley waters and other beverages shall be packed in clean bottles securely sealed. These products when frozen and sold in the form of ice shall be packed in suitable cartons. Juices and Pulps may be packed in wooden barrels when sulphited.

(*v*) For packing Preserves, Jams, Jellies, and Marmalades, new cans, clean jars, new canisters, bottles, chinaware jars, aluminium containers may be used and it shall be securely sealed.

(*vi*) For Pickles, clean bottles, jars, wooden casks, tin containers covered from inside with polythene lining of 250 gauge or suitable lacquered cans shall be used.

(vii) For Tomato Ketchups and Sauces, clean bottles shall be used. If acidity does not exceed 0.5% as acetic acid, open top sanitary cans may also be used.

(viii) Candied fruits and peels and dried fruits and vegetables can be packed in paper bags, cardboard or wooden boxes, new tins, bottles, jars, aluminium and other suitable approved containers.

(ix) Fruits and Vegetable products can also be packed in aseptic and flexible packaging material having good grade quality conforming to the standards laid down by BIS.

3. Packaging requirements for Canned Meat Products

(*i*) New sanitary top cans made from suitable kind of tin plate shall be used. The cans shall be lacquered internally; they shall be sealed hermetically after filling. The lacquer used shall be sulphur resistant and shall not be soluble in fat or brine.

(*ii*) Cans used for filling pork luncheon meat shall be coated internally with edible gelatin, lard or lined with vegetable parchment paper before being filled.

(*iii*) Meat products packed in hermetically sealed containers shall be processed to withstand spoilage under commercial conditions of storage and transport.

4. Packaging requirements for Drinking Water (Both Packaged and Mineral Water)

It shall be packed in clean, hygienic, colourless, transparent and tamperproof bottles/containers made of polyethylene (PE) (conforming to IS:10146 or polyvinyl chloride (PVC) conforming to IS : 10151 or polyalkylene terephthalate (PET and PBT) conforming to IS : 12252 or polypropylene conforming to IS : 10910 or foodgrade polycarbonate or sterile glass bottles suitable for preventing possible adulteration or contamination of the water.



CHECK YOUR PROGRESS

Q.1: Define Principal Display Panel.

.....

.....

Q.2: Mention the Packaging requirements for Drinking Water.

.....

.....

10.6 LABELLING

10.6.1 General Requirements of labelling

1. Every prepackaged food shall carry a label containing information as required here under unless otherwise provided, namely,—
2. The particulars of declaration required under these Regulations to be specified on the label shall be in English or Hindi in Devnagri script: Provided that nothing herein contained shall prevent the use of any other language in addition to the language required under this regulation.
3. Pre-packaged food shall not be described or presented on any label or in any labelling manner that is false, misleading or deceptive or is likely to create an erroneous impression regarding its character in any respect;
4. Label in pre-packaged foods shall be applied in such a manner that they will not become separated from the container;
5. Contents on the label shall be clear, prominent, indelible and readily legible by the consumer under normal conditions of purchase and use;
6. Where the container is covered by a wrapper, the wrapper shall carry the necessary information or the label on the container shall be readily legible through the outer wrapper and not obscured by it;

10.6.2 Labelling of Pre-packaged Foods

In addition to the General Labelling requirements, every package of food shall carry the following information on the label, namely,—

1. **The Name of Food:** The name of the food shall include trade name or description of food contained in the package.
2. **List of Ingredients:** Except for single ingredient foods, a list of ingredients shall be declared on the label in the following manner:—
   (*a*) The list of ingredients shall contain an appropriate title, such as the term “Ingredients”;
   (*b*) The name of Ingredients used in the product shall be listed in descending order of their composition by weight or volume, as the case may be, at the time of its manufacture;
   (*c*) A specific name shall be used for ingredients in the list of Ingredients;
   (*d*) Where an ingredient itself is the product of two or more ingredients, such a compound ingredients shall be declared in the list of ingredients, and shall be accompanied by a list, in brackets, of its ingredients in descending order of weight or volume, as the case may be:

   Provided that where a compound ingredient, constitutes less than five percent of the food, the list of ingredients of the compound ingredient, other than food additive, need not to be declared;
   (*e*) Added water shall be declared in the list of ingredients except in cases where water forms part of an ingredient, such as, brine, syrup or broth, used in the compound food and so declared in the list of ingredients:

   Provided that water or other volatile ingredients

evaporated in the course of manufacture need not be declared; Provided further that in the case of dehydrated or condensed food, which are intended to be reconstituted by addition of water, the ingredients in such reconstituted food shall be declared in descending order of weight or volume as the case may be, and shall contain a statement such as "Ingredients of the product when prepared in accordance with the directions on the label";

(*f*) Every package of food sold as a mixture or combination shall disclose the percentage of the ingredient used at the time of the manufacture of the food (including compound ingredients or categories of ingredients), if such ingredient–

(*i*) is emphasised as present on the label through words or pictures or graphics; or

(*ii*) is not within the name of the food but, is essential to characterise the food and is expected to be present in the food by consumers, and if the omission of the quantitative ingredient declaration will mislead or deceive the consumer.

Provided that where the ingredient has been used as flavouring agent, the disclosure of such ingredient is not required:

Provided further that where the drained net weight is indicated on the label as required or in case of such food products where specific provisions are stipulated under these Regulations or where a pictorial representation of a serving suggestion is made for consumer information and use, the disclosure of such ingredient is not required.

Provided further that in case of any bottle containing liquid milk or liquid beverage having milk as an ingredient, soft drink, carbonated water or ready-to-serve fruit beverages, the declarations with regard to addition of fruit pulp and fruit juice shall invariably appear on the body of the bottle.

3. **Nutritional information –** Nutritional Information or nutritional facts per 100 gm or 100ml or per serving of the product shall be given on the label containing the following:—

(*i*) energy value in kcal;

(*ii*) the amounts of protein, carbohydrate (specify quantity of sugar) and fat in gram (g) or ml;

(*iii*) the amount of any other nutrient for which a nutrition or health claim is made:

Provided that where a claim is made regarding the amount or type of fatty acids or the amount of cholesterol, the amount of saturated fatty acids, monounsaturated fatty acids and polyunsaturated fatty acids in gram (g) and cholesterol in milligram (mg) shall be declared, and the amount of trans fatty acid in gram (g) shall be declared in addition to the other requirement stipulated above;

(*iv*) Wherever, numerical information on vitamins and minerals is declared, it shall be expressed in metric units;

(*v*) Where the nutrition declaration is made per serving, the amount in gram (g) or milliliter (ml) shall be included for reference beside the serving measure;

Provided that the food claimed to be enriched with nutrients, such as, minerals, proteins, vitamins, metals or their compounds, amino acids or enzymes shall give the quantities of such added nutrients on the label. Provided that —

(*i*) the nutritional information may not be necessary, in case of foods such as raw agricultural commodities, like, wheat, rice, cereals, spices, spice mixes, herbs, condiments, table salt, sugar, jaggery, or non –nutritive products, like, soluble tea, coffee, soluble coffee, coffee-chicory mixture, packaged drinking water, packaged mineral water, alcoholic beverages or fruit and vegetables, processed and pre- packaged assorted vegetables, fruits, vegetables and products that comprise

of single ingredient, pickles, papad, or foods served for immediate consumption such as served in hospitals, hotels or by food services vendors or *halwais,* or food shipped in bulk which is not for sale in that form to consumers.

(*ii*) The compliance to quantity of declared nutrients on the label shall be according to the established practices.

Explanation — For the purpose of this provision, at the time of analysis, due consideration, based on shelf-life, storage, and inherent nature of the food shall be kept in view in case of quantity declared nutrients;

(*iii*) The food, in which hydrogenated vegetable fats or bakery shortening is used shall declare on the label that 'hydrogenated vegetable fats or bakery shortening used-contains trans fats;

Provided further that, a health claim of 'trans fat free' may be made in cases where the trans fat is less than 0.2 gm per serving of food and the claim 'saturated fat free' may be made in cases where the saturated fat does not exceed 0.1 gm per 100 gm or 100 ml of food.

4. Declaration regarding Veg or Non veg –

(*i*) Every package of "Non Vegetarian" food shall bear a declaration to this effect made by a symbol and colour code as stipulated below to indicate that the product is Non-Vegetarian Food. The symbol shall consist of a brown colour filled circle having a diameter not less than the minimum size specified in the Table mentioned in the regulation.

(*ii*) Where any article of food contains egg only as Non-Vegetarian ingredient, the manufacturer, or packer or seller may give declaration to this effect in addition to the said symbol.

(*iii*) Every package of Vegetarian Food shall bear a declaration to this effect by a symbol and colour code as stipulated below for this purpose to indicate that the product is Vegetarian Food.

The symbol shall consist of a green colour filled circle, having a diameter not less than the minimum size specified in the Table below, inside the square with green outline having size double the diameter of the circle.

(*iv*) Size of the logo

Sl.No.	Area of principal display panel	Minimum size of diameters in mm
1	Up to 100 cms. Square.	3
2	Above 100 cms. Square up to 500 cms square.	4
3	Above 500 cms square up to 2500 cms square.	6
4	Above 2500 cms. Square.	8

The symbol shall be prominently displayed

(*i*) on the package having contrast background on principal display panel;

(*ii*) just close in proximity to the name or brand name of the product;

(*iii*) on the labels, containers, pamphlets, leaflets, advertisements in any media;

Provided also that the provisions of regulation regarding veg. or non-veg. item shall not apply in respect of mineral water or packaged drinking water or carbonated water or alcoholic drinks, or liquid milk and milk powders.

5. Declaration regarding Food Additives-

For food additives falling in the respective classes and appearing in lists of food additives permitted for use in foods generally, the following class titles shall be used together with the specific names or recognized international numerical identifications.

Acidity Regulator, Acids, Ant caking Agent, Antifoaming Agent, Antioxidant, Bulking Agent, Colour, Colour Retention Agent, Emulsifier, Emulsifying Salt, Firming Agent, Flour Treatment Agent, Flavour Enhancer, Foaming Agent, Gelling Agent, Glazing Agent,

Humectant, Preservative, Propellant, Raising Agent, Stabilizer, Sweetener, Thickener:

6. Name and complete address of the manufacturer:

(*i*) The name and complete address of the manufacturer and the manufacturing unit, if these are located at different places and in case the manufacturer is not the packer or bottler, the name and complete address of the packing or bottling unit as the case may be shall be declared on every package of food;

(*ii*) Where an article of food is manufactured or packed or bottled by a person or a company under the written authority of some other manufacturer or company, under his or its brand name, the label shall carry the name and complete address of the manufacturing or packing or bottling unit as the case may be, and also the name and complete address of the manufacturer or the company, for and on whose behalf it is manufactured or packed or bottled;

(*iii*) Where an article of food is imported into India, the package of food shall also carry the name and complete address of the importer in India.

Provided further that where any food article manufactured outside India is packed or bottled in India, the package containing such food article shall also bear on the label, the name of the country of origin of the food article and the name and complete address of the importer and the premises of packing or bottling in India.

7. Net quantity:

(*i*) Net quantity by weight or volume or number, as the case may be, shall be declared on every package of food; and

(*ii*) In addition to the declaration of net quantity, a food packed in a liquid medium shall carry a declaration of the drained weight of the food.

Explanation 1.— For the purposes of this requirement the expression “liquid medium” include water, aqueous solutions of sugar and salt, fruit and vegetable juices or vinegar, either singly or in combination.

Explanation 2.— In declaring the net quantity of the commodity contained in the package, the weight of the wrappers and packaging materials shall be excluded:

(*iii*) Where a package contains a large number of small items of confectionery, each of which is separately wrapped and it is not reasonably practicable to exclude from the net weight of the commodity, the weight of such immediate wrappers of all the items of the confectionery contained in the package, the net weight declared on the package containing such confectionary or on the label thereof may include the weight of such immediate wrapper if the total weight of such immediate wrapper does not exceed –

(*a*) eight per cent, Where such immediate wrapper is a waxed paper or other paper with wax or aluminium foil under strip; or

(*b*) six per cent. In case of other paper of the total net weight of all the items of confectionery contained in the package minus the weight of immediate wrapper.

8. Lot/Code/Batch identification:

A batch number or code number or lot number which is a mark of identification by which the food can be traced in the manufacture and identified in the distribution, shall be given on the label. Provided that in case of packages containing bread and milk including sterilized milk, particulars under this clause shall not be required to be given on the label.

9. Date of manufacture or packing:

The date, month and year in which the commodity is manufactured, packed or pre-packed, shall be given on the label. Provided that the month and the year of manufacture, packing or pre-packing shall be given if the “Best Before Date” of the products is more than three months. Provided further that in case any package contains commodity which has a short shelf life of less than three months, the date, month and year in which the commodity is

manufactured or prepared or pre-packed shall be mentioned on the label.

10. Best Before and Use By Date:

(*i*) the month and year in capital letters upto which the product is best for consumption, in the following manner, namely:—

"BEST BEFORE ..... MONTHS AND YEAR

OR

"BEST BEFORE ..... MONTHS FROM PACKAGING

OR

"BEST BEFORE .....MONTHS FROM MANUFACTURE

(Note: — blank be filled up)

(*ii*) In case of package or bottle containing sterilised or Ultra High Temperature treated milk, soya milk, flavoured milk, any package containing bread, dhokla, bhelpuri, pizza, doughnuts, khoa, paneer, or any uncanned package of fruits, vegetable, meat, fish or any other like commodity, the declaration be made as follows:—

"BEST BEFORE …….DATE/MONTH/YEAR"

OR

"BEST BEFORE.....DAYS FROM PACKAGING"

OR

"BEST BEFORE …….. DAYS FROM MANUFACTURE"

Note :

(*a*) blanks be filled up

(b) Month and year may be used in numerals

(*c*) Year may be given in two digits

(*iii*) On packages of Aspartame, instead of Best Before date, Use by date/recommended last consumption date/expiry date shall be given, which shall not be more than three years from the date of packing;

(*iv*) In case of infant milk substitute and infant foods instead of Best Before date, Use by date/ recommended last consumption date/expiry date shall be given, Provided further

that the declaration of best before date for consumption shall not be applicable to:

(*i*) wines and liquors

(*ii*) alcoholic beverages containing 10 percent or more by volume of alcohol.

Provided further that above provisions except net weight/net content, nutritional information, manufacturer's name and address, date of manufacture and "best before" shall not apply in respect of carbonated water (plain soda and potable water impregnated with carbon dioxide under pressure) packed in returnable glass bottles.

11. Country of origin for imported food:

(*i*) The country of origin of the food shall be declared on the label of food imported into India.

(*ii*) When a food undergoes processing in a second country which changes its nature, the country in which the processing is performed shall be considered to be the country of origin for the purposes of labelling.

12. Instructions for use:

(*i*) Instructions for use, including reconstitution, where applicable, shall be included on the label, if necessary, to ensure correct utilization of the food.

10.7 MANNER OF DECLARATION

10.7.1 General Conditions

1. Any information or pictorial device written, printed, or graphic matter may be displayed in the label provided that it is not in conflict with the requirements of these Regulations.
2. Every declaration which is required to be made on package under these regulations shall be:

(*i*) Legible and prominent, definite, plain and unambiguous

(*ii*) Conspicuous as to size number and colour,

(*iii*) as far as practicable, in such style or type of lettering as to be boldly, clearly and conspicuously present in distinct contrast to the other type, lettering or graphic material used on the package, and shall be printed or inscribed on the package in a colour that contrasts conspicuously with the background of the label

Provided that —

(*a*) Where any label information is blown, formed or moulded on a glass or plastic surface or where such information is embossed or perforated on a package that information shall not be required to be presented in contrasting colours:

(*b*) Where any declaration on a package is printed either in the form of a handwriting or hand script, such declaration shall be clear, unambiguous and legible.

3. No declaration shall be made so as to require it to be read through any liquid commodity contained in the package.

4. Where a package is provided with an outside container or wrapper, such container or wrapper shall also contain all the declarations which are required to appear on the package except where such container or wrapper itself is transparent and the declarations on the package are easily readable through such outside container or wrapper.

5. Labels not to contain false or misleading statements: A label shall not contain any statement, claim, design, device, fancy name or abbreviation which is false or misleading in any particular concerning the food contained in the package, or concerning the quantity or the nutritive value or in relation to the place of origin of the said food:

Provided that this regulation shall not apply in respect of established trade or fancy names of confectionery, biscuits and sweets, such as, barley,sugar,bull's eye, cream cracker or in respect of aerated waters, such as, Ginger Beer or Gold-

Spot or any other name in existence in international trade practice.

10.7.2 Principal display panel

The information required under these Regulations shall be given on the principal display panel of the package or container and such information may be given in the following manner.

(*a*) All information should be grouped together and given at one place.

OR

The pre-printed information be grouped together and given in one place and ,

(*b*) Online information or those not pre-printed be grouped together in another place.

1. Area of the principal display panel

The area of principal Display panel shall not be less than —

(*a*) In the case of a rectangular container, forty percent of the product of height and width of the panel of such container having the largest area;

(*b*) In case of cylindrical or nearly cylindrical, round or nearly round, oval or nearly oval container, twenty percent of the product of the height and average circumference of such container; or

(*c*) In the case of container of any other shape, twenty percent of the total surface area of the container except where there is label, securely affixed to the container, such label shall give a surface area of not less than ten percent of the total surface area of the container.

Provided that in the case of package having a capacity of five cubic centimeters or less, the principal display panel may be card or tape affixed firmly to the package or container and bearing the required information under these regulations.

10.8 SPECIFIC REQUIREMENTS/ RESTRICTIONS ON MANNER OF LABELING

10.8.1 Labelling of infant milk substitute and infant food

1. An article of infant milk substitutes /infant foods, whose standards are not prescribed under Food Safety and Standards (Food Products standards and Food Additives) Regulations, 2011 shall be manufactured for sale, exhibited for sale or stored for sale only after obtaining the approval of such articles of food and its label from the Authority.
2. Without prejudice to any other provisions relating to labelling requirements contained in these regulations, every container of infant milk substitute or infant food or any label affixed thereto shall indicate in a clear, conspicuous and in an easily readable manner, the words “IMPORTANT NOTICE” in capital letters and indicating there under the following particulars, namely:—
   (*i*) a statement “MOTHER’S MILK IS BEST FOR YOUR BABY” in capital letters. The types of letters used shall not be less than five millimeters and the text of such statement shall be in the Central Panel of every container of infant milk substitute or infant food or any label affixed thereto. The colour of the text printed or used shall be different from that of the background of the label, container as the case may be. In case of infant food, a statement indicating “infant food shall be introduced only (after the age of six months and upto the age of two years)” shall also be given;
   (*ii*) a statement that infant milk substitute or infant food should be used only on the advice of a health worker as to the need for its use and the proper method of its use;
   (*iii*) a warning that infant milk substitute or infant food is not the sole source of nourishment of an infant;

(*iv*) a statement indicating the process of manufacture (e.g spray dried) except in case of infant foods, instruction for appropriate and hygienic preparation including cleaning of utensils, bottles and teats and warning against health hazards of inappropriate preparations, as under;

"Warning/ caution-Careful and hygienic preparation of infant foods/infant milk substitute is most essential for health. Do not use fewer scoops than directed since diluted feeding will not provide adequate nutrients needed by your infant. Do not use more scoops than directed since concentrated feed will not provide the water needed by your infant".

(*v*) the approximate composition of nutrients per 100 gms. of the product including its energy value in Kilo Calories/ Joules;

(*vi*) the storage condition specifically stating "store in a cool and dry place in an air tight container" or the like (after opening use the contents within the period mentioned or the expiry date whichever is earlier);

(*vii*) the feeding chart and directions for use and instruction for discarding leftover feed;

(*viii*) Instruction for use of measuring scoop (level or heaped) and the quantity per scoop (scoop to be given with pack);

(*ix*) indicating the Batch No. Month and Year of its manufacture and expiry date

(*x*) the protein efficiency ratio (PER) which shall be minimum 2.5 if the product other than infant milk substitute is claimed to have higher quality protein;

(*xi*) the specific name of the food additives, if permitted, shall be declared in addition to appropriate class names.

3. No containers or label referred to in this regulation relating to infant milk substitute or infant food shall have a picture of infant or women or both. It shall not have picture or other graphic

materials or phrases designed to increase the saleability of the infant milk substitute or infant food. The terms "Humanised" or "Maternalised" or any other similar words shall not be used. The Package and/or any other label of infant milk substitute or infant food shall not exhibit the words, "Full Protein Food", "energy Food", "Complete food" or "Health Food" or any other similar expression.

4. The containers of infant milk substitute meant for (premature baby (born before 37 weeks)/low birth weight infant (less than 2500gm) or labels affixed thereto shall indicate the following additional information, namely:—
   (*i*) the words [PREMATURE BABY (BORN BEFORE 37 WEEKS) LOW BIRTH WEIGHT (LESS THAN 2.5 KG] in capital letters along with the product name in central panel;
   (*ii*) a statement "the low birth weight infant milk substitute shall be withdrawn under medical advice as soon as the mother's milk is sufficiently available'; and
   (*iii*) a statement "TO BE TAKEN UNDER MEDICAL ADVICE" in capital letters.
5. The product which contains neither milk nor any milk derivatives shall be labelled "contains no milk or milk product" in conspicuous manner.
6. The container of infant milk substitute for lactose or lactose and sucrose intolerant infants or label affixed thereto shall indicate conspicuously "LACTOSE-FREE or SUCROSE-FREE or LACTOSE and SUCROSE-FREE" in capital letters and statement "TO BE TAKEN UNDER MEDICAL ADVICE" and shall also bear the following statements, namely:—
   "Lactose free Infant Milk Substitute should only be used in case of diarrhea due to lactose intolerance.

The lactose free/sucrose free Infant Milk Substitute should be withdrawn if there is no improvement in symptoms of intolerance".

7. The container of infant milk substitute meant for infants with allergy to cow's /buffalo's milk protein or soy protein or label affixed thereto shall indicate conspicuously "HYPOALLERGENIC FORMULA" in capital letters and statement "TO BE TAKEN UNDER MEDICAL ADVICE".
8. Declaration to be surrounded by line:

   There shall be a surrounding line enclosing the declaration where the words "unsuitable for babies" are required to be used.

   (*i*) Distance of surrounding line:

   The distance between any part of the words "unsuitable for babies" surrounding the line enclosing these words shall not be less than 1.5 mm.

10.8.2 Labelling of edible oils and fats

1. The package, label or the advertisement of edible oils and fats shall not use the expressions "Super-Refined", "Extra-Refined", "Micro-Refined", "Double-Refined", Ultra-Refined", "Anti-Cholesterol", "Cholesterol Fighter", "Soothing to Heart", "Cholesterol Friendly", "Saturated Fat Free" or such other expressions which are an exaggeration of the quality of the Product.
2. Every container in which solvent-extracted oil or de-oiled meal or edible flour is packed for sale shall, at the time of sale by the producer, bear the following particulars in English or Hindi (Devnagri script) :—

   (*i*) the name, trade name, if any, or description of the solvent-extracted oil or de-oiled meal or edible flour, as the case may be:

   (*ii*) in the case of oil not conforming to the standards of quality for "refined" grade solvent extracted oils specified in

regulation 2.2.6 (1) of Food Safety and Standards (Food Products Standards and Food Additive) Regulation, 2011 for Edible vegetable oil/Vanaspati, a declaration in a type-size of not less than 50 mm, as follows shall appear on the label:

(*a*) "NOT FOR DIRECT EDIBLE CONSUMPTION", in the case of oils complying with the requirements for the "semi-refined" or "raw-grade 1" grades of oil specified in regulation 2.2.6 (1) of Food Safety and Standards(Food Products standards and Food Additive) Regulation, 2011

(*b*) "FOR INDUSTRIAL NON-EDIBLE USES ONLY", in the case of oils not complying with the requirements under item (a) above;

(*iii*) the name and business particulars of the producer;

(*iv*) the net weight of the contents in the container;

(*v*) the batch number, month and year of manufacture:

Provided that where solvent extracted oils are transported in bulk in rail tank-wagons or road tankers, or where de-oiled meal or edible flour is transported in bulk either for storage in silos or transferred to ship for bulk shipment, it shall be sufficient if the aforesaid particulars are furnished in the accompanying documents.

3. Every container in which solvent is packed shall, at the time of sale by the manufacturer or dealer thereof, bear the Indian Standards Institution certification mark.

4. Every container in which vanaspati, margarine, bakery shortening, blended edible vegetable oils, mixed fat spread and refined vegetable oil is packed in addition to other labelling requirements provided in these regulations shall bear the following particulars in English or Hindi in Devnagri script:

(*a*) The name/description of the contents, "free from Argemone Oil";

(*b*) The mass/volume of the contents;

5. Every container of refined vegetable oil shall bear the following label, namely—

Refined (name of the Oil) Oil

Provided that the container of imported edible oil shall also bear the word, "Imported", as prefix.

6. Every package containing an admixture of palmolein with groundnut oil shall carry the following label, namely—

BLEND OF PALMOLEIN AND GROUNDNUT OILPalmolein..... per cent Groundnut oil.... per cent

7. Every package containing an admixtu're of imported rape-seed oil with mustard oil, shall carry the following label, namely:

BLEND OF IMPORTED RAPE-SEED OIL AND MUSTARD OIL Imported rape-seed oil.....per cent Mustard oil.....per cent

8. Every package of vanaspati made from more than 30 percent of Rice bran oil shall bear the following label, namely :—

This package of vanaspati is made from more than 30 per cent Rice bran oil by weight

9. Every package containing Fat Spread shall carry the following labels namely:—

Milk Fat Spread

Use before .....

Date of packing .....

Total Milk Fat Content Per cent by weight…….....

Mixed Fat Spread

Use before .....

Date of packing .....

Per cent by weight……

Milk Fat Content.....

Total Milk Fat Content Percent by weight.....

Vegetable Fat Spread

Use before .....

Date of packing .....

Total Fat Content Per cent by weight .....

10. A package containing annatto colour in vegetable oils shall bear the following label namely:—

Annatto colour in oil (Name of oil/oils) used

11. Every package containing an admixture of edible oils shall carry the following label, namely:—

This blended edible vegetable oil contains an admixture of:

(i) .....% by Weight (ii) .....% by Weight

(Name and nature of edible vegetable oils i.e. in raw or refined form)

Date of Packing.....

There shall also be the following declaration in bold capital letters along with the name of product on front/central panel,—

NOT TO BE SOLD LOOSE

10.8.3 Labelling of permitted food colours

1. No person shall sell a permitted synthetic food colours for use in or upon food unless its container carries a label stating the following particulars:—
   (*i*) the words “Food Colours”;
   (*ii*) the chemical and the common or commercial name and colour index of the dye-stuff.
2. No person shall sell a mixture of permitted synthetic food colours for use in or upon food unless its container carries a label stating the following particulars:—

(*i*) the words “Food Colour Mixture”;

(*ii*) the chemical and the common or commercial name and colour index of the dye stuff contained in the mixture.

3. No person shall sell a preparation of permitted synthetic food colours for use in or upon food unless its container carries a label stating the following particulars:—

(*i*) the words “Food Colour Preparation”;

(*ii*) the name of the various ingredients used in the preparation.

10.9 SPECIFIC RESTRICTIONS ON PRODUCT LABELS

(1) Labels not to contain reference to Act or rules or regulations contradictory to required particulars: The label shall not contain any reference to the Act or any of these regulations or any comment on, or reference to, or explanation of any particulars or declaration required by the Act or any of these regulations to be included in the label which directly or by implication, contradicts, qualifies or modifies such particulars or declaration.

(2) Labels not to use words implying recommendations by medical profession: - There shall not appear in the label of any package, containing food for sale the words “recommended by the medical profession” or any words which imply or suggest that the food is recommended, prescribed, or approved by medical practitioners or approved for medical purpose.

(3) Unauthorized use of words showing imitation prohibited:

a. There shall not be written in the statement or label attached to any package containing any article of food the word ‘imitation’ or any word, or words implying that the article is a substitute for any food, unless the use of the said word or words is specifically permitted under these regulations.

b. Any fruit syrup, fruit juice, fruit squash, fruit beverages, cordial, crush or any other fruit products standardised under Food Safety and Standards (Food Products standards and Food Additives)

Regulations, 2011 which does not contain the prescribed amount of fruit juice or fruit pulp or fruit content shall not be described as a fruit syrup, fruit juice, fruit squash, fruit beverages, cordial, crush or any other fruit product as the case may be.

c. Any food product which does not contain the specified amount of fruit and is likely to deceive or mislead or give a false impression to the consumer that the product contains fruit, whether by use of words or pictorial representation, shall be clearly and conspicuously marked on the label as 'ADDED(NAME OF THE FRUIT) FLAVOUR'.

d. Any food product which contains only fruit flavours, whether natural flavours and natural flavouring substances or nature identical flavouring substances, artificial flavouring substances as single or in combination thereof, shall not be described as a fruit product and the word "ADDED" (NAME OF FRUIT) FLAVOUR shall be used in describing such a product;

e. Carbonated water containing no fruit juice or fruit pulp shall not have a label which may lead the consumer into believing that it is a fruit product.

f. Any fruit and vegetable product alleged to be fortified with vitamin C shall contain not less than 40 mgms. of ascorbic acid per 100 gm. of the product.

(4) Imitations not to be marked "pure": The word "pure" or any word or words of the same significance shall not be included in the label of a package that contains an imitation of any food.

(5) Labelling prohibitions for Drinking Water (Both Packaged and Mineral Water):

(*i*) No claims concerning medicinal (preventative, alleviative or curative) effects shall be made in respect of the properties of the product covered by the standard Claims of other beneficial effects related to the health of the consumer shall not be made.

(*ii*) The name of the locality, hamlet or specified place may not form part of the trade name unless it refers to packaged water collected at the place designated by that trade name.

(*iii*) The use of any statement or of any pictorial device which may create confusion in the mind of the public or in any way mislead the public about the nature, origin, composition, and properties of such waters put on sale is prohibited.

10.10 EXEMPTIONS FROM LABELLING REQUIREMENTS

1. Where the surface area of the package is not more than 100 square centimeters, the label of such package shall be exempted from the requirements of list of ingredients, Lot Number or Batch Number or Code Number, nutritional information and instructions for use, but these information shall be given on the wholesale packages or multi piece packages, as the case may be.
2. the 'date of manufacture' or 'best before date' or 'expiry date' may not be required to be mentioned on the package having surface area of less than 30 square centimeters but these information shall be given on the wholesale packages or multipiece packages, as the case may be;
3. in case of liquid products marketed in bottles, if such bottle is intended to be reused for refilling, the requirement of list of ingredients shall be exempted, but the nutritional information specified in regulation regarding veg. or non-veg. items these regulations shall be given on the label.

   Provided that in case of such glass bottles manufactured after March 19, 2009, the list of ingredients and nutritional information shall be given on the bottle.
4. in case of food with shelf-life of not more than seven days, the 'date of manufacture' may not be required to be mentioned on the label of packaged food articles, but the 'use by date' shall be mentioned on the label by the manufacturer or packer.

5. In case of wholesale packages the particulars regarding list of ingredients. Date of manufacture/ packing, best before, expiry date labelling of irradiated food and, vegetarian logo/non vegetarian logo, may not be specified.



CHECK YOUR PROGRESS

Q 3: Mention one item which do not require labeling.

.....

.....

Q 4: What declaration the seller should give in the container in case he use synthetic food colours in the product?

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10.11 LET US SUM UP

In this unit we have discussed the following aspects –

- Packaging requirements for Milk and Milk Products.
- Packaging requirements for Fruits and Vegetables Products.
- Packaging requirements for Canned Meat Products.
- Packaging requirements for Drinking Water Both Packaged and Mineral Water.
- Labeling requirements of Pre-packaged Foods.
- Items or products exempted from labeling requirements.



10.12 FURTHER READING

1) The Food Safety and Standards Act, 2006 along with Rules and Regulations 2011, Commercial Law Publishers (India) Pvt. Ltd.

2) Dev Raj, Sharma, K. & Joshi, V.K. (2011). "Quality Control for Value Addition in Food Processing" New Indian Publishing Agency, New Delhi

3) Mudambi, S.R., Rao, S.M. & Rajagopal M.V. (2006). "Food Science New Age International (P) Ltd., New Delhi



10.13 ANSWERS TO CHECK YOUR PROGRESS

Ans to Q No 1: "Principal Display Panel**"** means that part of the container/ package which is intended or likely to be displayed or presented or shown or examined by the customer under normal and customary conditions of display, sale or purchase of the commodity contained therein.

Ans to Q No 2: Package drinking water shall be packed in clean, hygienic, colourless, transparent and tamperproof bottles/containers made of polyethylene (PE) or food grade polycarbonate or sterile glass bottles suitable for preventing possible adulteration or contamination of the water.

Ans to Q No 3: Food with shelf-life of not more than seven days, the 'date of manufacture' may not be required to be mentioned on the label of packaged food articles, but the 'use by date' shall be mentioned on the label by the manufacturer or packer.

Ans to Q No 4: In case he use synthetic food colours in the product, its container carries must carry a label stating the following particulars:—

(*i*) the words "Food Colour Mixture";

(*ii*) the chemical and the common or commercial name and colour index of the dye stuff contained in the mixture.



10.14 MODEL QUESTIONS

Q 1: Define Wholesale package.

Q 2: List the General Requirements of labeling.

Q 3: Discuss the procedure of Labelling of edible oils and fats.

Q 4: What are the Nutritional Information's or nutritional facts to be declared on the label of a product in case of pre-package foods?

Q 5: Discuss the Packaging requirements for Fruits and Vegetables Products.

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13. Mahuhwari, R.P. & Maheshwari S.W. "Principles of Mercantile Law", Vikas Publishing House Pvt. Ltd.
14. Mercantile Law, By M.C. Shukla.
15. Mercantitle Law, By S.K. Dasgupta.
16. Mercantile Law, By D. Chandra Bose.
17. Mudambi, S.R., Rao, S.M. & Rajagopal M.V. (2006). "Food Science New Age International (P) Ltd., New Delhi
18. Principles of Mercantile Law; by R.P Maheshwari and S.N. Maheshwari
19. Shukla, M. C. (2007), *Mercantile Law*, New Delhi : S. Chand & Co. Ltd.
20. The Food Safety and Standards Act, 2006 along with Rules and Regulations 2011, Commercial Law Publishers (India) Pvt. Ltd.