GBA S3 03

Business and Labour Laws

SEMESTER - III

BACHELOR IN BUSINESS ADMINISTRATION

BLOCK - 1

KRISHNA KANTA HANDIQUI STATE OPEN UNIVERSITY

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BACHELOR IN BUSINESS ADMINISTRATION

BUSINESS AND LABOUR LAWS

BLOCK - 1

DETAILED SYLLABUS

UNIT 1.	**Indian Contract Act, 1872** Essential conditions of a Valid Contract under Indian Contract Act, Offer and Acceptance; Consideration, Capacities of Parties to Contract, Performance of Contract, Discharge of Contract, Breach of Contract and Its Remedies, Indemnity and Guarantee, Bailment and Pledge, Contract of Agency	**Pages : 7-42**
UNIT 2.	**Sales of Goods Act, 1930** Essential of Contract of Sales, Difference between Sale and Agreement to Sell, Condition and Warranty, Passing of Property in Goods, Transfer of Title by non- owners, Performance of Contract of Sale, Rights of Unpaid seller, Breach of Contract of Sale, Auction Sale	**Pages : 43-67**
UNIT 3.	**Formation of a Company** Formation of a Company, Stages of formation of Company, Documents Required for Incorporation, Types of Company, Meaning of Meetings and Kinds of Company, Meaning of Minute, Recording and Signing of Minutes, Role of Chairman, Postal Ballot, Resolution and its Different Kinds	**Pages : 68-96**
UNIT 4.	**The Indian Partnership Act, 1932** Basic Concept of Partnership, Advantages and Disadvantages of Partnership firm, Kinds and Deeds of Partnership, Kinds, Rights and Duties of Partners, Minor as a Partner and Partner's Express and Implied Authority, Registration and Dissolution of Partnership Firm	**Pages : 97-114**
UNIT 5.	**Consumer Protection Act, 1986** Definitions under the Act, Redressal Agencies under the Act, Powers of Redressal Agencies, Procedure of Filing a Complaint, Consumer Protection Councils, Penalties under the Act	**Pages : 115-127**

COURSE INTRODUCTION:

In the 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, law plays a vital role. In business world the legal environment plays an important role. The course “Business and Labour Laws” have been designed to give the learners the knowledge of the legal formalities that companies have to observe in their functioning. Different Acts included in this course will help the learners in understanding the various provisions of these Acts which are even useful in our daily life. The course consists of 15 units and the course is divided into three blocks :

Block 1 deals with the concepts of Indian Contract Act, Sales of Goods Act, Formation of a Company, Partner, Partnership Act, Consumer Protection Act,

Block 2 deals with Factories Act, Industrial Dispute Act, Trade Uninon Act, Payment of Wages Act,

Block 3 concentrates on some of the most important concepts of labour laws like Minimum Wages Act, Workmen Compensation Act, Emplyees Provident Fund and Miscellaneous Act, Payment Grauity Act and Arbitration and Conciliation Act.

Each unit of these blocks includes some along-side boxes to help you know some of the difficult, unseen terms. Some “EXERCISES” have been included to help you apply your own thoughts. You may find some boxes marked with: “LET US KNOW”. These boxes will provide you with some additional interesting and relevant information. Again, you will get “CHECK YOUR PROGRESS” questions. These have been designed to self-check your progress of study. It will be helpful for you 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 in making your learning more active and efficient. And, at the end of each section, 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.

BLOCK INTRODUCTION:

This is the *First Block* of the course '***Business and Labour Laws***'. After completing this block, which consists of five units, you will be able to get a fair idea on the different concepts in Business and Labour Laws.

This block comprises the following five units :

The first unit introduces us to the concept of conditions of a Valid Contract under Indian Contract Act,Offer and Acceptance,Consideration, Capacities of Parties to Contract, Performance of Contract,Discharge of Contract, Breach of Contract and Its Remedies,Indemnity and Guarantee, Bailment and Pledge and Contract of Agency.

The second unit gives us a broad overview of the Essential of Contract of Sales, Difference between Sale and Agreement to Sell, Condition and Warranty, Passing of Property in Goods,Transfer of Title by non-owners, Performance of Contract of Sale, Rights of Unpaid seller, Breach of Contract of Sale and Auction Sale.

The third unit gives us an idea on Formation of a Company,Stages of formation of Company, Documents Required for Incorporation, Types of Company, Meaning of Meetings and Kinds of Company, Meaning of Minute, Recording and Signing of Minutes, Role of Chairman, Postal Ballot and Resolution and its Different Kinds.

The fourth unit will help us in understanding the Concept of Basic Concept of Partnership, Advantages and Disadvantages of Partnership firm, Kinds and Deeds of Partnership, Kinds, Rights and Duties of Partners, Minor as a Partner and Partner's Express and Implied Authority and Registration and Dissolution of Partnership Firm.

The fifth unit gives us a broad overview of Consumer Protection Act, Redressal Agencies under the Act, Powers of Redressal Agencies, Procedure of Filing a Complaint, Consumer Protection Councils.

The structure of Block 1 is as follows :

UNIT 1 : Indian Contract Act

UNIT 2 : Sales of Goods Act

UNIT 3 : Formation of a Company

UNIT 4 : Partnership Act

UNIT 5 : The Consumer Protection Act

UNIT 1: INDIAN CONTRACT ACT, 1872

UNIT STRUCTURE

1.1 Learning Objectives
1.2 Introduction
1.3 Meaning and Importance of Business Law
1.4 Essential conditions of a Valid Contract under Indian Contract Act, 1872
1.5 Offer and Acceptance
1.6 Consideration
1.7 Capacities of Parties to Contract
1.8 Performance of Contract
1.9 Discharge of Contract
1.10 Breach of Contract and Its Remedies
1.11 Indemnity and Guarantee
1.12 Bailment and Pledge
1.13 Contract of Agency
1.14 Let Us Sum Up
1.15 Further Reading
1.16 Answers To Check Your Progress
1.17 Model Questions

1.1 LEARNING OBJECTIVES

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

- explain the essential elements of valid contract under Indian Contract Act, 1872
- describe the capacities of parties to contract, performance of contract and discharge of contract
- discuss the breach of contract and its remedies, indemnity and guarantee
- explain the bailment and pledge, contract of agency.

1.2 INTRODUCTION

In this unit we are going to discuss about Indian Contract Act, 1872. The Indian Contract Act, 1872 deals with the different principles of contract. A contract creates different rights and liabilities for the parties. This unit encompasses the different essential elements of a valid contract under the Indian Contract Act. It also discusses the different concepts which are related in the formation of an agreement and legally bind the parties entered into the contract like the capacities of parties to contract, performance of contract and discharge of contract. Through this unit, you will be able to know about breach of contract and its remedies, indemnity, guarantee, bailment, pledge and contract of agency.

1.3 MEANING AND IMPORTANCE OF BUSINESS LAW

Here we will discuss the essential conditions of a valid contract under Indian Contract Act, 1872. Under Section 2 (h) of the Indian Contract Act, 1872, the term 'contract' is defined as '*an agreement enforceable by law*'. The 'agreement' is defined under Section 2 (e) of the Act as "every promise and every set of promises forming consideration for each other is an agreement". On the other hand, a 'promise' is defined as "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 [Section 2 (b)].

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 by law made between two or more persons by whom rights are acquired by one or more to acts or forebearences on the part of the other or others."So, the two main elements of a contract are—

i) Agreement and,

ii) Its enforceability by law.

That is why, all contracts are agreements, but all agreements are not necessarily contracts. Example: X agrees to sell his house to Y for Rs. 5, 00,000/-. The agreement gives rise to an obligation on the part of X to

deliver the house to Y and on the part of Y to pay Rs. 5, 00,000/- to X. This agreement is a contract.

1.4 ESSENTIAL CONDITIONS OF A VALID CONTRACT UNDER INDIAN CONTRACT ACT, 1872

In addition to agreement and enforceability of law, there are some other conditions provided by the Section 10 of the Indian Contract Act, 1872. According to Section 10 of the Act " All agreements are contracts if they are made by the free consent of parties, competent to contract, for a lawful consideration and with a lawful object and not hereby expressly declared to be void". These conditions must be fulfilled in order to make a valid contract. Now we will discuss these essential *conditions of a valid contract*.

Intention to create legal Relationship: - The parties should have sufficient intention to make a lawful relationship among them.

Lawful offer and acceptance: - To be a valid contract there must be offer and acceptance. The offeror is the party who makes the offer and the offeree is the party to whom the offer is made. These two parties should lawfully think of their offer. The offer made by the offeror must be accepted by the offeree to make a valid contract.

Capacity of the parties: - Capacity implies competence of the parties to enter into a contract. Under Section 11, it is laid down that every person is competent to contract if ,he (i) is of the age of majority (ii) is of sound mind and (iii) is not disqualified from contracting by any law to which he is a subject. Thus, a minor or a person of unsound mind or a person disqualified by any other law is incapable to enter into a contract.

Free consent: - Another essential element of a valid contract is the free consent of all parties to an agreement. Free consent means the parties agreed upon the same thing in the same sense. Consent is said to be free when it is not caused by coercion, fraud, misrepresentation, undue influence and mistake. The parties should offer a free consent to the agreement.

Lawful object and consideration: - Object of an agreement is its purposes. With unlawful object or consideration, an agreement can be enforced in the court. So, both the object and the consideration of an agreement should be lawful.

Not declared to be void: - The agreement should not be declared as void expressly otherwise, it would not be enforceable by law. According to various sections of the Contract Act 1872, the following *agreement are treated as void-*

i. Agreements made with the parties having no capacity to contract e.g. minor and person of unsound mind. (Section 11)
ii. Agreements which are made under mistake of fact. (Section 20)
iii. Agreements with unlawful consideration or object. (Section 23)
iv. An agreement, whose consideration or object is unlawful in part. (Section 24)
v. Agreement having no consideration. (Section 25)
vi. Agreement in restraints of marriage. (Section 26)
vii. Agreement in restraint of trade. (Section 27)
viii. Agreement in restraint of legal proceedings. (Section 28)
ix. Agreement, the meaning of which is uncertain. (Section 29)
x. Agreement by way of wager. (Section 30)
xi. Agreement to do impossible acts. (Section 56)

Certainty and Possibility of Performance of Contract: - To be a valid contract, it must be certain. Uncertain, vague or impossible to do something are called void under the Section 56.

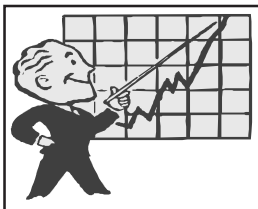
Legal Formalities: - A contract should fulfill legal formalities. It means the contract must be in writing, attested or registered.



LET US KNOW

The Indian Contract Act, 1872 is an important part of business law. This Act came into force from 1st September 1872. The Indian Contract Act is applicable to the whole of India except the State of Jammu and Kashmir. The Act deals with mainly into two groups. Such as:

i) General principles of the law of contract which are included from Section1 to 75, and
ii) Some special contracts, which includes from Section 124 to 238.



CHECK YOUR PROGRESS

Q 1: Mention three essential conditions of a valid contract.

i) .....

.....

ii) .....

.....

iii) .....

.....

1.5 OFFER AND ACCEPTANCE

All contracts are made by the process of a lawful offer and acceptance. At the time of formation of an agreement, there should have a definite offer by one person to another as well as its unconditional acceptance by the person to whom the offer is made.Let us discuss the meaning and legal rules for a valid contract of an offer and acceptance.

OFFER:

Both the words proposal and offer are synonymous. So, they are used interchangeably. According to Section 2 (a) of the Indian Contract Act, a proposal is defined as "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". Under Section 2 (c), it is mentioned that the person making the offer is known as the offeror, proposer or promisor and the person to whom the offer is made is called the offeree or proposee. An offer may be express or implied offer. An offer which is made by express words, spoken or written, called an express offer. Again an offer which is made by the conduct of the parties is called implied offer. On the other hand, offer may be specific or general. If an offer is made to a particular person, it is known as specific offer. If the offer is made to all the people or the world at large, it is called a general offer.

Example: i) M says to N, “Will you purchase my house for Rs.1, 00,000/- ?” M, in this case, is making a specific offer to N, as he signifies to N his willingness to sell his house to N for Rs.1, 00,000 with a view to obtaining N’s assent to purchase the house.

Legal Rules for a valid offer:

In order to make a valid offer, following rules must exist-

Legal Relation: - The offer should create a legal relation. A proposal will be a promise after it is made with a view to create legal obligation.

Certain and definite: - Vague and indefinite offer never come into existence. That is why, the terms and conditions of offer should be certain and definite. This type of offer can fix the rights and obligations among the parties to a contract.

Example: A offer to B to pay an amount of money if B marries the daughter of A. Here, the amount to be paid by A is not certain. Thus, it is not a valid offer.

Communication with offeree: - With a view to making a valid offer, the offeror should communicate the offer to the offeree. The offeree can not accept the offer without knowing it.

Example: “R” loses his horse and gives an advertisement offering a reward, if anybody can find the horse. “S” had found the horse, but “S” had not seen the advertisement. Then “S” would unable to claim the reward as because that there is no communication between “R” and “S” regarding the advertisement.

Assent of other party: - Offer must be made with a view to obtaining the assent of the other parties of the contract, so that it must be distinguished from mere expression of intention.

Conditional: - An offer may be conditional. In case of conditional offer, acceptance will be subject to fulfillment of the conditions. Of course, the offer against the public policy can not be enforced by the court of law.

Compliance: - To make a valid offer, it must not include any term of non-compliance where it will be assumed as amount to acceptance. Nobody can say that if the offer is not accepted within certain time, the offer would be deemed to have been accepted.

Lapse of an offer: - Under Section 6 (2) of the Indian Contract Act, the offer must be accepted by the offeree within the time laid down in the offer. No time is mentioned then it must be accepted within a reasonable time. The reasonable time will be considered depending upon the circumstances of each case.

An invitation to offer is not an offer: - To make a valid offer, it must be distinguished from an invitation. Because in "invitation to offer", no intention on the part of the person is found, who is sending the invitation to obtain the assent of the other person.

Example: Displaying goods in front of a shop along with its price list is called an invitation to offer.

Obtain acceptance: - The offer must be made with a view to obtaining acceptance of the offeree. It is laid down under Section 2 (a) that an offeror must make a proposal with the intention to get the acceptance.

No cross offer: - Identical or cross- offers do not make any contract. Where two parties formulate identical offer to each other by ignoring offer of each other, this offer is called cross offers. No contract can be made with these cross offer.

Example: "A" offers to "B" by writing a letter for selling a machine of "A" at Rs. 1, 00,000. In the same time, "B" also offers to "A" by writing a letter for selling a same type of machine at same price. So, due to cross offer, it will not be a contract.

ACCEPTANCE:

Now we will discuss the meaning and legal rules of a valid acceptance.

When a person to whom a proposal is made signifies his assent there to, then the proposal is said to be accepted. Thus, acceptance is the assent given to a proposal by the offeree to establish legal relations with the offeror. According to Section 2 (b) after accepting, an offer becomes a promise. In the word of Sir William Anson, acceptance means in general communicated acceptance. Acceptance may be of two types as express or implied.

Example: M offers to sell his car for Rs. 1, 50,000/- to N. N accepts the offer made by M and agrees to purchase the car at Rs. 1, 50,000 from “M”. It is called acceptance.

Legal Rules of a valid acceptance: - Following legal rules are immensely important to make a valid acceptance.

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.

Communication with offeror: - Acceptance must be communicated to the offeror. No contract can be formed if the offeree fails to communicate the acceptance to the offeror. So, an acceptor should show something as an indicator to accept the offer. Even after accepting, if acceptor fails to post the letter of acceptance then it will be not valid acceptance.

Example: X is a supplier, who sent draft agreement supply rice to Y for acceptance. Y accepts and put the draft in the drawer of his table for sending to X. But, the draft agreement remains in the drawer. So, it will not a contract as because Y does not communicate with X.

Time limitation: - Acceptance must be formed 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. The reasonable time will depend on circumstances of the case.

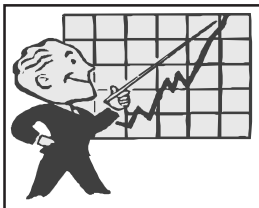
Acceptance according to mode :- According to the Section 7 of the Indian Contract Act 1872, when the offeror prescribes a particular mode of acceptance, then the acceptor should follow that mode. Some usual and reasonable mode is essential to be made by the acceptor, where no mode of acceptance is prescribed by the proposer.

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.

Aware of the proposal at the time of the offer: - The acceptor must be aware of the proposal at the time of the offer. Without knowing the existence of the offer if the acceptor conveys his acceptance, then it will be no contract. Example: “A” sold his business to his manager “B”. But it is unknown to his customer “C”. If “C” sent an order to “A” for the supply of goods and B received and executed this order then C can refuse to pay the price. Because, contract is made between B and C.

Before the offer lapse or before the offer is revoked: - 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 may not be implied from Silence: - In case of offeree remains silent and has nothing to show, then no contract can be formed. Mere silence made by offeree cannot be regarded as an acceptance of the proposal.



CHECK YOUR PROGRESS

Q 2: State the true or false for the following statements:

i) The person who makes an offer is called the offeree. (True\False)

ii) The offeree is not required to communicate his acceptance to the offer. (True\False)

iii) The terms of the offer must be certain and definite. (True\False)

iv) The acceptor must accept an offer according to the mode prescribed by the offeror. (True\False)

1.6 CONSIDERATION

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.

Legal Rules of consideration:

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

- ***At the desire of the promisor:*** According to this rule an act forms consideration for the promise, which must be done or promised to be done according to the desire of the promisor.

  Example: 'A' sees that B's house on fire and help 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.

- ***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 words “do or abstain 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.

- **Consideration may move from the promisor or from any other person: -** According to the Indian Law, consideration may move from the promise 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 should be more than what already promise. Consideration must be of some value in the eye of law.

  Example: - "A" promises to pay a sum of money to a police officer for investigation of a crime will be without consideration because he is already bound to do so by law.



LET US KNOW

The general rule is that an agreement made without consideration is void. But, under Section 25, some exceptions to rule are mentioned. According to the Section 25, the following are the three cases in which contract are rated without consideration.

Under Section 25 (1), where an agreement is expressed in writing and registered under law for the time being in force for the registration of the documents and is made on account of natural love and affection between the parties standing in near relation to each other, such contract is enforceable without consideration.

Under Section 25 (2), a promise to compensate wholly or in part, a person who has already voluntarily done something for the promisor is enforceable even though there would be no consideration.

Under Section 25 (3), a promise made by a debtor to pay a time barred debt is enforceable that it is made in writing and is signed by the debtor or his agent generally or specifically authorised in that behalf. The promise may be to pay whole or a part of the debt.



ACTIVITY 1

A. X agrees to pay Y Rs. 10,000/- and in consideration for, Y agrees to unload 100 bags of sugar from a truck in 5 minutes. Is it a valid contract?

B. A writes to B, "As a doctor you treat my wife without charging,

I promise to pay you Rs. 5000/-. "A" does not pay. Advise B.

C. A owes B Rs. 5000/- for the last 7 years and the payment in time barred. A signs a pronote for it. Is it a valid contract? If yes, give reason.



CHECK YOUR PROGRESS

Q 3: Fill in the blanks with appropriate words:

i. Consideration is the price for which the promise for other is bought and the promise is given for …… is enforceable.

ii. All contracts are made by the process of a lawful offer and ……..…....

iii. Under section 2 (h) of the Indian Contract Act, 1872, the term 'contract' is defined as 'an …… enforceable by law'.

iv. Acceptance must be communicated to the ……..

1.7 CAPACITIES OF PARTIES 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 agreement are contracts if they are made by the free consent of the parties competent to contract." On the other hand, it is laid down under Section 11, of the Act that "every person is competent to contract who is of the age of majority according to the law of which he is subject, is of sound mind, and is not, disqualified from contracting by any law of which he is subject.

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. With a view to removing the controversy in the determining the age of majority, two approaches are provided by the law, such as -

i. In case of contract pertaining to ordinary mercantile transactions, the age of majority is to be determined by the law of place where the contract is made.

ii. In case of contracts relating to land, the age of majority is to be determined by the law of the place where the land is situated.

Minors are frequently exploited and ill treated. Further, their properties are often stolen. As per provision of the law the court is to guard against their lack of knowledge and experience.

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 are 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 as form rational judgment as to its effect in his interests, 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. Some are partially disqualified from contracting by law. Alien enemy, married women in England (before the Married Women's Property Act 1982), Crown in England, the President of India, the Governor of State and their agents, foreign state, diplomatic representative of foreign state are the examples of absolute disqualified person from contracting by law. Public authority (under Indian law), corporation, trade unions, a convict, bankrupt or insolvent, professional in capacity are the example of partially disqualified persons from contracting by law.



LET US KNOW

The case of necessaries supplied to a minor is covered by Section 68 of the Contract Act which provides as follows: "If a person incapable of entering into a contract or anyone whom he is legally sound to support is supplied by another person with necessaries suited to his condition to be reimbursed from the property of such incapable person.



CHECK YOUR PROGRESS

Q 4: Fill in the blanks with appropriate words:

i. Under section _____of the Indian Contract Act, 1872 it is laid down that all agreements are contracts if they are made by parties competent to contract.

ii. A minor is one who has not completed his or her _____ years of age.

iii. Under Section _____ of the Indian Contract Act. 1872, a person in said to be of sound mind if he is capable of understanding rational judgment.

iv. A person who is usually of unsound mind, but occasionally of sound mind may _____ a contract, when he is of sound mind.

1.8 PERFORMANCE OF CONTRACT

Regarding the performance of contract Section 37 of the Act states that the parties to a contract must either (i) perform their respective promises or (ii) offer to perform the same; (iii) such performance is dispensed with or (iv) excused under the provisions of the Act or of any other law. There are mainly two ways of performing a contract such as–

i. Actual performance

ii. Attempted performance

When the party has done what he had undertaken to do, it is called

actual performance. In actual performance, the party is to fulfill all his obligations under the contract. On the other hand, it is called attempted performance when the party offers to perform his obligation, but it is not accepted by the promisee. So, it is also called offer to performance or tender. Hence, a valid tender of performance is considered to be the performance of a promise.

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 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.

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 promise must be given a reasonable opportunity to inspect the goods.

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

By whom contract must be performed:

A contract can be performed by the following persons: –

i) *Promisor himself:* Under Para 1 to Section 40, it is laid down that where it appears from the nature of the contract, the intention of the parties that any promise contained in it must be performed by the promisor himself or by his legal representatives or by any other competent person employed by him, then such promise must be performed by the promisor himself or by his legal representatives or by any other competent person employed by him.

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 promise may employ a competent person such as agent to perform the promise, if the

contract is not formed on personal condition.

iii) *Representations:* A contract which involves the use of personal skill or it is founded on personal considerations, comes to an end if the promisor dies. Of course in case of other contracts, the legal representatives of a deceased promisor are bound to perform it as provided in Para 2 of Section 37.

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 Person:* 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.

v) *Joint Promisors:* In case of joint promisors , a promise may compel one or more of the joint promisors in the absence of a contract to the contrary.

vi) *For whom contract is performed:* 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.

Of course, there are certain special cases, where a third party can enforce a promise though he is not a party to the contract e.g. in respect of trust, marriage settlement etc. In case of death of promisee, the representative appointed by him can ask for the performance of the promise under a contract.

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 promisor. 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 partly payment of the debt.

1.9 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.

MODE OF DISCHARGE OF CONTRACT:

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

A) Discharge by performance :-

Performance implies doing the obligation of the contract. 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 perform the respective promises, the contract is said to be discharged. Performance done by the parties must be according to time and terms of contract.

2) Attempted performance: - It is also called tender. Tender is not an actual performance. It is only an offer to perform the obligation by the promisor which may be refused by the promisee. In such a case tender is become equivalent to actual performance except in the case of tender of money.

B) By agreement on consent: - Agreement between the parties can find then to perform the contract. Because a contract is created by an agreement, hence in the same way, it can be discharged by an agreement. In this connection the rule of law is as follows. “Eodem modo qus and quide constituitor, eodem modo destruitur,” the meaning of which is that a thing may be destroyed in the same manner, in which, it is constituted. The consent may be of the following types. Such as –

i) Express: Express consent may be given at the time of formation of the contract or subsequent to its formation.

ii) Implied : The contracts are also discharged by implied consent, different modes of discharged by implied consent are mention below – a) Novation b) Alteration e) Rescission d) Remission e) Accod and Satisfaction f) Waiver g) Merger.

C) 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, all acts to do impossible acts are void.

There are two types of impossibility of performance such as –

i) Impossibility existing at the time of agreement.

ii) Impossibility arising subsequent to the formation of contract.

On the other hand, impossibility of performance existing at the time of performance of a contract may be either (a) known to the parties or b) not known to the parties.

Likewise impossibility arising subsequent to the formation of a contract or supervening impossibility may be –

a) By some event beyond the control of the parties or

b) By some act either of the promisor or of the promisee.

D) 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 deprived of his remedy at law. In such cases, the contract is discharged.

E) 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 merger:* - Merger will take place when an inferior right accruing to the same party either under the same or another contract.

iii) *By insolvency:* - An insolvent is discharged from all liabilities incurred prior to his adjudication.

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.

v) *Right and liabilities vesting in the same person:* - Where the right and liability become vested in the same person, the other parties are discharged.

1.10 BREACH OF CONTRACT AND ITS REMEDIES

All parties to a contract are expected to perform their promises. When one party refuses to perform his promise, then the breach of contract takes place. 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) Claim for specific performance.

iii) Claim for injunction.

iv) Claim for quantum merit and

v) Claim for damages.

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

Example: - M promises N to supply him a motor car on 1st January 2007, and N promises to pay for the motor car on 1st January 2007. N is absolved from paying its price.

2) Claim for specific performance: - In some specific cases if the damages are not 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.

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.

ii) When it is probable that compensation in money cannot be get for the non-performance of the act agreed to be done.

iii) When there is not any 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 ultra-vires of its memorandum of association.

viii) The court cannot supervise its carrying out.

3) Claim 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) Claim for quantum merit:- The claim for quantum merit 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 merit 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 merits are arised 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) Claim 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 exemplar damages and

iv. Nominal damages.



CHECK YOUR PROGRESS

Q 5: Fill in the blanks with appropriate words:

i. Discharge of contract implies_____

ii. Express consent may be given at the time of _____ of the contract.

iii. All acts to do impossible acts are_____

iv. If there is breach of contract by one party, then the other party may_____ the contract.

1.11 INDEMNITY AND GUARANTEE

CONTRACT OF INDEMNITY:

According to the Section 124 of the Indian Contract Act, a 'Contract of Indemnity' is a contract by which one party promises to save the other from the loss caused to him by the conduct of the promisor himself on or by the conduct of a third party. The person who promises to- pay the loss is called the 'Indemnified' or the 'Indemnity holder'. According to English Law, a contract of indemnity is a promise to save another from the loss caused as a result of a transaction entered into at the instance of the promisor.

Example: A and B go to C, a scooter dealer. B asks C to give A one new Bajaj Scooter and says that he (B) will pay the amount within a month. The contract between B and C is one of the indemnities.

Hence, the definition given by the Indian Contract Act, 1872 is not exhaustive and that is why Indian court accepts the English definition of 'Contracts of Indemnity.'

Rights of indemnity holder:

According to Section 125 of the Indian Contract Act, 1872 an indemnity holder can recover the following benefits from the indemnifier:

1. All damages which he may be compelled to pay in any suit in respect of any matter to which the promise to indemnify applies.
2. All costs which he may be compelled to pay in bringing or defending such suits.
3. All such sums, which he may have paid under the terms of compromise of any such suit. But such compromise should not be contrary to the orders of the indemnifier and must be prudent or authorized by him (indemnifier).

Rights of indemnifier:

It is to be mentioned that regarding the rights of indemnifier, the Indian Contract Act, 1872 does mention any thing. So, on the basis of English Law, the rights of the indemnifier can be stated that an indemnifier has the same rights, as a surety has, in case of the contracts of guarantee as provided under the Section 141.

CONTRACT OF GUARANTEE:

According to the Section 126 of the Indian Contract Act 1872, a contract of guarantee is a contract to perform the promise made or discharge liability incurred by a third person in case of his default. The contract of guarantee must satisfy all the essential elements of a valid contract except few differences. Such as i) surety himself must be benefited ii) principal debtor may be a minor and iii) the liability of the surety is conditional.

Parties to a contract of guarantee-

The following three parties are found in case of contract of guarantee:

i. The surety- The person who gives the guarantee.
ii. Principal debtor- The person in respect of whose default, the guarantee is given.
iii. Creditor- The person to whom the guarantee is given.

Example- "A" gives a loan of Rs. 1, 00,000 to "B". "C" promises to "A" that if "B" does not repay the loan, he will pay. This is a contract of guarantee. Here "B" is the principal debtor, "C" is the surety and "A" is the creditor.

Types of guarantee:

There are mainly two types of contracts of guarantee. Such as-

1. Specific guarantee- It implies a guarantee which is given for a specific transaction. So, liability of the surety extends only to a single transaction.
2. Continuing guarantee - It implies such type of guarantee which extends to a series of transactions. Continuing guarantee is not confined to a single transaction. So, the surety can fix up only a limit on his liability as to time or amount of guarantee.

Rights of the surety:

The rights of the surety can be categorized mainly into three heads. Such as:

i. Rights of the surety against the principal debtor- it includes the right to be subrogated and right to claim indemnity.
ii. Rights of the surety against creditor- It includes the benefit of every security which the creditor has against the debtor at the time when the contract of suretyship is entered.
iii. Rights against co-sureties- It includes a share of every collateral

security which has been delivered to any of the sureties.

Discharge of surety:

A surety can be discharged from his liabilities by the following ways-

i. *By Revocation of contract:* A surety can be discharged by the revocation of the contract in any of the following cases.

a) By notice as per Section 130.

b) By death as per Section 131.

c) By novation as per Section 62.

ii. *By conduct of the creditors:* A surety can also be discharged by the conduct of the creditor in any of the following cases.

a) Guarantee obtains by misrepresentation as per Section 142.

b) Guarantee obtained by concealment as per Section 143.

c) Guarantee on contracts that creditor does not act until a co-surety joins as per Section 144.

d) Failure of consideration.

1.12 BAILMENT AND PLEDGE

Bailment and pledge are special class of contract. Chapter IX (Section 148 to 181) of the Indian Contract Act, 1872 deals with the contract of bailment and pledge.

The word bailment is derived from the French word “baillier” the meaning of which is “to deliver”. It implies any kind of handing over. According to Section 148, 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. There are two parties in the contract of bailment. They are bailor and bailee. The bailor is the person who delivers the goods and bailee is the person to whom they are delivered.

Examples:

1. M delivers a piece of cloth to N, a tailor to be stitched into a suit. There is a contract of bailment between M and N.
2. X lends two books to Y to be returned after the examination. It is a contract of bailment between X and Y.

Essential elements of bailment:

Following are the essential elements of bailment-

1) *Contract*- A bailment is usually created by an agreement between a bailor and a bailee except finder of goods.
2) *Delivery of Possession*- The contract of bailment necessarily involves a delivery of possession of goods by bailor to bailee. It requires temporary delivery of goods. Mere custody of goods without possession cannot make a bailment e.g. a domestic servant uses goods of his owner is not a bailment.
3) *Return of goods*- In bailment, the goods should be returned as soon as the purpose is fulfilled. It must be returned as per the direction of bailor.
4) *No transfer of ownership*- Incase of bailment ownership is not transferred. The bailor will be the actual owner of the goods bailment.

Duties and rights of bailor and bailee:

Duties of bailor:

Following are the duties of the bailor:

i. To disclose all known faults in the goods as per Section 150.
ii. It is duty of the bailor for those faults, which are unknown to him, where goods are bailed on hire as per Section 150.
iii. The bailor is to bear the extraordinary expenditure of bailment as per Section 158.
iv. The bailor is responsible to bear such types of loss, which arised due to his defective goods as per Section 164.
v. The bailor is to receive back the goods whenever it is returned by the bailee as per Section 165.

Duties of bailee-

Following are the duties of bailee-

i. It is the duty of the bailee to take reasonable care of the goods as per Section 151 to152.
ii. The bailee is to act in consistent with the terms of bailment and follow these strictly as per Section 153.
iii. The bailee is to use the goods of bailment according to terms and

conditions of bailment as per Section 154.

iv. It is a duty of bailee not to mix his own goods with the goods of bailment as per Section 155 to157.

v. The bailee is to return the goods of bailment as soon as expiry of the specific period of time as per Section 160 to161.

vi. The bailee is to deliver the profit to the bailor, if any such profit is acquired from the goods of bailment as per Section 163.

vii. It is a duty to the bailor to hold the goods on behalf of the bailor as per Section 117.

Rights of bailee-

Following are the rights of bailee-

i. Right of compensation for defective goods as per Section 150.

ii. Right to claim for necessary extraordinary expenditure as per Section 158.

iii. Right in case of gratuitous bailment as per Section 158.

iv. Right to claim for compensation or loss because of the defective enrollment of the bailor as per Section 164.

v. Right to delivery of goods to any of the joint bailors as per Section 165.

vi. Right to delivery of good to bailor without title as per Section 166.

vii. Right to ask the court to decide the ownership of the goods of bailment, if the third party claims the ownership of the good as per Section 167.

viii. Right to bring an action against third party, if a third party wrongfully deprives the bailee as per Section 180.

ix. Right of particular lien over the goods until his expenditure is paid as per Section 171.

Rights of bailor –

Following are the rights of bailor-

i. Right of compensation for loss caused by lack of reasonable care by the bailee as per Section 152.

ii. Right to terminate bailment for consistent use of goods by bailee as per Section 153.

iii. Right to claim damages in case of unauthorized use of goods bailed as per Section 154.

iv. Right against mixture of goods bailed as per Section 155.

v. Right to terminate the contract and take back the goods in case of gratuitous bailment as per Section 159.

vi. Right to get the goods returned as per Section 160.

vii. Right of compensation for non- return of goods as per Section 161.

viii. Right to get accretion to the goods as per Section 163.

ix. Right to enforce by suit all the liabilities of the bailee as his rights.

Contracts of pledge:

Pledge can be defined as a special kind of bailment. Pledge is a transfer of goods as a security for the payment of a debt or for the performance of a promise. According to Section 172 of the Indian Contract Act, 1872, pledge is the bailment of goods as security for the payment of a debt or performance of a promise. In case of the contract of pledge the bailor is called pledger or powner and the bailee is called pledgee or pawnee. The contract of pledge can be only of movable properties. Transfer of goods in pledge can be either actual or constructive. The pledger should have judicial right on the goods pledged.

Example: X borrows a loan of Rs. 1, 00,000 from Y and X give his car as security. It is a valid pledge. In this case X is “pledger” and Y is the “pledgee”.

Duties and rights of Pawner and Pownee:

Like bailor and bailee, the powner and pownee have some duties as well as rights, which are discussed as follows:

Duties of powner:

1. To repay the debt or to make performance in time.
2. To inform the pownee about any default or risk of goods if any.
3. To repay the expenditure incurred by the pownee on the goods pledged.

Duties of pownee:

1. To take reasonable care of the goods.
2. To act as per the terms and conditions of the pledge.
3. To avoid unauthorized use of the goods bailed.
4. Pownee should not mix the goods pledged with his own goods.

5. To return the goods to the powner as soon as receiving the payment of debt.
6. It is a duty of pownee to use the particular lien for the refund of the interest on debt.
7. To return the profit if any accrued from the goods pledged to the powner.
8. It is a duty of pownee not to conceal anything regarding decay, destruction or deterioration.

Right of the powner:

1. Right to withdraw the goods pledged as per Section 177.
2. Right to take back the goods pledged on payment of his debt.
3. Right to get the surplus in case of sale.

Right to pownee:

1. Right to retain goods for payment of the debt and for the performance of the promise as per Section 173.
2. Right to retain goods for any subsequent advances as per Section 174.
3. Right to receive any extraordinary expenses from the powner as per Section 175.
4. Right against the true owner if the powner's title to the goods is defective as per Section 178-A.
5. Pownee can exercise his right in case of default by Powner as per Section 176.
6. Right to redeem the debt in the manner and time at his choice as per Section 177.

1.13 CONTRACT OF AGENCY

Under section 182 of the Indian Contract Act 1872, an agent is defined as person employed to do any act for another or to represent another in dealing with the third person. The person for whom such act is done by the agent is known as the "principal person". So, contract of agency can define as a relation between two parties (one is agent and another is principal) created by an agreement express or implied. There is a legal maxim

regarding agency, which is “Quit facit per alium facit per se”. It implies that “He who does through another does by himself”. The act of principal is done by the act of agent. Generally agents are appointed with some instructions. The Section 226 states that “Contracts entered into through an agent and obligations arising from acts done by an agent may be enforced in the same manner and will have the same legal consequences as if the contracts had been entered into and the acts done by the principal in person”.

Example: A appoints B to purchase a car on behalf of him. In this case, A is the principal and B is the agent. On the other hand, the relationship between A and B is known as Agency.

Methods of creating Agency: The agency can be created in following ways:

1. *By express agreement:* By an express agreement, a contract of agency can be created. The express agreement may be oral or written.
2. *By implied agreement:* By an implied agreement, a contract of agency can be created under certain circumstances from the behaviour or conduct of the parties on the relationship between them. Agency by estoppel and agency of necessity are case of implied contract of agency.
3. *By estoppel or by holding out:* By estoppel or by holding out an agency can be created.
4. *Agency of necessity:* Without any express authority, sometimes circumstances force a person to act on behalf of another. This way agency of necessity can be created.
5. *By ratification:* It implies subsequent adoption and acceptance of an act, which was done originally without any instruction.

   Example: A buys a bag of rice for B. B did not appoint A as his agent and did not instruct him to buy the rice for him. B may accept the rice upon hearing of the transaction. If B does so, the act of B is ratified and A becomes his agent with retrospective effect.

Classification of Agents: Agents can be classified from two points of view, such as :

A. From the point of view of *the extent of authority*, which may be-

- **Special agent:** The person who is appointed to perform a particular act or to represent his principal for some particular transaction.
- **General agent:** The person who has authority to do all acts connected with a particular function.
- **Universal agent:** The person whose authority to act for the principal is unlimited.

B. From the point of view of *the nature of work performed by them*, which may be-

- **Factor:** The person who is entrusted with the possession of goods for the purpose of selling them.
- **Auctioneer:** The person who is appointed by a seller for the purpose of selling his goods by public auction.
- **Broker:** The person who is appointed to purchase or to sell goods for another.
- **Commission agent:** The person who is appointed for purchasing and selling goods or transacting business for other persons.
- **Del Credere agent:** The person, who guarantees his principal that the persons with whom he enters into contract on behalf of the principal, shall perform their obligation.

Duties of agent: Different duties of agent are as follows:

- To carry out the work undertaken according to the directions given by the principal.
- To carry out the work with reasonable care, skill and diligence.
- To render proper accounts to his principal.
- To communicate with the principal in case of difficulty.
- Not to deal on his own account.
- To pay sums received for the principal.
- To protect and preserve the interest of the principal in case of his death or insolvency.
- Not to use information obtained in the course of the agency against the principal.
- Not to make secret profit from agency.

- Not to set up an adverse title.
- Not to delegate authority.

Right of agent:

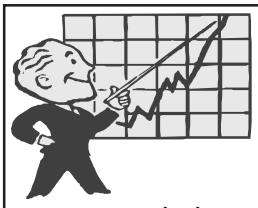
- Right of retainer
- Right to receive remuneration.
- Right of lien.
- Right of indemnification.
- Right of compensation.
- Right of stoppage in transit.

Duties of Principal:

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

Rights of principal:

- To recover damages by the agent.
- To obtain an account of secret profits and recover them and resist a claim for remuneration.
- To resist agent's claim for indemnify against liability incurred.



CHECK YOUR PROGRESS

Q 6: State true or false for the following statements:

i. The person who promises the loss is called indemnifier. (True / False)

ii. The contract of indemnity under Section 124 includes both express and implied promises. (True / False)

iii. There are mainly two parties in contract of guarantee. (True /False)

iv. In case of contract of guarantee creditor is the person to whom the guarantee is given. (True / False)

v. Continuing guarantee is given for a specific transaction. (True / False)



1.14 LET US SUM UP

In this unit we have discussed about the law of contract. Contract is an agreement enforceable by law. To become a valid contract an agreement must have the essential elements like,

a. Offer and acceptance,
b. Intention to create legal relationship,
c. Capacity of the parties,
d. Consideration,
e. Free consent,
f. Lawful object,
g. Not declared to be void,
h. Certainty and possibility of performance

The unit discusses all different aspects which are related to contract law like indemnity, guarantee, pledge, bailment etc.



1.15 FURTHER READING

1. K Sen, J K Mitra (2006);*Commercial and Industrial Law*; World Press
2. Maheshwari S K Maheshwari S N (2014); *Principles of Business Law*; Himalaya Publishing House, New Delhi
3. N D Kapoor (2017);*Elements of Mercantile Law*; Sultan Chand & Sons,India
4. Sharma M, Sareen V.K., Garg K.C. (2010); *Business Regulatory Framework*; Kalyani Publishers, India

1.16 ANSWERS TO CHECK YOUR PROGRESS

Ans to Q No 1: i) There must be an offer and acceptance.
ii) The parties should be capable of entering into contract.
iii) There must be free consent of the parties.

Ans to Q No 2: i) False ii) False iii) True iv.) True

Ans to Q No 3: i) value ii) acceptance iii) agreement iv) offeror

Ans to Q No 4: i) 10, ii) 18, iii) 12, iv) make,

Ans to Q No 5: i) Termination, ii) Formulation, iii) Void,
iv) Rescind

Ans to Q No 6: i) True, ii) False, iii) False, iv) True,
v) False.



1.17 MODEL QUESTIONS

Q 1: "An agreement enforceable by law is contract." Discuss the definition, bringing out clearly the essentials of a valid contract.

Q 2: Mention the legal rules of the following:
(i) Valid offer, (ii) Valid acceptance, (iii) Consideration

Q 3: "Tender is attempted performance" Comment.

Q 4: State by whom contract should be performed.

Q 5: Examine the various ways in which a contract may be discharged.

Q 6: Write short notes on:
(i) Breach of Contract, (ii) Indemnity, (iii) Guarantee, (iv) Bailment, (v) Pledge, (vi) Contract of agency.

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UNIT 2: SALES OF GOODS ACT, 1930

UNIT STRUCTURE

2.1 Learning Objectives

2.2 Introduction

2.3 Essential of Contract of Sales

2.4 Difference between Sale and Agreement to Sell

2.5 Condition and Warranty

2.6 Passing of Property in Goods

2.7 Transfer of Title by non- owners

2.8 Performance of Contract of Sale

2.9 Rights of Unpaid seller

2.10 Breach of Contract of Sale

2.11 Auction Sale

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 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

2.2 INTRODUCTION

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

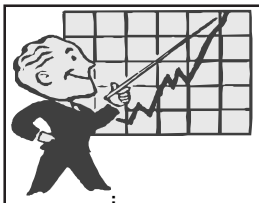
2.3 ESSENTIALS OF CONTRACT OF SALE

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 term 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 nonexistence of consideration will treated, it 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. ……

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ii. .....

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2.4 DIFFERENCE BETWEEN SALE AND AGREEMENT TO SELL

Now let us discuss the difference 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 recover 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.

2.5 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 are 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 it 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 ask 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 stipulations 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 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 present 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. .....

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ii. .....

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2.6 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 are in deliverable state and the ownership 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 to notice 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
- 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.

2.7 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 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 if has sole possession of the goods by permission of the co-owners, then the property in goods is 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.

2.8 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 delivery 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 the 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 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 bear by 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 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 avail 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 has to be deemed to have accepted the goods in case of 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 the seller to deliver the goods to the buyer. Of course, he cannot do so until the buyer applies for delivery.



ACTIVITY 1

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 for the following statements:

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)

Q 4: Fill in the blanks with appropriate words:

I. A contract of sale can be performed by the _____ ways.

II. Under section _____ reservation of the right of disposal is defined as any action made by the seller.

III. There are _____ types of modes of delivery

IV. In case of defective delivery the buyer _____ reject the goods.

2.9 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 of 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 perishable in 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 for the 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 the 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.

2.10 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.

2.11 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.



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.



2.12 LET US SUM UP

In this unit, we have discussed the following -

- 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.
- 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.



2.13 FURTHER READING

1. Shukla M.C. (2010); *A Manual of Merchantile Law*; S Chand & Company, India
2. K.C.Garg,ý V Gupta,ý R.C.Chawla (2010);Company Law and Secretarial Practice; Kalyani Publishers, India
3. D Chandra Bose (2008); *Business Law*; Prentice Hall Learning, India
4. N D Kapoor (2017);Elements of Mercantile Law; Sultan Chand & Sons, India
5. Sharma Mukesh, Sareen V.K., Garg K.C. (2010); Business Regulatory Framework; Kalyani Publishers

2.14 ANSWERS 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.

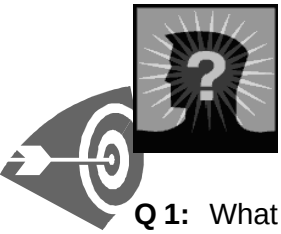
Ans to Q No 2: i) In case of sale, ownership of goods is transferred from the seller to the buyer immediately and in case of agreement to sell, the ownership of goods is transferred from the seller to the buyer at a future date.

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



2.15 MODEL QUESTIONS

Q 1: What is a contract of sale? What are its essential elements?

Q 2: Distinguishes 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?

Q 6: Define the term Delivery. Discuss the rules relating to delivery in the Sale of Goods Act.

Q 7: Who is an unpaid seller? What are the rights of an unpaid seller?

Q 8: Discuss the different remedies available to seller and buyer in case of breach of a contract of sale.

Q 9: What is an Auction sale? Discuss the rules regarding the Auction sale.

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UNIT 3: FORMATION OF A COMPANY

UNIT STRUCTURE

3.1 Learning Objectives

3.2 Introduction

3.3 Formation of a Company

3.4 Stages of formation of Company

3.5 Documents Required for Incorporation

3.6 Types of Company

3.7 Meaning and Kinds of Company Meetings

3.8 Meaning of Minute

3.9 Recording and Signing of Minutes

3.10 Role of Chairman

3.11 Postal Ballot

3.12 Resolution and its Different Kinds

3.13 Let Us Sum Up

3.14 Further Reading

3.15 Answers To Check Your Progress

3.16 Model Questions

3.1 LEARNING OBJECTIVES

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

- define and explain the formation of a company
- describe the stages of formation of company
- discuss the documents required for incorporation of a company
- describe the certificate of incorporation and commencement of business
- discuss the meaning of a company meeting and its different kinds
- define the meaning of a Minute
- elaborate the recording and signing of minutes
- explain the role of the Chairman and know about Postal Ballot
- describe the resolution and its different kinds.

3.2 INTRODUCTION

In this unit, we are going to discuss about the formation of a company and company meetings. Here, you will able to know details about the documents required for incorporation of the formation of a company. This unit also encompasses the stages of formation of company.The unit discusses the certificate of incorporation and the certificate of commencement of business. Thus, you will able to understand through this unit, the basic concept of company, the essential document for formation of a company, stages, documents required for incorporation, certificate of incorporation and certificate of commencement of business.

And at the end of this unit you will be able to know about company meetings and recording of minutes and prospectus.

3.3 FORMATION OF A COMPANY

Before formation of a company, there must be an idea originated in the mind of a person or persons to form a company and do the necessary steps to convert it into reality. Such persons are called as 'Promoter'.

The term 'promoter' is not define anywhere in the Companies Act. According to Palmer, "A person who originate a scheme for the formation of the company, has the Memorandum and Article prepared, executed and registered, and finds the first directors , settles the terms of preliminary contracts and prospectus (if any) , and make arrangements for advertising and circulating the prospectus and placing the capital, is a promoter."

An idea has to come to start a business and it should bring into existence. The promoter is a person who originates the idea to start a business and plan to bring it into reality. He has very wide powers relating to the formation of the company. He is neither a trustee nor an agent of the proposed company. The promoter stands in a fiduciary relationship towards the company.

Lord Justice Lindley, defines the company as,

"A company is voluntary association or an organization of many persons who contribute money or monies worth to a common stock and employee it in some trade or business and who share the profit or loss

arising therefrom. The common stock so contributed is denoted in money and is the capital of the company. The persons, who contribute it or to whom it belongs, are members of the company. The proportion of capital to which each member is entitled, is his share. The shares are of fixed value and the whole capital of the company is divided into equal number of shares. The shares are generally transferable although under certain special circumstances, the right to transfer may be restricted."

3.4 STAGES OF FORMATION OF COMPANY

A company is nothing but an association of persons incorporated under Companies Act, having legal separate existence from its members. A company is formed under three stages, as –

1. Promotion of a company
2. Registration, incorporation and Commencement of a company and
3. Raising of capital

1. Promotion of a company: An idea has to come in the mind of certain persons to form a company. These persons are called promoter. He takes all necessary steps to form the company. The promoter may be an individual, association of persons, partners etc who originate the scheme for formation of the company; get together the subscribers to the memorandum, gets the Memorandum and Article, prepared, executed and registered, finds the bankers, brokers and legal advisers, find the directors, settle the terms of preliminary contracts with vendors and agreement with underwriters and makes arrangement for preparation, advertisement and circulation of the prospectus and placement of the capital.

2. Registration, incorporation and commencement of a company: The following aspects have to decide before a company incorporate and commence its business:

a. **Types of company:** Any two or more persons required to start a private company and 7 members for a public company, associated for a lawful purpose, by subscribing their names to the memorandum of association in respect of registration, form an incorporated company, with or without limited liability.

b. **Application for availability of name of company:** The promoters choose at least five names apart from the main name of the company and make an application along with prescribed fee(presently Rs. 500) to the Registrar of Companies to ascertain the availability of the name. According to Section 20 of the Act, a company cannot be registered with the name which is undesirable in the opinion of Central Government or which is identical with or too nearly resembles the name of an existing company. The name of the company must end with the word "Limited" in the case of a public company and the words "Private Limited" in the case of a private company. The Registrar of Companies shall have to furnish the information regarding the availability of name within seven days. In case the name is undesirable, the registrar may reject the same or ask for resubmission of the application with new name or calls for further information, ordinarily within three days of receipt of the application.

c. **Preparation of Memorandum and Article of Association:** Memorandum of Association is the constitution of the company which specifies the area of the company, within which it can act. It contains clauses like, name clause, object clause, capital clause, liability clause, subscription clause and registered office clause. Article of Association is another important document which contains rules and regulations relating to the internal management of a company.

d. **Vetting of Memorandum and Articles, Printing, Stamping and Singing of the same:** The draft of the Memorandum and Articles of Association should be prepared and typed. But before printing the Memorandum and Articles Association it is desirable to get the draft vetted by the Registrar. This helps in avoiding mistakes and unnecessary delay in registration of the Company. It should be signed separately by the subscribers. It should be stamped.

e. **Power of attorney:** With a view to fulfill the various formalities that are required for incorporation of a company, the promoters may appoint an attorney empowering him to carry out the instruction/ requirement stipulated by the Registrar. This requires execution of a Power of Attorney on a non-judicial stamp paper of a value prescribed in the respective State Stamp Laws.

f. **Additional Documents Required:**

   A. Consent of director: In case of public limited company having share capital, the director has to give written consent to act as director.

   B. Notice of the Registered office: The notice of location of the registered office in the memorandum and article of association is necessary.

   C. Particulars of directors: The persons who are to act as first directors may file their particulars to the Registrar at the time of registration.

g. **Statutory Declaration in e-Form No. 1:**

Statutory Declaration for completing of all legal formalities should be signed by an advocate of High Court or Supreme Court or attorney or Chartered Accountant or by a person named in the Article as a director, manager, or secretary of a company and filed with the Registrar. The Registrar may accept such a declaration as sufficient evidence of such compliance.

h. **Payment of Registration Fees:** The fee prescribed for registration of company is required to be paid to the Registrar.

i. **Certificate of incorporation:** If all the documents mentioned above are complete and the Registrar of the Companies is satisfied that all requirements are complied with, the Registrar shall certify under his hand that the company is incorporated. The certificate of incorporation given by the Registrar and it is the conclusive evidence that all requirements of the Companies Act, 1956, have been complied with in respect of registration.

But, a public company cannot start its business until it gets certificate of commencement of business from Registrar of Companies. To get the certificate of commencement of business a public company has to pass through capital subscription state i.e. raise sufficient capital to commence its business. There are two ways of raising capitals i.e. from private source and from the public.



CHECK YOUR PROGRESS

Q 1: Mention any three aspects that have to decide before a company incorporate and commence its business?

i) .....
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ii) .....
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iii) .....
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3. Raising of capital: If a company raises capital from private source i.e. from director's members and their relations, it is required to file a statement in lieu of prospectus with the Registrar at least three days before the allotment of shares. Where the company wishes to invite public in subscription for its shares, it will have to issue a prospectus after filing a copy of it with the Registrar. On receiving the minimum subscription, the company can allot shares and thus raise the required capital.

3.5 DOCUMENTS REQUIRED FOR INCORPORATION

There are certain necessary documents that have to file with the

Registrar of companies for its incorporation:

1. **The Memorandum of Association:** It is a document that describes the object of the company for which it is form and it should be signed by all the persons necessary to form the company.
2. **The Article of Association:** It is the document which contains the rules and regulation of the company and should be signed by the all the persons necessary to form the company.
3. The agreement which the company propose to enter with any individual for appointment as company's managing director, or whole-time directors or manager: If the company is entered into an agreement with any individual for appointment as company's managing director, or whole-time directors or manager than copy of the same should be filed with the Registrar of the company.
4. The declaration that all the requirements of the Companies Act relating to the registration of the company have been compiled with:
   Such declaration must be signed by any one of the following person—
   a. A Chartered Accountant in the whole-time practice in India;
   b. A company secretary in whole-time practice in India;
   c. An advocate of the Supreme Court or High Court;
   d. An attorney or pleader entitled to appear before High Court;
   e. A person named in the article of association as a director, manager, or secretary of the company.
5. A written consent of such directors to act as director of the company:
   It should be signed by the director himself or by his agent authorized in writing.
6. A written undertaking by such directors to take and pay for their qualification shares if any:
   It should be signed by all directors.
7. A list of persons who have agreed to become the first directors of the company:



CHECK YOUR PROGRESS

Q 2: Mention any three necessary documents that have to file with the Registrar of companies for its incorporation?

i) .....
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ii) .....
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iii) .....
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LET US KNOW

STATEMENT IN LIEU OF PROSPECTUS:

The statement in lieu prospectus contains similar particular as are required for a prospectus and should fulfil similar conditions as regards statements. It must be in the form set out in Schedule III. When a private company converts itself into a public company it must either issue a prospectus or file a statement in lieu of prospectus.

A certificate of incorporation is issued by the Registrar of company which certifies that the company is incorporated. A private company can start its business from the date of the certificate of incorporation. Thus, the legal effect of certificate of incorporation are stated as,

1. The company comes into existence having separate legal existence.
2. The company can start its business from the date of the certificate of incorporation.

3. The 'memorandum of association' and 'articles of association' binds upon the company as well as its members and it acquire perpetual succession.
4. The liabilities of the members become limited of company limited by shares.

Conclusiveness of the Certificate of Incorporation:

The certificate of Incorporation is conclusive evidence that all the requirements of the Companies Act, 1956, complied with and it is conclusive that—

a. All the requirements of the Act have been complied with in respect of the registration.
b. The company is duly registered and,
c. That the company came into existence on the date mentioned in the certificate.

Thus, once a private company gets registered, it can begin its business.

3.6 TYPES OF COMPANY

The word 'corporation' is derived from the Latin word 'corpus' which means anybody or any institution enjoying perpetual succession having own separate legal existence. It is divided into two parts:

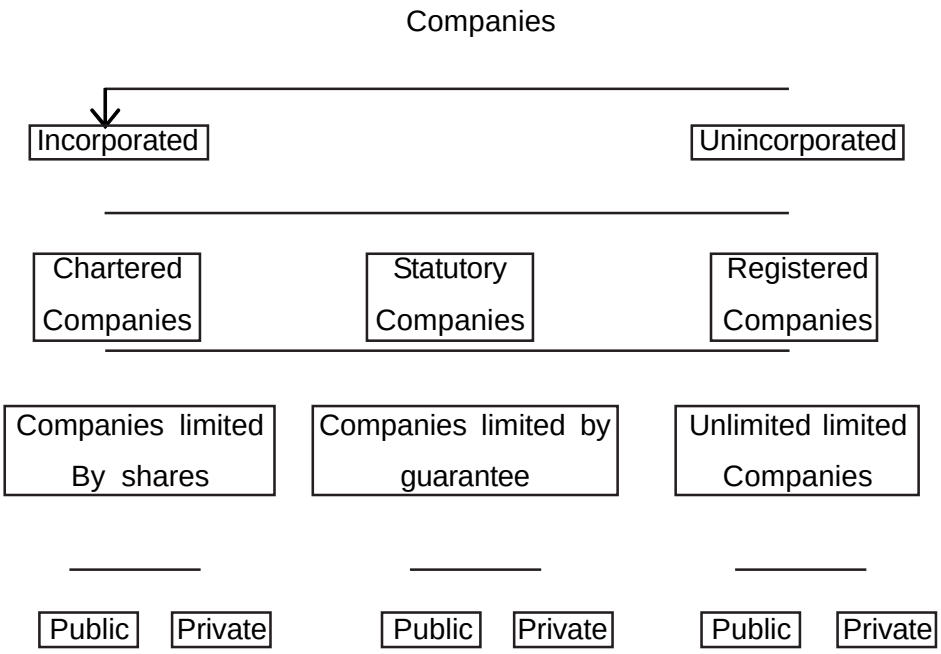
a. A corporation sole;
b. Corporation aggregate.

A corporation sole means a single person constituted as a corporation in respect of some office or function, e.g., Governor, President etc; and corporation aggregate means a collection of individuals united into body having perpetual succession and an independent, e.g. trading and non-trading corporation.



Stock Exchange — A place where stocks, bonds or other securities are bought and sold.

The Companies Act, 1956, provides for a variety of companies which can be promoted and registered under the Act. The companies can be classified into the following categories, like:



A. Incorporated:

1. *Chartered Companies:* Chartered Companies formed under a special Royal Charter issued by the King or Queen. The Charter defined their powers and areas of operation.
2. *Statutory Companies:* Statutory Companies are formed under special Act like, RBI Act, LIC Act etc.
3. *Registered Companies:* Registered Companies are companies which are formed under the Companies Act, 1956. It may be-
   a. Companies limited by shares: A company that has the liability of its members limited by the memorandum to the amount, if, any unpaid on the shares respectively held by them is termed as a company limited by shares.
   b. Companies limited by guarantee: A company that has the liability of its members limited to such amount as the members may respectively undertake, by the memorandum, to contribute to the assets of the company in the event of its being wound up.
   c. Unlimited liability companies: In this type of company, the members are liable for the company's debts and their liability is unlimited.

A. Private Company: By virtue of section 3 (1)(iii), a private company

means a company , which has a minimum paid-up capital of one lakh rupees or such higher paid-up share capital as may be prescribed, and by its articles:

(i) Restrict the right to transfer its shares, if any;

(ii) Limits the number of its members to fifty not including –

a. persons who, are in the employment of the company; and

b. persons who, having been formerly in the employment of the company, were members of the company while in that employment and have continue to be the members after the employment ceased;

(iii) Prohibits any invitation to the public to subscribe for any shares in, or debentures of, the company; and

(iv) Prohibits any invitation or acceptance of deposits from persons other than its members, directors or their relatives.

Here it must be borne in mind that invitation is not prohibited but invitation to the public other than the members is prohibited. A private company can issue any number of debentures to its members but, not to the public in general. Similarly, the number of members is limited to fifty and if two or more person holds one or more shares in a company jointly, it is treated as single member.

B. Public Company: By virtue of section 3 (1) (iv), a public company means a company which-

(i) is not a private company,

(ii) has a minimum paid-up capital of five lakh rupees or such higher paid-up capital as may be prescribed;

(iii) is a private company which is a subsidiary of a company which is not a private company.

There should be 7 members to start a public company, which is registered under the Act. In case of public company, invitation to subscribe shares and debentures is not prohibited. It may be listed its shares and debentures to the stock exchange.

Every public company existing on the commencement of the Companies (Amendment) Act, 2000, with a paid-up capital of less than five lakh rupees, was required to, within a period of two years from such

commencement; enhance its paid-up capital to five lakh rupees. Where a public company failed to do so, such company was deemed to be a defunct company within the meaning of Section 560.

3.7 MEANING AND KINDS OF COMPANY MEETINGS

Company has a separate identity from its members. A company being an artificial person can not act on its own .It is however, constituted by the shareholders and express its decisions in the form of resolution in the meeting. Thus, a meeting has been defined as, “coming together of two or more persons face to face so as to be in each others’ presence or company”. A meeting is a gathering or assembling of a numbers of persons for transacting any lawful business. It should be conducted under prescribed rules and regulation of the Companies Act, 1956. The shareholders and directors can take their decisions by calling the meeting.

The meeting of a company may be classified, as-

1. Meeting of the members (shareholders):
   - (i) Statutory Meeting
   - (ii) Annual General Meeting
   - (iii) Extraordinary General Meeting
   - (iv) Class Meeting
2. Meetings of the debentureholders.
3. Meetings of the creditors.
4. Meetings of the Board of Directors.

1. Meeting of the members (shareholders):

(i) Statutory Meeting, (Section 165):

According to section 165, of Companies Act, 1956, every company limited by shares or guarantee and having share capital, shall, within a period of not less than one month, but not more than six months from the date which the company is entitled to business, has to hold a general meeting of the members of the company. The meeting shall be called ‘statutory meeting’. The statutory meeting is held only once in the life time of the company. The Board of Directors are required to prepare a report, called ‘ statutory report’.

The statutory report should be sent to each member at least 21 days before the day on which the meeting is to be held. A notice is also sent for the meeting to the members.

There are certain legal provisions relating to the statutory meeting, like—

1. The Board of Director has to prepare the 'Statutory Report' at least 21 days before the day the meeting is to be held.
2. The statutory meeting should be held within a period of not less than one month, but not more than six months from the date on which the company is entitled to business.
3. Statutory Report should be sent to the members of the company containing the particulars like total number of shares allotted and the total amount received from the same, details of company's preliminary expenditures, particulars of company directors, managers, auditors ete.
4. The Statutory Report has to be certified by two directors. If the company has a managing director, then he has to certify the statutory report.

(ii) Annual General Meeting, Section166 (1):

As the term denotes, annual general meeting is the meeting under section 166(1) which has to be held annually. It is the meeting of the members through which they get the opportunity to express their views on the management of the company. Through this meeting, the shareholders can exercise control over the affairs of the company. The 'Annual General Meeting' is sometimes called '"Ordinary General Meeting" as it usually deals with the so-called 'Ordinary Business'. The main purpose to hold this meeting are, like;

a. To submit the annual account, balance sheet, director's report and auditor's report.
b. To declare the dividend.
c. Special business- any other business to be transacted will be deemed special business likes:
   i. To increase share capital
   ii. To alter Article of Association
d. To appoint auditors and fix their remuneration.
e. To elect directors are that liable to retire by rotation.

Every company is required to hold this meeting. But, there are certain

legal provisions which have to be followed, relating to the annual general meeting as contained in sections 166 to 168. There are:

a. The annual general meeting must be held once in each year in addition to other meeting.
b. The first annual general meeting must be held within 18 months of the incorporation of the company. The Registrar of Companies may extend this time period up to 3 months for special reasons.
c. The members of the company have to get at least 21 days before the meeting is held.
d. The meeting must be held during the business hours and on a day which should not be a public holiday.
e. The meeting must be held either at the registered office or at some place within the city, town or village.

As mentioned earlier, every company is required to hold this meeting according to the provision of the Companies Act. If any company fails to hold the annual general meeting the consequences are as follows:

A) As mentioned above, the annual general meeting provides the opportunity to the members to express views on the management of the company. Any member can apply to the Central Government for the failure of the company to call the meeting. The Central Government may give direction to the company for calling the meeting.
B) The company as well as every officer will become liable if they fail to held the meeting and shall be punishable with fine upto Rs. 50,000, and if the default continues , with a further fine of Rs. 2,500 for every day after the first day of default during which the default continues.

For example, 'ABC Private Ltd' was incorporated in February 2006. The first annual general meeting of the company was held in March 2007 and the next in July 2008.In this case, the company 'ABC Private Ltd' is not guilty of not holding the annual general meeting for the year 2006 or 2007. Because, the first annual general meeting was held within 18 months of incorporation of the company.

(iii) Extraordinary General Meeting:

A General meeting other than the statutory meeting and the annual general meeting is called 'Extraordinary General Meeting' (Clause 47 of Table

A, Schedule I).Due to some urgent or special business purpose, the extraordinary general meeting is held between two consecutive annual general meetings. Here, 'special business' means, all the business transacted at any meeting except in the annual general meeting. But, every 'Extraordinary General Meeting' has to be informed to the members through a notice accompanied by an 'Explanatory Statement', which explains the objective of the meeting. The 'Extraordinary General Meeting' can be convened by:

- the Board of Directors of its own accord.
- the directors on requisition.
- the requisitionists themselves.
- the Tribunal.

1. Extraordinary general meeting convened by Board of Directors:
   The Board of Directors under clause 48, table A, can call the extraordinary general meeting on its own whenever they like to call the meeting. However, they have to pass a resolution for convening such a meeting.
2. The directors on requisition:
   Under section 169, the extraordinary general meeting becomes necessary on the requisition of the members and the Directors are also become bound to call such a meeting.
3. Extraordinary general meeting convened by requisitionists:
   Some times, the Board of Directors fails to call the extraordinary general meeting though the members deposit a valid requisition. If the Board of Directors fails to call the extraordinary general meeting within 21 days from the deposit of valid requisition, a meeting may be called on a day not later than 45 days from the date of the deposit of the requisition, the meeting may be called by;
   a. the requisitionists themselves;
   b. the company having a share capital, by such of them as represent either a majority in value of the paid-up share capital held by all

of them or not less than one tenth paid-up share capital of the company, whichever is less; or

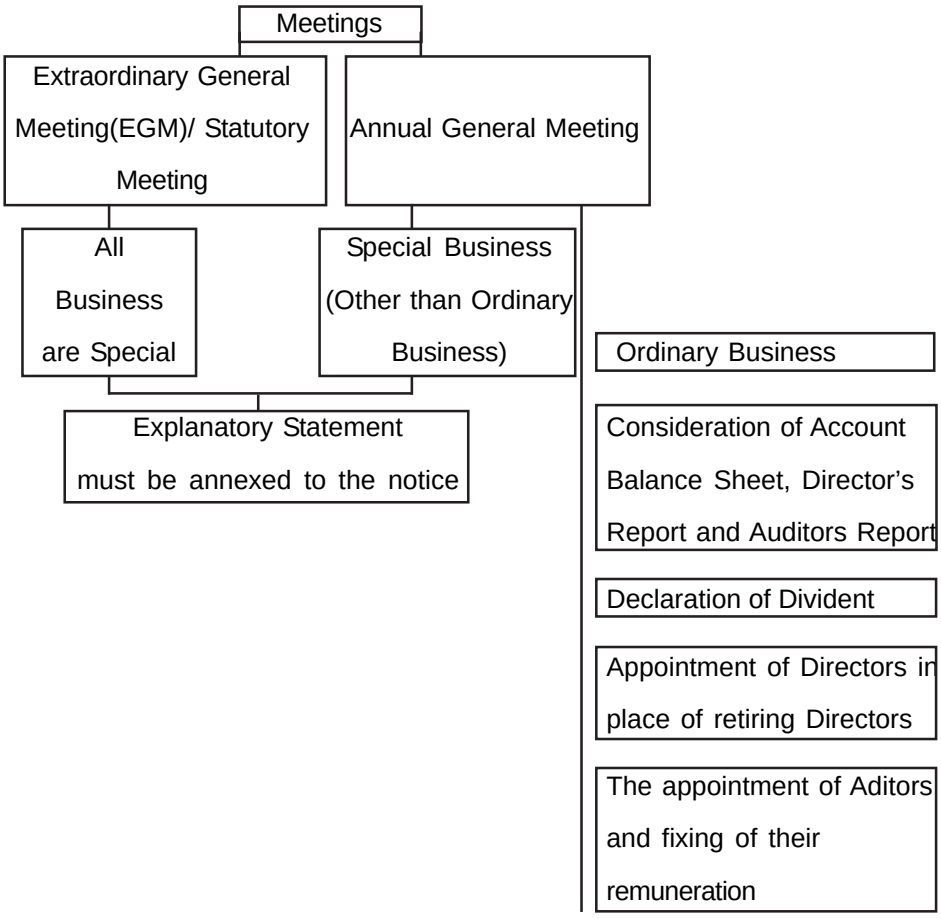
c. a company not having share capital , by such of the requisitionists as represent not less than one tenth of the voting power of the members of the company.

Under section 169(7), the meeting must be held within 3 months of the deposit of valid requisition.

4. Extraordinary general meeting convened by the Tribunal:

The tribunal under section 186 can call a meeting of the company. The tribunal may call the meeting either on its own motion or, on an application of any director, or, on an application of any member of the company entitled to vote at the meeting.

All Business at EGM are special business and Explanatory Statement must be annexed to the Notice:



(V) Class Meeting, Sections 106 and 107:

Class meeting are basically held for taking consent of a particular class of shareholders. Through this meeting, the rights and privileges of the shareholders can be altered, or conversion of one class to another can be done. If the article permits, the right of the different classes of the shareholders can be altered from the class of holder of that share, only when a resolution is passed in a separate meeting.

2. Meetings of the debentureholders:

Meeting of the debentureholders are held according to the debenture trust deed to protect the interest of the debentureholders. Such type of meeting is held at the time of reconstruction, amalgamation, or winding up. The essential rules and regulations of valid meeting are contained in the debenture trust deed, like—

a. Proper convening authority:

The meeting should be called by the proper authority. The proper authority in a company is the Board of Directors. Thus, if the Board of Directors makes default in calling the meeting, then the meeting can be called by the requisitionists or Company Law Board.

b. Notice:

Previous notice should be given to every member about the holding of the meeting.

c. Proxy:

Proxy is nothing but, an agent of the members authorized to give vote. Thus, proxy should be mentioned in the debenture trust deed.

d. Voting by Poll:

Voting by showing hand is a general method in ascertaining the wishes of the members. But, sometimes a poll may be demanded by the chairman or by the members.

e. Quorum:

According to the rule of the Companies Act, a minimum number of members should be present in the meeting. This is called the quorum for the meeting. For ‘General Meeting ‘of a company, the quorum is laid down in the article of association of the company. But for Board

Meeting, it is 1/3rd of the total number of the members or two directors, which ever is higher.

f. Chairman of the Meeting:

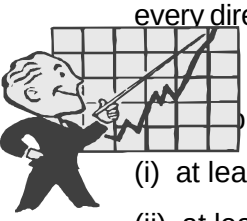
There should be chairmen in the meeting. But, if no chairman is elected beforehand or the elected chairman can not come within 15 minutes of the fixed time, then any one director or a member can be elected as the chairman.

3. Meetings of the Creditors:

Sometimes it becomes necessary to make certain arrangement with the creditors by the company. Usually, this type of meeting is held for such purposes only.

4. Meetings of the Board of Directors:

As most of the power of the company is exercised by the directors of the company, it become necessary for then to interact frequently among them to review the management of company's affairs. Notice has to sent to every director about the meeting previously. The notice has to clearly mention date and place of the meeting. The meeting of the Board of Directors ompany should be held—



(i) at least once in every three months, and

(ii) at least four such meetings shall be held in every year.

CHECK YOUR PROGRESS

Q 3: What do you mean by "Extraordinary General Meeting"?

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3.8 MEANING OF MINUTE

A minute is nothing but a, written record of the proceedings of a meeting. Many important decisions are taken in the company general meeting and the Board meeting. Many new policies as well as existing policies are

discussed in the meetings. It is necessary to record every decision taken in the meetings and a company has to keep a fair record of all the transactions and the resolutions arrived in a meeting in the form of 'minutes'. For this purpose, a book is maintained in every company and all the proceedings of each meeting should be recorded within 30 days.

Advantages of minute:

1. It is an official record of every meeting.
2. As it keeps the record of all the decisions taken in the previous meeting, it becomes an evidence of what new or prior decisions have been adopted or changed.
3. It helps the member who was absent in the previous meeting, in knowing the proceedings of that meeting and also enables him to review and understand the necessity of the meeting.
4. If the minutes are signed by the chairmen, it becomes a prima facie evidence of the proceedings of the meetings and the decisions recorded there are deemed valid.

MINUTES TO BE EVIDENCE

Minutes are constituted as the official records of all decisions, transactions, resolution made in a meeting. Care is always taken not to include any defamatory and detrimental statements in the minute. The minute books of the general meeting are signed by the chairman and on his death or absence by, any director authorized by the Board. On the other hand, in case of the Board meeting or meeting of the committee of the Board, the Chairman of the said meeting or the Chairman of the next succeeding meeting has to sign it. Thus, each proceeding of the minute of all meetings is recorded. Under section 194, all the records of the minutes of the different meetings of the company may act as evidence. 6.5



CHECK YOUR PROGRESS

Q 4: Mention three advantages of a minute?

a. .....

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b. .....

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c. .....

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3.9 RECORDING AND SIGNING OF MINUTES

Every company is required to keep minutes of all meetings, such as—

a. All General Meetings;

b. Meeting of the Board of Directors;

c. Meeting of the Board of Directors.

But, there are certain legal obligations in maintaining the records in the form of minute:

1. All proceedings of each meeting should be recorded within 30 days from the conclusion of the meeting. [Section 193 (1)]
2. The minutes of each meeting must contains fair and correct records. [Section 193 (2)]
3. All the appointments and decisions made in the meeting must be included in the minutes. [Section 193 (3)]
4. In case of the Board Meeting and Committee of Board Meeting, the minute must record, [Section 193 (4)]
   i) The name of the each director present in the meeting.
   ii) If any resolution is passed in the meeting, the names of the

directors who dissent or do not concur with the resolution of the meeting must be recorded.

5. The chairman of the meeting has the right to exclude any matter of the meeting, if he thinks it necessary.
6. The minute books are maintained at the registered office of the company.
7. In case of a general meeting of the company, minute books should be signed by the Chairman and on his death or in his inability to be present in the meeting any director can be sign the minute as permitted by the Board of Directors.
8. The pages of the minute books must be consecutively numbered.
9. If the minute is maintained properly, it shall be presumed that the meeting was duly held.

Every recording of the meeting in the minute should be signed and the last page should be dated and signed properly:

a. In case of the minutes of the Board meeting or meeting of the committee of the Board, thereof, these are to be signed by the chairman of the said meeting or the chairman of the next succeeding meeting.
b. In case of the minutes of a general meeting, minutes are to be signed by the Chairman of the same meeting or on his death or inability, by any director duly authorized by the Board.

3.10 ROLE OF CHAIRMAN

The Chairman is the person who has been elected to conduct the proceeding of the meeting. If the Article of association does not permit to elect the Chairman, than he is elected under Section 175. In this regards, the Section 175 lays down,

(i) Unless the article of a company otherwise provides, the member personally present at the meeting shall elect one of them to be the Chairman.
(ii) If a poll is demanded on the election of the chairman, it shall be taken forthwith. The Chairman elected on a show of hands shall exercise all the power of the chairman.

(iii) If some other person is elected Chairman as a result of the poll, he shall be the Chairman for the rest of the meeting.

The Chairman is responsible for maintaining the proper rules and regulations and the decorum of the meeting. The chairman has to play a vital role in a company, like—

a. The chairman has to see that the meeting is properly convened and followed all the rules and regulations are followed in the meeting.
b. Sometimes the members raise their points in the meeting. The chairman has to interpret the rules regarding their points and the decision that is given by the chairman will be binding on the members.
c. He is responsible to observe whether all statutory rules, standing orders and regulations are followed in conducting the proceeding of the meeting.
d. He is also responsible for to giving opportunity to those who wish to speak and to express their views in the meeting.
e. The chairman has the duty on ruling over the points of order and all other emerging questions.
f. The minutes of the meeting should also be signed by the chairman. He has to check the records of the previous meeting whether they are properly entered, confirmed and duly signed.
g. The Chairman is also plays an important role in taking care that the sense of the meeting is properly ascertained with regard to any question before it. But, he can not adjourn the meeting or dispose it at his own choice.
h. The chairman has the right to cast vote as a member. But, he can cast vote in second time also if the rules expressly allow him to do.
i. He is to judiciously exercise his power of adjournment.

3.11 POSTAL BALLOT

The members of a company may be widely dispersed and it may be impossible for all to attend the meetings of the company. But, the company general meeting are required to be held during working hours. Thus, a listed company can pass resolution through postal ballot, where the members

can give their consent easily. Under section 192 A (1), the central Government may also empowers certain companies for passing resolution through postal ballot.

In case of listed companies, notice has to sent to all the members along with draft resolution explaining the reasons of the meeting and requesting them to give their assent within 30 days from the date of posting the notice. But, this notice has to be sent only Under Registered Post Acknowledgement Due or Under Certificate of Posting. In addition to that, an advertisement should be given in a leading English Newspaper and in any one vernacular Newspaper in the locality of the registered office. Thus, if the majority of the members have given their assent for passing the resolution, than it shall be deemed that the resolution has been duly passed at the general meeting.

3.12 RESOLUTION AND ITS DIFFERENT KINDS

Decisions are taken by the company by passing resolution. It is passed and prescribed by the majority of the members present at the meeting. It can be categorized into three types,

a. Ordinary Resolution
b. Special Resolution and
c. Resolution Requiring Special Notice

a. "Ordinary Resolution" means a resolution passed by the members of a company in general meeting by a simple majority of the votes cast in person or by proxy where proxies are allowed.

b. "Special Resolution" means a resolution passed by a majority of not less than 3/4 of the votes cast by those members of a company who, being entitled to do so, vote in person or by proxy where proxies are allowed at a general meeting of the company and, not being less than 21 days' notice of the meeting specifying the intention to propose the resolution as a special resolution.

c. “Resolution Requiring Special Notice” means under section 190 of the Companies Act, 1956, where by any provision in this Act or in the article, special notice is required of any resolution, notice of the intention

to move the resolution shall be given to the company not less than fourteen days before the meeting at which it is moved or deemed to be served and day of the meeting.

Section 192 of the Companies Act states that a copy of each of the following resolutions or agreement must within 30 days after the passing be printed or type written submitted to the Registrar who shall record the same.



LET US KNOW

SPECIMEN OF NOTICE OF ANNUAL GENERAL MEETING:

PQR Ltd.

(Regd. Office)

Notice is hereby given that the 10th Annual General Meeting of the Company will be held at its Registered office at ……. At 2.00 P.M on ……. the day of ……..2008 to transact the following business.

ORDINARY BUSINESS

1. To receive and adopt the Balance Sheet as at …….. and the Profit and Loss Account for the year ended ……. And the Directors' and the Auditor's Report thereon.
2. To declare dividend.
3. To appoint director in place of Shri P, who retire by rotation and being eligible offers himself for re-appointment

SPECIAL BUSINESS

4. To consider and, if thought fit, to pass with or without modification, the following resolution as a SPECIAL RESOLUTION:
   Resoled that clause 5 of the Memorandum of Association of the Company be and is hereby substituted by the following clause 5:
5. "The Authorised Share Capital of the Company is Rs. 90, 00,000 (Rupees ninety lakhs) divided into 30,000 (thirty thousand) Preference shares of Rs 100(Rupees one hundred) each and 6, 00,000 (six lakhs) Equity Shares of Rs. 10 (Rupees ten each)."

By order of the Board of Directors
for PQR Ltd.
Sd/-
COMPANY SECRETARY

Dated:
Place:



LET US KNOW

SPECIMEN MINUTES OF

ANNUAL GENERAL MEETING OF MEMBERS

PQR Ltd.

Minutes of the 10th Annual General Meeting of the Company held at its Registered Office on …, the date…….. at…..

Present: Mr. ……. Chairman
Mr. ……. Managing Director
Mr. ……. Director
Mr. ……. Director
Mr. ……. Director
Mr. ……. Director, and
……..(Number) members present in person, and
……. (Number) members represented by Proxies)

Also Present: Mr. ……. Company Secretary
Mr …….. General Manager (Finance)
Mr……Auditor of the Company

1. CHAIRMAN

Pursuant to Article …… of the Article of Association, the Chairman of the Board of Directors being present took the chair.

2. QUORUM

After satisfying himself that there was adequate quorum, the chairman declared the meeting to be duly constituted and commenced the proceedings.

3. WELCOME

The Chairman welcomed the members for the company's Annual General Meeting.

4. REGISTER OF DIRECTORS' SHAREHOLDINGS

The Chairman informed the members that the Register of the Directors' Shareholdings maintained under Section 307 of the act was available at the meeting for inspection by any member till the conclusion of the meeting.

5. NOTICE OF THE MEETING

With the consent of the members, the Chairman said that the notice sent to members calling the Annual General Meeting along with the other documents had been taken as read.

6. CHAIRMAN'S SPEECH

The Chairman addressed the members.

7. REAPPOINTMENT OF MR ……..

The following motion was moved, by Mr. …… And seconded by Mr. ……..

"That Mr. …….. who retires by rotation and who is eligible for reappointment , be and is hereby appointed a director of the Company."

This was put to vote and declared by the Chairman to have been carried.

The meeting terminated with a vote of thanks to the Chair,

Dated. ……. CHAIRMAN



3.13 LET US SUM UP

In this unit, we have discussed the following:

- Promoters are generally the persons who assume the primary responsibility of matters relating to promotion of a company.

- A company is formed under three stages, as promotion of a company, registration and incorporation of a company and commencement of business.
- The word ‘corporation’ is derived from the Latin word ‘corpus’ which means any body or institution enjoying perpetual succession having own separate legal existence.
- A public company can not start its business from the date of the certificate of incorporation. It will have to obtain a further document called as ‘certificate to commencement of business’.
- A meeting can be defined as, “coming together of two or more persons face to face so as to be in each others’ presence or company”.
- The statutory meeting is held only once in the life time of the company.
- Annual general meeting is the meeting under section 166(1) which has to be held annually.
- Due to some urgent or special business purpose, the extraordinary general meeting is held between two consecutive annual general meetings.
- Class meetings are basically held for taking consent of a particular class of shareholders.
- Meetings of the debentureholders are held according to the debenture trust deed to protect the interest of the debentureholders.
- Chairman is the person who has been elected to conduct the proceeding of the meeting.
- Under section 194, all the record of minutes of the different meeting of the company acts as an evidence.



3.14 FURTHER READING

1. Arvind P Datar,S. Balasubramanian, Ramaiya (2013); *Guide to the Companies Act*; Lexis Nexis
2. A Singh (2016);*Company Law*; Eastern Book Co. (EBC)

3. Ghosh, P.K.& V. Balachandran (1989); *Company Law and Practice*, Sultan Chand & Sons, New Delhi
4. A.K. Majumdar & G.K. Kapoor (2012);Company Law and Practice; Taxmann Publications Private Limited

3.15 ANSWERS TO CHECK YOUR PROGRESS

Ans to Q No 1: Any three aspects that have to decide before a company incorporate and commence its business are—

i) Types of company,

ii) Application for availability of name of company and

iii) Preparation of Memorandum and Article of Association.

Ans to Q No 2: Any three necessary documents that have to file with the Registrar of companies for its incorporation are—



i) The Memorandum of Association

ii) The agreement which the company propose to enter with any individual for appointment as company's managing director, or whole-time directors or manager and

iii) A written consent of such directors to act as director of the company

Ans to Q No 3: All General meetings other than the statutory meeting and the annual general meeting are called 'Extraordinary General Meeting' (Clause 47 of Table A, Schedule I).

Ans to Q No 4: Three advantages of Minute are:

i. It is an official record of every meeting.

ii. As it keeps record of all decision taken in the prior meeting, it is become an evidence of what new or prior decisions have been adopted or changed.

iii. It helps the member who was absent in the prior meeting, to review and understand the necessity of the meeting.



3.16 MODEL QUESTIONS

Q 1: Define the company. What are the stages of formation of a company?

Q 2: Distinguish –

a. Private Company and Public Company

b. Corporation aggregate and corporation sole

Q 3: When a public limited company can commence its business?

Q 4: What are the various documents to be filled with the Registrar for incorporation of a company?

Q 5: "The 'certificate to commence business' is conclusive evidence in regards to start the businesses". Discuss.

Q 6: Define Meeting. What are the different type of meeting?

Q 7: Write short notes on

(a) Statutory Meeting

(b) Extraordinary meeting

(c) Minute

(d) Postal Ballot

(e) Role of chairman

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UNIT 4: THE INDIAN PARTNERSHIP ACT, 1932

UNIT STRUCTURE

4.1 Learning Objectives

4.2 Introduction

4.3 Basic Concept of Partnership

4.4 Advantages and Disadvantages of Partnership firm

4.4 Kinds and Deeds of Partnership

4.6 Kinds, Rights and Duties of Partners

4.7 Minor as a Partner

4.8 Registration and Dissolution of Partnership Firm

4.9 Let Us Sum Up

4.10 Further Reading

4.11 Answers To Check Your Progress

4.12 Model Questions

4.1 LEARNING OBJECTIVES

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

- explain the concept of Partnership
- explain the advantages and disadvantages of Partnership
- define various kinds and Deeds of Partnership
- describe rights and duties of Partners.
- explain Express and Implied Authority of Partners
- explain the Registration and Dissolution of Partnership firm

4.2 INTRODUCTION

In the previous unit we have discussed about formation of a company. In this unit we are going to discuss partnership of a firm and its various aspects such as concept, kinds, deed, registration and dissolution of partnership firm, right and duties of partners etc. Partnership is the most natural outgrowth of sole proprietorship. The growth and size of business necessitated demand for more funds. Hence, the ownership came to be

shared and so also the control. Partnership is an association of person called partners, who pool their financial and managerial talents to share profits in an agreed ratio.

In this unit we will discuss in more details about partnership business.

4.3 BASIC CONCEPTS OF PARTNERSHIP

Partnership:

Partnership, as a form of business organization, grew essentially out of the limitations of the sole proprietorship form of business organisation. In sole proprietorship, financial resources, managerial skills and risk-taking ability are usually limited and therefore, the need for an association of two or more persons arises. History reveals that the partnership organization was started with the enactment of the Partnership Act in 1907 in England. In India, the Act which governs the formation, management and control of various partnership firms in the country, is the Indian Partnership Act, 1932.

Most of the important provisions relating to partnership contracts are contained in the Indian Partnership Act, 1932. Section 3 of this Act states that the general principles (relating to the law of partnership) of the Indian Contract Act, 1872, shall apply in so far as they do not contradict the Partnership Act, 1932.

Section 4 of the Partnership Act, 1932,defines partnership as 'the relation between persons who have agreed to share the profits of a business carried on by all or by any of them acting for all'. All sections referred to in this unit hereafter belong to the Indian Partnership Act, 1932, unless mentioned otherwise.

Essential elements of Partnership:

There are four elements essential for a partnership to come into existence. These elements, also indicated in the aforesaid definition, are as follows:

(i) There must be atleast two persons. But the number of members should not exceed 10 in case of banking business and 20 in case of other business. If the number of members exceeds this maximum limit then that business cannot be termed as partnership business.

(ii) There must be a relationship arising out of an agreement between two or more persons to do a business. Further, the agreement must be a valid agreement and for a lawful object and persons between the persons competent to contract. This agreement contains details such as:

a) the amount of capital contributed by each partner;
b) profit or loss sharing ratio;
c) salary or commission payable to the partner, if any;
d) duration of business, if any ;
e) name and address of the partners and the firm;
f) duties and powers of each partner;
g) nature and place of business; and
h) any other terms and conditions to run the business.

(iii) The agreement must be to share the profits and losses of the business. People coming together for some social or philanthropic or religious purposes do not constitute 'partnership'.

(iv) The business must be carried on by all or any of them acting for all.

Mutual Agency:

Though sharing of profits is essential for a partnership, it is not a conclusive test to determine the validity of a partnership. The real test of partnership is 'mutual agency', i.e. whether a partner can bind the firm by his acts. In nearly all the cases, the question whether a person is or is not a partner depends upon whether the partners have the authority to act on behalf of each other. Partnership is, therefore, described as an extension of the 'Principle of Agency'.

According to Dr. William R. Spriegel, "Partnership has two or more members, each of whom is responsible for obligation of the partnership. Each of the partners may bind the others and the assets of partners may be taken for the debts of the partnership."

4.4 ADVANTAGES AND DISADVANTAGES OF PARTNERSHIP FIRM

- **Advantages of the Partnership Form of Business Organisation:**

a) **Easy to form -** Like sole proprietorship, the partnership business can be formed easily without any legal formalities. It is not necessary to get the firm registered. A simple agreement, either oral or in writing, is sufficient to create a partnership firm.

b) **Availability of large resources -** Since at least two partners join to form a partnership, it may be possible to pool more resources as compared to sole proprietorship. Creditworthiness of the firm is also higher because every partner is personally and jointly liable for the debts of the business.

c) **Better decisions -** Each of the partners is entitled to participate in the management of the business. Since all partners participate in decision-making, there is less scope for wrong decisions.

d) **Flexibility in operations -** The partnership firm is a flexible organisation, since its partners can decide to change the size or nature of business or area of its operation at any time, provided the consent of the partners exists.

e) **Sharing of risks -** In a partnership firm all the partners share the business risks. The burden of every partner will be much less as compared to the burden of sole trader.

f) **Protection of interest of each partner -** All important matters connected with the business require the consent of all the partners. So the majority of partners cannot disregard the interest of the minority partners. In extreme cases a dissenting partner may withdraw himself from the business and can dissolve it.

g) **Easy Dissolution -** The partnership can be easily dissolved on insolvency, lunacy or death of a partner. If the partnership is at will, then any partner can get the firm dissolved by giving a notice to other partners. No legal formality is required at the time of dissolution.

- **Disadvantages of Partnership form of Business Organisation:**

a) **Unlimited Liability:** All the partners are jointly as well as separately liable for the debt of the firm to an unlimited extent. Unlimited liability discourages many people from becoming a partner in the firm.

b) **Uncertain Life:** The partnership firm has no legal entity separate from its partners. It comes to an end with the death, insolvency, incapacity or the retirement of any partner. Further, any dissenting member can also give notice at any time for dissolution of partnership.

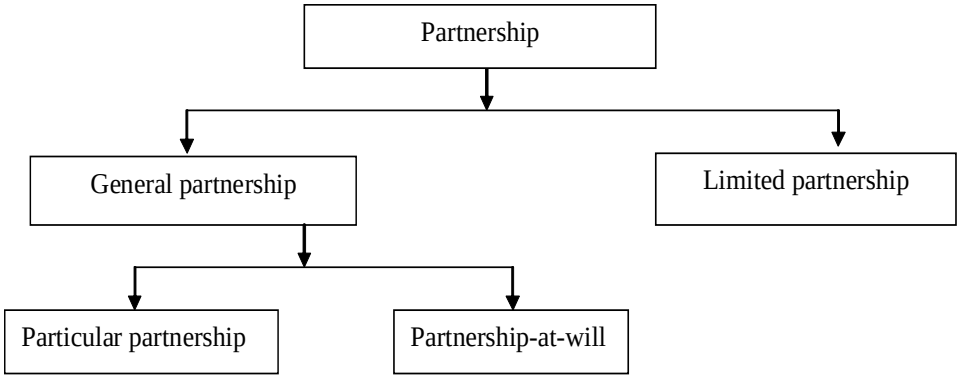
c) **Danger of Implied Agency:** The acts of partners legally bind the business and every other partner in the normal course of business. Thus, the other partners may have to lose his personal assets for the mistake of the other partners.

d) **Limited resources:** The resources of the firm are limited because of the limited number of persons that can join the firm. It may not be possible to start a very large business in partnership form.

e) **No transferability of share:** A partner cannot transfer his interest in the firm to an outsider without the consent of the other partners. This makes investment in a partnership firm non-liquid, fixed and less attractive.

4.5 KINDS AND DEEDS OF PARTNERSHIP

Different kinds of partnership may be explained as follows.



1. General or Unlimited Partnership

It is a kind of partnership in which the liability of all the partners is unlimited i.e., each partner is liable for any debt taken on by the business. If

the assets of the firm are not sufficient to satisfy the claims of the creditors of the firm, the private assets of the partners can be attached to meet such claims.

All the partners can take part in the working of the business. In India, only this kind of partnership exists.

General partnership, on the basis of the duration of existence of the firm can be classified into two types:

a. Partnership–at–will [Section 7].

Where no provision is made by contract between the partners for the duration of their partnership, or for the determination of their partnership, such a partnership is called “partnership at will”. The life of such a partnership continues as long as the partners are willing to continue it as such. Any partner can dissolve a firm by giving a notice in writing to the effect that he wants to withdraw from the firm

b. Particular Partnership [Section 8].

It is a partnership which is formed for a particular period of time or for the completion of a specified venture. Such a firm is dissolved immediately on the completion of the particular period or purpose, as the case may be.

2. Limited Partnership

It is a kind of partnership in which the liability of some of the members is limited only to the extent of their individual share in the capital of the firm. A limited partnership consists of two types of partners: general partner and limited partner. Each of the general partners has unlimited liability for the debts of the partnership, but the limited partner's liability to the debts of the partnership is limited to the contribution each has made to the partnership.This kind of partnership is very common in Europe and U.S.A.

3. Partnership Deed

A partnership firm can be formed through an agreement among two or more persons. The contract/agreement that forms the basis of the relationship between the partners specifies the terms and conditions that bind the partners into the relationship. This agreement may be written or oral. But it is desirable to have the partnership agreement in writing to avoid any misunderstanding among the partners. The partnership agreement, also

known as Partnership Deed or Articles of Partnership, is a document which is signed by all the partners and which contains all the matters determining and governing the mutual rights, duties and liabilities of the partners in the conduct and management of the affairs of the partnership firm.

Some of the contents of the Partnership Deed are outlined below:

a) Name of the firm.
b) Date of agreement and principal place of business.
c) Names and addresses of all the partners.
d) Nature of business proposed to be carried on by the firm.
e) Duration of the partnership, if any.
f) Amount of capital contributed by each partner.
g) Amount of withdrawal of each partner.
h) Ratio of distribution of profits and losses among the partners.
i) Salary/Commission payable to partners.
j) Interest on capital and interest on drawings.
k) Rights, duties and obligations of partners
l) Procedure for admission or retirement of partners.
m) Method of revaluation of assets or liabilities on admission, retirement or death of a partner
n) Manner of dissolving the firm and the mode of settlement of accounts on such dissolution.
o) Maintenance of books of accounts and their audit.
p) Loans and advances to the firm by the partners and the rate of interest payable on them.
q) Mode of valuation of goodwill on admission, retirement or death of a partner.
r) Procedure for settlement of disputes among partners by arbitration.
s) Operation of bank account

The above items are not the final list of clauses. Any clause mutually agreed to by the partners can be included in the agreement. If the deed is silent on any point, then the provisions of Partnership Act of 1932, will apply. Further, the contents of a partnership deed can be altered only with the consent of all the partners.



CHECK YOUR PROGRESS

Q 1: Fill in the blanks with appropriate words:

i. Section _____ of the Partnership Act 1932 defines the term partnership.

ii. The real test of partnership is _____

iii. The partnership firm has no _____ entity separate from its partners.

iv. The partnership agreement also known as partnership _____ or _____ of partnership.

v. _____ partnership is very common in Europe and U.S.A.

4. 'Partners', 'Firm' and 'Firm name'

'Partnership' is the relationship between persons who have agreed to share the profits of business carried on by all or any to them acting for all. Persons who have entered into partnership with one another are individually known as 'partners' and collectively 'a firm', and the name under which their business is carried on is called the 'firm name'[Section 4].

4.6 KINDS, RIGHTS AND DUTIES OF PARTNERS

There are different kinds of partners as mentioned below:

a. Active Partner

A partner who takes active part in the management of the partnership firm is known as active or working or managing or general partner. His liability is unlimited.

b. Sleeping Partner or Dormant Partner

The partners who contribute capital to the firm's business, share profits and losses of the firm but do not participate in the day-to-day functioning and management of the business are called sleeping or dormant or financing partners. A sleeping partner can retire from the firm without giving any public notice to this effect.

c. Nominal or Ostensible Partner

These partners only allow the firm to use their name as a partner.

They do not invest any capital or share profits and they also do not take part in the conduct of the business of the firm. However, they remain liable to third parties for the acts of the firm.

d. Partner in Profit Only

He is a partner who shares the profits of the firm but is not liable for the losses. Usually he has no voice in the management of the firm. But his liability to third parties is unlimited.

e. Partner by Estoppel

If a person falsely represents himself as a partner of any firm or behaves in a way that somebody can have an impression that such person is a partner and on the basis of this impression transacts with that firm, then that person is held liable to the third party. The person who falsely represents himself as a partner is known as partner by estoppel. He cannot later on deny that he is not a partner.

f. Partner by Holding out

When a person who is not really a partner in a business, is described as a partner to others, then he must at once deny it when he comes to know about it. If he keeps quiet, then he is liable to other persons who do business with that partnership firm, believing that he is also a partner. Such a person is called partner by holding out.

g. Sub-Partner

When a partner enters into an agreement with a third party to share his (partner) interest in the property and profit of the firm, the third party is called a sub-partner. Such a sub-partner has no rights against the firm, nor is he liable for the debts of the firm.

h. Minor as a Partner

Legally, a minor (i.e., a person who has not completed 18 years of age) cannot become a partner because he is incapable of entering into a contract. He may, however, be admitted to the benefits of partnership with the consent of all partners, under certain conditions. A minor can only share the profit of the business. In case of loss, his liability is limited only to the extent of his share in the profits and property of the firm.

6. Rights & duties of a partner

In case the partnership deed does not specify the rights and duties of partners, the provisions of Partnership Act 1932 will apply.

i. Rights of Partners

a) To take part in the conduct and management of the business.

b) To express opinion on any matter related to the firm and to be consulted in the important decisions of the firm.

c) To inspect and take copy of books of account and records of the firm.

d) To be entitled to an equal share in the profits of the firm unless otherwise agreed by the partners.

e) To receive interest on loans and advances at the rate stipulated, and where no rate is agreed upon, at 6% per annum. A partner cannot claim interest on capital unless there is an agreement to pay it.

f) To be indemnified by the firm in respect of expenses incurred and losses sustained by him in the ordinary conduct of the firm's business.

g) To use the assets of the firm for its business.

h) To prevent the introduction of a new partner into the firm without his consent.

i) To continue in the partnership and not be expelled from it.

j) To retire from the firm, by giving notice where the partnership is at will

k) To act in an emergency for protecting the firm against loss.

l) To dissolve the partnership with the consent of all the partners, except when the partnership is at will.

ii. Duties of Partners

a) To act diligently and honestly in the discharge of his duties to the maximum advantage of all partners.

b) To act in a loyal and faithful manner towards the other partners.

c) To render the firm full information of all things affecting the firm, any partner, or his legal representative.

d) To maintain and render true and correct accounts relating to the firm's business.

e) To act within the scope of the authority entrusted to him.

f) To share the losses of the firm equally unless otherwise agreed.

g) To indemnify the firm for any loss caused to it by his wilful negligence in the conduct of the business of the firm.

h) To not make any secret profit by way of commission on purchases or sales effected on behalf of the firm

i) To use the firm's property, including goodwill, only for the firm's business and interest.

j) To not engage himself in a business which is likely to compete with the business of the firm.

k) To not transfer or assign his interest in the firm to any third party without the consent of the other partners.

4.7 MINOR AS A PARTNER

As a minor has no contractual capacity, he cannot become a partner in a partnership firm. At best, he can be admitted into the benefits of the partnership with the consent of the other partners. However, there must be at least two major partners before a minor can be admitted into the benefits of a partnership. The position of a minor partner may be studied under the following two heads:

a. Position before attaining majority

a) He has a right to share the property and profits of the firm as may have been agreed upon.

b) He has a right to have access to and inspect and take a copy of the accounts of the firm.

c) His liability is limited only to the extent of his share in the profits and property of the firm.

b. Position after attaining majority

On attaining majority the minor partner has to decide within six months by giving notice whether he shall continue in the firm or not. If he fails to give such notice, he is deemed to have become a partner. If he decides to or is deemed to be a partner, he becomes personally liable to the firm from the date, on which he was admitted as minor partner. If he decides not to continue as a partner, he is not liable for the debts of the firm after the date of notice.

8. Partner's Express and Implied Authority

The authority of a partner means the capacity of a partner to bind the firm by his act. The authority may be express or implied.

a) Partners' express authority

Where the authority to a partner is expressly conferred by an agreement, it is called express authority. The firm is liable for all the acts of such partners done within such authority.

b) Implied Authority of a Partner

Where there is no partnership agreement or where the agreement is silent, "the act of a partner which is done to carry on, in the usual way, business of the kind carried on by the firm, binds the firm".[Sec.19(1)]. This authority of a partner to bind the firm by his acts is called 'implied authority'. A partner has implied authority for various acts such as buying, selling and pledging the goods of the firm, receiving payment of the debts due to the firm and issuing receipts for them, borrowing and repaying loans for the firm, engaging servants for the partnership business etc.

However, a partner has no implied authority in certain cases such as: to open a bank account on behalf of the firm in his own name, to withdraw a suit or proceeding filed on behalf of the firm, to acquire immovable property on behalf of the firm, to enter into partnership on behalf of the firm etc.

4.8 REGISTRATION AND DISSOLUTION OF PARTNERSHIP FIRM

Registration of a partnersheep :

Registration of a partnership firm in India is not compulsory. The Indian Partnership Act, 1932, provides that if the partners so desire, they may register their firms with the Registrar of Firms of the state. A partnership firm can be registered at any time by filing a statement in the prescribed form. The form should be duly signed by all the partners and sent to the Registrar of Firms along with the prescribed fee. The statement should contain the necessary details such as name of the firm, principal place of its business, name and address of each partner, date of admission of each partner, date of commencement of business of the firm and duration of the

firm. On receipt of the statement and the fees, the Registrar makes an entry in the Register of Firms and then issues a certificate known as the Certificate of Registration. The firm is thereupon considered to be registered. Any change in the above particulars must be communicated to the Registrar of Firms within a reasonable period of time so that necessary alteration may be made in the Register of Firms.

Registration of partnership in case of a partnership firm is merely a reliable evidence of the existence of the firm. Non-registration in no way invalidates the transactions of the firm. However, an unregistered firm is denied certain rights, some of which are mentioned below:

a) A partner of an unregistered firm cannot file any case against the firm or against any other partner for enforcing his contractual rights under the partnership agreement or under the Act.

b) An unregistered firm cannot sue a partner(s) of the firm.

c) An unregistered firm cannot file a suit against third parties to enforce its claims exceeding rupees one hundred, but a third party can file a suit against the firm to claim their rights.

Dissolution of a partnership firm :

Dissolution of a partnership firm is different from dissolution of a partnership. When one partner dies, retires or becomes insolvent, but the remaining partners continue to carry on the business of the firm, the partnership ends but the firm is not dissolved. Dissolution of the firm takes place when there is dissolution of partnership between all the partners of a firm. Thus, dissolution is of two types:

a) Dissolution of partnership

b) Dissolution of firm

a) Dissolution of partnership: Dissolution of partnership means the termination of the original partnership agreement. The business can continue after such dissolution. Dissolution of partnership takes place (even when there is no dissolution of the firm) under the following circumstances:

(i) Completion of the adventure/expiry of the term of partnership

(ii) Death of a partner

(iii) Insolvency of a partner

(iv) Retirement of a partner

In all the above cases, the remaining partners may continue the firm in pursuance of an agreement to that effect. If they do not continue, then the dissolution of the firm takes place automatically.

b) Dissolution of firm: The dissolution of firm implies:

- The termination of the contractual relationship between all the partners, and
- The end of the partnership business

On dissolution of the firm, the assets of the firm are realised and the creditors are paid off. The business cannot be continued after dissolution of the partnership firm. Dissolution of firm may take place in any of the following circumstances or ways:

1. Dissolution by Agreement (Sec.40)

A partnership is created and dissolved by an agreement. A firm may be dissolved by an agreement either with the consent of all partners or in accordance with the contract among the partners. This is also known as voluntary dissolution.

2. Compulsory dissolution (Sec 41)

A firm is compulsorily dissolved in different ways as:

(i) When all the partners except one become insolvent

(ii) When all the partners become insolvent

(iii) When the business carried on by the firm becomes illegal

(iv) Where the number of partners exceeds twenty in case of ordinary business or ten in case of banking business.

3. Dissolution on the happening of certain contingencies (Sec 42)

Subject to contract between the partners, a firm is dissolved on the happening of the following contingencies:

(i) Death of a partner.

(ii) Expiry of the term of duration of the firm, if the partnership is for a fixed period.

(iii) Completion of the venture for which the firm was constituted.

(iv) Adjudication of a partner as an insolvent.

4. Dissolution by notice of partnership-at-will (Sec 43)

Where the partnership is at will, the firm may be dissolved at any time, by any partner by giving a notice in writing to all the other partners of his intention to dissolve the firm.

5. Dissolution through Court (Sec 44)

Any partner may bring a suit in a court of law to get the partnership dissolved on any of the following grounds:

(i) **Partner's Insanity:** If any partner becomes insane, the court may order dissolution

(ii) **Permanent Incapacity:** When a partner, other than the partner suing, becomes permanently incapable of doing business, the court may order dissolution.

(iii) **Persistent Breach of Agreement:** If a partner willfully and persistently violates the agreement relating to the management of the firm, and the other partner(s) finds it impossible to do business in partnership with him, then the other partner(s) can move to the court for dissolution of the firm.

(iv) **Misconduct of a Partner:** If any partner is guilty of misconduct (misuse of money, moral misconduct etc.) that is likely to adversely affect the business of the firm, then any other partner can file a suit for dissolution of the firm.

(v) **Transfer of Share:** When a partner transfers his share in the business to a third party without the consent of other partners, then the other partners can move the court for dissolution.

(vi) **Continuous Loss:** When the business of the firm cannot be carried on except at a loss, the court order for dissolution.

(vii) **Just and equitable grounds:** When the court feels that it is just and equitable, it may order for dissolution of the firm.



CHECK YOUR PROGRESS

Q 2: Fill in the blanks:

1. Partnership is described as an extension of the _____.
2. A partner who shares the profits of the firm but is not liable for the losses is called a _____
3. The maximum number of members in non-banking firm is _____
4. A _____ partner can retire from the firm without giving any public notice to this effect.
5. A firm is compulsorily dissolved when the business carried on by the firm becomes _____



4.9 LET US SUM UP

- Partnership is 'the relation between persons who have agreed to share the profits pf a business carried on by all or by any of them acting for all'.
- Four elements are essential for a partnership to come into existence: association of two or more persons, contractual relationship, sharing of profits, and existence of business.
- The real test of partnership is 'mutual agency', i.e. whether a partner can bind the firm by his acts.
- The different kinds of partnership include general partnership and limited partnership. General partnership may be a particular partnership or partnership-at-will.
- The Partnership Deed which forms the basis of the relationship between the partners specifies the terms and conditions that bind the partners into the relationship.

- There are different kinds of partners such as: active partner, sleeping partner, nominal partner, partner in profit only, partner by estoppel, partner by holding out etc.
- In case the partnership deed does not specify the rights and duties of partners, the provisions of Partnership Act 1932 will apply.
- Since a minor has no contractual capacity, he cannot become a partner in a partnership firm but he can be admitted into the benefits of the partnership with the consent of the other partners. In case of loss. his liability is limited only to the extent of his share in the profits and property of the firm
- The authority of a partner means the capacity of a partner to bind the firm by his act. The authority may be express or implied. A partner has implied authority for various acts such as buying, selling and pledging the goods of the firm, receiving payment of the debts due to the firm and issuing receipts for them etc.
- Registration of a partnership firm in India is not compulsory. However, an unregistered firm is denied certain rights.
- Dissolution is of two types: a) Dissolution of partnership b) Dissolution of firm
- Dissolution of partnership means the termination of the original partnership agreement and the business can continue after such dissolution. The dissolution of firm implies the termination of the contractual relationship between all the partners, and the end of the partnership business.



4.10 FURTHER READING

1. A.K Sen & J Kumar (2010);*Commercial Law Including Company Law*; The World Press Private Limited
2. Maheshwari S. K. & Maheshwari S. N. (2011);*Business Law*;Himalaya Publishing House, India
3. Sharma M, Sareen V.K., Garg K.C. (2010); *Business Regulatory Framework*; Kalyani Publishers, India



4.11 ANSWERS TO CHECK YOUR PROGRESS

Ans to Q No 1: (i) 4, (ii) Mutual Agency, (iii) Legal, (iv) deed or article, (v) Limited

Ans to Q No 2: (1) Principle of Agency, (2) Partners in Profit Only (3) 20 (4) sleeping (5) illegal

4.12 MODEL QUESTIONS

Q 1: What do you mean by partnership? What are the four essential elements of a partnership?

Q 2: Explain the different kinds of partnership.

Q 3: What are various kinds of partners? State the rights and duties of partners.

Q 4: What is a partnership deed? What are the contents of a partnership deed?

Q 5: What are the circumstances for the compulsory dissolution of a firm?

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UNIT 5: CONSUMER PROTECTION ACT, 1986

UNIT STRUCTURE

5.1 Learning Objectives

5.2 Introduction

5.3 Definitions under the Act

5.4 Redressal Agencies under the Act

5.5 Powers of Redressal Agencies

5.6 Procedure of Filing a Complaint

5.7 Consumer Protection Councils

5.8 Penalties under the Act

5.9 Let Us Sum Up

5.10 Further Reading

5.11 Answers To Check Your Progress

5.12 Model Questions

5.1 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

5.2 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.

5.3 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 (O) 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 2 (Sale of Goods Act, 1930).



CHECK YOUR PROGRESS

Q 1: State whether the following statements aretrue 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.

5.4 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 the redressal of 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 — The legal power to apply the law.

Jurisdiction of District Forum

The district forum has jurisdiction to decide consumer disputes where the value of goods and services and the compensation claimed does not exceed Rs. 20 lakhs.

Composition of District Forum

According to the provisions of 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.

5.5 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.

5.6 PROCEDURE OF FILING A COMPLAINT

Here, 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'. 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.

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 b. 67 years c. 70 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 b. 70 years c. 75 years d. 80 years

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

a. 2 b. 3 c. 4 d. 6

5.7 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 competitive rates;
- Right to be heard in appropriate forums; etc.

5.8 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.



5.9 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.



5.10 FURTHER READING

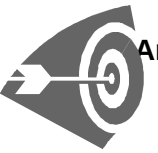
1. V S Datey (2001); Students' Guide to Economic Laws; Taxmann
2. The consumer protection Act, 1986(Bare Act)

5.11 ANSWERS TO CHECK YOUR PROGRESS

Ans to Q No 1: (i) False (ii) False (iii) False

Ans to Q No 2: False.

i. True ii. False iii. False iv. 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;

iii. 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.



5.12 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

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