KLE LAW ACADEMY BELAGAVI

(Constituent Colleges: KLE Society's Law College, Bengaluru, Gurusiddappa Kotambri Law College, Hubballi, S.A. Manvi Law College, Gadag, KLE Society's B.V. Bellad Law College, Belagavi, KLE Law College, Chikodi, and KLE College of Law, Kalamboli, Navi Mumbai)

STUDY MATERIAL

for

CONTRACT II

Prepared as per the syllabus prescribed by Karnataka State Law University (KSLU), Hubballi

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CONTRACT II -SPECIAL CONTRACTS

UNIT – I: Contract of Indemnity –Definition, Nature and Scope - Rights of indemnity holder – Commencement of the indemnifier's liability

Contract of Guarantee – Definition, Nature and Scope – Difference between contract of indemnity and Guarantee – Rights of surety – Discharge of Surety – Extent of Surety's liability – Co-surety

UNIT-II: Contract of Bailment – Definition – Kinds – Rights and Duties of Bailor and Bailee – Rights of Finder of goods as Bailee

Contract of pledge – Definition – Comparison with Bailment – Rights and duties of Pawnor and Pawnee

UNIT – III: Agency – Definition – Creation of Agency – Kinds of Agents – Distinction between Agent and Servant – Rights and Duties of Agent – Relation of Principal with third parties – Delegation – Duties and Rights of Agent – Extent of Agents authority – Personal liability of Agent – Termination of Agency.

UNIT – IV: Indian Partnership Act – Definition – Nature, Mode of determining the existence of Partnership – Relation of Partner to one another – Rights and duties of partner – Relation of partners with third parties – Types of partners – Admission– Retirement, and Expulsion of partners Dissolution of Firm – Registration of Firms.

UNIT – V: Sale of Goods Act – The Contract of sale – Agreement to sell - Conditions and Warranties – Passing of property – Transfer of title – Performance of the Contract – Rights of Unpaid Seller – Remedies for Breach of Contract.

Prescribed Books:

1. Singh, Avtar, Law of Contract and Specific Relief, 11th Edition, (Lucknow: Eastern Book Company, 2013)

2. Verma J.P (ed.,) Singh and Gupta, The Law of Partnership in India, (New Delhi: Orient Law House, 1999)

3. Saharay, H. K, Indian Partnership and Sale of Goods Act, (Universal, 2000)

4. Nair, Krishnan, Law of Contract, (New Delhi: Orient Law House, 1999)

5. Hire Purchase Act

Reference Books:

1. Pollock and Mulla, Indian Contract and Specific Relief Act,14th Edition, (New Delhi: Lexis Nexis, 2013)

2. Anson, William, Law of Contract, 29th Edition, (Oxford University Press, 2010)

3. Avtar Singh, Principles of the Law of Sale of Goods and Hire Purchase, (Lucknow; Eastern Book House Ltd, 1998)

4. Sir Frederick Pollock and Mulla, Pollock and Mulla on the Sale of Goods Act, 9th Edition, (Lexis Nexis: 2014)

5. J. P. Verma (ed.), Singh and Gupta, The law of partnership in India, (New Delhi: Orient Law House,1999)

Special Types of Contracts

The Act as enacted originally had **266 Sections**, it had wide scope and

- General Principles of Law of Contract – **Sections 01 to 75**
- Contract relating to Sale of Goods – **Sections 76 to 123**
- Special Contracts- Indemnity, Guarantee, Bailment & Pledge and Agency – **Sections 124 to 238**
- Contracts relating to Partnership – **Sections 239 to 266**

Previously, the Indian Contract Act, 1872 contained provisions relating to Sale of Goods (Movable Property) and Partnership. But now these two provisions have been removed from the Act and are placed in two separate Acts known as the Sale of Goods Act, 1930 and the Indian Partnership Act, 1932. So, at present, the Indian Contract Act includes the General Principles of Contract and Special Contracts only.

The Indian Contract Act brings within its ambit the contractual rights that have been granted to the citizens of India. It endows rights, duties and obligations on the contracting parties to help them to successfully conclude business- from everyday life transactions to evidencing the businesses of multi-national companies. The Indian Contract Act, 1872 was enacted on 25th April, 1872 [Act 9 of 1872] and subsequently came into force on the first day of September 1872. The essence of the India Contract Act has been modelled on that of the English Common Law. The extent of modifications made in the Act as per the Indian conditions and its adaptability to the Indian economy is an important area of research. In this regard it is pertinent to note that since the enactment of the Act there have been no amendments and thus the Law that was made in 1872 still stands good.

During the entire ancient and medieval periods of human history in India, there was no general code covering contracts. Principles were thus derived from numerous references- the sources of Hindu law, namely the *Vedas*, the *Dhramshatras*, *Smritis*, and the *Shrutis* give a vivid description of the law similar to contracts in those times. The rules governing contracts form a part of the law called *Vyavaharmayukha*. During the Muslim rule in India, all matters relating to contract were governed under the Mohammedan Law of Contract.

The English common law and statute law in force at that time came into India by the Charters of the eighteenth century which established the Courts of justice in the three presidency towns

of Calcutta, Madras and Bombay, so far it was applicable to Indian circumstances. The English law of contract, it has been, was evolved and developed within the framework of assumption. By the Charter of 1661 and 1726 the English law has deep impact on the Indian legal system. Prior to the enactment of the Indian Contract Act, 1872, The English Law is applied into the Presidency towns of Madras, Bombay and Calcutta by the Charter granted in 1726 by King George I to the East India Company.

It is a matter of controversy whether English law was introduced by the Charter of 1726 by which the statutes up to that date would be enforced in India with the same amount of force as in England, or subsequently by the Charters of 1753-74 so as to embrace statutes up to 1774. Anyways, since there was an indiscriminate application of English law to Hindus and Mahommedans within the jurisdiction of the Supreme Court it led to many inconveniences. To obviate this, the Statute of 1781 empowered the Supreme Court at Calcutta and the Statute of 1797 empowered the Courts of Madras and Bombay (recorders courts), to determine all actions and suits of contractual nature against the natives of the said towns in the case of Mahommedans by the laws and the usages of the Mahommedans and in the case of Hindus (called 'Code of Gentoo Laws' in the Statutes) by the laws and usages of the Hindus, and where only one of the parties was Mahommedan or Hindus, by the laws and the usages of the defendant.

In 1781, The Act of Settlement was passed by the British government which says that in the matters of inheritance and succession, contracts dealing with parties in the case of Mohammedans and Hindus, their respective laws were considered. In cases where only one of the parties is a Mohammedan or Hindu, the laws and usages of the defendant are considered. This rule was applied in the Presidency Towns. In places outside the presidency towns, judgment was decided according to the justice, equity and good conscience and this continued until the enactment of the Indian contract Act.

Scope of the Act

Act not retrospective – the provisions of this Act do not apply to contracts made before the Act came into force.

Principles of construction of contracts – A person is only entitled to enforce his contractual rights in a reasonable way and a court will not support an attempt to enforce them in an unreasonable way. The courts should not, in commercial transactions, be astute to defeat the efficacy of documents which parties have acted on, by seeking to apply to their construction rule such as the 'subject to contract rule'. Such rules are but guide.

They must not become tyrants, compelling a construction which in the circumstances of a particular case, produces a wholly artificial and unreal result.

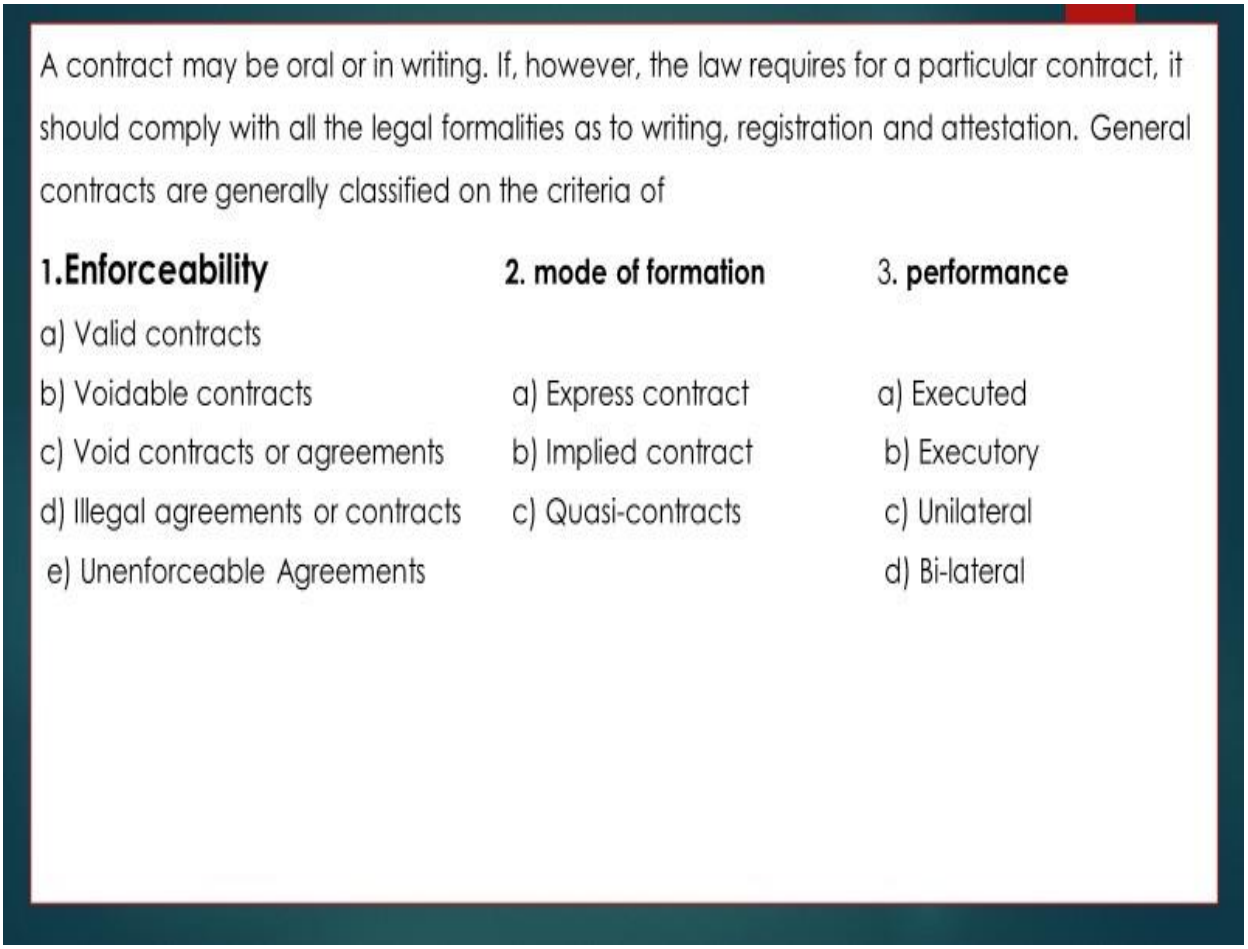
The Rights available under the Indian Contract Act –

There are two kinds of rights, one is ***Right in rem,*** and the other is ***Right in personam***.

The Indian Contract Act, 1872 provides *right in personam* to the parties who have bound their promises in a contract. Thus, the parties in such a situation can only enforce their contractual rights against each other only and not against the world at large.

Example – X and Y enter into a contract for delivering ten books on a specified date. If Y fails to deliver the same to X, then X can sue only Y and not anybody else. The rest of the world is concerned with this contract.

CLASSIFICATION OF CONTRACT



Definition of a Contract –

Section 2(h) of the Indian Contract Act defines the term contract as **"an agreement enforceable by law is a contract."** So, a contract is an agreement plus legal enforceability.

Law means a 'set of rules' which governs our behaviors and relating in a civilized society. So, there is no need of law in an uncivilized society. One should know the law to which he is subject because 'ignorance of law is no excuse'.

A contract may be defined as a legally binding agreement or, in the words of Sir Frederick Pollock: "A promise or set of promises which the law will enforce".

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

"A contract is an agreement creating and defining obligation between the parties" – Salmond.

The Law of Contract constitutes the most important branch of Mercantile or Commercial Law. It is the foundation upon which the superstructure of modern business is built. It affects everybody, more so, trade, commerce and industry. It may be said that the contract is the foundation of the civilized world.

The Indian Contract Act is divisible into **two parts**.

The first part (Section 1-75) deals with the general principles of the law of contract and therefore applies to all contracts irrespective of their nature.

The second part (Sections124-238) deals with certain **special kinds of contracts,** namely contracts of Indemnity and Guarantee, Bailment, Pledge, and Agency

SPECIFIC CONTRACTS

CONTRACT OF INDEMNITY

Contract of Indemnity –Definition, Nature and Scope - Rights of indemnity holder – Commencement of the indemnifier's liability

The term Indemnity literally means "Security against loss". In a contract of indemnity one party – i.e., the indemnifier promises to compensate the other party i.e., the indemnified against the loss suffered by the other.

The English law definition of a contract of indemnity is – "it is a promise to save a person harmless from the consequences of an act." The promise may be express or it may be implied under English law.

An illustration in English law of the meaning and effect of contract of indemnity is to be found in the facts of *Adamson v. Jarvis.*

The plaintiff, an auctioneer sold certain cattle on the instruction of the defendant. It subsequently turned out that the livestock did not belong to the defendant, but to another person, who made the auctioneer liable and the auctioneer in his turn sued the defendant for indemnity for the loss he had suffered by acting on the defendant's directions.

The court laid down that the plaintiff having acted on the request of the defendant was entitle to assume that, if, what he did, turned out to be wrongful, he would be indemnified by the defendant.

In *Dugdale v. Lovering*, the plaintiff was in possession of certain trucks which were claimed both by the defendants and one K.P. Company the defendants demanded delivery and the plaintiffs asked for an indemnity bond, but received no reply. Even so they delivered the trucks to the defendant. K.P Company, having successfully sued the plaintiffs for conversion of their property, the plaintiffs were held entitled to recover indemnity from the defendants on an implied promise as evidenced by the fact that by demanding an Indemnity, they made it quite clear that they had no intention to deliver except on indemnity.

Similarly, in *Sheffield Corporation v. Barklay,* A corporation, having registered to transfer a stock on the request of a banker, was held entitle to recover indemnity from the banker when the transfers were discovered to be forged.

Thus, the English definition of Indemnity includes within its ambit losses caused not merely by human agency but also those caused by accident or fire or other natural calamities. Indeed, every contract of insurance, other than life insurance, is a contract of indemnity.

A Contract of indemnity is a direct engagement between two parties whereby one promises to save another from harm. According to section 124 of the Indian Contract Act a contract of indemnity means "a contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself or by the conduct of any other person."

The definition provided by the Indian Contract Act confines itself to the losses occasioned due to the act of the promisor or due to the act of any other person.

DEFINITION: - ***As provisions made in section 124 of the Indian Contract Act 1872 says that, "whenever one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of the any other person, is called a Contract of Indemnity."***

Example

A contract to indemnify B against the consequences of any proceedings which C may take against B in respect of a certain sum of 200 rupees. This is a contract of indemnity.

Meaning of Indemnifier and indemnity holder

Indemnifier: The person who promises to make good the loss is called the 'indemnifier'. In the aforesaid example A is the Indemnifier.
Indemnity holder: The person whose loss is to be made good is called 'Indemnity holder'. In the aforesaid example B is the Indemnity holder.

Nature of contract of Indemnity

A contract of indemnity may be express or implied depending upon the circumstances of the case, though Section 124 of the Indian Contract Act does not seem to cover the case of implied indemnity.

A broker in possession of a government promissory note endorsed it to a bank with forged endorsement. The bank acting in good faith applied for and got a renewed promissory note from the Public Debt Office. Meanwhile the true owner sued the Secretary of State for conversion who in turn sued the bank on an implied indemnity. It was held that – it is general principle of law when an act is done by one person at the request of another which act is not in itself manifestly tortious to the knowledge of the person doing it, and such act turns to be injurious to the rights of a third person, the person doing it is entitled to an indemnity from him who requested that it should be done. [*Secretary of State v Bank of India*].

ESSENTIAL ELEMENTS: The following are the essentials of the Contract of Indemnity: -

1. There must be a loss.

2. The loss must be caused either by the promisor or by any other person.

3. Indemnifier is liable only for the loss.

Thus, it is clear that this contract is contingent in nature and is enforceable only when the loss occurs.

Modes of contract of Indemnity

EXPRESS

A contract of Indemnity is said to be **express when a person expressly promises to compensate the other from the loss**

IMPLIED

A contract of Indemnity is said to be implied **when it is to be inferred from the conduct of the parties or from the circumstances of the case**

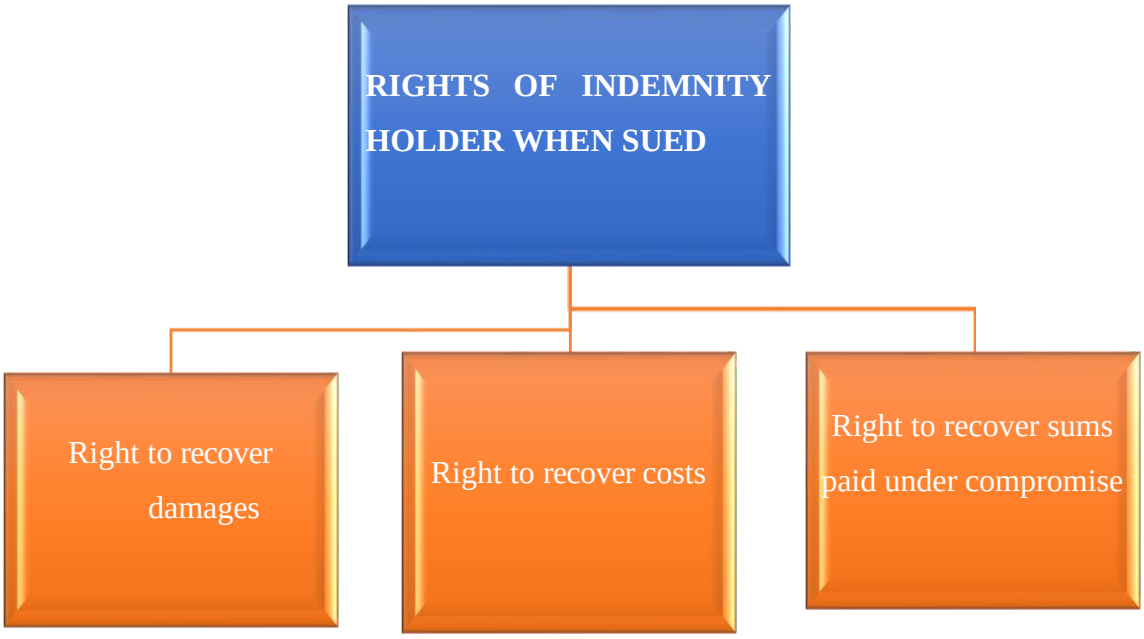
INSURANCE INDEMNITY

All most all insurances other than life and personal accident insurance are contracts of Indemnity. The insurers promise to indemnify is an absolute one. A suit can be filed immediately upon failure to performance, irrespective actual loss. If the indemnity holder incurred liability and that liability was absolute, he would be entitled to call upon the indemnifier to save him from that liability by paying it off (***New India Assurance Company Ltd. v. State trading Corporation of India, AIR 2007 NOC)***

Extent of Liability

Sec.125 Right of the indemnity holder

An indemnity holder (i.e., indemnified) acting within the scope of his authority is entitled to the following rights –



1. Right to recover damages – he is entitled to recover all damages which he might have been compelled to pay in any suit in respect of any matter covered by the contract.

2. Right to recover costs – He is entitled to recover all costs incidental to the institution and defending of the suit.

3. Right to recover sums paid under compromise – he is entitled to recover all amounts which he had paid under the terms of the compromise of such suit. However, the compensation must not be against the directions of the indemnifier. It must be prudent and authorized by the indemnifier.

4. Right to sue for specific performance – he is entitled to sue for specific performance if he has incurred absolute liability and the contract covers such liability. The promise in a Contract of Indemnity, acting within the scope of his authority, is entitled to recover from the promisor.

Right of recover Damages: - All the damages that he is compelled to pay in a suit in respect of any mater to which the promise of indemnity applies.

Right of recover all Costs: - All the costs that he is compelled to pay in such suit if in bringing or defending it he did not contravene the orders of the promisor and has acted as it would have been prudent for him to act in the absence of the contract of indemnity or if the promisor authorized him in bringing or defending the suit.

Right of recovery all sums: - All the sums which he may have paid under the terms of a compromise in any such suite if the compromise was not contrary to the orders of the promisor and was one which would have been prudent for the promise to make in the absence of the contract of indemnity.

In case of ***Mohit Kumar saha v. New India Assurance Co***. It was held that the indemnifier must pay the full amount of the value of the vehicle lost to theft as given by the surveyor. Any settlement at the lesser value is arbitrary and unfair and violates Art.14 of the Constitution. All sums which he may have paid under the terms of any compromise of any such suit.

It is important to note here that the right to indemnity cannot be claimed of dishonesty, lack of good faith and contravention of the promisor's request. However, the right cannot be negatived in case of oversight. [*Yeung v HSBC*]

Rights of Indemnifier –

Section 125 of the Act only lays down the rights of the indemnified and is quite silent of the rights of indemnifier as if the indemnifier has no rights but only liability towards the indemnified.

In the logical state of things if we read Section 141 which deals with the rights of surety, we can easily conclude that the indemnifier's right would also be same as that of surety.

Where one person has agreed to indemnify the other, he will, on making good the indemnity, be entitled to succeed to all the ways and means by which the person indemnified might have protected himself against or reimbursed himself for the loss. [*Simpson v Thomson*]

COMMENCEMENT OF LIABILITY

When does the Indemnifier become liable to pay, or, when is the indemnity-holder entitled to recover his indemnity?

The Indian Contract Act, 1872 is silent on the time of commencement of liability of Indemnifier. On the basis of judicial pronouncement of courts, it can be said that the liability of an indemnifier commences as soon as liability of the indemnity holder absolute and certain. In other words, if the indemnity holder has incurred an absolute liability even though he has himself paid nothing, he is entitling to ask the indemnifier to indemnify him.

The original English rule was that indemnity was payable only after the indemnity-holder had suffered actual loss by paying off the claim. The maxim of law was: "you must be damnified before you can claim to be indemnified." But the law is different now.

In *Gajanan Moreshwar Parlekar v. Moreshwar Madan Mantri*, Chagla J explained the transformation of process. It is true that under English law no action could be maintained until the actual loss had been incurred. It was realized that indemnity might be worth very little indeed if the indemnified could not enforce his indemnity till he had actually paid the loss. Therefore, the court of equity held that if his liability had become absolute then he was entitled either to get the indemnifier to pay off the claim or to pay into court sufficient money which would constitute a fund for paying off the claim whenever it was made. This principle was expounded in *Richardson Re, Ex Parte The Governors of St. Thomas's Hospital and Osman Jamal & Sons ltd. V. Gopal Purushottam* observed that "Indemnity is not necessarily given by repayment after payment. Indemnity requires that the party to be indemnified shall never be called upon to pay.

Example:

X promises to compensate Y for any loss that he may suffer by filing a suit against Z. The court orders Y to pay Z damages of Rupees 5000/. As the loss has become certain, Y may claim the amount of loss from X and pass it on to Z.

CONTRACT OF GUARANTEE

Contract of Guarantee – Definition, Nature and Scope – Difference between contract of indemnity and Guarantee – Rights of surety – Discharge of Surety – Extent of Surety's liability – Co-surety

Contract of Guarantee

A formal assurance (typically in writing) that certain conditions would be fulfilled

Sec.126 - A "contract of guarantee" is a contract to perform the promise, or discharge the liability, of a third person in case of his default.

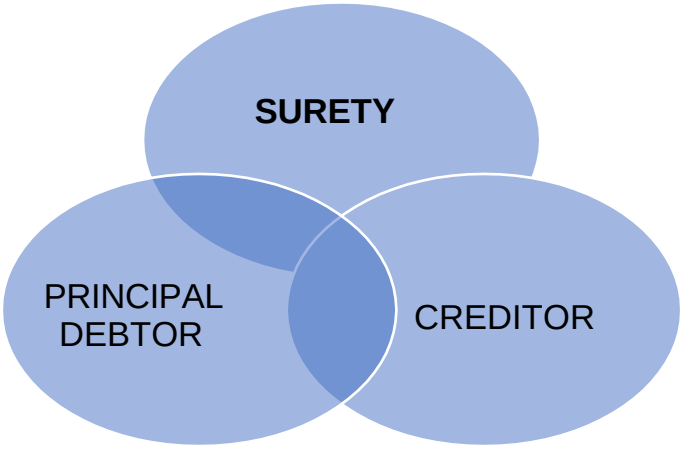
Economic functions of guarantee

The function of a contract of guarantee is to enable a person to get a loan, or goods on credit, or an employment. Some person comes forward and tells the lender, or the supplier or the employer that he (the person in need) may be trusted and in case of any default, "I undertake to be responsible". Guarantees are usually taken to provide a second pocket to pay if the first should be empty.

Example

X and his friend Y enter a shop and X says to Z "Supply the goods required by Y, and if he does not pay you, I will." This is a contract of guarantee.

Parties to the contract of guarantee- Sec 126



There are three parties to a contract of Guarantee-Principal debtor, Creditor and Surety.

Meaning of Principal Debtor [Section 126]

The person in respect of whose default the guarantee is given is called the 'Principal debtor'. Y is the principal debtor in the aforesaid example.

Meaning of Creditor [Section 126]

The person to whom the guarantee is given, is called the 'creditor'. Z is the creditor in the aforesaid example.

Meaning of Surety [Section 126]

The person who gives the guarantee is called the 'Surety'. X is the surety in the aforesaid example.

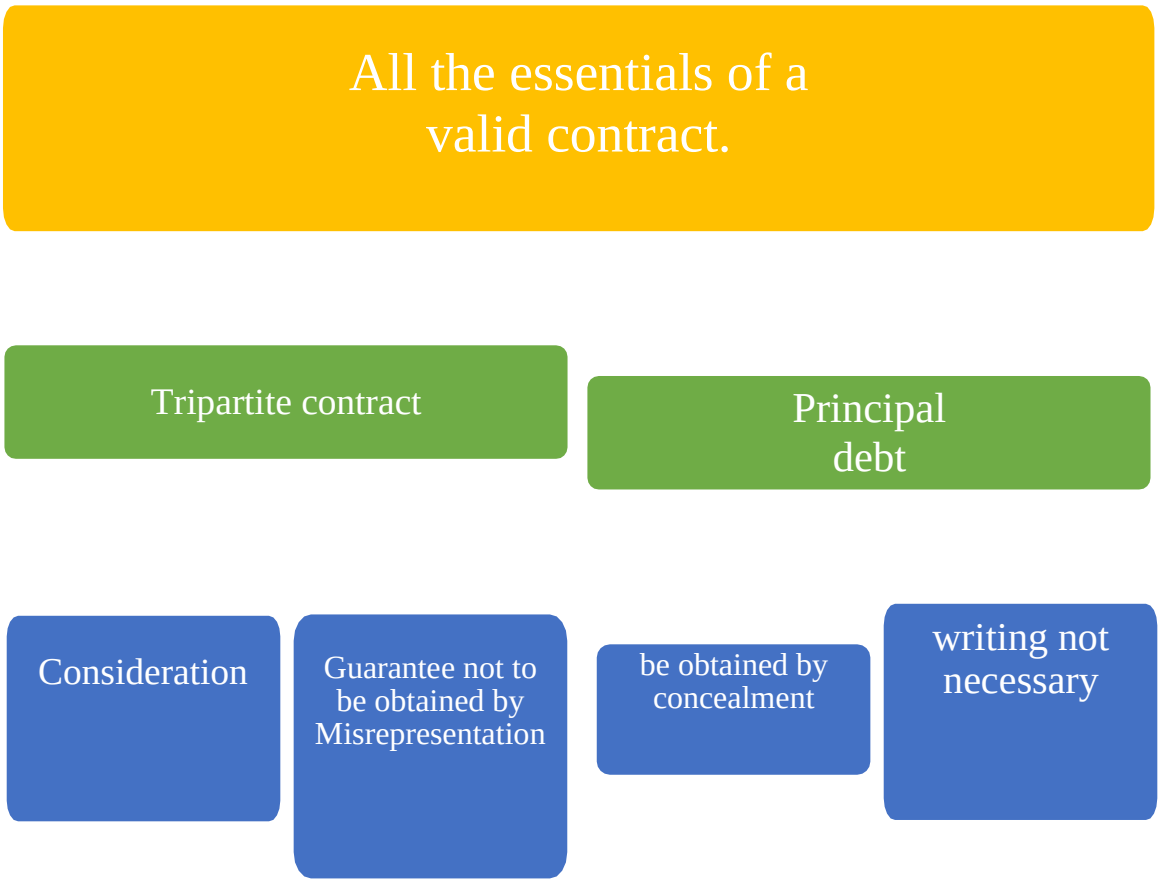
A guarantee may be either oral or written.

Independent liability is different from guarantee

There must be a conditional promise to be liable on the default of principal debtor. A liability which is incurred independently of a "default" is not within the definition of guarantee. (It has been applied in the following cases: (*Punjab National Bank v. Vikram Cotton Mills 1970 SCC 6, Birkmyr v.Darnell 91 ER 27 , Taylor v. Lee*)

ESSSENTIAL FEATURES OF CONTRACT OF GUARANTEE

The following are the requisites of a valid Guarantee



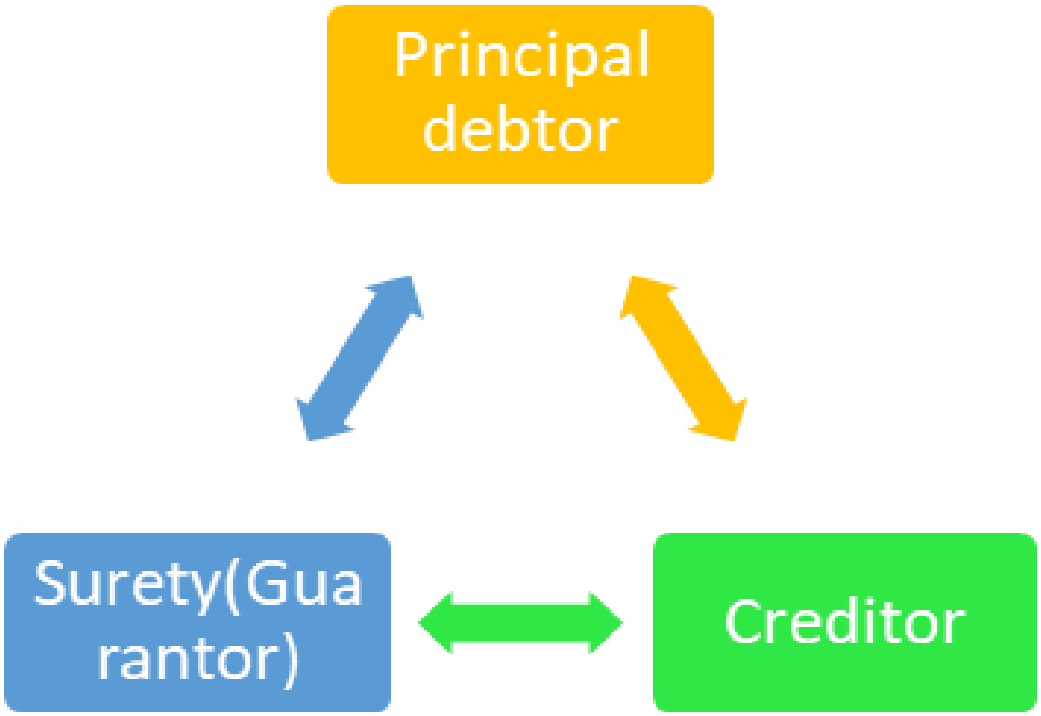
1. All the essentials of a valid contract.

(i) The principal debtor need not be competent to contract. In case the principal debtor is not competent to contract, the surety would be regarded as the principal debtor and would be personally liable to pay.

(ii) Surety need not be benefited. According to Section 127, "Anything done, or any promise made, for the benefit of the principal debtor, may be a sufficient consideration to the surety for giving the guarantee."

(iii) A guarantee need not be in writing. According to Section 126, a guarantee may be either oral or written.

2. Tripartite agreement



A contract of guarantee is a tripartite agreement between the principal debtor, creditor and surety. There are three contracts as under:

(i) Contract between creditor and the principal debtor out of which the guaranteed debt arises.

(ii) Contract between surety and the principal debtor by which the principal debtor undertakes to indemnity the surety if surety is required to pay.

(iii) Contract between surety and the creditor by which the surety guarantees to pay the principal debtor's debt if the principal debtor fails to pay.

3. Principal Debt

a. Recoverable Debt Necessary

b. Guarantee for void Debt, When enforceable

c. Guarantee of minor's Debt

There must be an existing liability or a promise whose performance is guaranteed. Such liability or promise must be enforceable by law. Hence, guarantee can be given only for liability or promise which is enforceable by law. But there is an exception to this rule. The exception is a guarantee given for minor's debt. Though minor's debt is not enforceable by law, yet the guarantee given for minor's debt is valid.

a. Recoverable Debt Necessary

For the purpose of valid guarantee and to secure payment of debt, the existence of recoverable debt is necessary. There must be someone responsible or liable as principal debtor and the surety must undertake to be liable on his default. (*Swan v. Bank of Scotland* and *Lima Leitao & Co. Ltd v. UOI, AIR 1968*)

d. Guarantee for void Debt, When enforceable

Sometimes a guarantee is for void debt may be still held enforceable. Example, The Directors of a company guaranteed their company's loan which was void as being *ultra vires*, the directors were never the less held liable. The reason may be that the voidness of a contract of guarantee the debt for company acting *ultra vires* is different in its consequence from the voidness brought about by the express and empathetic language of a statute.

e. Guarantee of minor's Debt

Where a minor's debt has been knowingly guaranteed by the surety then he should be liable as a principal debtor himself. (*Kashiba Bin Narsappa Nikade v. Narshiv Shripat 1984 ILR*)

4. Consideration

Consideration for guarantee [Section 127]: What constitutes consideration in a case of guarantee is an important question and is laid down in Section 127 of the Act.

As per Section 127 of the Act, "anything done, or any promise made, for the benefit of the principal debtor, may be a sufficient consideration to the surety for giving the

Illustrations

(a) B requests A to sell and deliver to him goods on credit. A agrees to do so, provided C will guarantee the payment of the price of the goods. C promises to guarantee the payment in consideration of as promise to deliver the goods. This is a sufficient consideration for Cs promise.

(b) A sold the goods and delivers them to B. C afterwards requests A to forbear to sue B for the debt for a year, and promises that, if he does so, C will pay for them in default of payment by B. A agrees to forbear as requested. This is a sufficient consideration for Cs promise.

(c) A sold the goods and delivers them to B. C afterwards, without consideration, agrees to pay for them in default of B. The agreement is void.

Example: When A requests B to lend `10,000 to C and guarantees that C will repay the amount within the agreed time and that on C falling to do so, he will himself pay to B, there is a contract of guarantee. Here, B is the creditor, C the principal debtor and A the surety.

a. Guarantee for past Debt

Guarantee for past debt should be invalid. The section says that "anything done for the benefit of the principal debtor" is good consideration.

In a case *SICOM Ltd. V. Padmashri Mahipatrai Shah,* (2005) before the Bombay High Court, a guarantee was executed subsequent to release of financial assistance to the borrower. The court held that it could not be said that there was no consideration for the guarantee. In the view of the court, "past consideration is valid consideration".

b. Past as well as future debt

A guarantee for a past as well as a future debt is enforceable provided some further debt is incurred after the guarantee. But there should be a clear undertaking to be liable for a past debt and as soon as some fresh obligation is incurred, the liability for all the obligations is coupled up (*Morell v. Cowan*).

c. Benefit of Principal Debtor, enough Consideration

If the principal debtor gets a benefit, that suffices to sustain the guarantee. It will be of no consequence to say that the principal debtor had never requested for a guarantee or that it was given without his knowledge or consent.

d. Counter guarantee

A counter guarantee is for protection of the original guarantor. When the original guarantor is called upon to pay and he has fulfilled his obligation under his guarantees, he can call upon the counter guarantor to pay him.

Is a contract of guarantee A contract of *uberrimae fidei?*

A contract of guarantee is not a contract of *uberrimae fidei* (i.e., a contract of absolute good faith) and hence, it is not necessary for the principal debtor or the creditor to disclose all the material facts to the surety before he enters in to a contract.

Example: In case of guarantee given to a Bank, bank need not inform the surety of matters affecting the credit of principal debtor.

However, the provisions of Sections 142 & 143 gave some protection to the surety by making following guarantee as invalid.

a. Guarantee obtained by misrepresentation
b. Guarantee obtained by concealment of material facts

5. **Guarantee not to be obtained by misrepresentation [section 142]** Any guarantee which has been obtained by means of misrepresentation made by the creditor, or with his knowledge and assent, concerning a material part of the transaction, is invalid.

6. Guarantee not to be obtained by concealment [section 143]

Any guarantee which the creditor has obtained by means of keeping silence as to material circumstances is invalid. (*London Omnibus Co v. Holloway*)

Example: - X sells and delivers goods to Y. X afterwards requests Z to pay in default of Y. Z agrees to do so. Here, Z cannot become surety without the consent of Y.

KINDS OF GUARANTEE

Guarantee may be classified under the following two categories:

SPECIFIC GUAARANTEE

- Single debt or specific transaction

CONTINUING GUARANTEE

- Series of transactions

I. **SPECIFIC GUARANTEE**

A guarantee which extends to a single debt or specific transaction is called a specific guarantee. The liability of the surety comes to an end when the guaranteed debt is duly discharged or the promise is duly performed.

Example :- X guarantees payment to Y of the price of the five bags of flour to be delivered by Y to Z and to be paid for in a month. Y delivers five bags to Z, Z pays for them. This is a contract of specific guarantee because X intended to guarantee only for the payment of price of the first five bags of flour to be delivered at one time. *[Kay v. Groves]*

CONTINUING GUARANTEE

Continuing Guarantee [Section 129]:
A Guarantee which extends to a series of transactions is called a 'continuing guarantee'. A surety's liability continues until the revocation of the guarantee.

Example 1: On A's recommendation, C employed B for the collection of rent from his tenants. A promised to make good any default made by B This is a contract of continuing guarantee.

Example 2: A guarantees payment to B, a tea-dealer to the extent of Rs 100, for any tea he may supply to C from time to time. B supplies C with tea to the above value of Rs 100, and C pays B for it. Afterwards, B supplies C with tea to the value of Rs 200. C fails to pay. The guarantee given by A was a continuing guarantee, and he is accordingly liable to B to the extent of Rs 100.

NOTE: A continuing guarantee may be given for a part of the entire debt or for the entire debt subject to a limit.

REVOCATION OF CONTINUING GUARANTEE

1. By Notice of revocation [Section 130]

A continuing guarantee may at any time be revoked by the surety as to the future transactions by notice to the creditor. However, the surety remains liable for the past transactions which have already taken place.

Example1: X gives guarantee to the extent of Rs 60,000 for the loans given from time to time by Y to Z. Y gave a loan of Rs 20,000 to Z. Afterwards, X gives notice of revocation. X is discharged from all liability to Y for any loan granted after the revocation of guarantee but he is liable to Y for Rs. 20,000 on default of Z.

Example 2: A guarantees to B, to the extent of 100,000 rupees, that C shall pay all the bills that B shall draw upon him. B draws upon C. C accepts the bill. A gives notice of revocation. C dishonors the bill at maturity. A is liable upon his guarantee.

Lloyd's v. Harper It was held that employment of a servant is one transaction. The guarantee for a servant is thus not a continuing guarantee and cannot be revoked as long as the servant is the same employment. *Wingfield v. De St Cron* it was held that a person who guaranteed the rent payment for his servant but revoked it after the servant left his employment was not liable for the rents after revocation.

2. By Death of surety [Section 131]

In the absence of any contract to the contrary, the death of surety operates as a revocation of a continuing guarantee as to the future transactions taking place after the death of surety. However, the surety's estate remains liable for the past transactions which have already taken place before the death of surety.

In the case of *Durga Priya v/s Durga Pada,* it was held by the court that in each case the contract of guarantee between the parties must be looked into to determine whether the contract has been revoked due to the death of the surety or not. It there is a provision that says that death does not cause the revocation then the contract of guarantee must be held to continue even after the death of the surety.

3. By modes of discharging the surety

A continuing guarantee is also revoked in the same manner in which the surety is discharged such as:

(i) Novation [Section 62]

(ii) Variance in terms of contract [Section 133]

(iii) Release or discharge of principal debtor [Section 134]

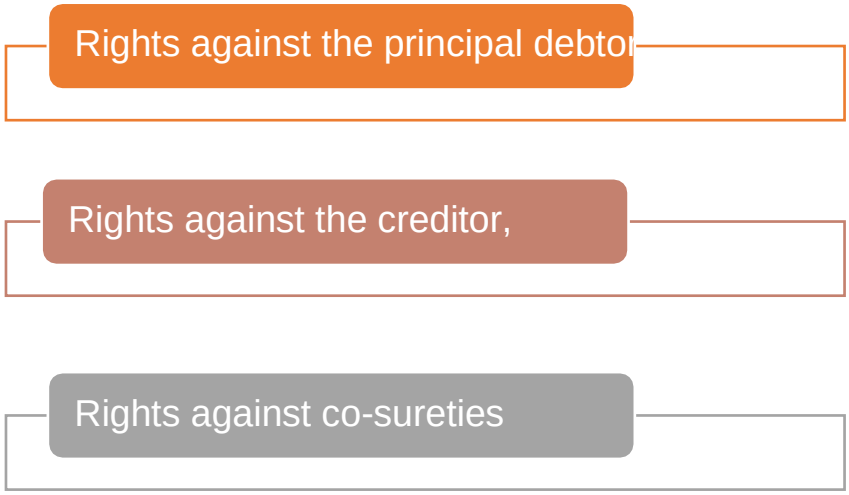
(iv) When the creditors enter into an arrangement with the principal debtor [Section 135]

(v) Creditor's act or omission impairing surety's eventual remedy [Section 139]

(vi) Loss of security [Section 141]

Rights of a Surety

Rights of a surety may be classified as under:



I. Rights against the principal debtor

(a) Right to Subrogation [Section 140]

On payment of the guaranteed debt or performance of the guaranteed duty; the surety acquires all the rights which the creditor had against the principal debtor. Thus, the surety steps into the shoes of creditor.

(b) Right to Indemnity [Section 145] In every contract of guarantee there is an implied promise by the principal debtor to indemnify the surety; and the surety is entitled to recover from the principal debtor whatever sum he has rightfully paid under the guarantee, but not those sums which he had paid wrongfully.

Example I: B is indebted to C, and A is surety for the debt. C demands payment from A, and on his refusal sues him for the amount. A defends the suit, having reasonable grounds for doing so, but he is compelled to pay the amount of the debt with costs. He can recover from B the amount paid by him for costs, as well as the principal debt.

Example II: C lends B a sum of money, and A, at the request of B, accepts a bill of exchange drawn by B upon A to secure the amount. C, the holder of the bill, demands payment of it from A, and on A's refusal to pay sues him upon the bill. A, not having reasonable grounds for so doing, defends the suit, and has to pay the amount of the bill and costs. He can recover from B the amount of the bill, but not the sum paid for costs, as there was no real ground for defending the action

Example III: A guarantees to C, to the extent of Rs 2,000, payment for rice to be supplied by C to B. C supplies to B rice of less amount than Rs 2,000 but obtains from A payment of the sum of Rs 2,000 in respect of the rice supplied. A cannot recover from B more than the price of the rice actually supplied.

RIGHTS OF AGAINST CREDITOR

(a) Right to Securities [Section 141]

A surety is entitled to the benefit of every security which the creditor has against the principal debtor at the time when the contract of suretyship is entered into, whether the surety knows

of the existence of such security or not; and if the creditor loses, or, without the consent of the surety, parts, with such security, the surety is discharged to the extent of the value of the security.

Example I: C advances to B his tenant, Rs 2,000 on the guarantee of A. C has also a further security for Rs 2,000 by a mortgage of Bs furniture. C cancels the mortgage. B becomes insolvent, and C sues A on his guarantee. A is discharged from liability to the amount of the value of the furniture.

Example II: C, a creditor, whose advances to B is secured by a decree, receives also a guarantee for that advance from A. C, afterwards, takes B's goods in execution under the decree, and then, without the knowledge of A, withdraws the execution. A is discharged.

Example III: A, as surety for B, makes a bond jointly with B to C, to secure a loan from C to B. Afterwards, C obtains from B a further security for the same debt. Subsequently, C gives up the further security. A is not discharged.

(b) Right to Claim Set Off

The surety has the right to claim set off or counterclaim, if any, which the principal debtor had against the creditors in case the creditors sue him for payment of liability of principal debtor.

II. Rights against co-sureties

CO- SURETIES

Meaning of Co-sureties: When the same debt or duty is guaranteed by two or more persons, such persons are called as 'co-sureties'

(a) Co-sureties liable to contribute equally (Section 146): Equality of burden is the basis of Co-suretyship. This is contained in section 146 which states that “when two or more persons are co-sureties for the same debt, or duty, either jointly, or severally and whether under the same or different contracts and whether with or without the knowledge of each other, the co-sureties in the absence of any contract to the contrary, are liable, as between

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

Example 1: A, B and C are sureties to D for the sum of 3,00,000 rupees lent to E, He makes default in payment. A, B and C are liable, as between themselves, to pay 1,00,000 rupees each.

Example 2: A, B and C are sureties to D for the sum of 1,00,000 rupees lent to E, and there is a contract between A, B and C that A is to be responsible to the extent of one-quarter, B to the extent of one-quarter, and C to the extent of one- half. He makes default in payment. As between the sureties, A is liable to pay 25,000 rupees, B 25,000 rupees, and C 50,000 rupees.

(a) Liability of co-sureties bound in different sums (Section 147): The principal of equal contribution is, however, subject to the maximum limit fixed by a surety to his liability. Co-sureties who are bound in different sums are liable to pay equally as far as the limits of their respective obligations permit.

Example 1: A, B and C, as sureties for D, enter into three several bonds, each in a different penalty, namely, A in the penalty of 1,00,000 rupees, B in that of 2,00,000 rupees, C in that of 4,00,000 rupees, conditioned for D's duly accounting to E. D makes default to the extent of 3,00,000 rupees. A, B and C are each liable to pay 1,00,000 rupees.

Example 2: A, B and C, as sureties for D, enter into three several bonds, each in a different penalty, namely, A in the penalty of 1,00,000 rupees, B in that of 2,00,000 rupees, C in that of 4,00,000 rupees, conditioned for D's duly accounting to E. D makes default to the extent of 4,00,000 rupees; A is liable to pay 1,00,000 rupees, and B and C 1,50,000 rupees each.

Example 3: A, B and C, as sureties for D, enter into three several bonds, each in a different penalty, namely, A in the penalty of 1,00,000 rupees, B in that of 2,00,000 rupees, C in that of 4,00,000 rupees, conditioned for D's duly accounting to E. D makes default to the extent of 7,00,000 rupees. A, B and C have to pay each the full penalty of his bond.

Right to Claim Contribution**:** If a co-surety pays more than his proportionate share of liability, he has a right to claim contribution from the other co-surety or co-sureties.

Right to Share the Security: If a co-surety obtains any security of principal debtor, the other co-surety (or co-sureties) has (or have) a right to share such security.

Effect of Release of One Co-surety [Section 138]

Where there are co-sureties, a release by the creditor of one of them does not discharge the others; neither does it free the surety so released from his responsibility to the other sureties. However, under English law the release of one co-surety shall release all the other co-sureties since the liability of co- sureties under English law is only joint and not joint and several.

Extent of Surety's Liability Sec.128

In the absence of contract to the contrary the liability of the surety is co-extensive with that of the principal debtor. It means that the liability of surety is equal to that of the principal debtor unless otherwise agreed.

The liability of the surety is co-extensive with that of the principal debtor unless it is otherwise provided by the contract.

(i) The term "co-extensive with that of principal debtor" means that the surety is liable for what the principal debtor is liable.

(ii) The liability of a surety arises only on default by the principal debtor. But as soon as the principal debtor defaults, the liability of the surety co-extensive with the liability of the principal debtor, in the sense that the surety will be liable for all those sums for which the principal debtor is liable.

(iii) Where a debtor cannot be held liable on account of any defect in the document, the liability of the surety also ceases.

(iv) Surety's liability continues even if the principal debtor has not been sued or is omitted from being sued. In other words, a creditor may choose to proceed against a surety first, unless there is an agreement to the contrary.

(v) Surety's liability may be conditional. The surety may impose certain conditions in the contract of guarantee. Until those conditions are met, the surety shall not be liable. **Example**: A guarantees to B the payment of a bill of exchange by C, the acceptor. The bill is dishonored by C. A is liable not only for the amount of the bill but also for any interest and charges which may have become due on it.

Important cases on Sureties liability

In *Bank of Bihar Ltd. v. Damodar Prasad*, The Supreme Court held that the liability of the surety is immediate and cannot be defended until the creditor has exhausted all his remedies against the principal debtor.

In *Maharashtra Electricity Board Bombay v. Official Liquidator and Another*, under a letter of guarantee the bank undertook to pay any amount not exceeding Rs.50000/- to the Electricity Board. It was held that the bank is bound to pay the amount due under the letter of guarantee given by it to the Board.

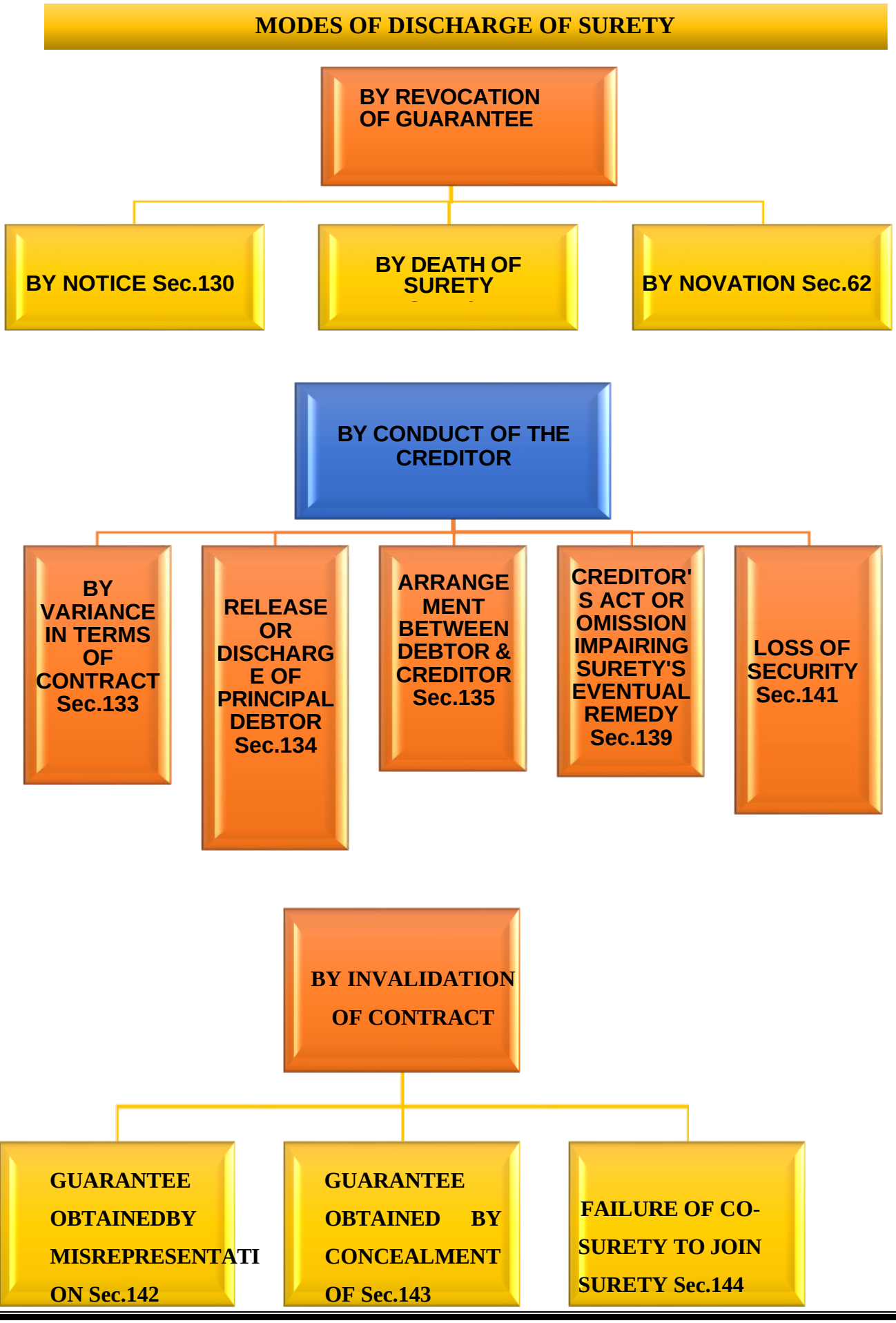
In *Kellappan Nambiar v. Kanhi Raman* in this case that if the principal debtor happens to be a minor and the agreement made by him is void, the surety too cannot be made liable in respect of the same because the liability of the surety is co-extensive with that of principal debtor. It has been held that the guarantee of the loan or an overdraft to an infant is void because the loan to the infant itself is *void ab intio*.

In *State Bank of India v. V.N. Anantha Krishnam* that in view of the provision of section 128 of Act the Presiding officer was not correct in giving directions to the bank to proceed against the property because cash credit facility and the liability of surety was co-extensive with that of principal debtor.

In *Industrial Financial Corporation of India v. Kannur Spining & Weaving Mills Ltd.* It was held that the liability of surety does not cease merely because of discharge of the principal debtor from liability.

In a case of *Harigobind Aggarwal v. State Bank of India,* it was held that the principal debtor liability is reduced e.g., after the creditor has recovered a part of the sum due from him out of his property the liability of the surety is also reduced accordingly.

DISCHARGE OF SURETY



BY REVOCATION OF CONTRACT OF GUARANTEE

- BY NOTICE [SECTION 130]

A specific guarantee may be revoked by a surety by notice to the creditor if the liability of the surety has not yet accrued. A continuing guarantee may at any time be revoked by the surety as to future transactions by notice to the creditor.

However, the surety remains liable for the past transactions which have already taken place.

- BY THE DEATH OF SURETY [SECTION 131]

In the absence of any contract to the contrary, the death of a surety operates as a revocation of a continuing guarantee as to future transactions taking place after the death of surety. However, the deceased surety's estate remains liable for the past transactions which have already taken place before the death of the surety but will not be liable for the transactions taking place after the death of surety even if the creditor has no notice of surety's death.

- BY NOVATION [SECTION 62]

A contract of guarantee is said to be discharged by novation when a fresh contract is entered into either between the same parties or between other parties, the consideration being the mutual discharge of the old contract. The original contract of guarantee comes to an end and the surety under original contract is discharged.

BY CONDUCT OF CREDITOR

By Variance In Terms of Contract [Section 133]

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

Example: C contracts to lend A Rs 5,000 on the first March. A guarantees repayment. C pays Rs 5,000 to A on the first January. A is discharged from his liability as the contract has been varied in as much as C might sue A for the money before the first of March.

But variation which is not substantial or material or which is beneficial to the surety will not discharge him of his liability. In M.S. *Anirudhan* v. *Thomeo's Bank,* the surety guaranteed overdraft provided by the bank to the principal debtor only up to Rs 25,000. Subsequently since the bank was willing to provide overdraft only up to Rs 20,000, the principal debtor reduced the amount in the guarantee form to Rs 2,000. On default by the principal debtor the court held the surety liable as the alteration was beneficial to him and it was not of a substantial nature.

BY RELEASE OR DISCHARGE OF PRINCIPAL DEBTOR [SECTION 134]

The surety is discharged by any contract between the creditor and the principal debtor, by which the principal debtor is released, or by any act or omissions of the creditor, the legal consequence of which is the discharge of the principal debtor.

Example I: A contracts with B for a fixed price to build a house for A within a stipulated time, B supplying the necessary timber. C guarantees A's performance of the contract. B omits to supply the timber. C is discharged from his suretyship.

Example II: A contracts with B to grow a crop of wheat on A's land and to deliver it to B at a fixed rate, and C guarantees A's performance of this contract. B diverts a stream of water which is necessary for irrigation of A's land, and thereby prevents him from raising the wheat. C is no longer liable for his guarantee.

- BY ARRANGEMENT [SECTION 135]

A contract between the creditor and principal debtor, by which the creditor makes a composition with, or promises to give time to, or not to sue the principal debtor, discharges the surety, unless the surety assents to such contract.

CASES WHERE SURETY IS DISCHARGED

(i) Where a contract to give time to the principal debtor is made by the creditor with a third person, and not with the principal debtor, the surety is not discharged.

Example: - C, the holder of an overdue bill of exchange drawn by A as surety for B, and accepted by a, contracts with M to give more time to A. A is not discharged.

(ii) Mere forbearance on the part of the creditor to sue the principal debtor or to enforce any other remedy against him, does not, in the absence of any provision in the guarantee to the contrary, discharge the surety.

Example: B owes to C a debt guaranteed by A. The debt becomes payable. C does not sue B for a year after the debt has become payable. A is not discharged from his suretyship.

(iii) Where there are co-sureties, the release by the creditor of one of them does not discharge the other nor does it free the surety so released from his responsibility to the other sureties. [Section 138]

(d) By Creditor's Act or Omission Impairing Surety's Eventual Remedy [Section139]

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

Example I: B contracts to build a ship for C for a given sum, to be paid by installments as the work reaches certain stage. A becomes surety to C for B's due performance of the contract. C, without the knowledge' of A, prepays to B the last two instalments. A is discharged by this prepayment.

Example II: C lends money to B on the security of a joint and several promissory note, made in C’s favour by B, and by A as surety for B, together with a bill of sale of B’s furniture, which gives power to C to sell the furniture, and apply the proceeds in discharge of the note. Subsequently, C sells the furniture, but, owing to his misconduct and willful negligence, only a small price is realized. A is discharged from liability on the note.

(e) Loss of Security [Section 141]

If the creditor loses, or without the consent of the surety, parts with security given to him, the surety is discharged from liability to the extent of the value of security.

Example: A gave a loan to B on the guarantee of C as well as on the mortgage of B's furniture. Afterwards, A cancels the mortgage. B becomes insolvent and A sues C on this guarantee. C is discharged from liability to the value of furniture.

BY INVALIDATION OF CONTRACT

(a) Guarantee Obtained by Misrepresentation [Section 142]

Any guarantee which has been obtained by means of misrepresentation made by a creditor or with his knowledge and assent, concerning a material part of the transaction, is invalid.

(b) Guarantee Obtained by Concealment [Section 143]

Any guarantee which a creditor has obtained by means of keeping silence to material circumstances is invalid

Example: - X employs Y as a clerk to collect money for him. Y fails to account for some of his receipts and X, in consequence calls upon Z to furnish security for his duly accounting. Z gives guarantee for Ys duly account. X does not inform Z about Ys previous conduct. Y, afterwards, makes default. 'z is not liable because the guarantee was obtained by concealment of facts.

(c) Failure of Co-surety to Join a Surety [Section 144]

Where a person gives a guarantee upon a contract that a creditor shall not act upon it until another person has joined in it as co-surety.

DIFFERENCE BETWEEN INDEMNITY AND GUARANTEE

INDEMNITY	GUARANTEE
1. In Indemnity there are two parties, one who is Indemnity holder and the other Indemnifier. 2. It consists of only one contract under which indemnifier promises to pay in the event of certain loss. 3. The contract of indemnity is made to protect the promisee against some likely loss. 4. The liability of the indemnifier in a contract of indemnity is a primary one. 5. The liability arises only on the happening of a contingency. 6. The indemnifier need not act at the request of indemnity-holder. 7. The indemnifier cannot sue a third party in his own name because of absence of privity of contract between him and a third party. He can sue the third party in his own name if there in an assignment in his favour.	1. There are three parties in contract of Guarantee, Principal debtor, Surety and the Creditor. 2.There are three contracts between surety, principal debtor and creditor. 3. The object of contract of guarantee is the security of the creditor. 4.In guarantee the liability of surety is only a secondary, when principal debtor default. 5.The liability arises only on the non-performance of an existing promise or non-payment of an existing debt. 6. The surety acts at the request of the principal debtor. 7. A surety, on discharging the debt of principal debtor, can sue the principal debtor in his own.

UNIT-II: Contract of Bailment – Definition – Kinds – Rights and Duties of Bailor and Bailee – Rights of Finder of goods as Bailee

Contract of pledge – Definition – Comparison with Bailment – Rights and duties of Pawnor and Pawnee

BAILMENT

Chapter IX (Section 148 – 181) of the Indian Contract Act, 1872 deals with the general rules relating to bailment and Pledge. The Chapter is not exhaustive on the topic of bailment – there are various other Acts which deal with other types of bailment like the Carriers Act, 1865, the Railways Act, 1890, the Carriage of Goods by Sea Act, 1925.

Bailment and Pledge are examples of specific contracts. Indian Contract Act, 1872. First of all, not a comprehensive Act, dealing with all types of specific contracts. There are various other Acts which deal with specific contracts.

In Halsbury's Laws of England, it is defined as "a delivery of personal chattels in trust, on a contract, express or implied, that the trust shall be duly executed and the chattels redelivered in either their original or an altered form, as soon as the time of use for, or condition on which they were bailed shall have elapsed or been performed."

Justice Blackstone defines Bailment as 'a delivery of goods in trust, upon contract, either expressed or implied, that the trust shall be faithfully executed on the part of the bailee'.

A Bailment is a special contract defined under section 148 of the Indian Contract Act, 1872. It is derived from a French word i.e., *"bailer"* which means "*to deliver*". The etymological meaning of bailment is "handing over" or "change of possession of goods". By Bailment, we mean delivery of goods from one person to another for a special purpose on the contract that they shall reimburse the goods on the fulfilment of the purpose or dispose of them as per the direction of the bailor. The person who delivers the goods is known as Bailor and the person

to whom the goods are given is known as Bailee and the property bailed is known as Bailed Property.

Definition - Contract of Bailment (Sec. 148)

A 'bailment' is the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them. The person delivering the goods is called the **"bailor".** The person to whom they are delivered is called the **"bailee".**

Example: A man drops off his clothes for dry cleaning. He is the bailor and the purpose of bailment is to have the particular set of clothes cleaned. The dry cleaner is the bailee – he is the temporary custodian of the clothes and is responsible for keeping them safe and to return them to the bailor once they have been cleaned.

Section 148 states that if a person already in possession of the goods of another person contracts to holds the goods as a bailee, he becomes the bailee even though the goods may not have been delivered to him by way of bailment in the first place. For example, a seller of goods becomes a bailee if the goods continue to be in his possession after sale is complete. Here the original possession of goods was with the seller as the owner of the said goods and after the sale, his possession is converted into a contract of bailment.

Example: A has a motor cycle; he sells to B who leaves the motorcycle in the possession of A while he is out of town. Here, A becomes the bailee even though he was the owner originally.

Bailment can also be described as 'the delivery of goods to another person for a particular use'. Only 'goods' can be bailed and thus, only movable goods can be the subject matter of bailment.

Current money or legal tender cannot be bailed. Deposition of money in a bank is not bailment as money is not 'goods' and the same money is not returned to the client. But the coins and notes that are no longer legal tender and are more or less just objects of curiosity, then they can be bailed.

Mere custody of goods is not the same as delivery of possession. A guest who uses the goods of the host during a party is not a bailee. Similarly, it was held in *Reaves vs. Capper* that a

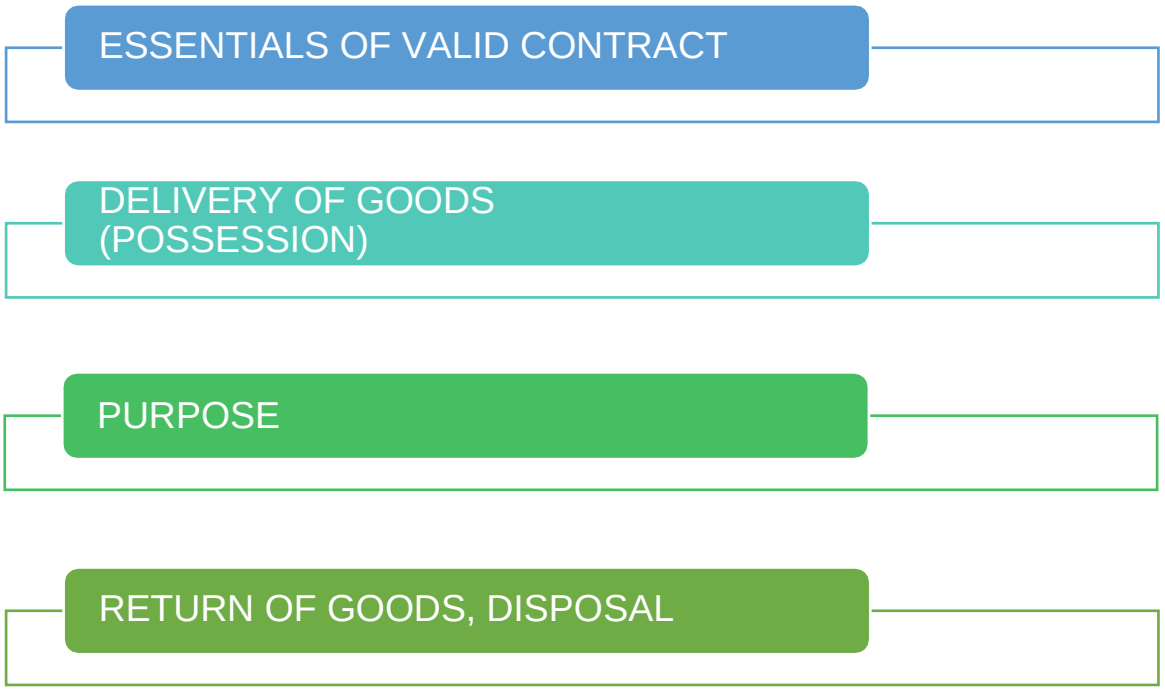
servant in custody of certain goods by the nature of his job is not a bailee. Similarly, a servant holding his master's umbrella is not a bailee but is a custodian. Similarly, hiring and storing goods in a bank locker by itself is not bailment thought there is delivery of goods to the bank premises. The goods are in no way entrusted to the bank. A bank cannot be presumed to know what goods are stored in any given locker at all the times. If a bank is given actual and exclusive possession of the property inside a locker by the person who hired the locker, only then can bailment under Section 148 can be presumed.

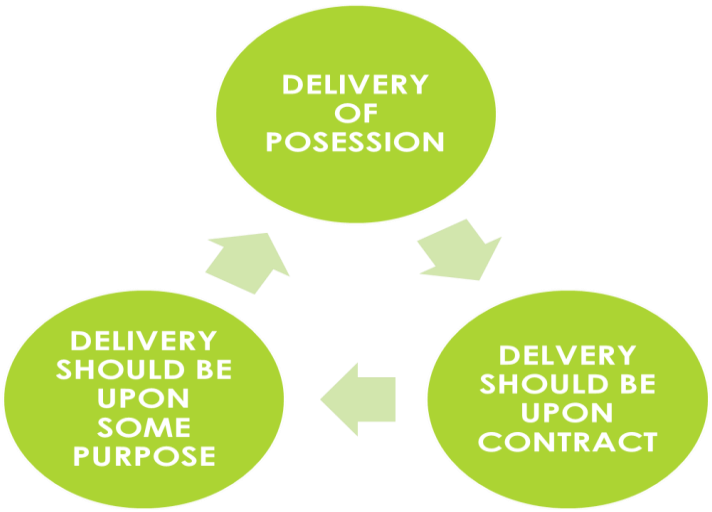
In *Atul Mehra vs. Bank of Maharashtra* [AIR 2003 P&H 11], it was held that mere hiring of a bank's locker and storing things in it would not constitute a bailment. But the position changes completely if the locker in the safe deposit vault of the bank can be operated even without the key of the customer. Example: A hired a locker in a bank and kept some of his valuables in it. He was given one key to open the locker. But the bank manager of the particular branch had fraudulently filed the levers of the locks of the lockers. Thus, the lockers could be opened even without the key of the customers. A's valuables went missing. A's control over the valuables in that locker had gone because the locker could be operated even without A's key. The bank was liable for the loss of A's belongings from the locker as it became a bailee.

This example is similar to the case of *National Bank of Lahore vs. Sohan Lal* [AIR 1962 Punjab. 534] Thus, it is clear that the nature of possession is very important to determine whether a delivery is for bailment or not. If the owner continues to have control over the goods, there can be no bailment. To create a bailment, the bailee must intend to possess and in some way physically possess or control the bailed goods or property. In a situation where a person keeps the goods in possession of another person but in fact, continues to have control over such goods, there is no delivery for the purpose of bailment. The delivery of possession does not mean that the bailee now represents the bailor with respected to the bailed goods. The bailee only has certain power over the property of the bailor with his permission. The bailee has no power to make contracts on behalf of the bailor or make the bailor liable for his own acts with the goods bailed.

Example: If a person delivers his damaged car to a garage for repair under his insurance policy, the insurance company becomes a bailee and the garage a sub bailee. If the car is stolen from the garage or destroyed by fire in the garage, both – the insurance company and the garage will be liable to the owner of the car, the bailor.

ESSENTIAL ELEMENTS OF BAILMENT





Contract-There must be a contract. The contract may be expressed or implied. This contract between the parties for the delivery of goods. The goods shall be delivered for a special purpose only. Goods-Bailment can be made of goods only. Bailment can only be done for movable goods and not for immovable goods or money.

Delivery-There must be delivery of goods by one person to another person.

Purpose of delivery: The goods must be delivered for some purpose.

The purpose may be expressed or implied. There shall be a transfer of possession of goods, the delivery of goods must be conditional. The condition shall be that the goods shall be – returned (either in original form or in any altered from); or disposed of according to the directions of the bailor, when the purpose is accomplished.

Ownership is not transferred to Bailee; therefore, Bailor remains the owner, Bailee is duty bound to deliver the same goods back and not any other goods.

Return or disposal of goods Exception: The money deposited in the bank shall not account to bailment as the money returned by the bank would not be the same identical notes. And it is one of the essentials of the bailment that same goods are to be delivered back.

(1) **Delivery of possession of goods:** Delivery of goods from one person to another person for some purpose is an essential element of bailment. According to Section 149 of the Indian Contract Act, 1872 the delivery to the bailee may be made by doing anything which has the effect of putting the goods in the possession of the intended bailee or of any person authorized to hold them on his behalf. It is necessary that the goods should be delivered to the bailee. It is the essence of the contract of bailment. It follows that bailment can be of movable goods only. It is further necessary that the possession of the goods should be voluntarily transferred and is in accordance with the contract.

For example, A, a thief enters a house and by showing the revolver, orders the owner of the house to surrender all ornaments in the house to him. The owner of the house surrenders the ornaments. In this case although, the possession of goods has been transferred, but it does not create bailment because the delivery of goods is not voluntary.

The goods must be handed over to the bailee for whatever is the purpose of bailment. Once this is done, a bailment arises, irrespective of the manner in which this happens.

In *Ultzen v. Nicols*, an old customer went in to a restaurant for the purpose of dining there. When he entered the room, a waiter took his coat, without being asked, and hung it on a hook behind him. When the customer rose to leave the coat was gone. What the waiter did might be no more than an act of voluntary courtesy towards customer, yet the restaurant keeper was held liable as a bailee.

Kaliaperumal V. Visalakshmi (1938) AIR 1938 Mad 32, In this case A lady employed a goldsmith to melt old jewelry and prepare new ornaments. Every evening she used to

receive incomplete ornaments from the goldsmith and put them in a box which was left in the goldsmith's shop. It was held that the goldsmith was not liable for the loss of the ornament as the goldsmith cannot be said to have been the bailee of the goods as the lady kept the key with her and there was no effective delivery of the contents of the box to the goldsmith either actually or constructively. Here the Court held that delivery of possession is an essential element of bailment.

Hiring of locker – not bailment

Atul Mehra v bank of Maharashtra, in this case it was held that mere hiring of locker of bank would not constitute bailment as provided under sec 148. The exclusive possession of the property was *sine qua non* for bailment, which should be given by the hirer of the locker to the bank. It was not possible for the bank to know the quantity, quality and the value of the goods that was allegedly kept in the locker. So, hiring of locker, the court thus ruled was transaction wholly distinct in nature form a transaction of bailment.

MODES OF DELIVERY Sec.149

Delivery of possession may be actual or constructive

1. **Actual delivery:** Transfer of physical possession of goods from one person to another. Here, the bailor hands over the physical possession of the goods to the bailee.

Example: A's watch is broken. When he leaves his watch at the showroom for repair, he has given actual delivery of possession of goods to the showroom.

2. **Symbolic delivery** Physical possession of goods is not actually transferred. A person does some act resulting in transfer of possession to any other person.

Examples: Delivery of keys of a car to a friend, Delivery of a railway receipt.

3. **Constructive delivery** If A person is already in possession of goods of owner. Such person contracts to hold the goods as a bailee for a third person. Then such person becomes the bailee, and the third person becomes the bailor. Constructive delivery is an action that the law treats as the equivalent of actual delivery. It can be difficult to deliver intangible.

In constructive delivery, the physical possession of the goods may not be handed over. The possession of the goods may remain with the bailor with the consent or authorization of the bailee. In constructive delivery, an action on part of the bailor merely puts the bailee in position of power with respect to the bailed goods. The bailor gives the bailee the means of access to taking custody of it, without its actual delivery.

Example: A has rare coins in a locked safe-deposit box. Delivery of a safe deposit box is not possible. When he hands over the keys of the box to B, it is taken as constructive delivery for purpose of bailment. Section 149 specifically deals with constructive delivery of goods. It states that anything done which has the effect of putting the goods in the possession of the intended bailee or any other person authorized to hold them on his behalf is to be treated as constructive delivery of the goods. Constructive delivery is a legal fiction – thus, a legal delivery is presumed even where the delivery of the actual goods has not taken place. Even the delivery of a railway receipt is taken as the equivalent of delivery of the goods.

In *Bank of Chittor vs. Narsimbulu* [AIR 1966 AP 163], a person pledged cinema projector with the bank but the bank allowed him to keep the projector so as to keep the cinema hall functional. It was held that there was constructive delivery because action on part of the bailor had changed the legal character of the possession of the projector. Even though the actual and physical possession was with the person, the legal possession was with the bank, the bailee.

- *Morvi Mercantile Bank v. UOI*
- *Bank of Chittor v. Narasimbulu*
- *Fazal v. Salamat Rai*
- *N R Srinivasa Iyer v. New India Assurance Company Ltd.,*

(2) Agreement: For creating a bailment the essential requirement is the existence of an agreement between the bailor and the bailee. As you have read just now bailor is the person who bails the goods and bailee is the person to whom the goods are bailed. The agreement between the bailor and bailee, may be either express or implied.

Delivery of goods should be upon contract: There can be no bailment without a contract. All conditions for valid contract are to be satisfied, such as competent parties, free consent lawful object etc. It is necessary that the goods are delivered to the bailee and returned to the bailor when the purpose is accomplished upon a contract. This means there should a

contract between the two parties for such transaction of delivery and subsequent return. If there is no contract, there is no bailment. The contract giving rise to bailment can be express or implied. Property deposited in a court under orders is not property delivered under a contract. Such delivery or transfer does not constitute bailment.

Exception to the delivery upon contract: A finder of goods is treated as a bailee even if there is no contract of Bailment or delivery of goods under a contract. A finder of the goods is a person who finds the goods belonging to some other person and keeps them under his protection till the actual owner of the goods is found. An involuntary contract of bailment arises and the finder automatically becomes bailee even in absence of bailment by the bailor the owner of the lost goods. Since the person is in the position of the bailee, he has all the rights and duties of a bailee.

- Delivery of goods should be made for some purpose and upon a contract that when the purpose is accomplished the goods shall be returned to the bailor.
- When a person's goods go into the possession of another without any contract, there is no bailment within the meaning of its definition in section 148.

In *Ram Gulam v. Govt. of U. P.* The plaintiff's ornaments, having been stolen, were recovered by the police and, while in police custody, were stolen again. The plaintiff's action against the State for the loss was dismissed. It was held that the goods were not given to the police under any contract and thus there was no bailment. The Govt. therefore never occupied the position of bailee and is not liable as such to indemnify the plaintiffs. (*Mohd. Murad Ibrahim v. Govt. of U. P)*

Non-Contractual Bailments

English law recognizes bailment without contract.

"At the present day, no doubt, in most instances where goods are lent or hired or deposited for safe custody, or as security for a debt, the delivery will be the result of a contract. But this ingredient, though usual, is not essential."

Under English Law: There can be bailment without a contract. If a person deposits or delivers the goods under stressful circumstance like fire flood, riots or if the person who is

depositing the goods is incapable of appreciating the value of the action, it is still regarded as bailment despite the absence of a contract. Delivery of goods to another under a mistake of identity of the person is also treated as bailment without a contract as long as the bailor took reasonable care to ascertain the identity.

Present Position in India: The Law Commission of India in its 13th report suggested that bailment without contract should also be included in the Indian Contract Act, 1872 but no concrete steps have been taken as yet. Presently, the Indian Courts have taken the position that bailment can exist without a contract. In some of these cases, even the government has been held liable as a bailor despite the absence of a contract.

The case of *Lasalgoan Merchants Bank vs. Prabhudas Hathibhai* is one the first where the courts started imposing the obligations of a bailee even without a contract.

In *State of Gujarat vs. Memon Mahomed Haji Hasan*, SC held that bailment can happen even without an explicit contract. The Supreme Court of India accepted this view and stated that "…Bailment is dealt with by the Contract Act only in cases where it arises from a contract, but it is not correct to say that there cannot be bailment without an enforceable contract."

In this case, certain motor vehicles were seized by the State under Sea Customs Act, which were then damaged. SC held that the govt. was indeed the bailee and the State was responsible for proper care of the goods.

3. Purpose: In a bailment, the goods are delivered for some purpose. The purpose for which the goods are delivered is usually in the contemplation of both the bailor and the bailee.

Bailment of goods is always made for some purpose and is subject to the condition that when the purpose is accomplished the goods will be returned to the bailor or disposed of according to his mandate.

 If the person to whom the goods are delivered is not bound to restore them to the person delivering them or to deal with them according to his directions, their relationship will not be that of bailor and bailee.

(3) Return or dispose of goods according to the direction: In bailment the goods are delivered for specific purpose. After the purpose is accomplished the goods may be

returned to the bailor in the same or altered direction, condition or maybe disposed of as directed by bailor. If the person to whom the goods are delivered is not bound to restore them to the person delivering them or to deal with them according to the mandate their relationship will not be that of bailor and bailee.

Delivery for a purpose and Return of Goods: There has to be a purpose for the bailment of goods and it is mandatory that once such purpose is accomplishing, the goods have to be returned to the bailor or be disposed of per his instructions. Bailment cannot arise if the goods are not to be specially accounted for after completion of such task or purpose. This is a feature of bailment that distinguishes it from other relations like agency, etc.

The delivery of goods must be for some specific task or performance. Delivery of goods in bailment is not permanent. There has to be a purpose for the bailment of goods and it is mandatory that once such purpose is accomplishing, the goods have to be returned to the bailor or be disposed of per his instructions. A tailor is given a cloth for stitching a shirt, a watch repair shop is given a watch to mend it.

That the goods must be returned to the bailor or be taken care of as per the instructions of the bailor. If a person is not bound to return the goods to another, then the relationship between them is not of bailment. If there is an agreement to return the equivalent and notthe same goods, it is not bailment. An agent who collects money on behalf of his principal is not a bailee because he is not liable to return the same money and coins.

Example: A tailor who receives a cloth for stitching is the bailee in this case. The tailor is supposed to return the finished garment to the customer, the bailor, once the garment has been stitched. Return of goods in specie is also essential. The same goods that were bailed must be returned to the bailor in the same condition after the accomplishment of purpose as they were handed over to the bailee in the beginning. Any accruals to the goods must also be handed over. If an animal gives birth during the period of bailment, the bailee must return the animal with the offspring at the conclusion of the bailment.

The bailor can give other directions as to the disposal or return of the bailed goods. In case of such agreement or instructions, the bailee must immediately dispose the goods after completion of purpose as per the directions.

If the goods are not returned or dealt as per the directions of the bailor there is no bailment. For example, depositing money into bank by a customer does not give rise to a contract of bailment because the bank is not bound to return the same notes and coins to the customer. This same point was also made in the case of *Ichcha Dhanji v. Natha* [1888 13 Bom 338].

In *Secy of State v. Sheo Singh Rai* [1880 ILR 2 All 756], a man delivered nine government promissory notes to the Treasury Officer at Meerut for cancellation and consolidation into a single note of Rupees 48,000 only. The notes were misappropriated by the servants of the Treasury Officer. The man sued the State to hold it responsible as a bailee. But the action failed as there can be no bailment without delivery of goods and a promise to the return the same. The government was in no way bound to return the same notes or dispose the surrendered notes in accordance with the instructions of the man.

Return of the goods: It is important that the goods which form the subject matter of the bailment should be returned to the bailor or disposed of according to the directions of the bailor, after the accomplishment of purpose or after the expiry of period of bailment. Where goods are transferred by the owner to another, in misdirection of price, it is a safe. Similarly, where the goods are not to be delivered back in specie but their price is paid, it is not a bailment. Again, where money is deposited by a customer with a bank in a current, savings or fixed deposit account, and, therefore, there is no obligation to return the identical money but an equivalent of it, it is no bailment. But what is thus created is a relationship of creditor and debtor. But if valuables or even coins or notes in a box deposited for safe custody there is a contract of bailment, for these are too stunned as they are, and not their monetary value.

Consideration

Delivery of the goods is the consideration.

Legal liability arises out of the fact that the chattel has been delivered.

EXAMPLES/ CASE LAWS/ ILLUSTRATIONS

Other common examples of a contract of bailment are where a watch is given for repairs, or diamonds are given for being set in a gold ring. In both these cases, the same watch or the same diamonds should be returned after the purpose for which they were given, has been fulfilled. A pledge of a jewel on the security of which money is borrowed, gold jewels

delivered to a bank for safe custody, goods delivered to a railway company for being carried and delivered to the consignee, are all examples of bailment.

L.M. Co-Operative Bank v. Prabhudas Hathibhai, the Bombay High Court has taken the contrary view. In this case some packages of tobacco belonging to A had been pledged to the plaintiff bank but they were still lying in A's godown. The godown was locked and its keys were handed over to the plaintiff bank. Owing to the non-payment of some income-tax dues by A, the said goods were attached by the Collector though they were allowed to remain in the same godown. The key of the godown was handed over to the police there were heavy rains, roof of the godown leaked and the goods inside were damaged. Even though the goods were not in the possession of the Government under a contract, the state was still held liable as a bailee.

Coggs v Bernard (1703) is a landmark case both for English property law and contract law, decided by Sir John Holt, Chief Justice of the King's Bench. It sets out the duties owed by a bailee – someone in possession of property owned by another. William Bernard undertook to carry several barrels of brandy belonging to John Coggs from Brooks Market, Holborn to Water Street, just south of the Strand (about half a mile). Bernard's undertaking was gratuitous; he was not offered compensation for his work. As the brandy was being unloaded at the Water Street cellar, a barrel was staved and 150 gallons were lost. Coggs brought an action on the case against Bernard, alleging he had undertaken to carry the barrels but had spilled them through his negligence. Bernard's undertaking was gratuitous; he was not offered compensation for his work. As the brandy was being unloaded at the Water Street cellar, a barrel was staved and 150 gallons were lost. Coggs brought an action on the case against Bernard, alleging he had undertaken to carry the barrels but had spilled them through his negligence.

Which held that a general bailee was strictly liable for any damage or loss to the goods in his possession (e.g., even if the goods were stolen from him by force). Under the ruling in *Coggs v Bernard*, a general bailee was only liable if he had been negligent. Despite his reappraisal of the standard of liability for general bailees, Holt CJ refused to reconsider the long-standing common law rule that held common carriers strictly liable for any loss or damage to bailed property in their possession.

B. Dutta, Senior Advocate v. Management of State, (2010) 1 CPC 319. To hold that laws of bailment, apply when a customer pays to park his car in a parking lot and it is then stolen or damaged. It was noted that the price paid for food consumed in the hotel would include

consideration for a contract of bailment from the consumer (bailor) to the hotel (bailee). Applying this to the facts of this case, the State Commission observed that though the Appellant hotel had averred that Respondent No. 2 had not had dinner at the hotel that night, it was improbable for him to have stayed inside the hotel from 11 p.m. to 1 a.m. without consuming any food or snacks or paying any kind of bill. Hence, the State Commission proceeded on the assumption that Respondent No. 2 had paid consideration for the contract.

In light of this, the State Commission allowed the complaint and directed the Appellant-hotel to pay Respondent No. 1 a sum of £2,80,000 (the value of the car) with interest at 12% per annum and L 50,000 as litigation costs. In addition to this, it directed payment of £1,00,000 to Respondent No. 2 for inconvenience and harassment faced by him. The State Commission also held that Respondent No. 3 (insurer of the hotel) would not be liable to indemnify the loss caused to the Appellant hotel, as the theft of the car had not been notified to it within due time.

Hyman & Wife V/S Nye & Sons (1881) 6 QBD 685. The plaintiff hired from the defendant for a specific journey of a carriage, a pair of horses and a driver. During the journey a bolt in the under-part of the carriage broke, the splinter bar became displaced, the carriage was upset and the plaintiff injured. Holding the defendant liable, justice Lindley said: "A person who lets out carriages is not responsible for all defects discoverable or not; he is not an insurer against all the defects which care and skill guard against. His duty is to supply a carriage as fit for the purpose for which it is hired as care and skill can render it".

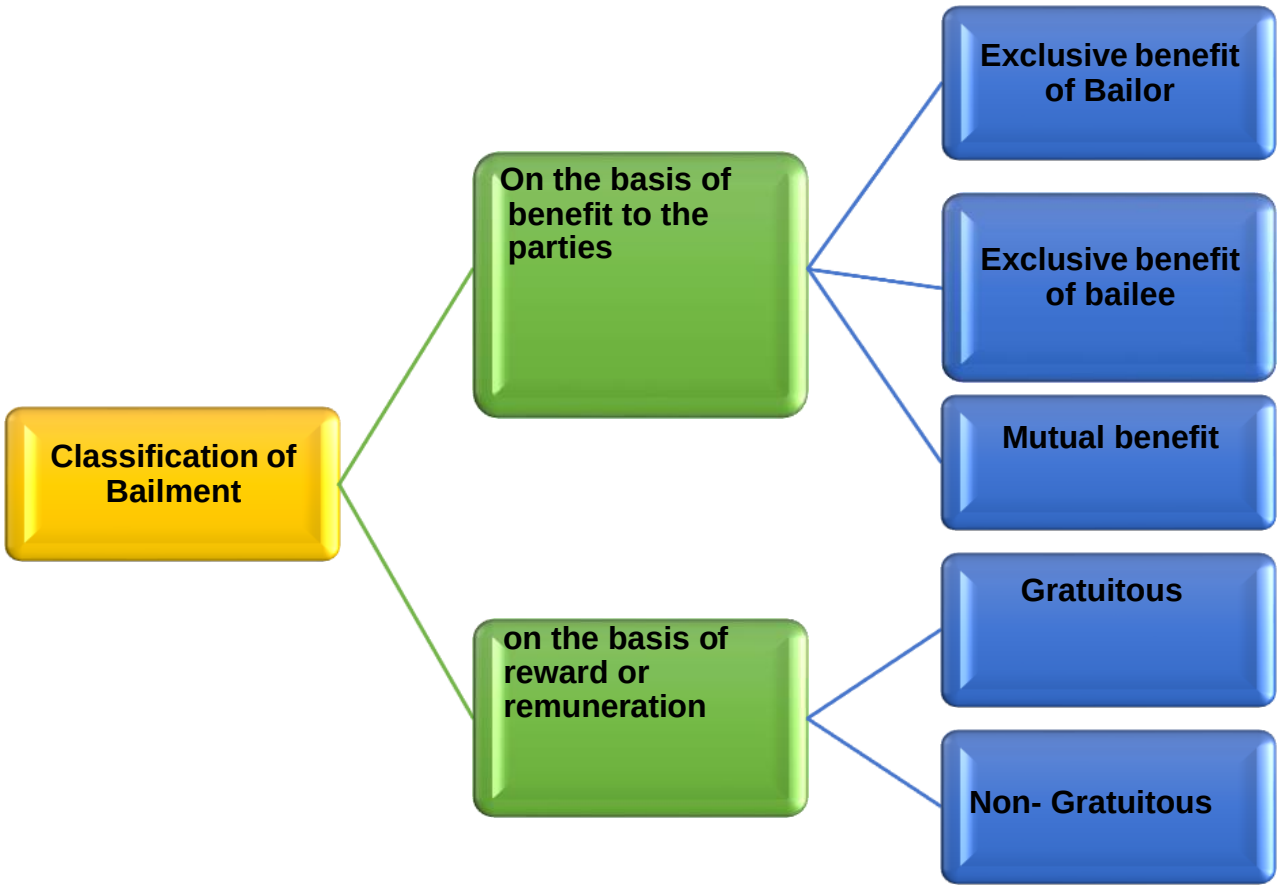
Reed V/S Dean (1949) 1 KB 188.The plaintiff hired a motor launch from the defendant for a holiday on the river Thames. The launch caught fire, and the plaintiffs were unable to extinguish it, the fire-fighting equipment being out of order. They were injured and suffered loss. The court held that there was an implied undertaking that the launch was as fit for the purpose for which it was hired as reasonable care and skill could make it. The defendant was accordingly held liable.

Lyell V/S Ganga Das, ILRC (1875) 1 AII 60 Goods consigned without disclosing that they were combustible. Where a bailor delivers goods to another for carriage or for some other purpose, and if the goods are of dangerous nature, the fact should be disclosed to the bailee.

In the case of *Atul Mehra v Bank of Maharashtra* to determine whether the hiring of the lockers by the plaintiffs constitutes actual delivery of possession to the defendants. This case was filed by Atul Mehra in appeal at the High Court of Punjab and Haryana. It is one of the landmark

cases in India because it lays down the principle that hiring lockers at banks does not constitute a contract of bailment. It was previously talked about in some cases, and this court has upheld the principle that merely hiring a bank locker does not constitute delivery of possession which is a necessary ingredient for the contract of bailment. It was also said by the learned Judge that in order to constitute a contract of bailment, the bailee must be made aware of the contents of the locker so that it can gauge the nature and extent of the security and possible liability.

CLASSIFICATION OF BAILMENT



On the Basis of Reward Bailment can be classified as gratuitous and non-gratuitous bailment on the basis of whether the parties are getting or not getting some value out of the contract of bailment.

1) **Gratuitous Bailment-** A Bailment made without any Consideration for the benefit of the bailor or for the benefit of the bailee is called Gratuitous Bailment.
   In simple words A bailment with no consideration is Gratuitous bailment. When there is no consideration involved in the contract of bailment it is called gratuitous bailment.
   For example, when you lend your cycle to your friend so that he can have 3 ride or when you borrow his books to read, it is a case of gratuitous bailment because no exchange of money or any other consideration is involved. Neither you nor your friend would be entitled to any remuneration here. No hire charges are paid by bailee; and No custody charges are paid by bailor.

2) Non-Gratuitous Bailment: Non-Gratuitous is a bailment for reward. It is for the benefit of both the bailor and bailee. A contract of bailment which involves some consideration passing between bailor and bailee, is called a non-gratuitous bailment.

For example, if your friend hired a cycle from a cycle shop or you borrowed a book from a bookshop on hire, this would be a case of non-gratuitous bailment. Hire charges are paid by bailee; or Custody charges are paid by bailor.

On the Basis of Benefit

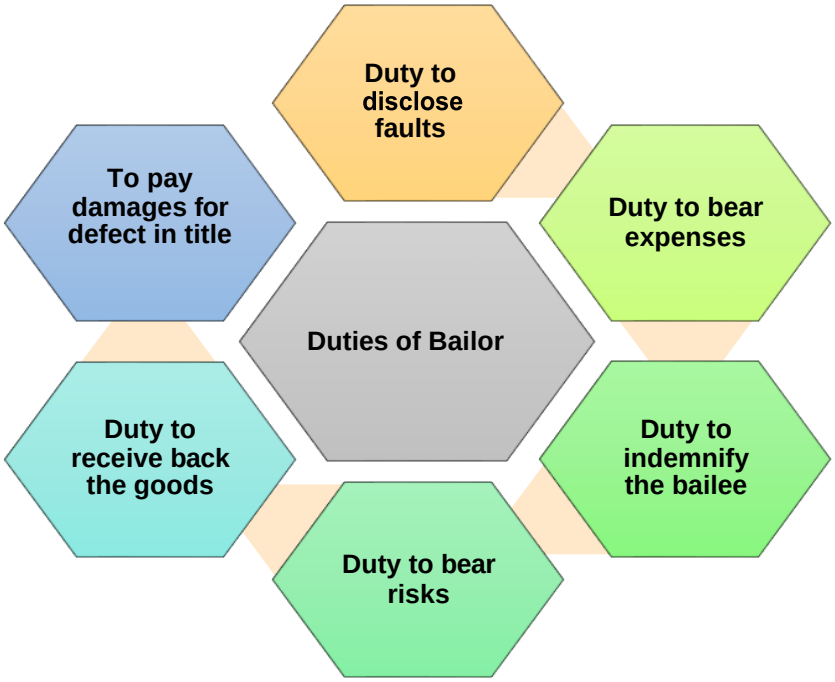
On the basis of the benefits accruing to the parties, the contract of bailment may be divided into the following types:

i) Bailment for the exclusive benefit of the bailor: In this case the bailor delivers his goods to a bailee for a safe custody without any benefit/ reward. It is called " the bailment for the benefit of the bailor". This is the case where a contract of bailment is executed only for the benefit of the bailor, and the bailee does not derive any benefit from it. For example, if you are going out of station and leave your valuable goods with your neighbor for safety, it is you as bailor, who alone is being benefited by this contract.

ii) Bailment for the exclusive benefit of the bailee: In this case Bailor delivers his goods to a bailee without any benefit for his use, it is called "the bailment for the exclusive benefit of the bailee". This is the case where the contract of bailment is executed only for the benefit of the bailee and the bailor does not derive any benefit from the contract. For example, if you lend your books to a friend, without charge, so that he can study for his exams, it is your friend as the bailee, who alone is going to be benefited by this contract.

iii) Bailment for the mutual benefit of bailor and bailee: In this case goods are delivered for consideration, both the bailor and bailee get benefit and hence it is called the bailment for the benefit of the bailor and bailee. In this case both the bailor and the bailee derive some benefit from the contract of bailment. For example, if you give your shirt to be stitched by the tailor, both of you are going to be benefited by this contract, while you get a stitched shirt; the tailor gets the stitching charges.

Duties of Bailor



A bailor has the following duties

1) **Duty to disclose defects:** Section 150 of the Indian Contract Act, 1872 bound the bailor with certain duties to disclose the latent facts specifically pertaining to defect in goods. Bailor's duties of disclosure are:

Gratuitous Bailment: It is the duty of the bailor to disclose all the defects in the goods that he is aware of to the Bailee that can interfere with the use of goods or can expose him to extraordinary risks. And failure to do the same will make bailor liable for damages.

Non-Gratuitous Bailment (Bailment for Reward): This duty particularly deals with the goods given on hire. As per this provision, when the goods are bailed for hire, then in such a situation even if the bailor is aware of the defect in the goods or not will be held liable for the injury that has been caused due to the existence of such defect.

In *Hyman v Nye & Sons*, the plaintiff took a carriage on hire from the defendant but the carriage was not fit for the journey and subsequently, the plaintiff suffered injuries. The court held that even though the defendant was aware of such defect or not he shall be liable.

Disclose faults in goods [Sec. 150]: Bailor is bound to disclose to Bailee, faults in the goods bailed, of which he has knowledge. He should also disclose such information which –

(a) materially interferes with the use of goods, or

(b) expose the Bailee to extraordinary risk.

The bailor is bound to disclose to the bailee faults in the goods bailed, of which the bailor is aware, and which materially interfere with the use of them, or expose the bailee to extraordinary risk; and if he does not make such disclosure, he is responsible for damage arising to the bailee directly from such faults.

Example-A lends a horse, which he knows to be vicious, to B. He does not disclose the fact that the horse is vicious. The horse runs away. B is thrown and injured. A is responsible to B for damage sustained.

Liability for defects in goods

In case of Gratuitous bailment Bailor is liable only for those losses which arise due to non – disclosed risks

In case of Non – Gratuitous Bailment Bailor is liable for damages whether or not he was aware of the existence of faults

Example: A owning a motorcycle, allows B, his friend, to take it for a joy ride. A knows that its brakes were not proper but does not disclose it to B. B meets with an accident. A is liable to compensate B for damages. But when A had lent the motorcycle on hire, he is liable to B even if he did not know of the failure of his brakes.

The law of bailment imposes a duty on bailor to disclose the defects of the goods bailed. Bailor is under an obligation to inform those defects in the good which would interfere with the use of the goods for which the goods hired, bailed car would expose the bailee to some risk.

Bailment of goods may be gratuitous (in which neither bailor nor the bailee gets any reward) or non-gratuitous bailment for reward). In case of gratuitous bailment, the law imposes a duty on the bailor to reveal all the defects known to him, which would interfere with the use of goods bailed. If the bailor does not disclose the defects and the bailee in consequence suffers some loss, the bailor would be liable to compensate the bailee for the losses so suffered.

For example, A the owner of a scooter allows B, his friend, to take his scooter for a joy ride. A knows that the brakes of the scooter were not working well. A does not discloses this fact to B.

Consequently, B meets with an accident. A is liable to compensate B for damages. In case of Non-gratuitous bailment, i.e., bailment for reward, the bailor has a duty to keep the goods in a fit condition. The goods should be fit to be used, for the purpose, they are meant. In such a case the bailor is responsible for all defects in the goods whether he knows the defects or not is immaterial, and if the bailee suffers any loss, the bailee has to bear it.

For example, A delivers to B, certain chemicals, to be carried to Bombay. These chemicals have a tendency to burst, if not kept below a certain temperature. A does not tell B to take this precaution. While carrying the chemicals, the chemicals burst and injure B. A is liable for all the damages.

To pay damages for Non-Disclosure (Section 150) Second part of Section 150 of the said Act says that, if bailor does not make disclosure to the bailee faults in the goods bailed, he is responsible for damage arising to the bailee directly from such faults.

Example: (a) A lends a horse, which he knows to be vicious, to B. He does not disclose the fact that the horse is vicious. The horse runs away. B is thrown and injured. A is responsible to B for damage sustained.

(b) A hire a carriage of B. The carriage is unsafe, though B is not aware of it, and A is injured. B is responsible to A for the injury.

2) Duty to bear expenses: Section 158 of the Indian Contract Act says that, where, by the conditions of the bailment, the goods are to be kept or to be carried, or to have work done upon them by the bailee for the bailor, and the bailee is to receive no remuneration, the bailors shall repay to the bailee the necessary expenses incurred by him for the purpose of the bailment.

The general rule in those bailments where the bailee is not to receive any remuneration is that the bailor should bear the usual expenses in keeping the goods or in carrying the goods or to have work done upon them by the bailee for the bailor. The bailor must repay to the bailee all the necessary expenses which the bailee has already incurred for the purpose of bailment.

For example- if A, a farmer gives some gold to his friend B. who is a goldsmith, to make a gold ring. B is not to receive any remuneration for the job. But A has a duty to repay to B any expenses incurred by him in making the ring. In cases of non-gratuitous bailments (where the bailee is to receive remuneration). bailor has a duty to bear extraordinary expenses, borne by the bailee.

For the purposes of bailment. However, the bailor is not to bear ordinary or usual expenses.

For example, if a horse is lent for a journey, the expenses for feeding the horse would be payable by the bailee. But, if the horse becomes sick and expenses have to be incurred, or for the horse is stolen and expenses are incurred for recovery. the bailor should pay those expenses.

Bear expenses [Sec.158]

Expenses of Bailment

In case of Gratuitous bailment Bailor shall repay to Bailee, all necessary expenses incurred by him for the purpose of Bailment

In case of Non – Gratuitous Bailment Bailor is liable to repay only extra – ordinary expenses, and not the ordinary expenses.

Example: M lends his car to N and it runs out of petrol. N can recover the amount paid for refueling (ordinary expenses). If in case, the car suffers a breakdown, N can recover such charges as are paid by him in bringing it back to condition (extra ordinary expenses). He M hired the car to N, he shall be liable only for the repair charges, being extra ordinary expenses.

3) Duty to indemnify the bailee:

To indemnify the loss (Section159) Indemnity means promise to make good the loss. According to Section 159 of the Indian Contract Act 1872 bailor has a duty to indemnify the loss suffered by the bailee under the contract.

The lender of a thing for use may at any time require its return, if the loan was gratuitous, even though he lent it for a specified time or purpose. But if, on the faith of such loan made for a specified time or purpose, the borrower has acted in such a manner that the return of the thing lent before the time agreed upon would cause him losses exceeding the benefit actually derived by him from the loan, the lender must, if he compels the return. Indemnify the borrower for the amount in which the loss so occasioned exceeds the benefits so derived.

It is the duty of the bailor to indemnify the bailee, for any loss which the bailee may suffer because of the bailor's title being defective. The reason for this is that the bailor was not entitled to make the bailment or to receive back the goods bailed or to give directions regarding the goods bailed.

For example, A asks his friend B to give him cycle for one hour. B instead of his own cycle gives C's cycle to A. While A was riding, the true owner of the cycle catches A and surrenders him to police custody. A is entitled to recover iron B all costs, which A had to pay in getting out of this situation.

4) Duty to bear risks: It is the duty of bailor to bear the risk of loss, deterioration and destruction, of the things bailed, provided that bailee has taken reasonable care to protect the goods from loss etc.

5) Duty to receive back the goods: It is the duty of the bailor that when the bailee, in accordance with the terms of bailment, returns the goods to him that: bailor should receive them. If the bailor, without any reasonable reasons refuses to take the goods back, when they are offered at a proper time and at a proper place, the bailee can claim compensation from the bailor for all necessary and incidental expenses, which the bailee undertakes to keep and protect the goods.

6) To pay damages for defect in bailor's title (Section 164)-The bailor is responsible to the bailee for any loss which the bailee may sustain the reason that the bailor was not entitled to make the bailment, or to receive back the goods, or to give directions, respecting them.

Indemnify the bailee for defective title

The bailor shall indemnify the bailee for any loss caused to bailee due to defective title of bailor. Indemnify the bailee for premature termination If – the bailment is gratuitous; and for a specific period. Then –

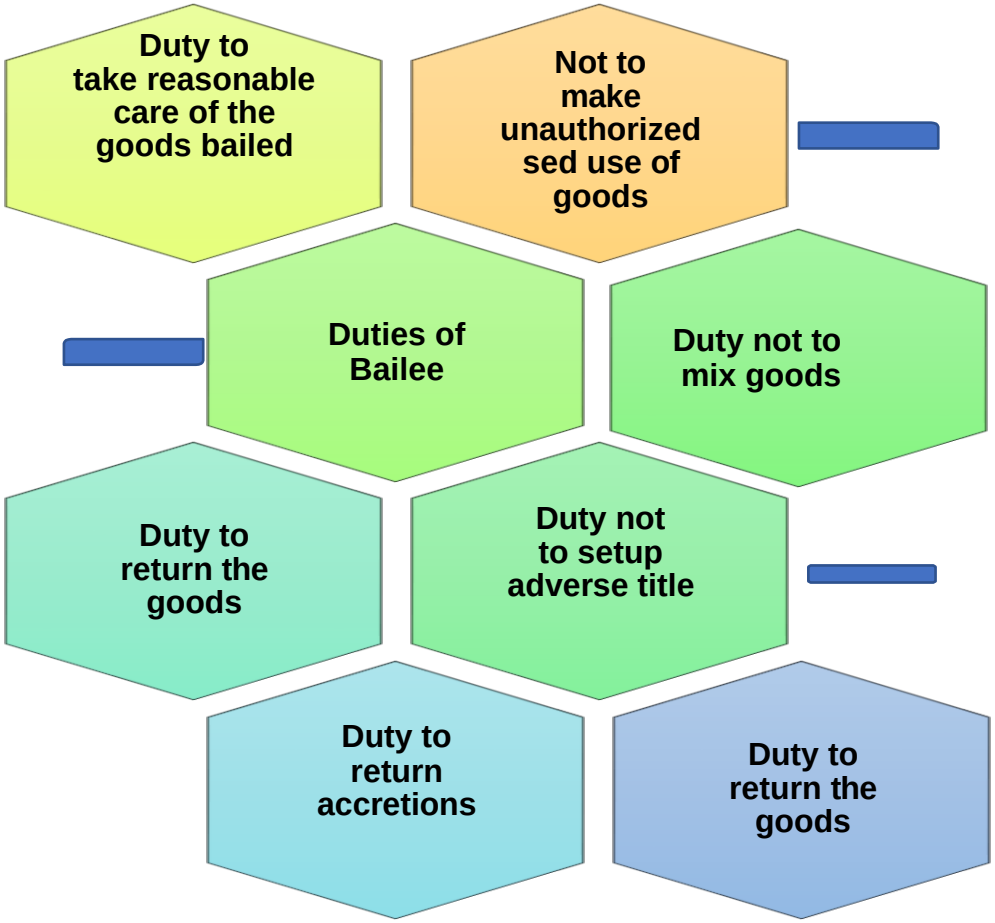
(a) the bailor may compel the bailee to return the goods before expiry of the period of bailment; but

(b) the bailor shall indemnify the bailee for any loss incurred by the bailee.

7) To put bailee into possession (Section 149)-The delivery to be bailee may be made by doing anything which has the effect of putting the goods in the possession of the intended bailee or of any person authorised to hold them on his behalf. *Kaliaperumal V. Visalakshmi* (1938) AIR 1938 Mad 32, In this case Madras high court held that delivery is an essential element of bailment.

Bailee's Duties

Bailee has to fulfil several obligations as per Indian Contract Act, 1872. A bailee has the following duties:



1) **Duty to take reasonable care of the goods bailed**: Section 151 of the Indian Contract Act lays down the degree of care, which a bailee should take, in respect of goods bailed to him. The bailee is bound to take as much care "if the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed. The standard of care is same whether the bailment is gratuitous or for reward. So, a bailee is liable when the goods suffer loss due to the negligence on the part of bailee. However, under Section 152 of the Act, the standard of care of ordinary prudent man can be increased by entering into a contract, between the bailor and the bailee. In that situation the bailee, in order to save himself from any liability, would be bound to take as much care, as provided by the terms of contract. In the absence of any such contract, if the bailee has taken care as an ordinary

prudent man of the goods bailed, he is not responsible for the loss, destruction or deterioration of the goods bailed.

To take an example, If A gives a diamond ring to be kept by its owner for safe custody with another person B and B is not to receive any reward for it. The bailee should keep it locked in an iron safe, or some other safe place but not keep it in his room, simply because the bailment is gratuitous. Similarly, if a cow is delivered for safe custody it is sufficient if it is kept in the backyard properly enclosed and even if it is for reward, no one would expect it to be kept in the drawing room. If the goods get stolen, lost or otherwise destroyed, even after the bailee has taken reasonably good care, the bailee would not be liable for this loss. The bailor, would have to bear this loss.

Duty to take reasonable care: It is the duty of the Bailee to take care of goods as his own goods. He shall ensure all safety measures that are necessary to protect the goods. The standard of care should be such as taken care by a prudent man. The goods shall be taken care of equally whether they are gratuitous or non-gratuitous. The Bailee shall be held liable for payment of compensation if he fails to take due care. But if the Bailee has taken due care and instead of that the goods are damaged then in such a situation Bailee will not be liable to pay compensation. The Bailee is not liable for the loss of goods due to destruction by fire. (Section 151-152)

2) **Not to make any Unauthorized use of goods:** The bailee is under a duty to use the bailed goods in accordance with the terms of bailment. If bailee does any act with regard to the goods bailed, which is not in accordance with the terms of bailment, the contract is voidable at the option of the bailor. Besides it, the bailee is liable to compensate the bailor for any damage caused to the goods. By an inconsistent use of the goods bailed. If he makes unauthorized use of goods, bailee would not be saved from his liability even if he has taken reasonable care of the ordinary prudent man.

For example, A lends his car, B to be taken to Delhi from Hyderabad. The car was to be driven by B himself. B takes along with him a friend C, who has been driving his car for the last 10 years. B instead of going to Delhi goes to Calcutta. The contract becomes voidable at the option of the bailor. On way to Calcutta, B allows C to drive the car. In spite of the fact that C, in accordance with the directions of B, drives the car at a very slow speed, an accident takes place and the car is damaged. A is entitled to be compensated for the loss.

Bailee is duty bound to use the goods for a specific purpose only and not otherwise. If he uses the goods for any other purpose than what is agreed for then the bailor has the right to terminate such bailment or is entitled with compensation for damage caused due to unauthorized use. (Section 153-154)

3) **Duty not to mix bailor's goods with his own goods**: Next duty of the bailee is to keep the goods of the bailor separate from his own. Sections- 155 to 157 of the Act lays down this duty in the following ways:

i) If the bailee, with the consent of the bailor, mixes the goods of the bailor with his own goods, the bailor and the bailee shall have an interest, in proportion to their respective shares, in the mixture thus produced (Section 1-76].

ii) ii) If the bailee, without the consent of the bailor, mixes the goods of the bailor with his goods, and the goods can be a separated or divided, the property in the goods remains in the parties respectively; but the bailee is bound to bear the expense of separation or division, and any damages arising from the mixture (Section 156). For example, A bails 100 bales of cotton marked with a particular mark to B. B, without A's consent, mixes these 100 bales with other bales of his own, bearing a different mark, A is entitled to have his 100 bales returned, and B is bound to bear all expenses incurred in the separation of the bales, and any other incidental damage.

iii) If the bailee, without the consent of the bailor, mixes the goods of the bailor with his goods, and the goods can be a separated or divided, the property in the goods remains in the parties respectively; but the bailee is bound to bear the expense of separation or division, and any damages arising from the mixture (Section 156).

For example, A bails 100 bales of cotton marked with a particular mark to B. B, without A's consent, mixes these 100 bales with other bales of his own, bearing a different mark, A is entitled to have his 100 bales returned, and B is bound to bear all expenses incurred in the separation of the bales, and any other incidental damage. goods without sorting them out. It was held that the bailor was entitled to refuse to take delivery in to and claim compensation for loss or damage. It is the duty of the Bailee not to mix bailor’s goods with his own. But if he wants to do the same then he shall seek consent from the bailor for mixing of goods. If the bailor agrees for the mixing of the goods then the interest in the mixed goods shall be shared in proportion.

In case, Bailee without the consent of bailor mixes the goods with his own then two situations arise: goods can be separated and goods can't be separated. In the former case the Bailee has to bear the cost of separation and in the latter case since there is the loss of the goods, therefore, bailor shall be entitled with damages of such loss. (Section 155-157)

4) **Duty not to set up adverse title**: The bailee is duty bound not to do any act which is inconsistent which the title of the bailor. He should not set up his own title or the title of a third party on the goods bailed to him.
5) **Duty to return the goods**: It is the duty of the bailee to return or to deliver the goods according to the directions of bailor, without demand, on the expiry of the time fixed or when the purpose is accomplished. If he does not return or deliver as directed by the bailor, or tender the goods at the proper time, he becomes liable to the bailor for any loss, destruction or deterioration of the goods from that time. He is liable even without his negligence. For example, a book-binder kept books beyond the time allowed to him for binding, and they were lost in an accidental fire, the binder is liable.

If, however, the bailment is gratuitous, then the bailee will have to return the goodsloaned, at any time on demand by the bailor, even though the goods were lent for a specified time or purpose. But if on the faith of such loan made for a specified time or purpose, the borrower has acted in such a manner that the return of the thing lent before the time agreed upon would cause him loss exceeding the benefit actually derived by him from the loan the lender must, if he compels the return, indemnify the borrower for the amount in which the loss so occasioned exceeds the benefit so derived.

Duty to return the goods on the fulfilment of purpose: Bailee is duty bound to return the goods once the purpose is achieved or on the expiry of the time period for which the goods were bailed. But if the Bailee makes default in returning the goods on proper time then he will be responsible with the loss, destruction or deterioration of the goods if any. (Section 160-161)

In the case of *Bank of India v. Grains & Gunny Agencies* the court held that if the goods are lost or destroyed due to the negligence of servant of Bailee, then in such case as well Bailee shall be liable.

6) **Duty to return accretions to the goods:** In the absence of any contract to the contrary, the bailee must deliver to the bailor, or according to his directions, any increase or profit

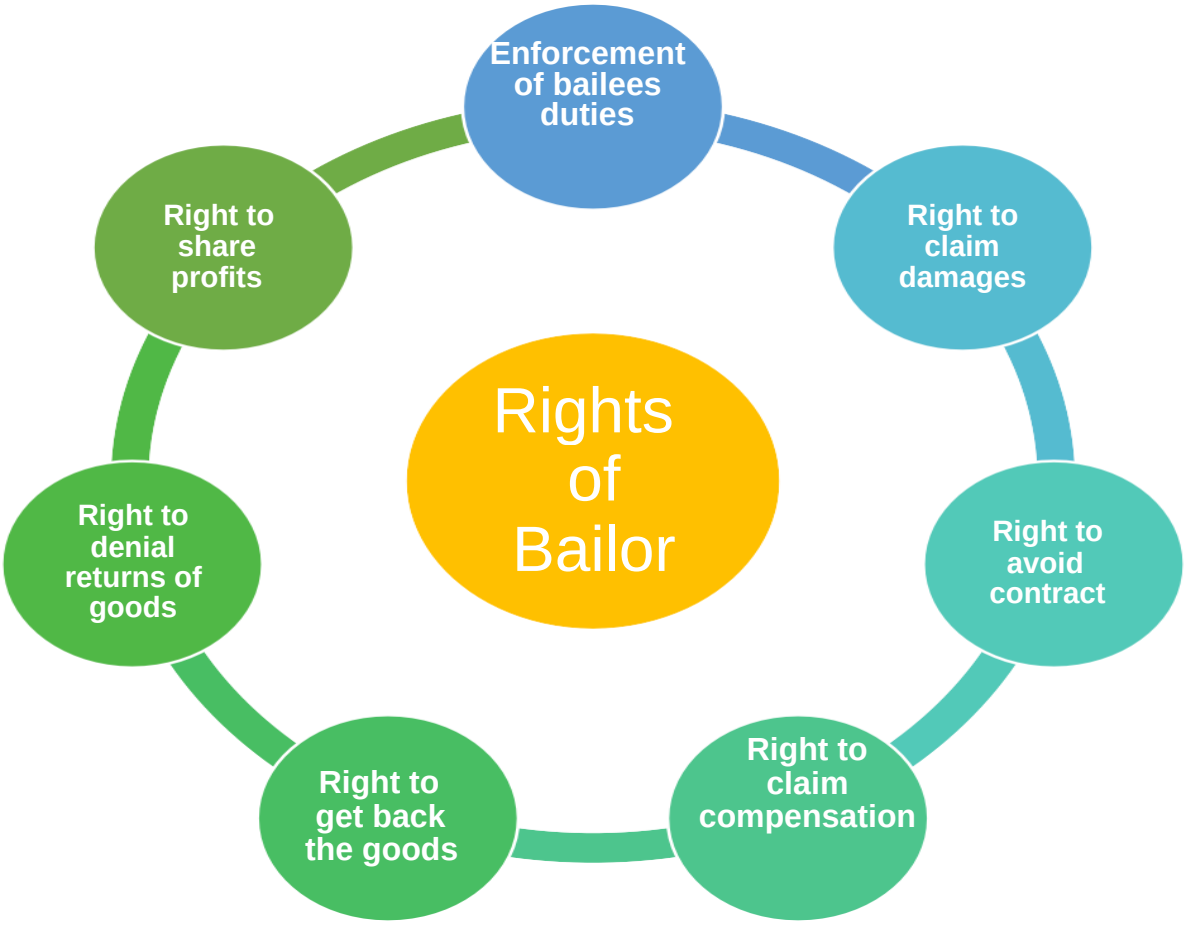
which have accrued from the goods bailed. For example, A leaves a cow in the custody of B to be taken care of. The cow has a calf. B is bound to deliver the calf as well as the cow to A.

Duty to deliver to the bailor increase or profit if any on the goods bailed: The Bailee has a duty to return the goods along with increase or profit subject to contract to the contrary. Accretion that has accrued from the bailed goods is the part of the bailed goods and therefore bailor has the right over such accretions if any. And such accretions shall be handed over to the bailor along with the goods bailed. For instance, A leaves a cow in the custody of B and cow gives birth to the calf. Then B is duty bound to hand over the bailed goods along with accretion to the bailor. (Section 163).

Bailor's Rights

As such Indian Contract Act, 1872 does not provide for Rights of a Bailor. But Rights of a Bailor is same as Duties of the Bailee i.e., Rights of Bailor = Duties of Bailee.

A bailor has the following rights.



1) **Enforcement of bailee's duties:** You have just now read the duties of the bailee. Duties of the bailee are the rights of the bailor. Since Right of the bailor is same as the right of the Bailee, therefore on the fulfilment of all duties of Bailee the bailor's right is accomplished.

For example, when the bailee returns the goods bailed, he should also return all-natural accretions to the goads. This is a duty of the bailee and it is the right of the bailor to receive all-natural accretions in the goods baited, when the goods are returned to him. For example, it is the duty of the Bailee to give the accretions and it is the right of bailor to demand the same.

2) **Right to claim damages:** It is an inherent right of the bailor to claim damages for any loss that might have been caused to the goods bailed, due to the bailee's negligence (Section 151). If the Bailee fails to take care of the goods, the bailor has the right to claim damages for such loss. (Section 151)
3) **Right to avoid the contract:** If the bailee does any act, in respect of the goods bailed, which is inconsistent with the terms of bailment, the bailor has a right to avoid the contract.
4) **Right to claim compensation**: If any damage is caused to the goods bailed because of the unauthorized use of the goods. The bailor has a right to claim compensation from the bailee. In the same way the bailor has (right to claim: compensation, if, some loss is caused to the goods bailed, due to unauthorized mixing by bailee, of bailee's own goods with the goods of the bailor (Sections 154. 155 and 156). If the Bailee uses the goods for an unauthorized purpose or mixes the goods which cause loss of goods in such case bailor has the right to claim compensation.

For example, A lends his car to B for Bs personal use. B starts using the car as a taxi. A can avoid the contract (Section 153).

If the Bailee does not comply with the terms of the contract and acts in a negligent manner in such case the bailor has the right to rescind the contract. (Section 153) The bailor has a right to terminate the contract of bailment if the bailee does any act with the goods bailed to him. which is inconsistent with the terms of the contract. For example- bailor gives his tonga to bailee for his personal use, but he uses it for carrying passengers.

5) **Right to claim compensation**: If any damage is caused to the goods bailed because of the unauthorized use of the goods. The bailor has a right to claim compensation from the bailee. In the same way the bailor has (right to claim: compensation, if, some loss is caused to the goods bailed, due to unauthorized mixing by bailee, of bailee's own goods with the goods of the bailor (Sections 154. 155 and 156). If the Bailee uses the goods for an unauthorized purpose or mixes the goods which cause loss of goods in such case bailor has the right to claim compensation.

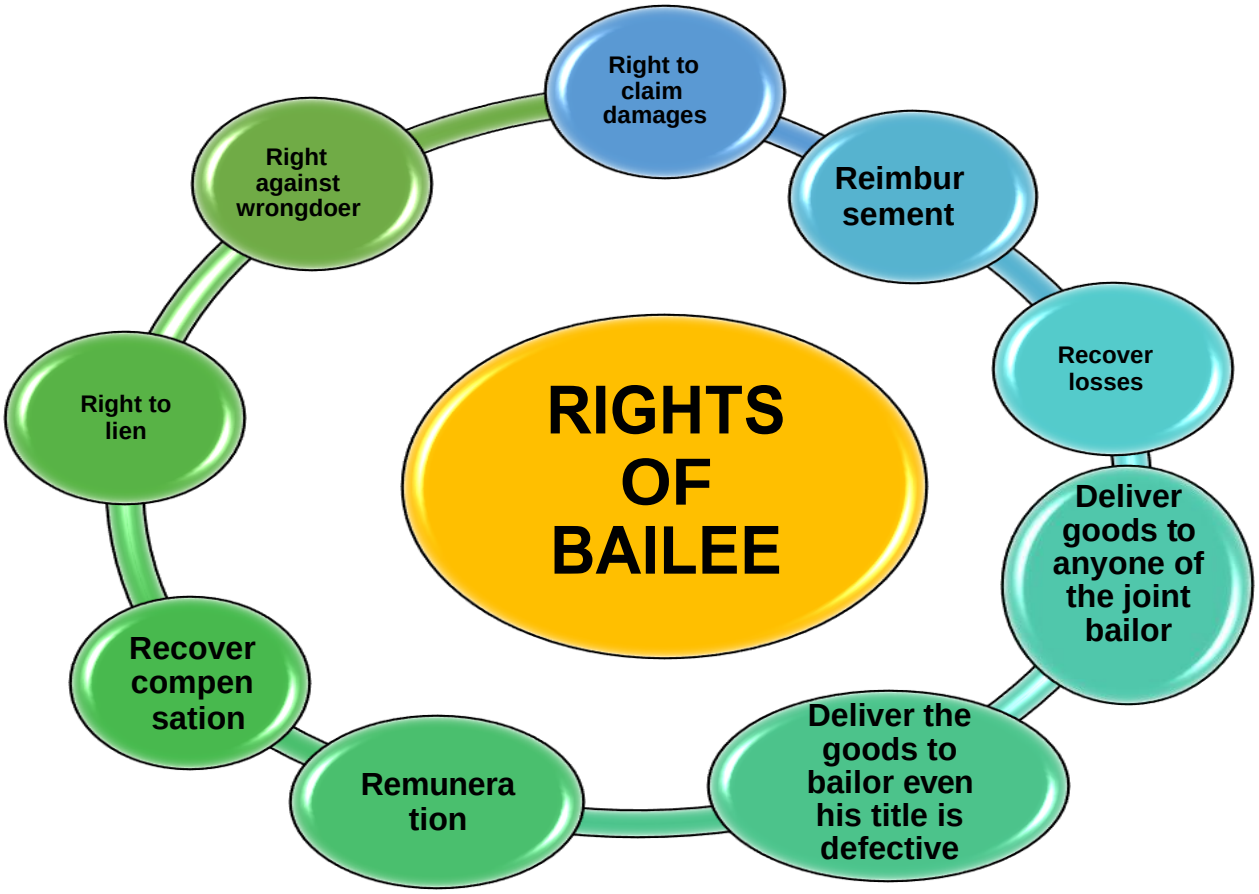
Compensation for goods-If the bailee has mixed the goods of the bailor with someone other goods not belonging to bailor without the consent of the bailor and bailors' goods cannot be separated from the other goods, the bailor has a right to get reasonable compensation from bailee for his goods. Compensation for unauthorized use- If the bailee make's any use of the goods bailed, which is not in accordance to the conditions of the bailment, the bailor has a right to get Compensation from the bailee for any damage arising to the goods from or during such unauthorized use of the goods. Compensation for delay in time according to the Contract Act, the bailee is responsible to return, deliver or to tender the goods to the bailor at a proper time. If he fails to do the bailor has a right to get compensation from bailee for any loss, destruction or deterioration of the goods due to such delay in time.

6) **Right to get back the goods**-The bailor has a right to get back the goods bailed by him as soon as the purpose of bailment is accomplished. If the bailee fails to do so, is entitled to get reasonable compensation from the bailee
7) **Right to denial return of goods**: It is a right of the bailor to compel the bailee, to return the goods hailed, when the time of bailment has expired or when that purpose for which the goods were bailed has been accomplished. You have just now read that in the case of a gratuitous bailment, even if the goods have been bailed for a fixed time or for a fixed purpose, the bailor has a right to compel the bailee to return them, before the agreed time. It is the duty of the Bailee to return the goods and the bailor has the right to demand the same.
8) **Right to share profit**-The bailor has a right to share with bailee any profit earned from the goods bailed if it is so provided by the contract.
9) **Expenses of separation**-If the bailee has mixed the goods of bailor with someone other goods not belonging to bailor without the consent of the bailor, the bailor has a right to

get from bailee the expenses which he has to bear for the separation of his goods from others.

Bailee's Rights

The duties of bailor are the rights of bailee and bailee can enforce his rights against the bailor by suing him in case of a default. The rights of bailee are as follows.



1) **Right to claim damages**: If the bailor has bailed the goods, without disclosing the defects in goods, and the bailee has suffered some loss, the bailee has a right to sue the bailor for damages. A hired a carriage of B. The carriage is unsafe, though B is not aware of it, and A is injured. B is responsible to A for the injury (Section 150).
2) **Right to claim reimbursement:** In case of non-gratuitous bailment the bailee has a right to recover from the bailor, all necessary expenses, which the bailee had incurred for achieving the purpose of bailment. In case of a gratuitous bailment, bailee has a right to

recover from the bailor, all extraordinary expenses, borne by the bailee or the purposes of bailment (Section 158).

3) **Right to recover losses:** It is a right of bailee to recover from the bailor, all losses suffered by him by reason of the fact that the bailor was not entitled to make the bailment of the goods or to receive back the goods, or to give directions regarding them (Section 164). In the contract of Bailment, the Bailee incurs expenses to ensure the safety of goods. The Bailee has the right to recover such expenses from the bailor. (Section 158)
4) **Right to deliver goods to any one of the joint bailors**: If the goods are owned and bailed by more than one person, the bailee has a right, in the absence of a contrary contract, to deliver back the goods to any one of the joint owners, or may deliver the goods back according to the directions of one of the joint owner, without the consent of all. (Section 165).
5) **Right to deliver the goods to bailor even if his title is defective**: If the title of bailor is defective and the bailee, in good faith returns the goods to the bailor or according to the directions of bailor, the bailee is not liable to the true owner in respect of such delivery (Section 166).
6) **Right to remuneration:** When the goods are bailed to the Bailee, he is entitled to receive certain remuneration for services that he has rendered. But in case of gratuitous bailment, the Bailee is not awarded any remuneration.
7) **Right to recover compensation**: At times a situation arises wherein bailor did not have the capacity to contract for bailment. Such a contract causing loss to the Bailee; therefore the Bailee has the right to recover such compensation from the bailor. (Section 168)
8) **Right to lien:** When the bailee, in accordance with the purpose of agreement has rendered any service involving the exercise of labour or skill, to the goods bailed, and his lawful payments are not made by the bailor, the bailee has a right to retain unless there is a contract to the contrary, the goods bailed, until he received his remuneration for the services rendered by him. This right to retain goods is known as bailee's lien (Section 170). The bailee has a right of lien in respect of charges due to him for work of labour done in respect of goods bailed. As you have already read, the right of lien is a right to detain goods belonging to another, by a person in possession, until the sum claimed or other demand of the person in possession is satisfied.

Bailee has the right over Lien. By this, we mean that if the bailor fails to make payment of remuneration or does not pay the amount due, the Bailee has the right to keep the goods bailed

in his possession till the time debtor dues are cleared. Lien is of two types: particular lien and general lien. (Section 170-171) In the case of *Surya Investment Co. v. S.T.C*, the court held that expenses incurred by Bailee during preservation of goods under lien shall be borne by bailor.

The Indian Contract Act has dealt with the following kinds of lien:

(i) Lien of a finder of goods (Section 168);

(ii) Particular lien of bailee (Section 170);

(iii) General lien of Bankers, Factors, Wharfingers, Attorneys and Policy brokers (Section 171);

(iv) lien of Pawnees (Sections 173; 174); and

(iv) Lien of agents (Section 221), and the of a Pawnees is dealt separately in this unit. The item, lien on agents is discuss in the separate unit, "Contract of Agency". Possession of goods is necessary to claim it must be rightful, not for a particular purpose and lastly it should be continuo. For example, A, a trader took on lease, B's warehouse for 5 years. It was also between A and B that A can at any time deposit or take out his goods from the warehouse. After six months A stopped paying the lease rent. B detained A's goods and claimed lien. B cannot claim lien because it was agreed that A can take out his goods whenever he wanted. A lien may be either a particular lien or a general lien.

(vi) Unpaid seller's lien- sec 47, Sale of goods Act, 1930. (vii) Partner's lien – sec 52, Indian Partnership Act, 1932.

Particular Lien: A lien which can be exercised only on goods in respect of which some payment is due is called particular lien. Where the bailee has, in accordance with the purpose of the bailment, rendered any service involving the exercises of labour or skill in respect of the goods bailed, he has, in the absence of a contract to the contrary, a right to retain such goods until he received due remuneration for the services, he has rendered in respect of them (Section 170).

For example, A delivers a rough diamond to B, a jeweler, to be cut and polished, which is accordingly done. B is entitled to retain the stone till he is paid for the service he has rendered.

Again, A gives cloth to B, a tailor, to make into a coat. B promises A to deliver the coat as soon as it is finished, and to give a three months' credit for the price. B is not entitled to retain the coat. As a general rule a bailee is entitled only to particular lien, which means the right to retain only that particular property in respect of which the charge is due.

The right is available subject to certain important conditions. The foremost among them is that the bailee must have rendered some service involving the exercise of labour or skill or expenses incurred in respect of the goods bailed. Further, a bailee's right of lien arises only where "Labour and skill" have been used so as to confer an additional value on the article. So, a person who takes an animal for feeding has no lien, but a veterinary surgeon who has treated the animals has right of lien. Further conditions are that the contract has been fully in accordance with the contract, and goods, as you already know, are still in possession of the bailee and there exists no contract for payment of price in future.

General Lien: The right of general lien, as provided for in Section 171, means the right to hold the goods bailed as security for a general balance of account. Whereas right of particular lien entitles a bailee to detain only that particular property in respect of which charges are due. Right of general lien entitles the bailee to detain any, goods bailed to him for any amount due to him whether in respect of these goods or any other goods. The right of general lien is privilege and is specially conferred by Section 171 on certain kinds of bailees only. They are bankers, factors, wharfingers, attorneys of a high court, and policy brokers.

9) **Right to suit against a wrongdoer:** After the goods have been bailed and any third party deprives the Bailee of use of such goods, then the Bailee or bailor can bring an action against the third party. (Section 180).

Right of Bailor and Bailee Against Wrongdoer

If a third person wrongfully deprives the bailee of the use or possession of the goods bailed, or does them any injury, the bailee is entitled to use such remedies as the owner might have used in the like case if no bailment had been made; and either the bailor or the bailee may bring a suit against a third person for such deprivation or injury. Section 180 of the Act enables a bailee to sue any person who has wrongfully deprived him of the use or possession of the goods bailed or has done them an injury.

It says: If a third person wrongfully deprives the bailee of the use of possession of the goods bailed, or does them any injury, the bailee is entitled to use such remedies as the owner might

have used is the like case if no bailment had been made; and either the bailor or the bailee may bring a suit against a third person for such deprivation or injury. Section 181 provides for apportionment of the relief obtained by the bailee and reads: Whatever is obtained by way of relief or compensation in any such suit shall, as between the bailor and the bailee, be dealt with according to their respective interests.

For example, A, forcefully takes possession of a colour T.V. from B's repair shop. Now either the owner of the T.V. or B may sue A. If B files the suit, he shall hand over the amount received, after deducting his repair charges, to the owner of the T.V.

Duties of a Finder of Goods

Under Section 71 of the Contract Act, a finder of goods has same duties with regards the goods found, as that of a bailee. Hence,

1) The finder should take reasonable care of the goods found.

2) He should not put the goods for his personal use.

3) He should not mix the goods found with his own goods.

4) It is the duty of the finder of goods to find the real owner of the goods and then to entrust the goods to him.

According to section 71 of the Indian Contract Act, 1872 by the finder of lost goods we mean a person who comes across the goods that are unclaimed or whose actual owner is not known. Such a person has to take care of these lost goods as Bailee unless a true owner is found. He has the same responsibility, rights and duties of that of a Bailee as per section 151 of the Indian Contract Act, 1872. He is duty bound to return the goods to the actual owner. He has to take all measures to find actual owners. He cannot refuse the delivery of goods else he will be liable for non- delivery of goods.

Rights of Finder of Lost Goods The right of Lien: According to section 168 of the Indian Contract Act, 1872 finder of the lost goods can exercise his right of particular lien if the actual owner refuses to make the payment of the expenses incurred to preserve those goods or to find the actual owner. But finder of the lost goods cannot sue him for the same.

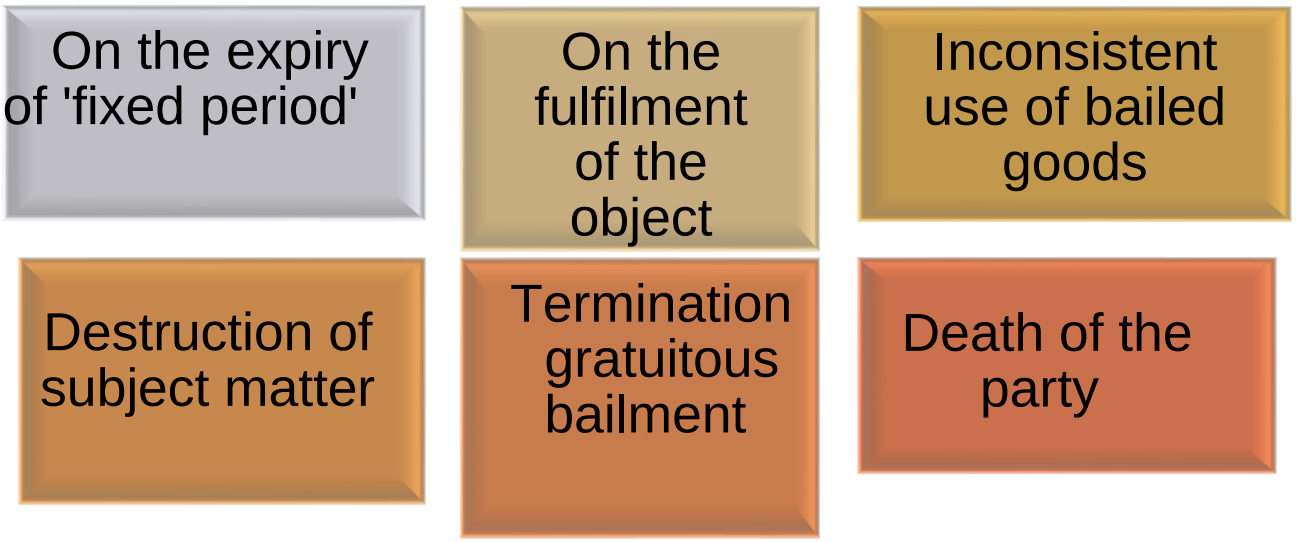
The right of Claiming the Award, if announced by the owner: According to section 168 of the Indian Contract Act, 1872 finder of lost goods cannot sue the actual owner for expenses

incurred by him. But he can sue him for the award that is announced by the owner and he refuses to pay the same. For instance, X finds Z's wallet and gives it to him. Z promises X to give him Rs. 100 for the same. This is a contract of bailment and Z is bound to pay the reward.

Right to sell the goods found: According to section 169 of the Indian Contract Act, 1872 finder of the lost goods also have the right to sell the goods on certain circumstances i.e., either he could not find the actual owner after taking all due diligence or the goods or of such nature that their value might perish.

Termination of Bailment

A contract of bailment comes to an end under the following cases:



1) On the expiry of fixed 'period: If the goods are bailed-for a fixed time, the bailment is terminated at the end of that period. Expiry of time When the goods are bailed for a fixed time, the contract of bailment is terminated at the expiry of the time fixed.

2) On the fulfilment of the object: If the goods are bailed for some specific purpose or purposes, the bailment is terminated on fulfilling the object. Accomplishment of purpose- When the purpose for which goods were bailed has been accomplished, the contract of bailment is terminated and goods are returned to the bailor.

3) Inconsistent use of bailed goods: If the bailee uses the goods in contravention of the terms of bailment, the bailor may terminate the bailment even before the term of bailment. Bailee's

inconsistent act-A contract of bailment ‘is voidable (terminated) at the option of the bailee does any act with regard to the goods bailed’ with the conditions of the bailment.

4) Destruction of the subject matter: A bailment is terminated if the subject matter of the bailment is destroyed or because of some change in the nature of goods bailed if the goods become incapable of being used for bailment.

5) Termination of gratuitous bailment: As you have already read, a gratuitous bailment can be terminated by the bailor at any time even though the bailment was for a fixed period or purpose. But in such a case, the loss to be suffered by the bailee from such premature termination should not exceed the benefit he had derived from the bailment. If the loss exceeds the benefit, the bailor shall indemnify the bailee.

6) Death: A gratuitous bailment is terminated by the death of either the bailor or the bailee. Sec. 162.

Pledge and Bailment

Pawn and bailment have many similarities. In both the cases only, the movable goods are delivered with the condition that the goods shall be delivered back after the purpose of contract is over or after the expiry of stipulated time.

Both pawn and bailment contracts are created by agreement between the parties, However, pawn differs from bailment in the sense that pawn is bailment of goods for a specific purpose i.e., repayment of a debt or performance of a duty.

Whereas, the bailment is for a purpose of ally kind.

Secondly, the Pawnee cannot use the goods pawned, but in bailment the bailee use the goods bailed if the terms of bailment so Bailment and Pledge - Specific Contracts provide.

Thirdly, Pawnee has a right to sell the goods, pledged with him after giving notice to pawnor, in case of default by the pawnor to repay the debt, whereas bailee may either retain the goods or sue bailor for his dues.

BAILMENT	PLEDGE
Sections 148 to 171 of the Indian Contract Act, 1872 deals with bailment	Sections 172 to 181 of the Indian Contract Act deals with Pledge.
Meaning: The term bailment is derived from the French word 'Bailor', which means 'to deliver. It means possession voluntarily from one person to another.	Meaning: Pledge is a special kind of bailment. If the goods are bailed as a security for payment of a debt or performance of a promise, it is called Pledge
Definition: Delivery of goods by Bailor to Bailee for a definite purpose on condition of their return or disposal, when purpose is accepted. (Section.148, I.C.A)	Definition: The Bailment of goods as security for payment of a debt or performance of a promise is called pledge. (Section.178, I.C.A)
Example: Sam delivers a cloth to John, a tailor making a shirt. The contract between Sam and John is bailment	Example: If a Farmer delivers to bank 50 bags of wheat as security for obtaining a loan, it is called pledge.
It is made for any purpose. Bailment may be for purpose other than by way of providing security for a loan or fulfilment of an obligation. It may be for purpose like repairs, safe custody, etc.	It is made for specific purpose. Pledge is bailment of goods for a specific purpose, i.e., to provide a security for a loan or fulfillment of an obligation.
The Bailee can use the goods. Bailee can use the goods bailed as per terms of contract.	Pledgee cannot use the goods. Pledgee has no right of using goods pledged.
The Bailee has no right to sell the goods bailed. Bailee can exercise lien on goods only for labour and service.	The Pledgee / Pawnee has a right to sell the goods pledged if the pledger could not redeem them within the stipulated period. Pledgee can exercise lien even for non-payment of interest.

Contract of pledge – Definition – Comparison with Bailment – Rights and duties of Pawnor and Pawnee

PLEDGE

Pledge is a kind of bailment. Pledge is also known as Pawn. It is defined under section 172 of the Indian Contract Act, 1892. By pledge, we mean bailment of goods as a security for the repayment of debt or loan advanced or performance of an obligation or promise.

Pawn or Pledge is a special kind of bailment where a movable thing is bailed as security for the repayment of a debt or for the performance of a promise.

For example, if you borrow rupees one hundred from B and keep your cycle with him as security for repayment, it is a contract of pledge. The person taking the loan is called the pledger or pawnor and the person with whom goods are pledged is called the Pawnee. Ownership of the pledged goods does not pass to the pledgee. The general property remains with the pledger but a "special property" in it passes to the pledgee.

The special property is a right to the possession of the articles along with the power of sale on default. Delivery of the goods pawned is a necessary element in the making of a pawn. The property pledged should be delivered to the Pawnee. Thus, where the producer of a film borrowed a sum of money from a financier-distributor and agreed to deliver the final prints of the film when ready, the agreement was held not to amount to a pledge, there being no actual transfer of possession. Delivery of possession may be actual or constructive. Delivery of the key of the godown where the goods are stored is an example of constructive delivery. Where the goods are in the possession of a third person, who, on the directions of the pledger,

consents to hold them on the pledgee's behalf, that is enough delivery. A railway receipt is a document of title of the goods and a pledge of the receipt operates as a pledge of the goods.

Meaning of 'Pledge', 'Pawnor', 'Pawnee' Sec.172

Pledge: The bailment of goods as security for payment of a debt or performance of promise is called 'pledge'.

Pawnor: The Bailor in case of a pledge is called as 'Pawnor'.

Pawnee: The Bailee in case of pledge is called as 'Pawnee'.

A borrowed Rs.100 from B and gave his cycle as a security for the repayment of the amount, in the condition that if A pays back to B, he will get his cycle back. it is called the contract of Pledge.

In case of *Lallan Prasad v. Rahmat Ali,* Supreme Court of India defined Pledge as: "Pawn or pledge is a bailment of personal property as a security for some debt or engagement. A pawnor is one who being liable to an engagement gives to the person to whom he is liable a thing to be held as security for payment of his debt or the fulfilment of his liability".

Illustrations / Examples:

1. Mr. A gives his watch for repair to Mr. B., In this case, Mr. A is bailor, Mr. B is Bailee and the goods bailed is watch.
2. Harry bailed his bike to David for riding for himself to go to college. David used it for racing purpose. Now David will be liable for unauthorized use of the bike bailed.
3. Mr. X gave his cat to Mr. Y for looking after over some days. Cat in that while gave birth to kittens. Now Mr. Y is liable to return the cat along the accretions.
4. Mr. A bailed his carriage for Mr. B for hire for a few days. But there was a default in the carriage of which Mr. A was not aware. And subsequently, Mr. B suffered injuries because of the same. Now Mr. A is liable to pay damages to Mr. B.
5. Y mixes his sweets with that of Z without Z's consent. Since the sweets can be separated so the cost to separate the sweets will be borne by Y.
6. Mark took a loan from the bank against a security of gold. In this case, Mark is a pledger, the bank is a pledgee and gold is the pledged goods.

7. Z pledged his goods with A. But now Z refuses to make the payment of the same. A now can either sell his goods or can initiate a suit proceeding against Z.

WHO MAY PLEDGE: Any of the following persons may make a valid pledge:

i) The owner, or his authorised agent, or

ii) One of the several co-owners, who is in the sole possession of goods, with the consent of other owners, or

iii) A Mercantile agent, who is in possession of the goods with the consent of real owner, or (Sec. 178)

iv) A person in possession under a voidable contract, before the contract is rescinded, or (Sec. 178 A)

v) A seller, who is in possession of goods after sale [Sec. 30(1)] or a buyer who has obtained possession of the goods before sale,[Sec.30 (2)] or

vi) A person who has a limited interest in the property. In such a case the pawn is valid only to the extent of such interest. (Sec. 179)

Note: If a servant has the custody of the goods, or a tenant gets the possession of a furnished house, the servant cannot pledge the goods, nor can a tenant pledge the furnishing materials in his possession. A person obtaining the goods fraudulently does not have any right to pledge them.

In *Purshottam Das v Union of India*, the goods were pledged on the basis of a forged railway receipt and it is not a valid pledge. The 'document of title' has the same meaning as the Sale of Goods Act 1930, Acc to sec. 2(4) of that act, includes a bill of lading, dock warrant, ware housekeeper's certificate, wharfinger's certificate, railway receipt, warrant or order for the delivery of goods and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to authorize, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented.

If the person entrusts some valuables to his neighbor for safe custody for some time, and he happens to be a mercantile agent, a pledge made by him will not be covered by this provision. So, the mercantile agent has not got the possession as such agent but in a different capacity, a pledge made by him not be a valid one.

Essentials of a Valid Contract of Pledge (Sec.172)

Since Pledge is a special kind of bailment, therefore all the essentials of bailment are also the essentials of the pledge. Apart from that, the other essentials of the pledge are:

There shall be a bailment for security against payment or performance of the promise

Note: in order to constitute a valid pledge, the foremost requirements must be satisfied.

i. There should be bailment of goods, i.e., and the delivery of goods from one person to another.
ii. The purpose of such bailment is to make the goods bailed serve as security for the payment of a debt, or performance of a promise.

Contract-There must be a contract. The contract may be expressed or implied.

Movable Property: The pledge is concerned with the movable property. All types of goods and valuable documents are included in it.

Goods: Pledge can be made of goods only. The subject matter of pledge is goods,
Goods pledged for shall be in existence.
Delivery: There must be delivery of goods by one person to another person.

There shall be the delivery of goods from pledger to pledgee Purpose of delivery- The goods must be delivered for some purpose.

The purpose must be to deliver the goods as security for

(a) Payment of a debt; or

(b) Performance of a promise.
Transfer of Possession: In case of pledge only possession, of goods transferred by the pawnor to the Pawnee.

Example: Mr. Nelson ledges car with Mr. McCallan and gets 1,00,000. He gives the possession of car to Mr. McCallan.

Ownership Right: In the case of a pledge, the ownership of the goods remains with the pawnor. It is not transferred to Pawnee.

Example: Mr. Wali pledges the plot with Mr. Raffel and gets 10 lacs. The ownership of the plot remains with Mr. Wali. There is no transfer of ownership in case of the pledge: Exception: In exception circumstances pledgee has the right to sell the movable goods or properties that are been pledged.

Return of goods-The delivery of goods must be conditional.

- The condition shall be that the goods shall be returned (either in original form or in altered form); or
- Disposed of according to the directions of the pawnor when the purpose is accomplished.

A case of Mere Custody: Those people who have only mere custody of the goods cannot pledge them. Example: A custodian cannot pledge his master's bang low. It will be an invalid pledge.

Limited Interest: Pledge property cannot be used for unlimited interest. When a person pledges goods in which he has only limited interest, the pledge is valid to the extent of that interest only.

Example: Mr. Nelson gives a car to Mr. Andre for repair, but does not pay 20,000 repair charges. Mr. Andre pledges the car with Mr. Smith and borrows fifty thousand. *This pledge is valid only up to ten thousand.*

Revenue Authority v Sudarsanam pictures, it has been held that an agreement wherein, the producer of a film agrees to deliver final prints of the film under production, when the same are ready, to a financier- distributor in return for the finance provided by the latter, is not pledge because there is no delivery of the goods.

Morvi Mercantile Bank v Union of India, AIR 1965, S.C. 1954. The delivery of a railway receipt was considered to be enough to constitute delivery of the goods represented by that railway receipt for the purpose of pledge. It was held with the majority that according to the prevailing Indian law, railway receipt is a document of title, and therefore delivery of the railway receipt means delivery of the goods represented by the railway receipt.

Bank of India V. Vinod Steel Ltd AIR 1977 MP 188: In this case, Court held that when certain movables have been pledged by a company to a Bank, they cannot be attached and sold for

satisfaction of claims of other creditors of the company without first satisfying the claim of the bank.

Reeves v. Copper (1933) In this case, the captain of the ship pledged his chronometer with his employer, the ownership. The captain was allowed to keep the chronometer and to use it for the purpose of a voyage later on the captain pledged it again with another person. It was held that the first place was valid as it was a case of constructive delivery.

PLEDGE AND HYPOTHECATION

Both pledge and hypothecation are created by an agreement between the parties. In both, movable property is delivered as a security for repayment of loan or for the performance of a promise. The difference in hypothecation and pledge is that, that in hypothecation the debtor continues to enjoy the possession of goods. The debtor has a right to deal in the goods but only subject to the terms of contract. He has to send to the creditor, details of property hypothecated. The creditor, in hypothecation, has a right to inspect the goods, at his convenience, whereas, in case of pledge, the pawnor loses the possession of the property as well as his rights to deal in the property pledged.

A hypothecation has been regarded as a form of pledge, but where there is no delivery of the possession. Thus, the hypothecator still remains in the possession of the goods with all his interest and rights to enjoyment of it intact. It is pertinent to note that in case of hypothecation, unlike pledge where the pledgee is in possession, the owner of the things as an agent of the hypothecatee. Thus, delivery of possession is the primary point of distinction between pledge and hypothecation. However, alike pledge the hypothecatee under pledge to have the right to sue and even to sell the thing for recovering the loan amount.

In hypothecation the position of the true owner becomes that of a bailee of goods acting for the bailor who in this case is hypothecate. In simpler words the distinctiveness can be made clear by saying that while pledge involves transfer of possession, hypothecation involves transfer of rights or interest, those too limited.

The Differences **Pledge** and **Hypothecation**

BASIS	PLEDGE	HYPOTHECATION
Meaning	It is defined under Section 172 of the Indian Contract Act, 1872.	As such it is not defined in the Indian Contract Act, 1872 but has been recognized by the usage since very long.
Transfer of property	Property is transferred from one person to another as security	Property is not transferred; it stays with the owner.
Dealing in Property	Once the property is pledged, the owner loses the right to deal in that property	Since the property stays with the owner, therefore he can deal in the property subject to certain condition.
Right of Lien	The right of lien can be exercised since the property is with the Pawnee.	The right of lien cannot be exercised since the property is not with the creditor.

Pledge and Lien- While a pledge creates special property in the thing pledged, lien is merely a personal right which the party is entitled to exercise in case where payment is due. The difference between the two arises on the basis of the rights the party have. While a pledge permits the pledgee to retain, sue and even sell the property of good pledged, under lien only the right of retainment is provided. To some extent lien can be regarded as an inverse of hypothecation as where the former involves transfer of possession, the later requires transfer of rights.

Pledge and Mortgage- pledge involves transfer of possession of a thing in return for certain sum or as a security for fulfilling an obligation. A pledge gives pledgee special rights to the pledgee that in case of default he has remedies available with him. However, under a mortgage, other than these special rights, the juristic rights or the legal rights are also transferred. That is to say that the right of enjoyment is not transferred in the case of pledge, but in case of

mortgage, the mortgagee has the right of enjoyment. Also, another point of distinction here is that a contract of mortgage does not require actual delivery of the goods or the things. Further, while only moveable goods are pledged under a contract of pledge, mortgage can be of both, moveable as well as immoveable property.

Rights of Pawnor

As per Section 177 of the Indian Contract Act, 1872 the Pawnor has the Right to Redeem. By this, we mean that on the repayment of the debt or the performance of the promise, the Pawnor can redeem the goods or property pledged from the Pawnee before the Pawnee makes the actual sale. The right of redemption is extinguished once the actual sale is done by the Pawnee as per his right under section 176 of the Indian Contract Act, 1872.

Rights of Pawnor If a time is stipulated for the payment of the debt, or performance of the promise, for which the pledge is made, and the pawnor makes default in payment of the debt or performance of the promise at the stipulated time, he may redeem the goods pledged at any subsequent time before their actual sale; but he must, in that case, pay in addition, any expenses which have arisen from his default. Besides this, all the duties of a Pawnee are the rights of a pawnor and so he has the right to get Pawnee's duties duly enforced.

1) It is the duty of pawnor to comply with the terms of pledge and repay the debt on the stipulated date or to perform the promise at the stipulated time.

2) It is the duty of pawnor to compensate the Pawnee for any extraordinary expenses incurred by him for preserving the goods pawned.

Rights of a Pawnee (Sec.173 and 176)

The rights of the Pawnee as per Indian Contract Act, 1872 are:

Right to retain the goods: If the Pawnor fails to make the payment of a debt or does not perform as per the promise made, the Pawnee has the right to retain the goods pledged as

security. Moreover, Pawnee can also retain goods for non-payment of interest on debt or non-payment of expenses incurred. But Pawnee cannot retain goods for any other debt or promise other than that agreed for in the contract. (Section 173-174).

Right of Retainer [Sec.173]: The Pawnee has right to retain the pledged goods till his payments are made (Sections 173 and 174). He can retain the goods for the following payments; Pawnee may retain the goods pledged for –

(a) Payment of the debt or the performance of promise,

(b) Any interest due on the debt; and

(c) All necessary expenses incurred by him with respect to possession or for preservation of goods pledged.

This right of the Pawnee to retain the pledged goods till he is paid, is known as Pawnee's right of particular lien, In the absence of a contrary contract, the Pawnee cannot retain the goods pledged for any debt or promise other than the debt or promise for which the goods are pledged. However, in the absence of any thing to the contrary, such a contract shall be presumed when subsequent advances are made without any further security. If fresh security is provided for the fresh advance, this presumption will not apply.

Retainer for subsequent advances [Sec.174]

(a) Where the Pawnee lends money to the Pawnor subsequently, after the date of pledge, it shall be presumed that the he has a right of retainer over the goods already pledged in respect of the subsequent lending also.
(b) This presumption can be made invalid only by an expenses provision to that effect.

Right to recover extraordinary expenses: The expenses incurred by Pawnee on the preservation of goods pledged can be recovered from Pawnor (Section 175).

Reimbursement of Expenses [Sec.175]: Where the Pawnee incurs extraordinary expenses to preserve the goods pledged with him; he is entitled to receive such amount from the Pawnor. The Pawnee is entitled to receive from the pawnor extraordinary expenses incurred by him for the preservation of the goods pledged. This right does not entitle the Pawnee to retain the goods for recovery of such expenses, however, he can sue the pawnor to pay such amount.

The right of suit to procure debt and sale of pledged goods: On the failure to make repayment to Pawnee of the debt, the Pawnee has two rights: either to initiate suit proceedings against him or sell the goods. In the former case, the Pawnee retains the goods with himself as collateral security and initiate the court proceedings. He needs to provide reasonable notice of such proceedings to the Pawnor. And in the latter case, the Pawnee can sell the goods after giving due notice of sale to the Pawnor. If the amount received from the sale of goods is less than the amount due then the rest amount can be recovered from Pawnor. And if the Pawnee gets more amount than the due amount then such surplus is to be given back to Pawnor. (Section 176).

Right to Sale (Sec. 176): Upon a default being made by the pawnor in the payment of the debt or performance of the Pawnee gets two distinct rights. Firstly, the Pawnee may bring a suit against the pawnor for the recovery of the due amount or for the performance of the promised duty and in addition to it he may retain the goods as a collateral security. Secondly, he may sell the goods pledged but only after giving reasonable notice of the intended sale, to the pawnor. If the proceeds of such sale are less than the amount due in respect of the debt or promise, the pawnor is still liable to pay the balance, if the proceeds of the sale are greater than the amount so due, the Pawnee shall pay over the surplus, to the pawnor. A further the Pawnee cannot sell the goods to himself. If the does so the sale is void and the pawnor can take back the goods after paying the amount due.

Rights in case of default by Pawnor [Sec.176]

(a) **Suit/ Right to sue:** Pawnee may institute a suit against Pawnor when there is a default in payment of debt or performance of promise at the stipulated time.
(b) **Retention / Sale of goods:** Pawnee may – (a) retain the goods pledged as collateral security, or (b) sell the goods pledged by giving a reasonable notice to the Pawnor.

Remedies of filing suit and sale of goods are disjunctive- in case the pawnor commits default in the payment of debt within the stipulated time, 2 avenues are available to the Pawnee:

- Either to file a suit against the Pawnor, by retaining the pledged goods as collateral security.
- To resort to sale of goods after giving reasonable notice to the Pawnor.

K. M. Hidaathulla v Bank of India, it has been held that the 2 remedies available to the Pawnee are disjunctive in nature. It means that if three years period is prescribed by the limitation act for filing the suit, this does not imply that the time available for sale to the Pawnee will be the same and such time shall be automatically extended.

(c) Surplus / Deficit on Sale: When there is a surplus on sale, Pawnee shall pay the excess to the Pawnor. In case of deficit, Pawnor shall be liable for the balance amount.

(d) Notice before suit: Where the Pawnee does not give a reasonable notice to the Pawnor. The section does not contemplate any notice before the institution of the suit. A suit for the debt due can be brought through notice is not given. The Pawnee can also being a suit to sell the goods pledged. However, a suit to recover the debt by sale of pledged articles must be preceded by notice.

Right against true owner of goods [Sec.178A]

When the Pawnor has acquired, possession of pledged goods, under a voidable contract, but the contract has not been rescinded, at the time of pledge, the Pawnee acquires a good title to the goods, even against the true owner, provided that Pawnee had no notice of the Pawnor' s defect in title and he acts in good faith.

(a) Where the Pawnor has acquired possession of pledged goods, under a voidable contract u/s 19 or 19A but contract has not been rescinded at the time of pledge, the Pawnee acquires a good title to the goods, against the true owner.
(b) The title of Pawnee is good only where – (a) he had no notice of the Pawnor' s defect in title and (b) he acts in good faith.

Reasonable notice u/s 176 means that a notice of intended sale of the security by the Creditor within a certain date, so as to afford an opportunity to the Debtor to pay the amount within the time mentioned in the notice.

Requisites of a valid Notice- This notice must be clear and specific in its language and must indicate the Pawnee's intention to dispose of the security. It can't be implied. It must be reasonable and not vague under this section. Merely an intimation that arrangements would be made for sale, not notice for sale. The debt for which the pledged goods are being sold must be mentioned.

Effect of sale without notice: Notice of sale is essential and a clause in the agreement excluding the requirement of Notice is inconsistent with the Act & is void and unenforceable.

Sale without notice is void, and a vendee without notice of the pledgee, takes only the limited rights or interest of the Pawnee, in other words, he steps in to the shoes of the Pawnee.

Duties of a Pawnor (Sec.175)

Pay the debt: The pawnor is liable to pay the debt or perform his promise as the case may be.

Pay extra – ordinary expenses: The pawnor is liable to pay to the Pawnee any extraordinary expenses incurred by the Pawnee for preservation of goods.

Disclose faults in goods: The Pawnor is liable to disclose all the faults which

(a) Are material for use of the goods; or

(b) May put the Pawnee to extraordinary risks.

Indemnify the Pawnee: If loss is caused to the Pawnee due to defect in Pawnor' s title to the goods, the pawnor must indemnify the Pawnee.

Duties of a Pawnee

Not to use the goods: The Pawnee has no right to use the goods However, he may use the goods, if he has been so authorised by the pawnor. Duty not to make unauthorised use of goods pledged.

Return the goods: The Pawnee must return the goods if the pawnor pays the debt or performs his promise. Duty to return the goods when the debt has been repaid or the promise has been performed.

Take reasonable care: The Pawnee must take such care of goods pledged as a man of ordinary prudence would take care of his own goods. Duty to take reasonable care of the pledged goods.

Not to mix goods: The Pawnee must not mix his own goods with the goods pledged. Duty not to mix his own goods with the goods pledged.

Return increase in goods: The Pawnee must return to the pawnor any accretion to the goods pledged with him. Duty to deliver increase (if any), to the goods pledged.

Duty not to do any act which is inconsistent with the terms of pledge.

In *Central Bank of India v. Abdul Mujeeb Khan,* the bank took over the possession of the hypothecated truck but thereafter neither sold it according to the agreed terms nor took care of it, leaving it in open place, the bank was liable for the extraordinary depreciation in the value of the vehicle.

Important Note:

Requirement of Notice: -Before making the sale, the pledger is required to give to the Pawner, a reasonable notice of his intention to sell. The requirement of 'reasonable notice' is a statutory obligation and, therefore, cannot be excluded by a contract to the contrary.

In a case of *Prabhat Bank v. Babu Ram*, before the Allahabad High Court: One of the terms of an agreement of loan enabled the lending banker to sell the securities without any notice to the Pawner. The Pawner defaulted in the payment. The bank sent a reminder, but the Pawner asked for more time. The bank thereupon disposed of the securities.

If the proceeds of such sale are less than the amount due in respect of the debt or promise, the pawnor is still liable to pay the balance. If the proceeds of the sale are greater that the amount so due, the Pawnee shall pay over the surplus to the pawnor.

When the Pawnee sells the pledged goods, he does not do so as full owner, but by virtue of an implied authority from the Pawnee to do so. The sale must be for the benefit of both the parties. After sale, it is the Pawnee's ordinary right 'to recover the balance of the loan unsatisfied on the sale of the pledge'. And if there is any surplus amount from such sale, it must be accounted for and refunded to the Pawner. The words 'such sale' in the second paragraph indicate that no liability can be fastened on the pawnor for loss, if the Pawnee does not exercise his right of sale according to section 176. Before a sale, the goods are the property of the pawnor in Pawnee's custody. If there arises dispute regarding the quality of the goods, the Pawnee cannot proceed in the matter without referring to the pawnor. In such a situation, Pawnee is the agent of the Pawnor.

Loss of Security due to Pledgee's Negligence: Where goods are lost due to the negligence of the pledgee, the liability of the pledger is reduced to the extent of the value of such goods

which are lost. In a case *of Gurbax Rai v. Punjab National Bank*, before the Supreme Court: Certain goods in the godown of a firm were under the pledge of a bank. The go down was insured against fire. A part of them was damaged by fire. The bank received insurance money to the extent of the fire.

Sale by Hypothecatee: A hypothecatee is not in actual possession of the goods. He grants the right of use to the borrower. He naturally has a right to take possession of the goods if the borrower makes default. He can then sell them in his capacity as a pledgee. Intervention of the court is not necessary.

Pawner's Right to Redeem: -

Section 177 of the Act provides for the most valuable right of the Pawner:

Defaulting Pawnor' s right to redeem If a time is stipulated for the payment of the debt, or performance of the promise, for which the pledged is made, and the pawnor makes default in payment of the debtor performance of the promise at the stipulated time, he may redeem the goods pledged at any subsequent time before the actual sale of them; but he must, in that case, pay, in addition, any expenses which have arisen from his default.

This provision is supplementary to the earlier section. Even after the time for payment of the debt or the performance of the promise has expired, the pawnor is entitled to redeem the goods pledged until they are actually sold; but he must then also pay any expenses which arise from his default.

It has been pointed out by the Supreme Court in a case of *Jaswantrai Manilal Akhaney v. State of Bombay*, that: "The special interest of the pledgee comes to an end as soon as the debt for which the goods were pledged is discharged. It is open to the pledger to redeem the pledge by full payment of the amount for which the pledge had been made at any time if there is no period fixed for redemption, or at any time after the fixed date and the right continues until the thing pledged is lawfully sold."

Redemption means the enforcement of the right to have the title to corpus of the pledged property restored to the pledger free and clear of the pledge. A suit for redemption has to be filed for exercising this specific remedy and not just for a declaration of the right of redemption.

Heritable Right: Certain gold ornaments were pledged with a bank as a security for a gold loan. The pawnor died. His wife sought to redeem the pledge by repaying the loan. She produced a 'will' of her husband to show her right. The court said that she was entitled to redeem. The bank could not ask her for submitting a probate of the will or a succession certificate. Her son and daughter raised no objection.

Premature Redemption: Where the Pawner redeems before expiry of the specified period, he would remain bound by the terms of the loan, if any, which require that a premium would be leviable on premature payment.

Statutory Right: Where the property of an employer was pledged with a bank as security for repayment of a loan, the court said that it could be attached and sold for recovery of employee's Provident Fund dues. (Section 11(2) of the Provident fund Act, 1952 operates against mortgage and pledge executed by employer to give priority to employees Provident Fund claims.)

Pledged goods if lost or damaged

In *central bank of India v. Grins and gunny agencies* Due to the negligence of the pledgee bank, the pledged goods were lost. The bank was requested by the Pawnor to sell away the goods and realize the balance, but the bank failed to do so. Moreover, now the bank was not a in a position to redeliver the goods on the satisfaction of its claim. It was held that the bank was liable for the loss of the goods a therefore, he was not entitled to succeed in his claim against the pawnor.

Legal heir's right to redeem- in case of death of a pawnor, the pledge made by him, can be redeemed by his legal heirs on meeting the liabilities concerning the pledge.

Conclusion

Pledge is a kind of bailment where a thing is delivered as security for the repayment of a debt or performance of any promise. Delivery of the possession to the Pawnee may be actual delivery or constructive delivery. Ownership of the pledged article does not pass to the pledgee. The Pawnee has the right to retain goods till the payment, of the debt, any interest on the debt, and any other necessary expenses incurred for preservation of the goods. Where Pawnee incur any other extraordinary expenses on goods for preservation, he is entitled of

the same from pawnor. In case of the default of the pawnor, in the debt or performance, the Pawnee has the right to sell the goods pledged.

The pawnor has also the right to redeem the goods before the actual sale, but after the payment of the debt or performance of promise and any other expenses which have arisen from his default.

UNIT – III: Agency – Definition – Creation of Agency – Kinds of Agents – Distinction between Agent and Servant – Rights and Duties of Agent – Relation of Principal with third parties – Delegation – Duties and Rights of Agent – Extent of Agents authority – Personal liability of Agent – Termination of Agency.

CONTRACT OF AGENCY

When one party delegates some authority to another party whereby the latter performs his actions in a more or less independent fashion, on behalf of the first party, the relationship between them is called an agency. Agency can be express or implied.

Chapter X of the Indian Contract Act, 1872 deals with the laws relating to Agency. It is important to know the law relating to agency because nearly all business transactions worldwide are carried out through agency. All corporations, big or small, carry their work out through agency. Therefore, laws relating to the agency are an important area of Business Law. Relationships relating to principal and agent involve three main parties: The Principal, the Agent, and a Third Party.

An agent does not act on his own behalf but acts on behalf of his principal. He either represents his principal in transactions with third parties or performs an act for the principal. The question as to whether a particular person is an agent can be verified by finding out if his acts bind the principal or not.

Illustrations:

A, a businessman, delegates B to buy some goods on his behalf. Here, A is the principal and B is the agent, and the person from whom the goods are bought is the 'Third Person'.

Joe appoints Mary to deal with his bank transactions. In this case, Joe is the Principal, Mary is the Agent and the Bank is the Third Party.

Lavanya lives in Mumbai, but owns a shop in Delhi. She appoints a person Susan to take care of the dealings of the shop. In this case, Lavanya has delegated her authority to Susan, and she becomes a Principal while Susan becomes an agent.

Who can appoint an Agent?

According to Section 183, any person who has attained the age of majority and has a sound mind can appoint an agent. In other words, any person capable of contracting can legally appoint an agent. Minors and persons of unsound mind cannot appoint an agent.

Who may be an Agent?

In the same fashion, according to Section 184, the person who has attained the age of majority and has a sound mind can become an agent. A sound mind and a mature age is a necessity because an agent has to be answerable to the Principal.

Principal is liable for the acts of agent

The principal is liable for all the acts of an agent which are lawful and within the scope of agent's authority.

The contracts entered into by the agent on behalf of the principal have the same legal consequences as if these contracts were made by the principal himself.

Who may employ an agent? Any person may employ an agent if – He is of the age of majority; and He is of sound mind.

Who can be an agent?

Any person may become an agent. Even a minor or a person of unsound mind can become an agent.

Liability of agent

Generally, an agent is liable to the principal. An agent is not liable to the principal if he is a minor or is of unsound mind.

Requirement of consideration

No consideration is necessary for creating an agency. (Section 185)

General Rule of Agency

- No essential of consideration
- Delegation of Authority
- Contractual capacity
- Agent can appoint sub agent with permission of Principal
- If the agent has removed, subagent is automatically terminated

Essentials of Agency

1- **The principal should be competent to contract -**Any person who is of the age of majority and is of sound mind may employ an agent. (Section 183) Since in an agency, the agent creates a contractual relationship between his principal and the third persons, it is necessary that the principle and third person should be competent to contract.

Mahendra Pratap Singh v Padam Kumar Devi, AIR 1993, ALL 143

When a client gives a power of attorney to his counsel, while he is in good state of health and mental understanding, but subsequently the client becomes old, feeble, weak, unable to comprehend under a mental incapacity, the power of attorney becomes worthless after the change in the state of health and metal infirmity of the client.

Madanlal Dhariwal v Bherulal AIR 1965 272.

If the principal is a minor or of unsound mind, he is incapable of being bound through the acts of his agent. Although a minor himself cannot appoint an agent, there is nothing in sec 183, which prohibits the guardian of a minor form appointing an agent for him.

2- **The agent may not be competent to contract-**Between the principal and the third persons, any person may become an agent. But no person who is a minor and of unsound mind can become an agent, so as to be responsible to his principal. (Section- 184)

The capacity of an agent has 2 angles.

- **The ca**pacity of the agent to act on behalf of the principal, so as to bind his principal and the third.
- His capacity to bind himself by a bind himself by a contract between himself and his principal.

He (minor) is capable of creating a valid contract between his principal and third party, in this context, the agent is only a connecting link between the 2 parties.

3- **Consideration** (sec. -185) No consideration is necessary to create an agency. The principal agrees to be bound by the acts done by the agent on his behalf and that serves as a sufficient detriment to the principal. Here the principal's duty to indemnify the agent is also there. The law does not require any consideration as such for the validity of a contract of agency.

It is not essential that a contract of agency be entered in to. It is sufficient if a person acts on behalf of another and is accepted by the latter.

An agency can be created either in writing or orally. An oral appointment is a valid appointment even though the contract of agency by which agent is authorized has to be in writing.

Modes of Creation of Agency (Model/ Methods of Creating Agency)

Modes mean the way and methods. There are various ways or modes by which the relationship of principal and agent may arise.

1- **By** actual authority being conferred on the agent to act on behalf of the principal. Such authority may be either express or implied.
2- **By agent's** authority to act on behalf of the principal in a situation of 'emergency'
3- **By** the conduct of the principal, which creates an agency on the basis of the law of estoppel.
4- **By ratification** of the agent's act by the principal, even though the same has been done without the principal's prior authority.
5- **By presumption of agency** in husband- wife relationship.

1- Express authority – According to Section 187, an authority is said to be express when it is given by words spoken or written. A contract of agency can be made orally or in writing. Example of a written contract of agency is the Power of Attorney that gives a right to an agency to act on behalf of his principal in accordance with the terms and conditions therein.

A power of attorney can be general or giving many powers to the agent or some special powers, giving authority to the agent for transacting a single act.

***Direct appointment** is* the standard form of creating an agency is by direct appointment. When a person, in writing or speech appoints another person as his agent, an agency is created between the two. Normally the authority given by principal to his agent is an express authority in such case; the agent may be appointed either by the words spoken or written or conduct of activities. For e.g., power of attorney.

2- Implied authority - According to Section 187, an authority is said to be implied when it is to be inferred from the circumstances of the case. In carrying out the work of the Principal, the agent can take any legal action. That is, the agent can do any lawful thing necessary to carry out the work of the Principal.

Essentials of Ratification

1- Full knowledge
2- Whole transaction
3- No damage to 3rd parties
4- Act on behalf of another person
5- Existence of Principal
6- Within reasonable time
7- Lawful acts
8- Acts within Principal's power
9- Communication
10- Agency by operation of law

Types of Agents

Agents are classified in various ways according to the point of view adopted. From the viewpoint of the authority they have, they can be classified as special agents, general agents and universal agents. They are classified as mercantile or commercial agents and non-mercantile or non-commercial agents. There are different various types of kind agents are as follows.

Sub-Agent-An agent appointed by an agent. Sub-agency denotes delegation of power by an agent to a person appointed by him as sub-agent. Incidentally the agent himself is delegate of his principal. The principal is that 'a delegate cannot delegate'. According to this, a person to whom powers have been delegate cannot delegate them to another. Section 190 of the Act. Contains this principle. Generally, an agent cannot lawfully employ another to perform acts, which he has expressly. But, if by the ordinary custom of trade, a sub-agent may be employed, the agent may to do so.

A sub-agent, according to section 191, is a person whom the original agent employs in the business of the agency and who under the control of the original agent. Thus, the relation of the sub-agent to the original agent is, as between themselves, that of the agent and the principal.

(i.) In case of proper appointment: The agent is responsible to the principal for the acts of the sub-agent. Thus, a commission agent for the sale of goods who makes a proper

employment of a sub-agent for selling his principal's goods is liable to the principal for the fraudulent disposition of the goods by sub-agent within the course of his employment.

(ii.) **In the case of appointment without authority**: In term of Section 193, the principal is not bound by the acts of the sub-agent, nor is the sub-agent liable to the principal. The agent is the principal of the sub-agent both to the principal and the third party.

Substituted Agent: Substituted agents are different from sub-agents. Section 194 provides that substituted agents are not sub-agents but are in fact agents of the principal. Suppose an agent has an implied authority to name another person to act for the principal in the business of the agency, and he has named another person accordingly. In the circumstances, such a named person is not a sub-agent he is an agent of the principal for such part of the business of the agency as has been entrusted to him.

For Example: A directs B who is a solicitor to sell his estate by auction and to employ an auctioneer for the purpose. B names C, an auctioneer, to conduct the sale. In such a situation, C is not sub-agent, but is A's agent for the sale.

Special Agents: Agent appointed to do a singular specific act. A special agent is also known as a specific or particular agent. Such agent appointed to perform a particular work or to represents his principal in particular transaction only. As soon as the said period lapses, the agency stands terminated. Specific agents have a limited authority and as soon as the entrusted to him is performed, his authority also comes to an end. A special agent cannot bind his principal in any act other than for which he is specially appointed. If he does anything outside his authority, his principal cannot be bound by it. The third parties that deal with a special agent must ascertain the extent of the authority he has. A Special Agent is one who is employed to do some particular act or represent his Principal in some particular transactions.

For example: An agent employed to sell a Bike. If the special agent does anything outside his authority, the principal is not bound by it and third parties are not entitled to assume that the agent has unlimited powers.

General agents: Agent appointed to do all acts relating to a specific job. This type of agents has a general authority to do everything in the course of his agency and he has to perform all the acts in the interest of his principal. Thus, a general agent is one that has authority to do all acts connected with the business of his principal. A manager of a branch shop of a firm or a commission agent is instances of general agents.

General agents have an implied authority to bind his principal by doing various acts necessary for carrying on the business of his principal. Sufficiently wide powers are vested in him to affect the business deals, enter into trade bargains, to make purchases and also payments of the purchases, to receive money on behalf of his principal.

A General Agent is one was employed to do all acts connected with particular business or employment. For example, A manager of a firm. He can bind the principal by doing anything which Falls within the ordinary scope of that business. Whether he is actually authorised for any particular act or not, is immaterial provided that third party acts bona fide.

Universal Agent: A universal agent has a universal or an unlimited power to act on behalf of his principal. A universal agent is one whose authority is unlimited and who any act on behalf of his principal can do provide such act is legal and is agreeable to the law of land. A universal agent is practically substituted for his principal for all those transactions wherein his principal cannot participate. A Universal agent is one who is authorised to do all the acts which the Principal can lawfully do and can delegate.

For Example: When a person leaves his country for a long time, he may appoint his son, wife or friend as his universal agent to act on his behalf in his absence.

Co-Agent- Agents together appointed to do an act jointly. When a principal appoints two or more persons agents jointly or severally, such agents are known as co-agents. Their authority is joint when nothing is mentioned about the exercise of their authority. It implies that all co-agents concur in the exercise of their authority unless their authority is fixed. But when their authority is several, any one of the co-agents can act without the concurrence of other.

Factor- An agent who is remunerated by a commission (one who looks like the apparent owner of the things concerned). A factor is a mercantile agent to home goods is entrusted for sale. He enjoys wide discretionary powers in relation to the sale of goods. A Factor is an agent who is entrusted with the possession and contract of the goods to be said by him for his Principal. He has possession of the goods, authority to sell them in his own name and a general discretion as to this sale. He may sale on the usual term of credit may receive the price and give a good discharge to the buyer.

Broker- An agent whose job is to create a contractual relationship between two parties. He is one who is employed to make contracts for the purchase and sale of goods. He is not entrusted with the possession of goods. He simply acts as a connecting link and bring it to parties together to bargain and if the circumstances materialize he becomes entitled

to his commission called brokerage. He makes a contract in the name of his Principal. Thus, a broker is an agent primarily employed to negotiable a contract between two parties where he is a broker for sale, he has no position of the goods to be sold.

Auctioneer- An agent who acts as a seller for the Principal in an auction.

An auctioneer is a mercantile agent who is appointed to sell goods on behalf of the principal i.e., seller and for this function, an auctioneer get a reward in the form of a commission. An auctioneer conducts auction on behalf of a seller, as he is

primarily the agent of the seller. However, after the sale, he also becomes of the purchaser who gives the highest bid. An auctioneer has no authority to sell the goods of his principal by private contract or contracts. An auctioneer is an agent to sell property at a public auction. He is primary an agent for the seller, but upon the property being knocked down he becomes also the agent of the buyer. He is mercantile agent within the meaning of Section 2(9) of the Sale of goods Act.

Commission Agent- An appointed to buy and sell goods (make the best purchase) for his Principal. Commission Agent is a mercantile Agent who buys or sells goods for his Principal on the best possible terms in his own name and who receives Commission for his labors. He may have possession of course or not.

Del Credere- An agent who acts as a salesperson, broker and guarantor for the Principal. He guarantees the credit extended to the buyer. He is one who in consideration of an extra commission guarantee his Principal that the third person with whom he enters into contracts on behalf of the principal shall perform their financial obligations that is, if the buyer does not pay, he will pay. Thus, he occupies the position of a surety it as well as an Agent. He is not answerable to his principle for the failure of the third person to perform the contract. A *del credere* agent constituted an exception to this rule.

Besides the above-mentioned agents, there are other types of agents also such as brokers, bankers, clearing agents, forwarding agents, underwriter, estate agents, etc. They also play an important role and perform various functions for and on behalf of their principals.

Bank and Bankers is the agent of the customers because the relationship between banker and customer is generally creditor and debtors. The bankers collect cheque, draft or bills or buys and sales securities on behalf and get commissions from the customer as considerations for services.

Non-Mercantile Agent: The agent who is unrelated with business activities. It includes estate agent, house agent, election agent, promoter, insurance agents, solicitors, clearing and forwarding agent etc. These include attorneys.

Agency between Husband and Wife

Generally, there exists no agency between a husband and wife, except in cases where it has expressly or impliedly been sanctioned that either of them would do certain acts or transactions as the agent of the other. That is, a relationship of agency can come into existence between the two through contract, appointment, or ratification.

A married woman cohabiting with her husband is presumed to have the power to pledge the credit of her husband for necessaries. It means for the domestic use or which may be of use of her husband, herself or children. If such goods or services are necessary to the conditions of life of that family, the husband becomes bound to pay for them. This results in an agency of necessity where the wife can use her husband's credit for what is necessary for her to live. But in cases where they are separated because of the wife's own whims or faults, for no just reason, the husband is not liable for the wife's necessaries. If they are living separately, there is presumed to be no such authority in wife to pledge the credit of her husband.

Wife as Agent

Where a husband and wife are living together, we presume that the wife has her husband's authority to pledge his credit for the purchase of necessaries of life suitable to their standard of living. But the husband will not be liable if he shows that:

(i) he had expressly warned the tradesman not to supply goods on credit to his wife; or

(ii) he had expressly forbidden the wife to use his credit; or

(iii) he already sufficiently supplies his wife with the articles in question; or

(iv) he supplies his wife with a sufficient allowance.

Similarly, where any person is held out by another as his agent, the third-party can hold that person liable for the acts of the ostensible agent, or the agent by holding out. Partners are each other's agents for making contracts in the ordinary course of the partnership business.

Who is a sub-agent?

An agent may sometimes delegate the duty that has been delegated to him by the Principal to somebody else. Ordinarily, an agent cannot delegate the duty he is supposed to perform himself to another person (***Delegatus Non Potest Delegare***), except in particular circumstances where he must, out of necessity, do so. Section 191 of the Indian Contract Act, 1872 defines a sub-agent to be a person employed by and acting under the control of the original agent in the business of the agency.

Delegatus non potest delegare

An agent cannot in ordinary circumstances delegate the duty that was delegated to him. The principle is based upon the idea that when a Principal appoints an agent, he does so by placing his confidence and trust in the agent and might not have similar trust in the work of another person.

Difference between sub-agent and substituted agent

The difference between sub-agent and the substituted agent is very fundamental. When a person, in the capacity of an agent, is asked to name someone for a certain task, the person who is named does not become a sub-agent to the Principal, but a substituted agent.

Illustration

Sarah asks her solicitor to appoint an auctioneer to sell her antique merchandise. Her solicitor appoints Naas as an auctioneer. In this case, Naas is not a sub- agent but is, in fact, a substituted agent for this sale.

Difference between Sub-Agent and Substituted-Agent

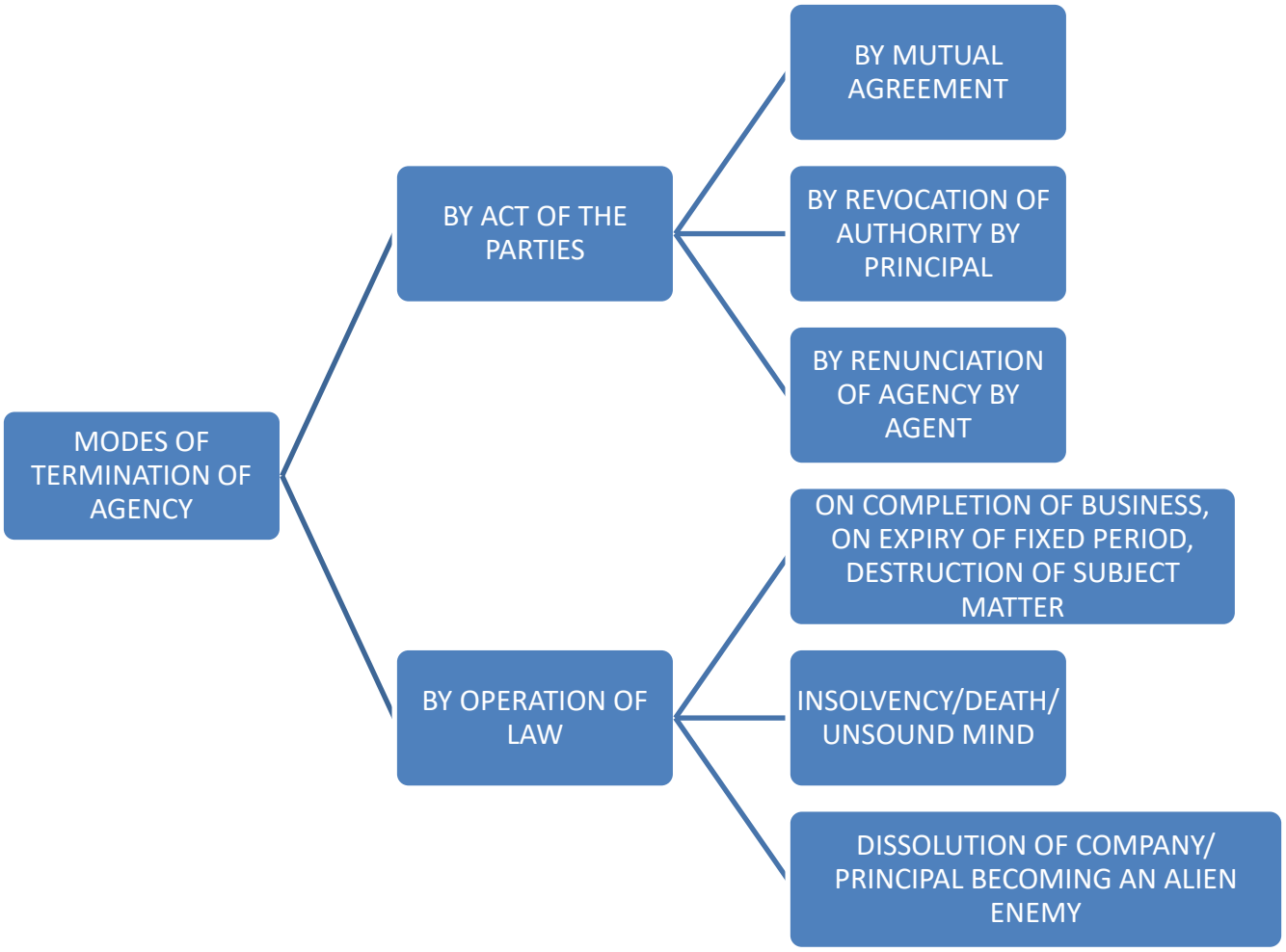
SUB-AGENT	SUBSTITUTED AGENT
Definition: According to Section 191 of the Indian Contract Act, 1872 - A "sub-agent" is a person employed by, and acting undue the control of, the original agent in the business of the agency	Definition: A Substituted agent is a person who is named by the Agent for performing such part of the business of the agency as is entrusted to him
Sub-Agent works under the control of the Agent. He is the agent of the Principle.	Substituted Agent works under the control of the Principle and he is an agent of the agent.

Sub-Agent is responsible to the Agent.	Substituted Agent is responsible to the principal
The Agent is responsible for the acts of the sub-agent.	The agent is not responsible for the acts of the substituted-agent
There is no Privity of contract between the Principle and subagent.	There is privity of Contract between the Principal and substituted-agent.

Distinction between Agent and Servant

AGENT	**SERVANT**
He has the authority to create commercial relationship between the principal and the third party	He ordinarily has no such authority
An agent may work for several principals at a time	He ordinarily works for only one master at a time. A servant usually provides services for only one master
He usually gets commission, i.e., An agent generally received commission for the acts done from his principal	He usually gets salary or wages, i.e., A servant generally receives salary as remuneration from his master
Agent is a person who represents another in matter to relating contracts	but servant is person employed by someone to do in a house for a payment
An agent is bound by lawful instructions of principal but is not under a direct control and supervision. He has a discretionary power	Whereas servant acts under direct control and supervision of his owner. He has no discretionary power.
An agent is employed with an authority to bring the principal into legal relations with third parties. He represents his principal in dealings with third party	but servant does not ordinarily do this kind of acts.
Mistakes made by an agent with authority are attributed to his principal. The agent isn't responsible personally for the act done Agent is a representative of the principal with a high status.	but mistakes made by servant may make his master liable only when it is committed at the time of employment A servant may act as an agent office master with low standard.

TERMINATION OF AGENCY



Termination of Agency (Sec 201- 210)

There are various modes/rules in which the agency can be terminated.

An agency can be terminated or is terminated in the following different ways and with different rules.

1- When the agent's authority is revoked by the Principal (Revocation by the principal) (sec. 201)
2- Revocation may be express or implied (sec. -207)
3- Revocation possible before the authority has been exercised (sec. 203)
4- \Revocation when authority has been partly exercised (sec. 204)
5- Principal to compensate, if there is premature revocation without justification (sec. 205)
6- Principal should give reasonable notice of revocation (sec. 206)
7- When the agent renounces the business of the agency
8- When the business of the agency is completed (Mutual Agreement). By performance- If agency is made for certain purpose on the completion of achievements of purpose the agency is terminated
9- When either of the parties dies or becomes mentally disabled. The death of the principal or agent terminates the contract of agency. (sec. 209)
10- When the Principal is adjudicated an insolvent. Insanity of principal or (unsound mind), If the principal become insane the contract can be terminated. (Insolvency of principal) After the insolvency or bankruptcy of principal if agent acts on behalf of principal, he himself will be liable for that not the principal. So, after the insolvency the contract of agency terminates. Not only principal it also applies in case of agent as well.
11- By the act of the parties/ Destruction of the subject matter: - If the subject matter for which agency was created destroyed then it terminates the contract of agency.
12- Rescinding (Cancel) the authority by the principal
13- By expiry of time fixed: (sec. -208)- If time is fixed for the agency, whether or not purposes are fulfilled, and the agency is terminated after expiry of time fixed. If agency is made for some specific purpose and for a fixed time period the agency terminates when purposes are achieved or time is lapse.
14- By dissolution of company: - If the company dissolves the agent will have no more authority provided by the company or principal, and then contract of agency terminates
15- By operation of law /By the happening of any event rendering the agency unlawful: - If subsequent to the contract, law change in such way which invalidated the transaction, then the agency also terminates. Subsequent to the contract, if principal and agent became alien enemy the contract of agency also terminated.
16- On termination of sub-agent's authority. (sec. -210)
17- The death of one of the joint agents will terminate the agency only as far as he is concerned, while it will continue to be valid as regards the other surviving agents in the absence of contrary intention.

18- On the principal becoming an alien enemy.

There are certain rules regarding the revocation of an agent's authority. It can be revoked any time before the authority has been exercised. If according to the terms of the contract between the two, the agency has to continue up-to a certain time, any prior revocation by the Principal shall be compensated for, to the agent. The termination does not take effect before it has been communicated to the agent. Termination of the authority of an agent terminates the authority of all the sub-agents under him.

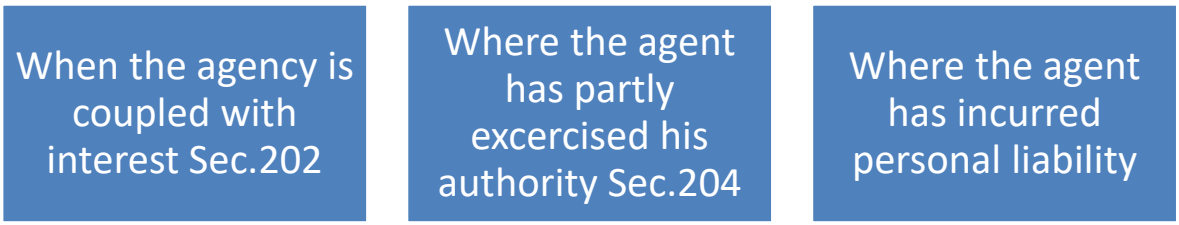
The parties by an agreement can create a contract of agency. Similarly, by an agreement they can terminate it.

Exceptions

Irrevocable Agency: When an agency cannot be put an end to, it is said to be irrevocable agency. An agency is irrevocable where the agent himself has an interest in the property which forms the subject-matter of the agency. (sec.- 202)

Time when Termination takes Effect: The termination of the authority of an agent does not, so far as regards the agent, take effect before it becomes known to him. As regards third persons, it terminates when it comes to their notice.

CIRCUMSTANCES WHERE AGENCY IS IRREVOCABLE-



***Liability of Agent to Third Parties**

Agent is not personally liable for a contract, (the principal is), provided he acted within his authority.

NOTE: – may be liable to Third Party if Third Party was unaware of agency but agent would be entitled to be indemnified by principal.

If Agent acts beyond his authority then he is personally liable.

According to Black Law's Dictionary "A fiduciary relationship created by express or implied contract or by law in which one party may act on behalf of another party and bind the other party by words or actions"

The principal is only responsible up to the extent to which the agent is assigned rights to do act beyond this boundary the principal isn't responsible but the agent is self-responsible. While making contract there may be or may not be consideration.

Agency is process of delegating the authority by a principal to the agent to act and represent from his behalf. The act done and representation made by an agent aren't the act of the agent but are regarded as the act of principal. Therefore, rights and duties created by agent are the right and duties of the principal. However, some acts relating to personal skill cannot be done through agency.

Following act can be done through Agency: -

- To do at for himself.
- To run commercial transaction by agent.
- To do transaction with third person.
- To establish legal relation with principal and third person

We may note that the contract relating to agency is legally recognized in following criteria: -

- Whatever a person can lawfully do he may also does the same through an agent.
- He who acts through another is considered to have acted personally.

All Contracts are agreements but all agreements are not contracts.

Agent's duties to Principal

An agent owes a number of duties to his principal who varies in degree according to the nature of agency and circumstances of a case.

An agent has following duties towards his Principal:

Duty to act according to directions or custom of trade – Sec. 211 He has to conduct the business of the Principal according to the directions of the Principal. Duty to follow customs, Where the principal has not given any instructions it is the duty of agent to follow the customs prevailing in the same kind of business at the place where the agent conducts his business.

- **To act under the terms of the contract: -** An agent is obliged to perform each and every term mentioned in the contract towards his principal.

- **Duty to act with reasonable care and skill**/Duty to carry out the work with reasonable care, skill and diligence: - Sec. 212 An agent is bound to conduct the business he is supposed to conduct with as much skill as a person on his position ordinarily holds. Agent is always bound to act with reasonable care, skill and diligence as he possesses and to make compensation to his principal in respect of direct consequences of his neglect or want of skill or misconduct.

- **Duty to render account** – Sec. 213 An agent is supposed to show the relevant accounts to the Principal as and when the Principal demands. Duty to keep and render separate and correct accounts, an agent must keep the money and property of the principal separate. He must keep true, correct and proper accounts of his all transactions on behalf of his principal and to be prepared all times to produce them to his principal.

 Duty not to deal on his own account (Ss. 215 & 216) Accounting must maintain separate accounts for the principal's funds & for the agent's funds, no intermingling is permitted o Repudiation of contract by principal when agent deals on his own account -sec. -215 o Principal's right to claim benefit when agent acting on his own account – sec. 216.

 Duty to communicate with Principal and to obtain Principal's instructions – Sec. 214, An agent has the duty to communicate any difficulty whatsoever he may come across while doing the Principal's business. He is supposed to perform due diligence in this regard. Duty to communication in cases of difficulty, it will be also the agent's duty to communicate the principal and obtain his instructions while carrying the business agency.

 Duty to follow instructions/ directions:-(Section 211) The first and foremast duty of an agent is to act strictly within the scope to the authority conferred upon him and to carry out the instructions of the principal. It is duty of an agent in cases of difficulty, to use all reasonable diligence in communicating with his principal and seeking to obtain his instruction

 Duties to disclose all material circumstances and to obtain the Principal's consent in dealings – Sections 215 & 216 If any material fact has been concealed or the business is not carried out in the manner that the Principal directed, the Principal can repudiate the contract between them. An agent must not use confidential information entrusted to him by his principal for his own benefit or against the principal

 Duty to pay sum received for Principal – Sections 217 & 218, If the agent carries out the business in the manner, he wanted to perform it, rather than on the directions of the Principal, the Principal may claim from the agent any benefit he may have achieved through doing so. An agent is duty bond to pay sums received to the principal on his account.

 Duty not to make secret profit from agency: -An agent's duty is to be loyal to his principal. It an agent makes secret profit from its agency; the principal can demand all the profits from the agent. The agent must not make secret profit from the extract agency. He must disclose any extra profit that he may make.

 Duty to protect and preserve the interest entrusted to him – Section 219An agent must not allow his interest conflict with his duty. For example, he must not compete with his principal. Loyalty: actions must be strictly for the benefit of the principal, not in the interest of the agent or a third party

 Duty to act with good faith: - An agent must act in good faith while representing the principal. Agent should not have any intention to cause harm to the principal. Obedience: must follow lawful & clearly stated instructions of the principal

 Duty not to delegate his authority (Sec. 190), An agent must not delegate his authority to delegate authority agent must have the permission of principal. As much as possible agent himself performs on behalf of principal. An agent must not delegate his authority to as sub-agent. This rule is based on the principle '*Delegatus non protest delegare'*. Delegate cannot further delegate (Section 190). But there are exceptions for this principle.

 Not disclose confidential information- Though the agent may have authority from his principal to deal on his accounts, agents are not allowed to disclose or leak the confidential information of the principal. It is the duty of agent to maintain privacy and secrecy of such confidential information of the principal.

 An agent should not set up an adverse title to the goods which he receives from the principal as an agent. Don't exceed authority which is given by the principal.

Illustration
Kala directs her agent Saima to buy a certain house for her. Saima does not buy the house, and tells Kala that it cannot be bought due to certain reasons, but ends up buying the house herself. In this case, Kala has the right to claim the house from Saima at the price which Saima bought it for herself.

If any material fact has been concealed or the business is not carried out in the manner that the Principal directed, the Principal can repudiate the contract between them.

Principal's duties to Agent

The Principal has duties towards the Agent:

 The Principal is bound to indemnify the agent against any lawful acts done by him in the exercise of his authority as an agent.
 The Principal is bound to indemnify the agent against any act done by him in good faith, even if it ended up violating the rights of third parties.
 The Principal is not liable to the agent if the act that is delegated is criminal in nature. The agent will also in no circumstances be indemnified against criminal acts.
 The Principal must make compensation to his agent if he causes any injury to him because of his own

competence or lack of skill. Compensation: must pay the agent for services rendered, & do so in a timely manner

 Liability of Principal for Agent's Fraud or Misrepresentation. According to Section 238, The Principal is liable for any fraud or misrepresentation made by his agent during the course of his business, as if the fraud or misrepresentation was done by the Principal himself.

 Reimbursement & indemnification: must reimburse agent that disburses money at principal's request. Must compensate (indemnify) agent for any costs incurred as a result of principal's failure to perform the contract

 Cooperation: must cooperate with & assist an agent in performing his duties Provide safe working conditions. Agent's Rights & Remedies: has a corresponding right for every duty of the principal.

 Liability of Principal to Third Parties for The Acts of Agent (Ss. 226 to 228) Principal is liable for the acts of agent, The principal is liable for all the acts of an agent which are lawful and within the scope of agent's authority. The contracts entered into by the agent on behalf of the principal have the same legal consequences as if these contracts were made by the principal himself. When agent exceeds his authority: Whether the acts done within the authority are separable from the acts done beyond authority. If yes- The principal is not bound for excess acts done by the agent. If no – The principal is not bound by the transaction and the principal can repudiate the whole transaction.

Rights of Principal

 Right to repudiate the Transaction

 To claim any resulted benefit from Agency

 Right to Recover Damages

 To Resist Agent's claim for Indemnity

 Normal contract & tort remedies, Principal's Rights & Remedies; has contract remedies for breach of fiduciary duties & tort remedies for Main actions available:

 Constructive trust: imposed by courts when agent withholds monies that belong to principal, allows principal to get what he deserves

 Avoidance: principal may avoid any contract entered into with agent if agent breaches agency duties

 Indemnification: principal can be sued by a third party for an agent's negligent conduct, & in certain situations the principal can turn around & sue agent for an equal amount of damages

Rights of Agent

There are number of rights which an agent has against his principal and third parties. These areas follows-

 Right to get remuneration, (sec – 219) If it is provided in the contract of agent has right to receive reasonably remuneration for his work for principal. An agent, when he has wholly carried out the business of the agency has the right to be remunerated of any expenses suffered by him while conducting the business. The agent has a right to retain any sums received on account of the principal in the business of the agency, all moneys due to himself in respect of his remuneration and advances made or expenses properly incurred by him in conducting such business

 Right of Lien-(sec – 221)-If agent is not paid lawful charges remunerations or expenses by his principal and of goods of principal are under his control he can retain the goods until the lawful charges is paid by principal. This right last till the lawful charges are fully satisfied. Right of Lien on Principal's property means the agent has the right to hold (keep with himself) any movable or immovable property of the Principal until his due remuneration is paid to him by the Principal. In the absence of any contract to the contrary, an agent is entitled to retain goods, papers and other property.

 Right to get indemnity- (sec – 222- 224) If principal removes the agent without concrete reason agent has right to claim compensation from his principal. Therefore, agent has also right to continue business performance until nothing is wrong done by agent. The agent has the right to be indemnified against all the lawful acts done by him during the course of conducting the Principal's business. Indemnified by principal in respect of the contract and all losses/liabilities provided the agent acted within his authority.

- Indemnity for civil wrong- (sec 223)
- No indemnity in case of criminal offences (sec 224)

Right of retainer– (sec – 217 &218) An agent has the right to retain any remuneration or expenses incurred by him while conducting the Principal's business.

Right to Compensation– (sec 225) The Agent has the right to be compensated for any injury or loss suffered by him due to the lack of skill and competency of the Principal.

Right of stoppage in transit-Where he has bought goods for his principal by incurring a personal liability, he has a right of stoppage in transit against the principal, in respect of the money which he has paid or is liable to pay. Where he is personally liable to the principal for the price of the goods sold, he stands in the position

of an unpaid seller towards the buyer and can stop the goods in transit on the insolvency of the buyer

Delegation

General rule: The general rule is that an agent cannot lawfully employ another act, which he has expressly or impliedly undertaken to perform personally.

Exceptions

 There is a custom or usage of trade to that effect.

 Where power of the agent to delegate can be inferred from the conduct of the both the principle and the agent.

 When the principal is aware of the intention of the agent to appoint sub agent by the does not object to it.

 When principle permits appointment of a sub-agent.

 If the nature of the agency is such that the sub-agent is necessary

 Extent of Agents authority

 Lawful Acts

 Emergency Authority

 Ostensible Authority

Liability of principal

Sec 226- for contracts relationship between the principal and the 3rd persons becomes bound towards a third person as if he entered into the contract himself.

- Principal's liability when agent exceeds authority- principal is not liable.
- Position when the authorized and unauthorized acts are separable sec- 227
- Principal's liability for notice to the agent – sec 299

- Principal's liability for agent's fraud, misrepresentation and torts (sec -238)-do not fall within their authority – it does not affect their principals.

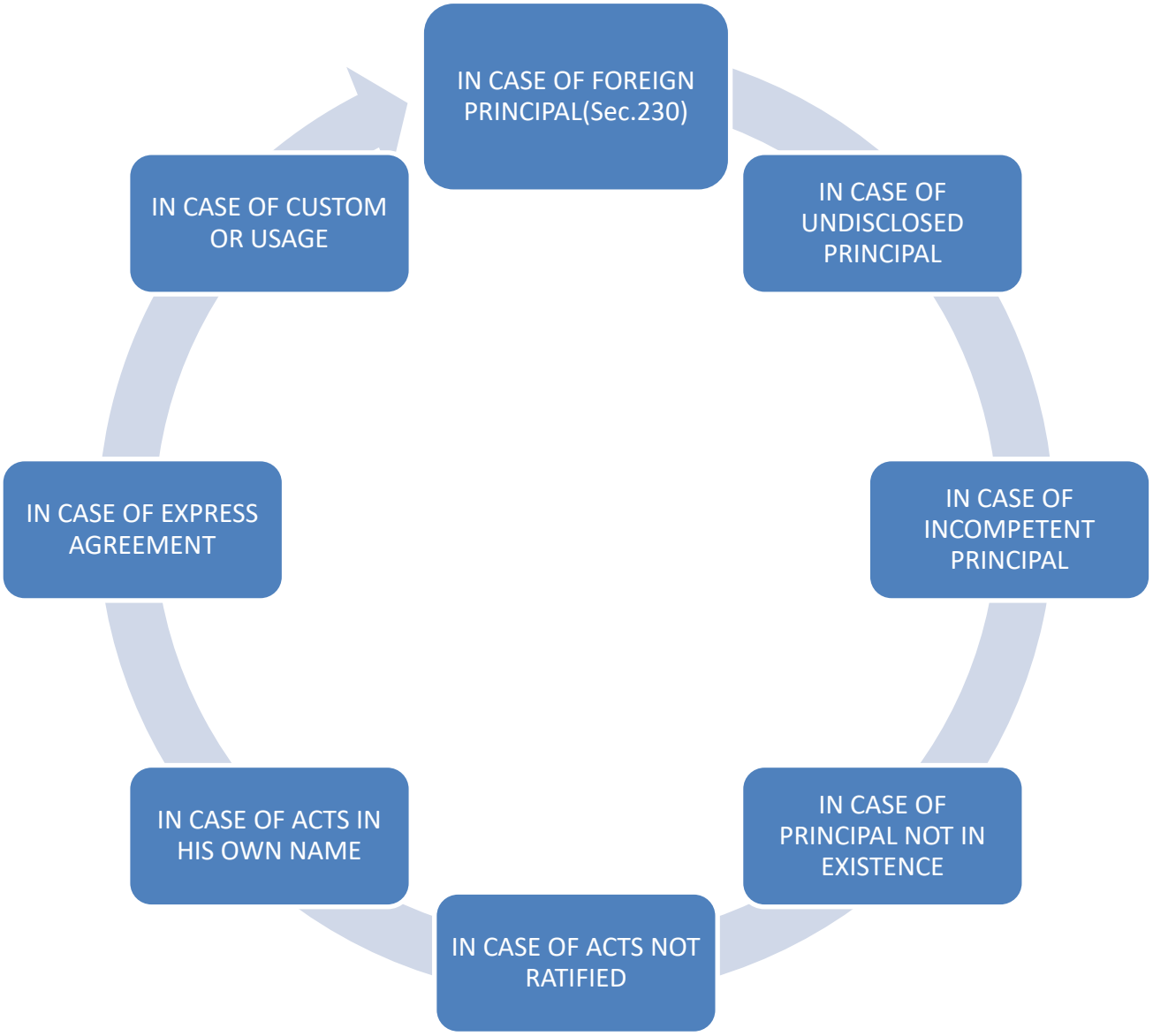
Personal Liability of an Agent

General Rule – No personal liability [Sec.230], In the absence of contract to contrary, an Agent cannot –

(a) personally, enforce contracts entered into by him, on behalf of his Principal,

(b) be held personally liable for them. This is because the Agent merely acts on behalf of his Principal. Thus, he enjoys immunity from being personally sued.

CIRCUMSTANCES WHERE AGENT BECOMES PERSONALLY LIABLE



Foreign Principal [Sec.230]: Where the contract is made by an Agent for the sale or purchase of goods for a merchant resident abroad.

Undisclosed Principal [Sec.230]: Where the Agent does not disclose the name of his Principal.

Right of undisclosed principal to require performance – sec 231

Right of third person against undisclosed principal – sec 232

Liability of pretended agent – sec 23

Principal cannot be sued [Sec.230]: Where the Principal, though disclosed, cannot be sued, e.g., Principal becoming of unsound mind, subsequent to appointment of agent.

Acting for a Principal not in existence: Where the Agent acts for a Principal who is not in existence at the time of making contracts, he shall be personally held liable e.g., contracts entered into by Promoters before incorporation of a Company are made in their personal capacity and hence personally liable.

Agency coupled with interest [Sec.202]: Where the Agent has an interest in the subject matter of agency.

Agent guilty of Fraud [Sec.238]: Where an Agent is guilty of fraud or misrepresentation in matters that are outside the scope of his authority, he is personally liable, and do not affect his Principal.

Agent exceeds authority & act not ratified: Where an Agent acts either without any authority or exceeds his authority, he shall be held personally liable when the principal does not ratify his acts.

Agent receives or pays money: Where an Agent receives or pays money by mistake or fraud to a third party, he shall be personally liable to such third party. Also, he can personally sue the third party if the fraud or mistake is accountable to such third party.

Express Agreement for personal liability: Where an Agent expressly agrees to be personally bound.

Execution of Contract in his own name: Where an Agent executes a contract in his own name, without disclosing that he is acting as Agent for a Principal, he shall be personally liable, e.g. An Agent signs a Negotiable Instrument without making it clear that he is signing it as an Agent only, he shall be held personally liable on the same. He would be personally liable as Maker of P/N, even though he may be described as Agent

Trade custom or usage: Where trade usage or custom makes an Agent personally liable.

Agent with special interest: An Agent with special interest or with a beneficial interest, e.g., a Factor or Auctioneer, can sue and be sued personally. [*Subramanya v. Narayana*]

Action against Agent or Principal [Sec 233]: Where the Agent is personally liable, a person dealing with him may hold – (a) either him or (b) his Principal or (c) both of them liable. The liability of Principal and Agent is "joint and several".

Exclusive liability [Sec. 234]

Where a person has made a contract with an Agent and –Induces such Agent to act upon it in the belief that only his principal would be held liable,

Induces the principal to act upon it in the belief that only his Agent would be held liable.

Such Third person cannot later on, shift the liability on to –

The Agent, or the principal, respectively.

Liability for contracts:

Disclosed / Partially disclosed principals: liable to a third party for contract made by the agent

Undisclosed principals: agent, not the principal, is liable as a party on the contract. However, if principal has a duty to perform & fails to do so, agent is entitled to indemnification by principal if third party seeks restitution from agent

Liability for Agent's Torts: Principal may be liable for agent's torts if they result from the following:

Principal's own tortious conduct

Principal's authorization of tortious act

Agent's unauthorized but tortious misrepresentation (if representations were made within scope of the agency)

Doctrine of *Respondeat Superior*: principal-employer is liable for any harm caused to a third party by an agent-employee in the scope of employment. This doctrine imposes vicarious liability on the employer.

Scope of employment: is employee doing what is normally expected of him, is employee "on the job" from a time & location standpoint, does the employee's act benefit the employer

Liability for employee's negligence: act causing the injury must have occurred within the scope of employment, employee going to & from work or to & from meals is usually considered outside the scope of employment

Notice of dangerous conditions: employer has assumed knowledge of any dangerous conditions discovered by an employee & pertinent to employment situation

Liability for employee's intentional torts: if torts committed within scope of employment

Liability for Independent Contractor's Torts: General rule is that the employer is not liable.

Test: how much control the employer exerts over the contractor. Exceptionally hazardous activities (blasting) that are contracted are an exception in that there is no shield for the employer

Liability for Agent's Crimes: General rule is that a principal or employer is not liable for agent's or employee's crime even if agent acted within scope of authority or employment.

Parties agreed that the agent will act on behalf & instead of the principal in negotiating & transacting bus with 3rd persons. 3 types

Special: hired for a ltd purpose (CPA, attorney)

General: employer/employee relations (wider affairs corporate lawyer)

Universal: hired to do everything

Fiduciary: fundamental to agency, means that trust & confidence are involved

Employer-Employee Relations: An employee is someone whose physical conduct is not entirely controlled, or subject to control, by the employer. Employees who deal with third parties are typically deemed to be agents.

Employer-Independent contractor Relations: an independent contractor is not controlled by another or subject to another's control with regard to physical conduct. He may or may not be an agent. Main determinant here is how much control is exercised over the contractor.

Conclusion

Contracts establishing a relationship of the agency are very common in business law. These can be express or implied. An agency is created when a person delegates his authority to another person, that is, appoints them to do some specific job or a number of them in specified areas of work. Establishment of a Principal-Agent relationship confers rights and duties upon both the parties. There are various examples of such a relationship: Insurance agency, advertising agency, travel agency, factors, brokers, del credere agents, etc.

UNIT – IV: Indian Partnership Act – Definition – Nature, Mode of determining the existence of Partnership – Relation of Partner to one another – Rights and duties of partner – Relation of partners with third parties – Types of partners – Admission– Retirement, and Expulsion of partners Dissolution of Firm – Registration of Firms.

Indian Partnership Act, 1932

ARRANGEMENT OF SECTIONS

CHAPTER I

PRELIMINARY

SECTIONS

CHAPTER II

THE NATURE OF PARTNERSHIP

CHAPTER III

RELATIONS OF PARTNERS TO ONE ANOTHER

CHAPTER IV

RELATIONS OF PARTNERS TO THIRD PARTIES

CHAPTER V

INCOMING AND OUTGOING PARTNERS

CHAPTER VI

DISSOLUTION OF A FIRM

CHAPTER VII

REGISTRATION OF FIRMS

CHAPTER VIII

SUPPLEMENTAL

Partnership is one of the specific contracts which were a part of the Indian Contract Act,1872. In 1930, however, the provisions relating to partnership contract were repealed and a separate Act called the Indian Partnership Act, 1932 was passed which is in force till today. It extends to the whole of India except the State of Jammu and Kashmir. It has come into force on the 1st day of October 1932 except Section 69, which came into force on the 1st day of October 1933.

Partnership in India are governed by the Indian Partnership Act,1932. Partnership is formed as result of an agreement between two or more persons who have agreed to share the profits of a business carried by all or any of them acting for all. Hence the general principles of law of contracts and agency (as contained in the Indian Contract Act,1872) also apply to partnerships except where the Act specifically provides to the contrary. The Act mainly contains the provisions relating to the formation of partnership the rights, duties and liabilities of partners and the procedure for its and various types of partners including the position of a minor partner the procedure for its dissolution etc.

Meaning and Definition

Partnership is the relation between persons who have agreed to share the profits of a business carried on by all or any one of them acting for all (Section 4). It, therefore, follows that a partnership consists of three essential elements:

(i) It must be a result of an agreement between two or more persons.

(ii) The agreement must be to share the profits of the business.

(iii) The business must be carried on by all or any of them acting for all. All these essentials must co-exist before a partnership can come into existence

Example: A manager, as a part of his remuneration, may be given a share in profits of the business.

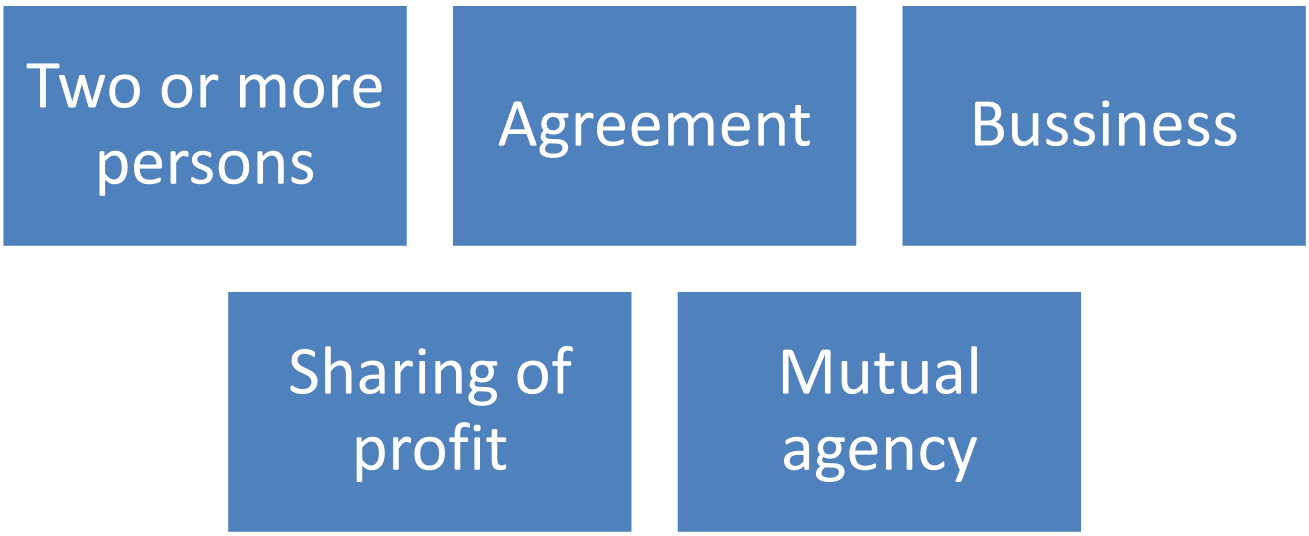
MEANING OF 'PARTNER', 'FIRM' AND 'FIRM NAME' [SECTION 4] Persons who have entered into partnership with one another are called individually ‘partners’ and collectively ‘a firm’, and the name under which their business is carried on is called the 'firm name'.

MAXIMUM LIMIT ON NUMBER OF PARTNERS

(a) In case of a partnership firm carrying on a banking business-maximum10 members

(b) In case of a partnership firm carrying on any other business-maximum 20 members If the number of partners exceeds the aforesaid limit, the partnership firm becomes an illegal association.

ESSENTIAL ELEMENTS OF PARTNERSHIP



Essential Elements of Partnership

1) **Two or more Persons -** There must be at least two persons to form a partnership and all such persons must be competent to contract. According to Section 11 of the Indian Contract Act, 1872, every person except the following, is competent to contract:

(i) Minor

(ii) Persons of unsound mind (e.g., lunatics, idiots), and

(iii) Persons disqualified by law (e.g., alien enemies, insolvents)

Shivaram v. Gauri Shankar in this case court held that 'there must be at least two persons and such persons must be competent to contract but after the formation of partnership, a minor can be admitted to the benefits of partnership with the consent of all other partners of the firm as per the provisions of Section 30 of the Act'.

The partnership can be formed between Companies but firms can't form partnership because Act makes it clear that by way of an agreement between competent person partnership can be established company being artificial person can be a party to the 'partnership deed' but unlike company firm is not legal person and therefore, firm is not capable of entering in to partnership deed. (*Dulichand v. Comissioner of income tax, Nagpur*)

2) **Agreement:** Partnership must be the result of an agreement between two or more persons. An agreement from which relationship of Partnership may arise may be express or implied from the act done by partners and from a consistent course of conduct being followed, showing mutual understanding between them. It may be oral or in writing. The essential element is further clarified under Section 5. Section 5 provides that the relation of partnership arises from contract and not from status. That is why; a Hindu undivided family carrying on a family business is not considered as

partnership firm. The reason is that the coparceners of a Hindu undivided family acquire interest in the business because of their status (i.e., birth) in the family and not because of any agreement between them. Thus, partnership is voluntary and contractual in nature.

3) **Business** - There must exist a business. According to Section 2(b), the term 'Business' includes every trade, occupation and profession. For example, when two or more persons agrees to share the income of the joint property (e.g., rent from a building). It does not amount to a partnership because there does not exist any business. Similarly, an association created for charitable, religious or social purpose cannot be regarded as partnership because there does not exist any business. It may also be noted that an agreement to carry on business at a future time does not result in partnership unless that time arrives and the business is started. [*R.R. Sorna, v. Reuben*]

When goods purchased for self-Consumption and not for the re-sale then it is not considered as business transaction, accordingly there will be no Partnership. (*Coope v. Eyre*) Business should be carried on and business should be of lawful business as *per* Sec. 23 of the Contract Act, 1872.

4) **Sharing of Profits** – There must be sharing of profits. Unless otherwise agreed, sharing of profits implies sharing of losses too. It may also be noted that sharing of profits is a *prima facie* evidence and not a conclusive evidence of partnership. Because of that everyone who shares the profits of business need not necessarily be a partner. For example, a manager who receives a particular share in the profits of a business as part of his remuneration is simply an employee and not a partner.
5) **Mutual Agency** There must existence of a mutual agency relationship among the partners. 'Mutual Agency' relationship means that each partner is both an agent and a principal. Each partner is an agent in the sense that he has the capacity to bind other partners by his acts done. Each partner is a principal in the sense that he is bound by the acts of other partners.

The mutual relationship of agency is emphasised in Section 18 of the Indian Partnership Act, which reads as under: "Subject to the provision of this Act, a partner is the agent of the firm for the business of the firm. "Moreover, the use of the words 'carried as by all or by any of them acting for all', in Section 4 of the Act clearly emphasises agency relationship."

Because of the existence of mutual agency relationship amongst the partners, the law of partnership is also regarded as an extension of the general law of agency. It may be noted that the mutual agency relationship distinguishes a partnership from co-ownership and simple agreement for sharing profits.

In *cox v. Hickman* it has been held that although the trustees were managing the business of smith and son but they did not become partners. Because trustees were acting as agents but they were not the principals.

NATURE OF A PARTNERSHIP FIRM

A partnership firm is not a person in the eyes of law [except under Section 2(31) of the Income Tax Act, 1961]. It has no separate legal entity apart from the partners constituting it [*Malabar Fisheries Co. v. CIT*]. Thus, firm themselves cannot enter into a contract for partnership though their partners can.

For example, two firms, namely, M/s A&B and M/s X&Y, themselves cannot form a new partnership though the partners of the individual firms can form a partnership.

Partnership is a form of business in which two or more persons come together with their resources to invest in a common business with the purpose of sharing the profits of the business.

There are some limitations of Sole proprietorship viz. limited capital, no risk sharing, limited skill etc. Partnership is the solution to such problems faced by a sole proprietor. In a partnership a few persons can come together to start a new business with an agreement to share the profits and losses of the business.

TEST OF PARTNERSHIP [SECTION 6]

According to Section 6, "In determining whether a group of persons is or is not a firm, regard shall be had to the real relation between the parties as shown by all relevant facts taken together." The real relation between the partners can be ascertained as under:

i. If there is an express contact: The real relation is ascertained from the terms of partnership contact.

ii. If there is no express contract: The real relation is ascertained from all the relevant factors such as contract of parties, books of accounts, statement of employees etc.

The Section 6 is based on the principle laid down in an important case of *Cox v. Hickman* (1860). The analysis of this section reveals that the following is the true test of partnership:

(a) The partnership is determined from the real relation between partners and such relation must show the existence of mutual agency relationship, and

(b) The sharing of profit is *prima facie* evidence but not a conclusive test of partnership.

A group of persons shall be regarded as partnership if the real relation between the partners shows that all essential elements of partnership are present. Cases where the Partnership Relation does not Exist [Explanations I and II to Section 6]

The two cases where the partnership relation does not exist are given below:

(a) Joint owners of some property sharing profits or gross returns arising from the property [Explanation I to Section 6).

Example X and Y jointly purchased a building and contributed capital equally to convert the building into a hotel. They let it out on a rent of as 1,00,000 per annum and share the rental Income equally. Here X and Y are regarded as co-owners and not partners. Because X and Y do not have mutual agency relationship. [Leading case: *Govind Nair v. Maga*]

(b) Persons sharing the profits but not having mutual agency [Explanation II to Section 6] - The sharing of profits is prima facie evidence. This statement is true in the sense that some persons though sharing the profits of a business are not regarded as partners since they do not have mutual agency relationship. Such persons are:

(i) Money lender (who has lent money to the firm) who receives a share of profits: [*Mallow Mantle & Co. v. The Court of Wards and Cox v. Hickman*]

(ii) Widow or child of a deceased partner sharing profits; Sometimes on the death of the partner the widow or child of the deceased partner may be given share of profits according to terms and conditions of contract. Merely sharing profits such widow or child doesn't become partner in the firm [*Holme v. Hammond* in this case court held that executors of deceased partner who shares profit had not become partners and therefore they couldn't made liable.

I.T. Commissioner v. Kesharmal Keshardeo ` there is no bar to the widow or son of the deceased partner to join firm after the death of the partner based on the terms and conditions provided in the agreement.

(iii) a servant or an agent who receives a share of profits as part of his remuneration; In partnership sometimes share may be given profits to the servants or agents to carry out the firm's business effectively merely, sharing profits he doesn't become partner in the partnership [*Munshi Abdul Latif v. Gopeshwar and Walker v. Hrisch*]

iv)The seller of the goodwill sharing the profits. seller of goodwill also may be entitle to the share in the profits in the form of consideration for the sale of goodwill, such person doesn't become partner. [*Rawlinson v. Clarke and Pratt v. Strick*]

Who are not partners?

The following persons are not treated as partners:

(a) Members of a Hindu undivided family (HUF) carrying on family business.

(b) Burmese Buddhist husband and wife carrying on a business.

Thus, partnership can be presumed when:

(a) there is an agreement to share the profits of a business and

(b) The business must be carried on by all or by any of them acting for all. Even when the exclusive power and control is vested with one partner under an agreement, partnership shall be presumed to exist. *[K.D. Kamath & Co. v. Commissioner of Income Tax,*]

PARTNERSHIP AND CO-OWNERSHIP

Co-ownership means joint ownership of some property. The two or more persons who own some property jointly arc called co-owners. As per Explanation I to Section 6, the joint owners of some property sharing profits or gross returns arising from the property do not become partners.

PARTNERSHIP	**CO-OWNERSHIP**
It arises from an agreement.	It may or may not arise from agreement.
It is formed to carry on a business.	It may or may not involve carrying on a business.
It involves profit or loss.	It may or may not involve profit or loss.
Partners have a mutual agency relationship.	Co-owners do not have a mutual agency relationship.
The persons who form partnership are called partners	The persons who own some property jointly are called co-owners.
The maximum limit of partners is 10 for a banking business and 20 for any other business.	There is no maximum limit of co-owners.
A partner cannot transfer his share to a stranger without the consent or other partners.	A co-owner can transfer his share to a stranger without the consent of other co-owners.
A partner has no right to claim partition of property but he can sue the other partners for the dissolution of the firm and accounts.	A co-owner has the right to claim partition of property.
A partner has a lien on the partnership property for expenses incurred by him on behalf of the firm.	A co-owner has no such lien.

PARTNERSHIP AND HINDU UNDIVIDED FAMILY (HUF)

According to the Hindu Law, "Hindu undivided family is a family which consists of all persons lineally descended from a common ancestor and includes their wives and unmarried daughters." Three successive generations in the male line (son, grandson, and great-grandson) who inherit the ancestral property are called 'Coparceners'.

The property which a man inherits from any of his three immediate mule ancestors (i.e., his father, grandfather and great grandfather), is called 'ancestral property'.

There are two schools of Hindu Law—*Dayabhaga* and *Mitakshara*. Under *Dayabhaga* School of Law, which is applicable to West Bengal and Assam, a son acquires an interest in the ancestral property only after the death of his father. Under *Mitakshara* School of Law, which is applicable to whole of India (except West Bengal and Assam), each son acquires by birth an interest in the ancestral property. The partnership and Hindu undivided family can be distinguished as under:

PARTNERSHIP	**HINDU UNDIVIDED FAMILY (HUF)**
It arises from an agreement.	It arises by status or operation of law.
It is governed by the Indian Partnership Act. 1932.	It is governed by Hindu Law.
The persons who form partnership are called 'Partners'.	The persons who are the members of the HUF are called 'Coparceners'.
The maximum limit of partner is 10 for a banking business and 20 for any other business.	There is no maximum limit of coparceners.
A person can be admitted to the existing partnership with the consent of all other partners.	A male person becomes a member merely by his birth
A minor can be admitted to the benefits of partnership with the consent of all the partners.	A male minor becomes a member merely by his birth.
A female can become a full-fledged partner.	A female does not become member merely by her birth.
Each partner has implied authority to bind the firm by acts done in the ordinary course of the business of the firm.	Only the Karta has implied authority.
The liability of all the partners is unlimited,	Only Karta's liability is unlimited and the liability of the other coparceners is limited only to their shares in the family property.
Each partner has a right to inspect and copy the account books and ask for the account of profits and losses.	The coparceners have no right to ask for the account of past dealings.
Unless otherwise agreed partnership is dissolved on the death of any partner.	The Hindu undivided family continues to operate even after the death of a coparcener.

Partnership and Company

A company is an artificial person created by law having, perpetual succession, separate legal entity with limited liability and a common seal.

Partnership	**Company**
A firm doesn't enjoy separate legal existence. Partners are collectively termed as a firm and individually as partners	It has a separate legal existence. A company is separate from its members.
The liability of partners is unlimited.	Liability of its members is limited to the extent of the value of shares held by them.
It does not enjoy a long lease of life. Death, sickness, retirement of partners may affect its existence so as to dissolve it. Dissolution may take place on certain grounds.	It enjoys perpetual existence. Even on the death of all the members company can't come to an end.
Minimum number of partners is two. Maximum may be ten (in case of banking business) or twenty (in case of nonbanking business).	A public company must have a minimum 7 members to start with. However, there is no limit on the maximum number of members of a company. In case of private company minimum 2 maximum 200 members.
A partner cannot transfer his share without the consent of other partners.	A member may transfer his shares as and when he likes. There is no restriction on transfer of shares.
Each partner represents the other partners so as to bind and be bound to others.	There is no agency relation-ship among members of a company as they do not bind each other with their actions.
Profits are distributable among partners as per the partnership deed.	There is no such compulsion that profits must be distributed. Only when the dividends are declared that the members get a share of profits.
The entire management lies with all the partners.	Members cannot participate in management unless appointed as directors. However, members may attend and vote at meetings while making the appointment of Directors, Auditors etc.

Property of the firm the joint property of all its partners	Property of the company is not the properly of its members as the company and members have separate legal existence.

DURATION OF PARTNERSHIP

On the basis of duration, the partnership can be classified in to two types namely

1) Partnership at will

2)Particular Partnership.

Partnership at Will (Section 7]

When there is no provision in partnership agreement for duration of the partnership, the partnership is called 'Partnership at Will'. A partnership at will may be dissolved by any partner by giving a notice in writing to all other partners of his intention to dissolve the firm.

Particular Partnership [Section 8] When a partnership is formed for a specific venture or for a particular period, the partnership is called a 'Particular Partnership'. Such partnership comes to an end on the completion of the venture or on the expiry of the period. If such partnership is continued after the expiry of term or completion of the venture, it is deemed to be a partnership at will. A particular partnership may be dissolved before the expiry of the term or completion of the venture only by the mutual consent of all the partners.

TYPES OF PARTNERS

- **ACTUAL OR OSTENSIBLE PARTNER**
- **SLEEPING OR DORMANT PARTNER**
- **NOMINAL PARTNER**
- **PARTNER IN PROFITS ONLY**
- **SUB PARTNER**

Actual or ostensible partner	**Sleeping or dormant partner**	**Nominal partner**	**Partner in profits only**	**Sub-partner**
He takes an active pan in the conduct of the business.	He does not take an active pan in the conduct of the business.	He lends his name to the firm without having any real interest in the firm. He neither contrib. tries to the capital nor shares the profits or takes part in the conduct of the business of the firm	He shares the profits only and not losses,	He is a third person with whom a partner agrees to share his profits derived from the firm
He along with other partners is liable to third panics for all the acts of the firm.	He along with other partners is liable to third panics for the acts of the firm.	He along with other partners is liable to third panics for all acts of the firm as if lie is an actual partner.	He along with other partners is liable to third parties for all the acts of the firm.	He has no rights against the firm nor is he liable for the acts of the firm.
He must give public notice of his retirement.	He need not give public notice of his retirement.	He must give public notice of his retirement	He must give public notice of his retirement.	There is no question of public notice at all since he is a third person and not a partner.
His insanity or permanent incapacity to perform his duties may be a ground for the dissolution of	His insanity or permanent incapacity to perform his duties is no ground for the dissolution of the firm.	His insanity or permanent in capacity to perform his duties is no ground for the dissolution of the firm.	His insanity or permanent incapacity to perform his duties may be a ground for the dissolution of the firm.	His insanity or permanent incapacity to perform his duties is no ground for the dissolution of the firm since he is a

the firm.				third person and not a partner.

Partner by Estoppel or Holding out [Section 28(1)]

A person is held liable as a partner by estoppel or holding out if the following two conditions are fulfilled:

(a) He must have represented himself to be a partner by word spoken or written or by his conduct (such type of representation may be called as active representation), or He must have knowingly permitted himself to be represented as a partner (such type of representation may be called as tacit representation); and

(b) The other person acting on the faith of such representation must have given credit to the firm. It is immaterial whether the person so representing to be a partner, is aware or not that the representation has reached the other person.

Example: Harish, a sole proprietor of Harish Shirish& Co. employed Shirish as manager. Harish introduced Shirish as his partner to X. a supplier of goods. Shirish remained silent. Treating Shirish partner X supplied the goods on credit. Harish failed to pay the price of goods. X filed a suit against both Harish and Shirish for the recovery of the price. Here, Shirish is liable as a partner by holding out because he has knowingly permitted himself to be represented as a partner and the S the4supplier has acted on the faith of such representation. [*Martyn v. Grag*]

Position of a Retiring Partner as Partner by Holding Out [Section 28(2)]

Where, after the retirement of a partner, the firm uses the retired partner's name as a partner, the retired partner who has not given public notice of his retirement, is held liable on grounds of holding out to third parties who give credit to the firm on the faith that he is still a partner.

Exceptions to the Principle of Holding out [Sections 28(2) and 34]

The principle of holding out does not apply in the following cases:

(a) Where, after the death of a partner, the firm uses the deceased partner's name as a partner. the estate of the deceased partner or his legal representatives cannot be held liable for acts of the firm done after his death. It may be noted that a public notice of a partner's death is not required.

(b) The estate of the insolvent partner cannot be held liable for the acts of the firm done after the date of the order of adjudication [Section 341]. It may be noted that a public notice of a partner's insolvency is not required.

POSITION OF MINOR AS A PARTNER

As per section 11 of Indian Contract Act 1872 minor is not capable of entering into a contract, an agreement by or with a minor is void ab-initio (*Mohni Bibi v. Dharamdas Ghosh*). partnership is a result of an agreement, a minor cannot enter into a partnership agreement, on the basis of the general rule than a minor cannot be a promisor, but can be a promisee or a beneficiary, Section 30 of the Indian Partnership Act, 1932, provides as under:

"With the consent of all the partners for the time being, a minor may be admitted to the benefits of partnership."

An analysis of the above provision highlights the following three conditions:

i)Before admission of a minor as a partner, there must be an existence of partnership;

ii)There must be mutual consent of all the partners;

iii)A minor can be admitted only to the benefits of partnership.

In *Shivaram v. Gourishankar* court opined that there cannot be a partnership consisting of all the minors or of one major and all other minors.

Rights and Liabilities of' a Minor Partner before Attaining Majority

Rights

(a) He has a right to share the profits and property of the firm in accordance with the agreement. [Section 30(2)] (b) He has a right to have access to, and inspect and copy, any of the accounts of the firm. But he does not enjoy such rights in respect, of books other than account books. (Section 30(2))

(c) He has a right to file a suit for his share of profits or the property of the firm when he is not given his due share of profits. However, he can exercise this right only when he decides to sever his connections with the firm [Section 30(4)].

Liabilities

(a) He is liable only to the extent of his share in the profits and the property of the firm. He is not personally liable to third parties. [Section 30(3)]

(b) He cannot be declared insolvent on declaration of firm's insolvency, his share vests in the Official Receiver or Official Assignee.

Rights and Liabilities of a Minor Partner on Attaining Majority [Sections 30(5), (6), (7)] Within six months of date of his attaining majority or date of his obtaining knowledge that he had been admitted to the benefits of firm, whichever is-later, the minor partner has to exercise his option whether or not to become a partner. Such option is required to be exercised by giving a public notice within the period of six months. If he fails to give a public notice, he is deemed to have become a partner in the firm on the expiry of the said six months [Section 30(5)]. The various rights and liabilities of a minor partner after attaining age of majority.

When he elects to become a partner

(a) He becomes personally liable to third parties for all acts of the firm since he was admitted to the benefits of partnership (Section 30(7) (a)].

(b) His share in the property and profits of the firm remains the same as he was entitled as a minor [Section 30(7) (b)].

When he elects not to become a partner

(a) His rights and liabilities continue to be those of minor up to the date of giving public notice (Section 30(8) (a)]

(b) His share is not liable for any acts of the firm done after the date of the public notice [Section 30(8) (b)].

(c) He is entitled to sue the partners for his share of the property and profits in the firm [Section 30(8)(c)].

MUTUAL RIGHTS AND DUTIES

The mutual rights and duties of partners are governed by

(a) The Partnership Agreement and

(b) The Partnership Act.

The various provisions of the Partnership Act governing the mutual rights and duties of partners as follows:

Mandatory Duties of Partners [Sections 9 and 10] These provisions cannot be changed by an agreement amongst the partners. The mandatory duties are:

A) to carry on the business of the firm to the greatest common advantage,

B) to be just and faithful to each other, i.e. every partner should act in good faith. Good faith requires that a partner should not deceive the other partner by concealment of material facts.

C) to render true accounts and full information of all things affecting the firm to any partner or his legal representative.

D) to indemnify (i.e., to make good or to compensate) the firm for loss caused to it by his fraud in the conduct of the business of the firm.

General Duties of Partners The general duties of partners as provided in the Act are subject to the clauses inserted in agreement by partners. They can be changed by an agreement amongst the partners. Unless otherwise agreed by the partners, every partner has the following duties:

(a) To attend diligently [Section 12(b)]: Every partner is bound to attend carefully to his duties in the conduct of his business.

(b) Not to claim remuneration for taking part [Section 13(a)]: A partner is not entitled to receive remuneration for taking part in the conduct of the business.

(c) To contribute equally to the losses [Section 13(b)]: A partner must contribute equally to the losses sustained by the firm.

(d) To indemnify the firm [Section 13(f)]: A partner must indemnify (i.e., compensate) the firm for any loss suffered by the firm due to his willful neglect in the conduct of the business of the firm. The term 'willful neglect', is something more than a mere 'negligence' and has been described as 'culpable negligence'.

(e) To hold and use firm's property for business purpose [Section 15]. The partners must hold and use the firm's property for the purposes of the business.

(f) To account for and pay the personal profits from transactions firm etc. [Section 16(a)]: Every partner must account for and pay to the firm the profits earned by him from any transaction of the firm or from the use of firm's property, business connection or name in *Bentlay v. Crawen*. If a partner is entrusted with the job of buying sugar for the firm and he supplies sugar to the firm at a higher price from personal supplies held by him, he is liable to account for profits made

(g) To account for and pay the personal profits from a competing business [Section 16(b)]: Every partner must account for and pay all profits earned by him in the competing business. It may be noted that Section 11(2) permits the partners to enter an agreement restraining a partner from carrying on any business other than the business of the firm so long as he is a partner.

Rights of Partners

The rights of partners as provided in the Act are subject to the agreement between the partners. They can be changed by an agreement amongst the partners. Unless otherwise agreed by the partners, every partner has the following rights:

(a) **Right to take part in the conduct of the business** [Section 12 (a)]: Every partner has a right to take part in the conduct of the business.

(b) **Right to express opinion** [Section 12(c)]: Every partner has the right to express his opinion before the matter is decided. All matters except the change in the nature of the business, may he have decided by a majority of the partners. The change in the nature of the business may be made only with the unanimous consent of all the partners.

Ex: Admission of new partner to the firm, change in the nature of firm’s business. Power of majority opinion has to be exercised in good faith. For instance, if the majority of the partners decided to expel one of the partners without justifiable reason such expulsion would be set aside.

(c) **Right to have access to books of the firm** [Section 12(d)]: Every partner has a right to have access to and to inspect and copy any of the books of the firm. A partner may exercise this right personally or by engaging his agent.

(d) **Rights to share profits** [Section 13(b)]: generally, A partner is entitled to share the profits of the business of the firm equally. Partners are entitled to share equally in the profits earned and so contribute equally to the losses sustained by the firm. The amount of a partner's share must be ascertained by enquiring whether there is any agreement in that behalf between the partners. If there is no agreement then you should make a presumption of equality and the burden of proving that the shares are unequal, will lie on the party alleging the same.

(e) **Right to receive interest on capital out of profits** [Section 13(c)]: Suppose interest on capital subscribed by the partner is payable to him under the partnership deed, then in such a case the interest will be payable only out of profits. As a general rule, interest on capital subscribed by partners is not allowed unless there is an agreement or usage to that effect. The principle underlying this provision of law is that with regards to the capital brought by a partner in the business, he is not a creditor of the firm but an adventurer.

The following elements must be before a partner can be entitled to interest on moneys brought by him in the partnership business:

(i) an express agreement to that effect, or practice of the particular partnership or

(ii) any trade custom to that effect; or

(iii) a statutory provision which entitles him to such interest.

(f) **Right to claim interest on advances** [Section 13(d)]: A partner is entitled to claim interest on advances made by him to the firm 6t 6% p.a. Interest on advances is payable whether there are profits or losses. It may be noted that the partner is not entitled to interest after the date of dissolution of firm unless otherwise agreed.

(g) **Right to be indemnified** [Section 13(e)]: A partner has a right to recover from the firm the payments made and liabilities incurred by him:

(i) in the ordinary and proper conduct of the business, and

(ii) in doing act in emergency for the purpose of protecting the firm from loss if he has acted in a manner as a person of ordinary prudence would have acted in similar circumstances in his own case.

(h) **Right to prevent the introduction of a new partner** [Section 31]: Every partner has the right to prevent the introduction of a new partner without the consent of all the existing partners.

(i) **Right to retire** [Section 32]: Every partner has the right to retire with the consent of all other partners and in the case of a partnership at will, by giving notice to that effect in writing to all the other partners.

(j) **Right not to be expelled** [Section 33]: Every partner has the right not to be expelled from the firm by any majority of partners unless such power is conferred by partnership agreement and is exercised in good faith. Thus, expulsion may be exercised subject to the following conditions.

(k) **Right to carry on competing business** [Section 36(1)]: Every outgoing partner has a right to carry on a competing business and to advertise such business. But, he cannot

(i) use the firm's name;

(ii) represent the firm, or

(iii) solicit the firm's customers.

(l) **Right to share subsequent profits** [Section 37]: Every outgoing partner or the estate of any partner who ceased to be a partner has the right to claim either a share in the subsequent profits of the firm or interest at 6% p.a. on his share in the firm's property till the accounts are finally settled.

(m) **Right to dissolve the firm** [Section 40]: A partner has the right to dissolve the partnership with the consent of all partners. But where the partnership is at will the firm may be dissolved by any partner giving notice in writing to all other partners of his intention to dissolve the firm.

(a) It must be approved by majority of the partners.

(b) It Must be exercised in good faith without any private animosity.

(c) The concerned partner must be given an opportunity to make a representation.

RELATION OF PARTNERS WITH THIRD PARTIES [SECTION 18]

The relations of partners with third parties are governed by the mutual agency relationship existing among the partners. According to Section 18, "every partner is an agent of the firm for the purposes of the business of the firm." In other words, every partner has the capacity to bind other partners by his acts done in firm's name. Therefore, all partners are liable to third parties for the acts of every partner.

IMPLIED AUTHORITY OF A PARTNER [SECTION 19] The authority of a partner means the capacity of a partner to hind the firm by his act. This authority may be express or implied. The authority conferred on a partner by mutual agreement is called 'express authority'. The authority conferred on a partner by the provisions of Section 19 of the Indian Partnership Act is called 'implied authority'. Reading together Sections 19(1) and 22. Implied authority covers those acts of partners which fulfill the following three conditions:

(a) The act must relate to the normal business of the firm;

(b) The act must have been done in the usual way of carrying on the business of the firm;

(It may be noted that the question as to what is usual and what is unusual in a business depends on the nature of business and the usage of trade, e. g. taking loan is considered as usual activity in case of a trading concern but unusual activity in case of a professional concern of solicitors.)

(c) The act must be done in the firm's name or in any other manner expressing or implying an intention to bind the firm.

In *Mathuranath v. Bageshwari Rani* A firm was engaged in trapping elephants. One of the partners of the firm hired out an elephant without the consent of the other partners. Held, the act fell within the implied authority of the partner.

Example A, B, C, D and E are partners of a banking lint State the legal position of firm for the following acts of partners

(a) A borrows money in the name of the firm,

(b) B orders for a certain quantity of wine, on the firm's letter head.

(c) C receives money from a borrower of a firm and utilised this amount for personal use without informing other partners about the receipt of this money.

(d) D borrows money on his own credit by giving his own promissory note and utilizes subsequently this amount for firm's use.

Acts within the Implied Authority An implied authority of a partner of business of the firm includes the following act:

(a)To purchase goods of the kind that are used in the business of the firm;

(b)To sell the goods of the firm;

(c)To settle accounts with the persons dealing with the firm;

(d)To receive payment of the debts due to the firm and issue receipts for the same;

(e)To engage servants for the business of the firm;

(f)To engage a lawyer to defend an action brought against the firm;

(g)To borrow money for the purpose of the firm's business;

(h)To pledge the goods of the firm as security for the repayment of borrowings made for the purpose of firm's business;

(i)To draw, accept, endorse Bill of Exchange and other negotiable instruments in the name of the firm.

Restrictions on the Implied Authority of a Partner [Sections 19 and 20]

Restrictions on the implied authority of a partner may be of two kinds:

I) Statutory Restrictions and

II) Restrictions imposed by mutual agreement.

I. **Statutory Restrictions [Section 19(2)]** In the absence of any usage or, custom of trade to the contrary, the implied authority of a partner does not empower him to do the following acts namely-

(a) To submit a dispute to arbitration relating to the business of the firm;

(b) To open a Bank Account on behalf of the firm in partner's own name;

(c) To compromise or relinquish any claim or portion of the claim by the firm;

(d) To withdraw a suit or proceedings filed on behalf of the firm;

(e) To admit any liability in a suit or proceedings against the firm;

(f) To acquire immovable property on behalf of the firm;

(g) To transfer immovable property belonging to the firm; and

(h) To enter into partnership on behalf of the firm.

A partner can do above-mentioned acts only with express authority given to him to do that act or the usage or custom of the trade permits him to do that act. For example, a partner may open a Bank Account on behalf of the firm in his own name if he is expressly authorized to do so by mutual agreement.

Liability of the Firm for the Restricted Acts of Partner The firm is not liable to third party for the above-mentioned restricted acts of a partner whether or not the person dealing with the firm have knowledge about such restrictions.

III) **Restrictions Imposed by Mutual Agreement [Section 20]** - The partners of a firm by mutual agreement may extend or, restrict the scope of implied authority of any partner. But a third party is not bound by any such restriction unless it has the, knowledge of such restriction. In other words, the firm is liable to third party only if the third party has no knowledge of the restrictions.

For example, A, B and C are partners in a trading firm. By an agreement, they decided that no partner shall have the right to buy goods beyond the value of Rs 2,00,000 without the consent of other partners. A third party who had no knowledge of such restriction sold goods worth Rs 3,00,000 to A who did not consult his other partners about this transaction. The firm is liable to pay the full amount to the third party.

Implied Authority and Third Parties [Sections 20, 23 to 27] All partners are liable to third parties for all acts of a partner which fall within the scope of his implied authority. Their liability to third parties

(a) Effect of Restriction on Implied Authority [Section 20] - The partners of a firm by mutual agreement, may extend or restrict the scope of implied authority of any partner. But, the third party is not bound by any restriction imposed on the implied authority of a partner unless it has the knowledge of such restriction.

(b) Effect of Admissions by a Partner [Section 23] - Any admission or representation (e.g., acknowledgement signed by a partner) by a partner is sufficient evidence against the firm if the following two conditions are fulfilled:

(i) Such admission or representation must relate to the affairs of the firm; and
(ii) Such admission or representation must be made in the ordinary course of business.

(**c) Effect of Notice to an Acting Partner** [Section 24] **-** Any notice to a partner operates as a notice to the firm if the following three conditions are fulfilled:

(i) Such notice must relate to the affairs of the firm;

(ii) Such notice must be given to a working partner and not to a sleeping partner.

(iii)There must not be any fraud committed by the partners and the third party against the firm.

(d) Contractual Liability [Section 25] - Every partner is liable jointly with other partners and also severally (i.e., individually) for all those acts of the firm which have been done while he was a partner.

Example X, Y and Z were partners in a firm when infringement of a trademark took place. X retired. Later on, damages arising out of the alleged infringement arose after the dissolution of the firm. It was held that all the partners who were members of the firm at the time when infringement of a trademark took place, were liable. (*Thomas Bear & Sons v. Ralia Ram*]

(c) Liability for torts and Wrongful Acts of a Partner [Section 26] - The firm is liable to the same extent as the partner for any loss or injury caused to any third party or any penalty by the wrongful act or omission of a partner if either of the following two conditions is fulfilled:

(i) Such wrongful act or omission must have been done by a partner while he was acting in the ordinary course of business of the firm, or

(ii) Such wrongful act or omission must have been done by a partner with the authority of the other partners. (*Lloyd v. Grace, smith &Co.*)

(f)Liability for misappropriation by a partner: [Section 27] provides that (a) when a partner, acting within his apparent authority, receives money or other property from a third person and misapplies it or (b) where a firm, in the course of its business, received money or property from a third person and the same is misapplied by a partner, while it is in the custody of the firm, is liable to make good the loss.

It may be observed that the workings of the two clauses of Section 27 are designed to bring out clearly an important point of distinction between the two categories of cases of misapplication of money by partners.

Clause (a) covers the misapplication of money or property belonging to a third party made by the partner receiving the same. For this provision to the attracted, it is not necessary that the money should have actually come into the custody of the firm. On the other hand, the provision of clause (b) would be attracted when such money or property has come into the custody of the firm and it is misapplied by any of the partners. The firm would be liable in both the cases.

If receipt of money by one partner is not within the scope of his apparent authority, his receipt cannot be regarded as a receipt by the firm and the other partners will not be liable, unless the money received comes into their possession or under their control.

Example: A, B, and C are partners of a place for car parking. P stands his car in the parking place but A sold out the car to a stranger. For this liability, the firm is liable for the acts of A.

(g)Partner's Authority in Emergency [Section 21] A partner's authority in an emergency covers those acts which fulfil the following two conditions:

(a) The act must be done to protect the firm from loss; and

(b) The act must be such as a prudent man would undertake under similar circumstances in his own case.

It may be noted that these acts do not form part of the implied authority of the partner but, nevertheless, they would bind the firm. A partner's authority in an emergency is similar to that of an agent in similar circumstances u/s 189 of the Indian Contract Act.

Example: A, B and C are partners in a trading firm. By an agreement, they decided that no partner would have authority to sell goods of the firm above the value of Rs 50,000 without the consent of other partners. Owing to a sudden drop in the market, the prices crashed. One partner, in order to save the firm from loss, sold all the stock worth Rs 5,00,000 without consulting any other partner. Such an act would bind the firm.

RECONSTITUTION OF A FIRM (INCOMING AND OUTGOING PARTNERS)

The reconstitution of a firm takes place when there is any change in the composition of the partnership. Chapter V (Section 31 to 38) of Indian Partnership Act contains provisions with respect to incoming and outgoing partners. By the following ways firm is reconstituted.

1. **Introduction of a Partner [Section 31]** Subject to provisions of Section 30 (regarding minor partner), a person may be admitted as a partner either-

(i) Introduction with consent of all the partners, or

(ii) Introduction in accordance with a contract between the existing partners.

Example: The partnership agreement between X and Y provides that X could introduce into partnership any of his sons on attaining the age of majority. X decides to admit his son (who has attained majority) as a partner. Y refused to consent; Y's consent is not required since the clause in the partnership agreement operated as consent (*Byrne v. Reid*)

Liability of an Incoming Partner for Firm's Acts done before his Admission an incoming partner is not liable for all the acts of the firm done before his admission. This general rule has two exceptions which are as follows:

(a) An incoming partner is liable for the acts done before his admission if

(i) the new firm assumes the liabilities of the old firm, and

(ii) the creditors accept the new firm as their debtor and discharge the old firm from its liability.

(b) A minor who, on attaining majority decides to become a partner, is liable for all acts of the firm done since he was admitted to the benefits of partnership.

(c) A minor admitted to the benefits of partnership becoming a partner(sec.30)

Liability of an Incoming Partner for Firm's acts done after his Admission

An incoming partner is liable for all the acts of the firm done after his admission.

Outgoing Partners

2. **Retirement of a Partner [Section 32]** –

A partner may be retire from the firm in any of the following ways:

(i) with the consent of all the other partners; or

(ii) in accordance with an express agreement among the partners; or

(iii) in the case of partnership at will, by giving a notice to all other partners of his intention to retire.

In case of a partnership at will, a partner may retire by notice even if the pending contracts have not been completed. [*Keshav Lal v. Bhai Lai*]

Liabilities of a Retiring Partner - The liabilities of a retiring partner may be as follows:

(a) For Firm's acts before his retirement [Section 32(2)] He continues to be liable to third party unless he is discharged for the same by a tripartite agreement between him, third party and the partners of the reconstituted firm.

(b) (b) For Firm's acts after his retirement [Section 32(3), (4)] He continues to be liable to third party (other than one who deals with the firm without knowing that he was a partner) until public notice of his retirement is given either by himself or any of the other partners. This liability of a retiring partner is based on the principle of holding out. (Sec.28).

Rights of a Retiring Partner (Section 36 and 37)

(a) Right to carry on competing business [Section 36] He may carry on a business competing with that of the firm and may advertise such business but unless otherwise agreed he cannot-

(i) use the firm's name;

(ii) represent himself as carrying on firm's business;

(iii) solicit the old customers.

(b)Right in case of no final settlement of accounts [Section 37] He at his option, is entitled to claim, either of the following:

(i) such share of profits earned after his retirement which is attributable to the use of his share of the property of the firm, or

(ii) Interest at the rate of 6% p.a. on the amount of his share in the property. This right is available to a retiring partner even if only a part of his property is used in the business. [*Ramakrishna Ayyar v. Muthu-swami Ayyar*] This right is also available to the legal representatives of a deceased partner.

3. **Expulsion of a Partner** [Section 33] - A partner may be expelled if the following three conditions are satisfied:

(a) the power to expel a partner must have existed in a contract between the partners;

(b) the power must have been exercised by a majority of the partners, and

(c) the power must have been exercised in good faith without any private animosity.

(d)The affected partner must be given an opportunity to make a representation before being dismissed the expulsion, without the satisfaction of the aforesaid conditions, is said to be an irregular expulsion which is null and void. The partner who has been wrongly expelled, has a right to claim re-installment as a partner and not to recover damages for wrongful expulsion.

Rights and liabilities of expelled partner are similar as like of rights and liabilities of retired partner.

4. **Insolvency of a Partner [Section 34]** – The following are the effects of the insolvency of a partner:

(a) He ceases to be a partner on the date of the orders of adjudication:

(b) Unless otherwise agreed, the firm is dissolved; [Section 42(d)]

(c) His estate is not liable for firm's acts done after the date of the order

(d) Firm is not liable for his acts done after the date of the order.

No public notice is required on the insolvency of a partner. [Section 45]

5. **Death of a Partner [Sections 35 and 42(c)] -** Unless otherwise agreed by the partners, a firm is dissolved on the death of a partner [Section 42(c)]. Where under the contract a firm is not dissolved by the death of a partner, the estate of the deceased partner is not liable for any act of the firm done after the date of his death [Section 35].

No public notice is required on the death of a partner. (Section 45]

Example X was a partner in a firm. The firm ordered goods in X's life time but the delivery of the goods was made after X's death. In such a case, X's estate would not be liable for this debt because there was no debt due in respect of such goods in X's life time. *(Beget v. Miller)*

6. **Rights of Transferee of a Partner's Share [Section 29]** - A partner may transfer his interest in the firm by sale, mortgage or charge fully or partially. The rights of such a transferee are as follows:

(a) During the continuance of the partnership: He is entitled to receive the share of the profits of the transferring partner and the account of profits agreed to by the partners. He is not entitled

i) to interfere with the conduct of the business

ii) to inquire accounts;

iv) to inspect the books of the firm.

(b) On the dissolution of firm or on the retirement of the transferring partner He is entitled to receive

(i) the share of the assets of the transferring partner and

(ii) an account as from the date of the dissolution for the purpose of ascertaining the share.

Sub-partnership: A sub-partnership arises when a partner of a firm agrees to share his share in the firm, with a stranger. It was assumed in *Venkatratnam v. Venkatratnum* that a sub- partner is a transferee within the meaning of Section 29. Thus, the rights of a sub-partner are the same as those of a transferee of partner's share under Section 29.

7.Effect of the Change in the Constitution of the Firm on Continuing Guarantee [Section 38] - A continuing guarantee is a guarantee which extends to a series of transactions. Unless otherwise agreed by the partners, a continuing guarantee given to a firm or to a third party in respect of the transaction of a firm is revoked as to the future transactions from the date of any change in the constitution of the firm.

8.Rights and Duties of Partners after Change in the Firm [Section 17] - The rights and duties of the partners of the reconstituted firm shall be the same as they were before the change in the firm. Section 17 provides for the following three types of changes in the firm:

a) Where there is a change in the Constitution of the firm. [Section 17(a)]

b) Where the firm continues after the expiry of the term of the firm. [Section 17(b)]

c) Where the firm carries on an additional undertaking. [Section 17(c)]

DISSOLUTION OF FIRM [SECTIONS 39 TO 47]

Meaning of Dissolution, the term 'dissolution' stands for discontinuation. Under the Indian Partnership Act, 1932, the dissolution may be either of Partnership or of a firm.

Meaning of Dissolution of Partnership: Dissolution of partnership means coming to an end of the relation known as partnership, between various partners. The firm continues its business after being reconstituted. This may happen on admission, retirement or death of a partner in the firm.

Example X, Y and Z are partners in a firm. X retires. The partnership between X Y and Z comes to an end and new partnership between Y and Z comes into existence. This new partnership between Y and Z shall be known as 'reconstituted firm'. Thus, on retirement of partner, the old partnership stands dissolved, but the firm continues its business with the remaining partners le and Z.

Meaning of Dissolution of Firm – According to Section 39 Dissolution of a firm means the dissolution of partnership between all the partners of a firm. In such a situation, the business of the firm is discontinued, its assets are realized, the liabilities are paid off and the surplus (if any) is distributed among the partners according to their rights.

Example: Firm consisting of A, B and C all of them cease to be partners with one another, it amounts to dissolution of the firm.

Dissolution of partnership is different from the dissolution of firm. Dissolution of a partnership firm merely involves a change in the relation of partners; whereas the dissolution of firm amounts to a complete closure of the business. When any of the partners dies, retires or become insolvent but if the remaining partners still agree to continue the business of the partnership firm, then it is dissolution of partnership not the dissolution of firm. Dissolution of partnership changes the mutual relations of the partners. But in case of dissolution of firm, all the relations and the business of the firm comes to an end. On dissolution of the firm, the business of the firm ceases to exist since its affairs are would up by selling the assets and by paying the liabilities and discharging the claims of the partners. The dissolution of partnership among all partners of a firm is called dissolution of the firm.

Modes of Dissolution (Section 40-41)

1) By Agreement
2) Compulsory dissolution
3) On happening of certain events
4) By Notice
5) By the court

1) **Dissolution by mutual agreement [Section 40]: -** A firm may be dissolved by mutual agreement among all the partners. Even a firm for a fixed duration may be dissolved by mutual agreement.
2) **Compulsory dissolution [Section 41]:** A firm is compulsorily dissolved in the following two circumstances:

(i) If all the partners, or all but one partner of the firm are declared insolvent; [The reason is that there must be at least two persons to continue a firm and such persons must be competent to contract].

(ii) If some event takes place which makes it unlawful for the firm's business to be carried on.

Example A the resident of India and Y the resident of Pakistan, are partners in a firm. War breaks out between India and Pakistan. In such a situation, on outbreak of war, the business of the firm becomes unlawful to be carried on.

3) Dissolution on the happening of contingent event (S.42) A firm may be dissolved on the happening of any of the following contingent event

(i) Expiry of Fixed Period A firm constituted for a term is of course not exempt from dissolution by any of the other possible cause before the expiration of the term. The contract may expressly provide that the partnership will determine in certain circumstances but even if there is no such express term, an implied term as to when the partnership will determine may be gathered from the contract and the nature of the business. The provision of this section makes it clear that unless some contract between the partners to the contrary is proved, the firm, if constituted for a fixed term would be dissolved by the expiry of that term.

(ii) **On Achievement of Specific Task,** A partnership constituted to carry out contracts with specified persons during a particular season would be taken to be dissolved once the contracts are closed. In the case of *Basantlal Jalan v. Chiranjilal,* Where the firm was constituted for a specific undertaking to supply certain quantity of grain and the contract was prematurely terminated after supply of a part of the goods, it was held that the partnership did not come to an end and was dissolved only on the final realization of the assets.

(iii) **Death of Partner** When the deed of partnership did not provide that the death of a partner would not dissolve the partnership, the partnership stood dissolve on the death of a partner. Firm, stands dissolved automatically on death of one partner. Continuance of business after such death would not tantamount to continuance of earlier partnership.

(iv) **Insolvency of Partner** In the absence of a contract to the contrary, the insolvency of any of the partner may dissolve the firm. The rule shall apply even though the partnership has been constituted for a fixed term and the term has not yet expired or has been constituted for particular adventure and the same has yet not been completed.

(v) **Resignation of Partner** Resignation by any of the partners dissolves the partnership If all the partners or all but one partner of the firm are dead or becomes insolvent, the firm shall be compulsorily dissolved even if the partnership agreement provided that the firm shall not be dissolved on the death of a partner. The reason is that there must be at least two partners to continue a firm.

4.Dissolution by notice (S.43) In case of partnership at will, a partner can dissolve it by giving written notice of dissolution to other partners duly signed by him. Notice must be very clear and certain. A notice once given cannot be withdrawn without the consent of other partners was held in case of *Banarsidas v. Kanshi Ram*. In those cases where a partner has given notice of dissolution at a time when dissolution will give him

some advantage over the other partners, he may be held in the firm till the pending transactions are completed.

Dissolution by Court (S 44)

The court may order for the dissolution of the firm on the following grounds:

(i) **Insanity of Partner:** On the application of any of the partner, court may order for the dissolution of the firm if a partner has become of an unsound mind. Lunacy of a partner does not itself dissolve the partnership but it will be a ground for dissolution at the instance of other partners. It is not necessary that the lunacy should be permanent. In the case of a dormant partner the court may not order dissolution even on the ground of permanent insanity, except in special circumstances.

(ii) **Incapacity of Partner:** If a partner has become permanent in capable of discharging his duties and obligations then court may order for the dissolution of firm on the application of any of the partner. where a partner is imprisoned for a long period of time the court may dissolve the partnership was held in case of *Whitwell v. Arthur*.

(iii) **Misconduct of Partner:** If any partner other than partner suing is responsible for any loss to the firm, which amounts to misconduct and prejudicially affects the carrying on of business then the court may order for the dissolution of the firm. In *Carmichael v. Evans* a partner of the firm was convicted on account of travelling without ticket in Rail, the court ordered the firm to be dissolved on petition by other partners as such act of the partner was detrimental to the interest of the firm.

Similarly, in *Abbot v. Grump* the court ordered the firm to be dissolved on account of adultery committed by one partner against the wife of the other partner. Dissolution was ordered as such act of adultery would adversely affect the mutual trust and confidence among partners.

(iv) **Constant breach of Agreement by partner:** the court may order for the dissolution of the firm if the partner other than the suing partner is found guilty for constant breach of agreement regarding the conduct of business or the management of the affairs of the firm and it becomes impossible to continue the business with such partner.

(v) **Transfer of Interest:** When any of the partner other than the suing partner transfers whole of its share to the third party for permanently.

(vi) **Continuous Losses** The court may order for dissolution if the firm is continuously suffering losses and there is no more capital available for the future growth of the firm.

(vii) **Just and Equitable** The court may order for dissolution on any other ground which court think is just, fair and equitable. e.g., loss of total confidence between the partners was held in *Abbot v. Crump* where adulterous act has been committed by one partner with another partners wife was held to be valid ground for the dissolution of firm by the court.

RIGHTS AND LIABILITIES OF A PARTNER ON DISSOLUTION

Rights of a Partner on Dissolution [Sections 46, 51 to 53]

The various rights of a partner on dissolution are as follows:

(a) Partner's General Line [Section 46]: Every partner or his representative is entitled-

(i) to have the firm's property applied in payment of the firm's debts, and

(ii) to have the surplus distributed amongst the partners or the representatives according to their respective rights.

(b) Right to Claim the Return of Premium on Premature Winding Up [Section 51]: If a partner joined a firm for a fixed term and had paid a premium and the firm is dissolved before the fixed term, he is entitled to return of the premium. The amount of premium will depend upon (i) the terms upon which he became a partner, and (ii) the length of the time during which he was a partner. However, such a partner cannot claim any return of the premium in the following three circumstances:

(i) When the dissolution is due to the death of partner,

(ii) When the dissolution is mainly due to the misconduct of the partner who paid the premium; or

(iii) The dissolution is according to an agreement which had no provision for the return of premium or any part thereof.

(c) Rights of a Partner in Case of Dissolution on Account of Fraud or Misrepresentation [Section 52]: Where the partnership is rescinded on grounds of fraud or misrepresentation, the aggrieved partner, besides other rights under other provisions, has the following rights:

(i) He has a right of lien on the surplus assets after the payment of firm's debts, for any sum paid by him for purchase of a share in the firm or for any capital contributed by him;

(ii) He is entitled to rank as a creditor of the firm in respect of any payment made by him towards firm's debts; (iii) He is entitled to be indemnified by the partners) guilty of fraud or misrepresentation against all the debts of the firm.

(d)Right to Restrain from Use of Firm Name or Firm Property [Section 53]: Unless otherwise agreed by the partners, every partner or his rep tentative may restrain any other partner or his representative from carrying on a similar business in the firm name or from using the property of the firm for his own benefit till the affairs of the firm are completely wound up.

(e) Agreements in restraint of trade (S.54) Partners may, upon or in anticipation of the dissolution of the firm, make an agreement that some or all of them will not carry on a business similar to that of the firm within a specified period or within specified local limits; and notwithstanding anything contained in section 27 of the Indian Contract Act, 1872 such agreement shall be valid if the restrictions imposed are reasonable *Curt Brothers Ltd. V. Webster in* this case A sells the goodwill of his business to B and sets up a new business. X who remains customer of the old firm deals his own accord with the new firm set by A. A is not entitled to solicit even such a customer as X, though if X continues to deal with A of his own accord, A would be entitled to deal with him.

Liabilities of a Partner on Dissolution [Sections 45 and 47]

Continuing Liability for acts of partners done after dissolution (S.45) This section provides that despite dissolution, the partners cannot escape their liability to third parties for acts done even thereafter unless public notice of dissolution is given. These provision emphasis the necessity of giving a public notice before a partner could terminate his future liability whether it is a case of dissolution, retirement or expulsion.

Continuing authority of partners for purposes of winding up (S.47) After the dissolution of a firm the authority of each partner to bind the firm, and the other mutual rights and obligations of the partners continue notwithstanding the dissolution, so far as may be necessary to wind up the affair of the firm and to complete transactions begun but unfinished at the time of the dissolution, but not otherwise:

PROVIDED that the firm is in no case bound by the acts of a partner who has been adjudicated insolvent; but this proviso does not affect the liability of any person who has after the adjudication represented himself or knowingly permitted himself to be represented as a partner of the insolvent. Mode of settlement of accounts between partners (S.48) In settling the accounts of a firm after dissolution, the following rules shall, subject to agreement by the partners, be observed-

When a partnership is dissolved, and after the debts to the third parties have been paid and advances made by a partner have been repaid, the assets are insufficient to repay each partner his capital in full, any deficiencies must be borne by the partners in the same proportion as the profits would have been divided.

(b) The assets of a firm are to be applied in paying

1. joint debts to third parties
2. advances, as distinguished from capital, of each partner
3. to each partner what is due from the firm to him in respect of capital.

Nowell v. Nowell in this case A and B trade as partners and it is agreed that profits should be shared and losses borne equally. On dissolution it is found that A has advanced more capital than B to the extent of Rs.1900. the net assets were only Rs.1400. there is thus a deficiency of capital to the extent of Rs500. Under sub section(a) both the partners must contribute in the proportion in which they have agreed to share profits that is equally. Therefore, B should pay to A sum of Rs 250.

Payment of firm debts and of separate debts (S.49) Where there are joint debts due from the firm, and also separate debts due from any partner, the property of the firm shall be applied in the first instance in payment of the debts of the firm, and, if there is any surplus, then the share of each partner shall be applied in payment of his separate debts or paid to him. The separate property of any partner shall be applied first in the payment of his separate debts, and the surplus (if any) in the payment of the debts of the firm.

TREATMENT OF LOSS ARISING DUE TO INSOLVENCY OF A PARTNER

The Capital Account of a partner may show a debit balance after making-all adjustments (including the share of any profit or loss on realization and the receipts from his private estate, if any). It may be noted that the private estate of each partner is applied first to pay off his private debts and the surplus (i.e., excess of private estate over private debts), if any, is applied to pay off the firm's debts. If a partner having a debit balance in his Capital Account is unable to bring in the necessary cash to make up the deficiency, he is said to be an insolvent partner. The h-recovered debit balance is called the loss arising due to the insolvency of a partner. Now the question arises, should this loss be regarded as an ordinary loss (which is shared by the partners in their profit-sharing ratio) or an extraordinary one? This issue was involved in the leading case of *Garner v. Murray*.

Decision in *Garner v. Murray* Justice Joyce held that the loss arising due to the insolvency of a partner must be distinguished from an ordinary loss (including realisation loss). Unless otherwise agreed, the decision in *Garner v. Murray* requires-

(a) that the solvent partners should bring in cash equal to their respective shares of the loss on realization;
(b) that the solvent partners should bear the loss arising due to the insolvency of a partner in the ratio of their Last Agreed Capitals.

Personal profits earned after dissolution (S.50) Where a partner, after dissolution and before the affairs of the partnership are wound up, derives any personal profit for himself from any transactions of the firm, or from the use of the property or business connection of the firm or the firm name, he shall account for the profit and pay his share to the surviving partner or the representative of the deceased partner. But if a partner carries on another business of a similar nature, this section would not apply.

Proviso – Where on dissolution a partner has bought the goodwill of the firm, he may use the firm name even before the affairs of the partnership have been completely wound up. Clements v. Hall In this case A and B carry on business in partnership. The firm holds leasehold for the purpose of the business. A die before the affairs of the firm is completely wound up, the lease expires and B renews it. The renewed property is partnership property.

Alder v. Fouracare. In this case A, B and C are partners. A agrees to take a lease in his own name, but in fact partnership purpose, and dies before the lease is executed. The representative of A can't deal with lease without the permission of B and C.

Return of premium on premature dissolution (S.51) Where a partner has paid a premium on entering into partnership of a fixed term, and the firm is dissolved before the expiration of that term otherwise than by the death of a partner, he shall be entitled to repayment of the premium or of such part thereof as may be

reasonable, regard being had to the terms upon which he became a partner and to the length of time during which he was a partner, unless-

(a) the dissolution is mainly due to his own misconduct, or

(b) the dissolution is in pursuance of an agreement containing no provision for the return of the premium or any part of it.

Airey vs. Barbam in this case A and B entered into a partnership for five years. A paid premium to B. The partnership was dissolved with into two years as a result of mutual disagreement due to A's failure to devote time to business as agreed. It was held that no part of premium was payable because the dissolution has been caused by the misconduct on the part of A.

Atwood v. Maude in this case A and B entered as solicitors for a term of seven years. A paying a premium of Rs.800.B before entering into the partnership know that A was inexperienced and incompetent. After the expiration of two years B complained that A's incompleteness was injuries to business and called him to dissolve the partnership. A thereupon filed a suit for repayment of proportionate premium. A succeed.

Pease v. Hewitt in this case A and B become partners for 10years. A paying B a premium of Rs1000. A quarrel occurs at the end of eight years, both parties being in the wrong and dissolution is decreed. A is entitled to a return of Rs.200.

Sale of goodwill after dissolution (S.55)

(1) In settling the accounts of a firm after dissolution, the goodwill shall, subject to contract between the partners, be included in the assets, and it may be sold either separately or along with other property of the firm. (2) Rights of buyer and seller of goodwill-Where the goodwill of a firm is sold after dissolution, a partner may carry on a business competing with that of the buyer and he may advertise such business, but, subject to agreement between him and the buyer, he may not-

(a) use the firm name,

(b) represent himself as carrying on the business of the firm, or

(c) solicit the custom of persons who were dealing with the firm before its dissolution.

PUBLIC NOTICE (SECTION 72)

When a Public Notice is Required to be Given A public notice is required to be given in the following three cases:

(a) on the retirement or expulsion of a partner, or

(b) on the dissolution of the firm,

(c) on the election to become or not to become a partner by a minor on his attaining majority.

When a Public Notice is not Required to be Given A public notice is not required to be given in the following two cases:

(a) on the death of a partner;

(b) on the insolvency of a partner.

Mode of Giving Public Notice

The mode of giving public notice is given as under.

In case of a registered firm	In case of an unregistered firm
It must be given by publication in the Official Gazette. It must be given by publication in at least one vernacular newspaper circulating in the district where the firm to which it relates has its place or principal place of business. It must be given to the Registrar of Finns.	It must be given by publication in the Official Gazette. It must be given by publication in at least one vernacular newspaper circulating in the distinct where the firm to which it relates has its place or principal place of business.

Consequences of not Giving a Public Notice

If a public notice is not given in cases in which it is required to be given, the consequences will be as follows:

(a) On election to become or not to become a partner by a minor on his attaining majority: Minor is deemed to have become a partner on the expiry of 6 months [Section 30(5)].

(b) In case of retirement of a partner: Retiring partner and the other partners continues to be liable as partner to the third parties for firm's acts done after retirement [Section 32(3)].

(c) In case of expulsion of a partner: The expelled partner and the other partners continue to be liable to third parties for firm's acts done after his expulsion (Section 33(2)).

(d) in case of dissolution of a firm: All the partners continue to be liable to third parties for firm's acts done after the dissolution of firm [Section 45].

REGISTRATION OF PARTNERSHIP (CHAPTERVII) (SECTIONS 56 TO 71)

The Act does not make the registration of partnership firms compulsory in India nor does the Act impose any penalties for non-registration. However, certain disabilities are provided in s 69 of the Act for unregistered firms and their partners. The procedure for registration is very simple and the disadvantages of non-registration are so great that generally the partners of a firm would like to get the firm registered.

Ss. 58 and 59 deal with the procedure for the registration of a firm.

The registration of a firm may be affected by submitting to the Registrar of Firms a statement in the prescribed form and accompanied by the prescribed fee. The Registrar of Firms are appointed by the State Government and State Government is also to define the areas within which the Registrars shall exercise their powers and perform their duties. Under Sec 57 of the Act The application for registration has to be made in the prescribed form, and the same has to be accompanied by the prescribed fee. The State Government has been authorized to make rules prescribing the fee but that shall not exceed the maximum fees specified in Schedule 1, which is Rs. 3/- for the purpose. The application must state the following:

a) The firm's name,
b) The place or principal place of business of the firm,
c) The names of any other places where the firm carries on business,
d) The date when each partner joined the firm,
e) The names in full and permanent addresses of the partners, and
f) The duration of the firm

The statement shall be signed by all the partners, or by their agents specially authorised in this behalf. Each person signing the statement shall also verify it in the manner prescribed.

[Sec 58(2)] A firm may be got registered at any time after the creation of partnership. It is not necessary that it should be registered at the time of its formation. Moreover, the Act does not lay down any time limit within which the firm should be registered. Therefore, there is no period of limitation either for the original registration, or recording of subsequent changes, as contemplated in s 63 of the Act. Thus, the concept of any limitation period or that of reasonable time cannot be introduced either for original registration or for subsequent changes in a firm. Hence, any legislation by the State Government laying down any time limit either for original registration or for recording of subsequent changes will be *ultra-virus* the Partnership Act and, therefore, bad in law. In *Harijan Boot House v Registrar of Firms*, The Registrar of Firms cannot reject an application for recording changes in the constitution of the firm on the ground of inordinate delay in submitting the application.

If a firm remains unregistered, the firm and its partners would suffer from the disabilities mentioned in s 69. If the firm is registered but some partner or partners have not been registered, e.g., they join after the registration of the firm, such partners who are not registered, will be subject to the disabilities mentioned in s 69 91) and (2).

A firm's name shall not contain any of the following words, namely (Section 58(3)

Crown", „Emperor", „Empress", „Imperial", „King", Queen", „Royal", or words expressing or implying the sanction, approval or patronage of Government except when the State Government signifies its consent to the use of such words as part of the firm name by order in writing.

When the Registrar is satisfied that the above-mentioned requirements have been complied with, he shall record an entry of the statement in the register called the Register of Firms, and shall file the statement. This amounts to the registration of the firm.

Penalty for furnishing false particulars (Section70)

Information given to the Registrar through various documents filed with him in connection with the registration of a firm serves the purpose of making the third parties conversant with the firm and the partners so that third parties dealing with the firm are not misled. Correct and complete information should be available with the Registrar. Section 70 imposes penalty for making any false declaration in any document filed with the Registrar. According to Section 70: Any person who signs any statement, amending statement, notice or intimation under this Chapter containing any particular which he knows to be false or does not believe to be true, or containing particulars which he knows to be incomplete or does not believe to be complete, shall be punishable with imprisonment which may extend to three months, or with fine, or with both.

Power to make Rules (Section71)

Section 71 grants power to the State Government to make rules prescribing the fees payable, statements to be submitted, regulating the procedure to be prescribed by the Registrar when disputes arise, filing of documents, inspection of documents, and with regard to carrying out the purposes of Chapter VII concerning the Registration of Firms. In *Salem Chit Funds v State of Tamil Nadu*, it has been held by the Madras High Court that Rule 3A of the T.N. Partnership (Registration of Firms) Rules, 1932 requiring every registered firm to file with the Registrar a declaration to the effect that registered firm had been carrying on its business or has been in operation during the financial year is intra vires rule making power. Therefore, the requirement of the filing of the return every year was held to be valid.

Subsequent changes and alterations (Ss 60-65)

Sometimes after the registration, there may be some changes as in the firm's name or the principal place of business, or closing or opening of branches by the firm, or in the names and addresses of the partners, or consequent on the dissolution of the firm or by an order of the court, etc. the alterations may have to be recorded by the Registrar. The Act contains the following provisions in this connection:

1) **Alteration in the firm's name and principal place of business Section 60:** When there is an alteration in the firm's name or in the location of principal place of business of a registered firm, the same kind of formalities as have been mentioned in Section 58 are to be observed. When the Registrar is satisfied that the necessary formalities have been complied with, he shall amend the entry in the Register of Firms.

2) **Closing and opening of branches Section 61**: When there is closing or opening of branches of an already existing firm, any partner or agent of the firm may send intimation thereof to the Registrar, who shall then make necessary changes in the Register of Firms.

3) **Changes in names and addresses of partners Section 62**: In case there is any change in the name or permanent address of any partner of a registered firm, an initiation of the alteration may be sent by any partner or agent of the firm to the Registrar. The Registrar shall then make necessary changes in the Register of Firms.

4) **Changes in the constitution of the firm or on dissolution of the firm. -** Changes in the constitution of the firm may occur either on the introduction of a partner1to the firm, or when a partner ceases to be a partner by retirement, expulsion, insolvency, or death. No fresh registration is needed on the death of a partner or otherwise in case of a change in the constitution of the firm, but it is sufficient to notify the Registrar, who can make a note in the relevant register.

When change in the constitution of the firm occurs or the firm is dissolved, its notice thereof, may be given to the Registrar by the incoming or outgoing partner, or by any of the continuing partners or by a duly authorized agent of any of the above stated persons. Like registration of a firm, the notice of the change in the constitution of the firm or its dissolution is not compulsory. However, in the case of retirement or expulsion of a partner or on the dissolution of a firm, public notice of such retirement, expulsions or dissolution has to be given, otherwise the liability of the partners for the act of each other continues to be the same as before. In the case of a registered firm, public notice includes notice to the Registrar under s 63.

When a minor has been admitted to the benefits of partnership, such a minor on attaining the age of majority has to give a public notice of his election as to whether he becomes a partner or not Public notice in the case of a registered firm also includes notice to the Registrar.

In *Sharad Vasant Kotak v Ramniklal Mohanlal Chawda*, there was change in the constitution of a registered firm in so far as on the death of one of the partners, a new partner was introduced in his place. It was held that by such a change the registration of the firm had not ceased, and there was no need of fresh registration of the firm. Information about the change in the constitution of the firm has to be given to the Registrar under Section 63. Failure to comply with Section 63 only attracts penalty under s 69A of the Act. Moreover, the person whose name does not find a place in Register of the Firms may suffer certain disabilities under Sec 69 clauses (1) and (2), but that does not affect the Registration of the Firm.

5) **Rectification of mistakes (Sec 64).-** Sec 64 (1) empowers the Registrar to correct any mistake which may have been there in the Register of Firms in order to bring the Register relating to any firm in conformity with the documents filed under this Chapter.

Sometimes there may be some mistake in the documents filed with the Registrar or in the records of the Registrar. Sec. 64 (2) provides that on application made by all the parties who have signed documents relating to a firm, the Registrar may rectify any mistakes in such documents in the records or note thereof made in the Register of Firms.

6) **Amendment of Register by order of Court (Sec. 65) -** Sometimes as a consequence of a decision relating to a registered firm, the need for amendment in the entry in the Register of Firms may arise. In such a case, the Court deciding any matter relating to a registered firm has been empowered by Sec 65 to direct the Registrar to make any amendment in the entry of the Register of Firms as may become necessary as a consequence of the decision.
7) **Inspection of documents and grant of copies (section 66 & 67)** The Register of Firms shall be open to inspection by any person on payment of such fees as may be prescribed. Moreover, all statements, notices and intimations filed under this Chapter shall be open to inspection, subject to such conditions and payment of such fee as may be prescribed.

Maximum fee which can be charged for inspection of any document or obtaining copies from the Registrar has been mentioned in Schedule I. The State Government has, however, been empowered to prescribe such charges in respect of the above, but such charges cannot exceed the maximum amount mentioned in Schedule I.

Evidentiary value of entries in the Register of Firms (Section 68) The following rules have been stated in sec 68 to explain the evidentiary value of entries in the Register of Firms:

1. The documents filed with the Registrar, on the basis of which he prepares his record and Register of Firms, shall be conclusive proof of the facts contained therein as against any person by whom or on whose behalf such document was signed. Therefore, if a person's name is there in the Register of Firms as a partner, he would be liable as a partner. The object of the provision is to compel the partners to have the changes in the constitution of the firm notified to the Registrar. When a partner retires or is expelled or the firm is dissolved, the partners continue to be liable for the act of each other unless a public notice of such retirement, or expulsion, or dissolution, of the firm is given. Public notice in the case of a registered firm includes notice to the Registrar of Firms.
2. A certified copy of an entry relating to a firm in the Register of Firms may be produced to prove either the registration of the firm or some other statements, etc. filed with the Registrar. In the case of *Shivraj Reddy and Brothers v Raghuraj Reddy*, the application for registration of a firm contained signature of plaintiff, therefore, he could be said to be a partner in the firm and plea that he was only nominally shown as partner was held not tenable.

Effects on Non-Registration

Sec 69 contains the provision describing the effects of non-registration of a partnership firm. It may be noted that the Partnership Act neither makes the registration of a firm compulsory nor does it impose any penalties for non-registration. However, it provides certain disabilities for an unregistered firm and the partners of such a firm or the partners whose names have not been shown as registered partners even though the firm is registered. Sec 69 (1) provides that no suit can be instituted to enforce rights arising from a contract or conferred by the Partnership Act by any partner against his co-partners or against the firm. Similarly, according to sSec 69 (2), no suit can be instituted to enforce any right arising from a contract by an unregistered firm against any third party.

Subsection (3) also provides that the disability mentioned in sub-sections (1) and (2) shall also apply into a claim of set off or other proceedings to enforce a right arising from a contract. The idea behind making these provisions is that in their own interest, the partners may get the firm registered and thereby the interest of the third parties with whom the firm may be dealing may be protected. The procedure for registration is very simple and disabilities being too compelling that generally the partners would like to get the firm registered at one time or the other. Certain exceptions, where the disabilities do not apply, have been stated in Section 69, sub-sections (3) and (4).

The disabilities on non-registration of a partnership firm and the exceptions thereto may be noted.

1. Suits between partners and the firm According to s 69 (1), no suit to enforce a right arising from a contract or conferred by the Partnership Act can be instituted in any Court unless the following two requirements are satisfied:

i) The partnership firm is registered; and

ii) The partners filing the suit have been shown in the Register of Firms as the partners of the firm.

In *Neelakantan Omana v Neelakantan Raveendran*, it was held that if firm is unregistered, the suit by a partner demanding rendition of accounts would not be maintainable.

In *Oriental Fire & General Insurance Co. Ltd. v. The Union of India*, it has been held that when a firm takes an insurance policy on a motor vehicle belonging to the firm, the claim under that policy arises out of a contract of insurance, rather than out of statute, i.e., the Insurance Act, and therefore, the same cannot be enforced by filing a suit if the firm is unregistered.

In *Mahendra Singh Chaudhary v Tej Ram Singh*, one of the partners of the firm, i.e. A‟ brought an action for injunction requiring that the cheques for payment to the firm should not be paid singly to the other partner B," but should be paid in the joint name of A & B so that the money could reach the coffers of the firm. The said firm was unregistered. It was held that the suit brought by A was on behalf of the firm, and the firm being unregistered, the suit was not maintainable under section 69.

In *Popular Automobiles v G.K. Channi*, the suit was filed on behalf of the firm. The plaint was signed by the manager of the firm. No power of attorney was given to him by the firm to verify and sign plaint on behalf of the firm, nor did his name appear in the Register of Firms as a partner. It was held that the suit was bad for non-compliance of mandatory provision contained in s 69(2) requiring the filing of the suit by a partner or an authorised person. Such suit is liable to be dismissed. Such defect cannot be cured by subsequent incorporation of verification and signatures by a partner.

3. Suits between the firm and the third parties

According to Sec 69 (2), if the firm is unregistered, no suit to enforce a right arising from a contract can be instituted by the firm or its partners against a third party. Sub-section (2) also requires two conditions to be fulfilled before a suit can be instituted against a third party:

i. The firm must be a registered firm;

ii. The persons suing must be shown in the Register of Firms as partners of the firm

To enforce the rights against third parties, it is not enough that the firm is registered, it is further necessary that "the person suing is or has been shown in the Register of Firms as a partner in the firm." In *Gandhi & Co v Krishna Glass Pvt. Ltd*.it was held that if the name of one of the partners had not been shown in the Register of Firms, the suit filed by the partnership firm must fail.

Arbitration proceedings not barred under Section 69

Sec 69 puts a bar on the enforcement of contract by an unregistered firm. It has been held by the Supreme Court in *Kamal Pushpa Enterprises v D.R. Construction Company*, that bar under Sec 69 has no application to proceedings before the arbitrator. Proceedings for enforcement of the arbitration award is not a right under contract.

Suit against infringement of trade mark not barred under Section69(2) In *Haldiram Bhujjawala v Anand Kumar Deepak Kumar*, that a suit for perpetual injunction to restrain the defendant from infringing plaintiff's trade mark and passing defendant's goods as those of the plaintiff, and a claim of damages in that regard, is not barred by Sec 69 (2). Such right does not arise out of contract. In such a case there is enforcement of a statutory right arising under the Trade Marks Act.

No disability against third parties as is obvious from sub-sec (2), the disability is against an unregistered firm or its partners but it is not against the third party. Therefore, a third party is not barred from bringing an action against an unregistered firm. In *Kantilal Jethalal Gandhi v Ghanshyam Ratilal Vyas*, as Section 69, clauses (1) & (2) do not bar an action by a third party against the firm, the bar under Sec 69(1) & (2) does not operate against suit for recovery of debt due and payable by an unregistered dissolved firm.

Exceptions

1. Suit for dissolution etc. [Section 69 (3) (a)]

S 44 mentions certain circumstances under which on the suit of a partner the court may dissolve a firm. Sec 69 (3) (a) permits a suit even by the partners of an unregistered firm to sue for the dissolution of a firm or for the accounts of a dissolved firm. In case the firm has already been dissolved, the partners of the unregistered firm can realize the property of the dissolved firm. In case the firm has already been dissolved, the partners of the unregistered firm can realize the property of the dissolved firm. The right includes enforcing a claim arising from contract prior to dissolution.

The disability for non-registration works only during the subsistence of the partnership. After the firm is dissolved, it is not the disability mentioned in sub-sections (1) and (2) of Sec 69 which governs the position, but it is the provisions of Sec 69 (3) (a) which operate giving the partners power to "realise the property of the dissolved firm." In *Biharilal Shyamsunder v Union of India*, the plaintiffs claimed damages for nondelivered of a bale of cloth dispatched from Ahmedabad to Muzaffarpur through railway. The said action was brought after the dissolution of the firm which was unregistered. It was held by the Patna High Court that the partners of the dissolved firm are entitled to bring the suit for compensation from the railway for non-delivery of the consignment of cloth.

In Gujarat Water Supply & Severage Board v Sundardas, all the partners of an unregistered firm except one had retired, and all the rights and liabilities of the firm were transferred to the remaining partner. It was held that a suit by the remaining partner against the Government for damages for the breach of contract between the Government and the erstwhile firm was maintainable.

In *Navinchandra v Moolchand,* it has been held that even a suit for damages for misconduct brought by one partner against another after the dissolution of an unregistered firm would be permitted because the amount so realised should be divided between the partners and that is, therefore, the property of the dissolved firm.

In *Premlata v Ishar Dass Chaman Lal*,it has been held by the Supreme Court that the right to sue for the dissolution of the firm also means right to enforce the arbitration clause for resolving disputes of the dissolved firm and also for the rendition of accounts or any right or power to realise the property of the dissolved firm.

2. **Suit on behalf of an insolvent partner [Sec 69 (3) (b)]**

Sec 69 (3) (b) mentions another exception when an action would be brought on behalf of an insolvent partner against an unregistered firm. It provides that an official assignee, receiver of Court has a power to bring an action to realise the property of the insolvent partner.

Dismissal of suit under Section 69(1) is no bar to a subsequent suit under Section 69(3) (a)

In *Ramesh Kumar Bhalotta v Lalit Kumar Bhalotta,* a partner of an unregistered firm filed a suit against the firm claiming declaration of share, proper administration of firm and rendition of the accounts of the firm. The suit was dismissed as barred under Sec 69(1).

The same partner subsequently filed another suit praying for the dissolution of the firm, and the accounts of the dissolved firm.

It was held that the subsequent suit was maintainable as it was permissible under Section 69(3) (a) and dismissal of the earlier suit was no bar to the present suit.

Moreover, the suit was not barred under Order 2, Rule 2of the C.P.C., as the cause of action under the two suits was different.

In *Kishore Kumar v Navin Chandra,* it has been held that if a suit has been filed in the individual capacity by a person who had been a partner of the dissolved firm against another person who had also been a partner of the dissolved firm, the bar under s 69(2A) would not be attracted.

In this case, plaintiffs No. 1 & 2 and defendants No. 1 & 2 were the partners of an unregistered firm, which was dissolved. These persons then became co-owners of the property which earlier belonged to the dissolved firm. Defendants No. 1 & 2 thereafter recovered rent of that property on behalf of the plaintiffs also. Plaintiffs No. 1 & 2 filed a suit against defendants No. 1 and 2 to recover a sum of Rs. 4, 83, 480 with interest being a proportionate share of the rent due in favor of the plaintiffs.

It was held that in this case the suit was not filed by the plaintiffs in the capacity of partners of the dissolved firm, nor is it a suit for the recovery of the property of the dissolved firm. It was a suit filed in an individual capacity by co-owners of the property. The suit was not barred by the provisions of s 69 (2) or 69 (2A) of the Indian Partnership Act.

3. **Suit where provisions relating to Registration of Firms do not apply [Section 69(4)(a)]** Sec 69 (4) (a) exempts such firms from the operation of the provisions of this section whose place of business is not in India or whose place of business is in such areas, where because of notification under Sec 56, this Chapter does not apply. It has already been noted above that Section 56 provides that the Government of any State may, by notification in the Official Gazette, direct that the provisions of this Chapter shall not apply to that State or to any part thereof specified in the notification.
4. **When value of the suit does not exceed Rs. 100 [s 69(4)(b)]** Sec 69 (4) (b) provides an exception for firms having small claims. If the value of the suit does not exceed Rs. 100/-, an unregistered firm or its partner can bring an action against the third party.

Once the registration is made, it would continue to be valid in the eyes of law until the same was cancelled. Thus, there is no nee of fresh registration on the death of a partner or when there is otherwise any change in the constitution of the firm in such cases, it is sufficient to notify the Registrar about the change so that he could note the same in the relevant register.

Registration subsequent to the filing of the suit

If the firm is not registered "no suit shall be instituted" either between the partners inter se or against any third party. In case the firm is unregistered, such a suit shall be liable to be dismissed. There is no specific provision in the Act for the dismissal of the suit *Suo moto.* A plea for the dismissal of the suit on the ground of non-registration has to be made. If the plaintiff admits that his suit is on behalf of an unregistered partnership, the Court must immediately dismiss the suit in view of the express and mandatory provisions of Sec 69.

In *M/s Jammu Cold Storage v M/s Khairati Lal* and Sons, M/s Khairati Lal and Sons instituted a suit to recover a sum of Rs. 1000/- from m/s Cold Storage and General Mills Ltd on 15th April 1959. The firm was not registered on that day but it was got registered subsequently on 30th May1959. It was held by the J & K High Court that since the firm was not registered on the date of the institution of the suit, the suit cannot proceed further and it must be dismissed.

UNIT – V: Sale of Goods Act – The Contract of sale – Agreement to sell - Conditions and Warranties – Passing of property – Transfer of title – Performance of the Contract – Rights of Unpaid Seller – Remedies for Breach of Contract.

Sale of Goods Act, 1930

ARRANGMENT OF SECTIONS

CHAPTER III

EFFECTS OF THE CONTRACT

Transfer of property as between seller and buyer

Transfer of title

CHAPTER IV

PERFORMANCE OF THE CONTRACT

65. [Repealed.].

66. Savings.

The **Indian Sale of Goods Act, 1930** is a Mercantile Law, which came into existence on 1 July 1930, during the British Raj, borrowing heavily from the Sale of Goods Act, 1893. Till 1930 the transactions relating to sale and purchase of goods were regulated by the Indian contract act, 1872, (sec 76-123) and were repealed and made separate act called **Indian Sale of Goods Act, 1930.** The Act was amended on 23 September 1963, and was renamed to the Sale of Goods Act, 1930. It is still in force in India. The Sale of Goods Act, 1930 herein referred to as the Act, is the law that governs the sale of goods in all parts of India.

Originally, the transactions related to sale and purchase of goods was regulated by **Chapter VII (Sections 76 to 123) of Indian Contract Act, 1872** – which was broadly based on English common law. A need was felt to overhaul the law due to rapid growth of mercantile transactions and various progressive English judgments being passed to meet the needs of the community. Thus, the provisions of Chapter VII were repealed, suitably amended keeping in mind the English Sales of Goods, 1893 and recent judicial decisions of the time. A separate act, the Sale of Goods Act came into force on 1st July 1930. It does not affect rights, interests, obligations and titles acquired before the commencement of the Act. The Act deals with sale but not with mortgage or pledge of the goods.

The contacts for sale of goods are subject to the general principles of the law relating to contracts i.e., the Indian Contact Act. A contract for sale of goods has, however, certain peculiar features such as, transfer of ownership of the goods, delivery of goods rights and duties of the buyer and seller, remedies for breach of contract, conditions and warranties implied under a contract for sale of goods, etc.

Law pertaining to sale of goods- identical application to domestic as well as international transaction.

Normally, the price of goods is paid when delivery is made. But there are several variations, mostly because parties are known to each other and repose trust admits themselves.

The Act defines various terms which are contained in the Act itself.

Buyer and Seller

As per the **sec 2(1)** of the Act, a buyer is someone who buys or has agreed to buy goods. Since a sale constitutes a contract between two parties, a buyer is one of the parties to the contract.

The Act defines seller in **sec 2(13)**. A seller is someone who sells or has agreed to sell goods. For a sales contract to come into existence, both the buyers and seller must be defined by the Act. These two terms represent the two parties of a sales contract.
A faint difference between the definition of buyer and seller established by the Act and the colloquial meaning of buyer and seller is that as per the act, even the person who agrees to buy or sell is qualified as a buyer or a seller. The actual transfer of goods doesn't have to take place for the identification of the two parties of a sales contract.

Goods

One of the most crucial terms to define is the goods that are to be included in the contract for sale. The Act defines the **term "Goods" in its sec. 2(7)** as all types of movable property. The sec. 2(7) of the Act goes as follows:

"Every kind of movable property other than actionable claims and money; and includes stock and shares, growing crops, grass, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale will be considered goods"

As you can see, shares and stocks are also defined as goods by the Act. The term actionable claims mean those claims which are eligible to be enforced or initiated by a suit or legal action. This means that those claims where an action such as recovery by auction, suit, refunds etc. could be initiated to recover or realize the claim. We say that goods are in a deliverable state when their condition is such that the buyer would, under the contract, be bound to take delivery of these goods.

A Contract of Sale is:

- an offer to buy for a price, or
- An offer to sell good for a price, and
- the acceptance of such offer.

A Contract may provide for

- the immediate delivery of the goods, or
- immediate payment of the price, or
- the immediate delivery of the goods and payment both, or
- for the delivery or payment by instalments, or
- That the delivery or payment or both shall be postponed.
- per the Section 5 sub-clause (2) - Subject to the provisions of any law for the time being in force, a contract of sale may be made- by word of mouth, or
- partly in writing and partly by word of mouth or
- may be implied from the conduct of the parties

FORMATION OF CONTRACT OF SALE

CONTRACT OF SALE OF GOODS

A contract of goods is a contract whereby the seller transfers or agrees to transfer the property to goods to the buyer for a price. There may be a contract of sale between one part-owner and another **[Sec. 4(1)].** A contract of sale may be **absolute or conditional [Sec 4(2)].**

The term 'contract of sale' is a generic term and includes both a sale and an agreement to sell.

Sale and agreement to sell: when under a contract of sale, the property in the goods is transferred from the seller to the buyer, the contract is called a 'sale', but where the transfer of the property in the goods is to take place at a future time or subject to some conditions thereafter to be fulfilled, the contract is called an **'agreement to sell' [Sec. 4(3)]**. An agreement to sell becomes a sale when time elapses or the conditions, subject to which the property in the goods is to be transferred, are fulfilled **[Sec. 4(4)].**

Definition of Sale

Section 4 of the Sales of Goods Act, 1930 defines a sale of goods as a "contract of sale whereby the seller transfers or agrees to transfer the property in goods to the buyer for price". The term 'contract of sale' includes both a sale and an agreement to sell.

A contract of sale is made by an offer to buy or sell goods for a price and the acceptance of such offer by the other party. The contract may be oral or in writing. A contract of sale may be absolute or conditional.

Formalities of a contract of sale: **Section 5 of the Act** specifically provides for the following three steps or formalities in a contract of sale:

1) **Offer and Acceptance**: A contract of sale is made by an offer to buy or sell the goods for a price and acceptance of such offer.

2) **Delivery and Payment**: It is not necessary that the payment for the goods to the seller and delivery of goods to the buyer must be simultaneous. They can be made at different times or in instalments – as per the contract.

3) **Express or Implied**: The contract can be in writing, oral or implied. It can also be partly oral and partly written.

Essential features

The five essential features of a contract of sale are as discussed below:

1) Two parties (It is a contract between 2 parties, one known as the seller and the other the buyer)

2) Subject matter to be goods

3) Transfer of ownership of goods (The seller should transfer or agree to transfer the property (ownership) in the goods to the buyer) Passing of property in the goods.

4) Consideration is price (The transfer of property (ownership) in the goods from the seller to the buyer is for consideration known as, 'price')

5) Essential elements of a valid contract- Agreement between the competent parties.

1) **Two parties:** there must be 2 distinct parties i.e., a buyer and a seller, to affect a contract of sale and they must be competent to contract. 'Buyer' means a person who buys or agrees to buy goods [Sec. 2(1)]. 'Seller' means a person who sells or agrees to sell goods [Sec. (13)]. A sale has to be bilateral because the goods have to pass from one person to another. The seller and the buyer must be different persons. A part owner can sell to another part owner. A partner may, therefore, sell to his firm or a firm may sell to a partner. But if joint owners distribute property among themselves as per mutual agreement, it is not 'sale'.

A person cannot be the seller of his own goods as well as the buyers of them.

However, when a bankrupt person's goods are sold under an execution of decree, the person may buy back his own goods from his trustee.

2) **Subject matter to be goods: Goods**: there must be some goods the property in which is or is to be transferred from the seller to the buyer. The goods which form the subject-matter of the contract of sale must be movable. Transfer of immovable property is not regulated by the Sale of Goods Act.

The term 'goods' is defined in Section 2(7). It states that 'goods' "means every kind of movable property other than actionable claims and money; and includes stock and shares, growing crops, grass and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale".

Money cannot be sold because money means legal tender and not the old coins which can be sold and purchased as goods. Actionable claims are things that a person cannot make use of, but which can be claimed by him by means of legal action such as a debt.

Sale of immovable property is not covered under this Act. As per Section 3 of the Transfer of Property Act, 1882, 'immovable property' does not include standing timber, growing crops or grass. They are considered movable property and thus goods. Standing timber is taken as movable property while trees are immovable property.

Things like goodwill, copyright, trademark, patents, water, gas, electricity are all goods. In the case of Commissioner of Sales Tax vs. Madhya Pradesh Electricity Board [AIR 1970 SC 732], the Supreme Court observed – "…electricity…can be transmitted, transferred, delivered, stored, possessed, etc., in the same way as any other movable property…If there can be sale and purchase of electric energy like any other movable object, we see no difficulty in holding that electric energy was intended to be covered by the definition of "goods".

In the case of *H. Anraj vs. Government of Tamil Nadu* [AIR 1986 SC 63], it was held that lottery tickets are goods and not actionable claims. Thus, sale of lottery tickets is sale of goods. Sugarcane supplied to a sugar factory is goods within the meaning of Section 2(7) of the Act as held in the case of UP Cooperative Cane Unions Federation vs. West UP Sugar Mills Assn. [AIR 2004 SC 3697]

3) **Transfer of ownership of Goods:** There must be transfer of ownership or an agreement to transfer the ownership of goods from the seller to the buyer – not the transfer of mere possession or limited interest as in the case of pledge, lease or hire purchase agreement). If goods remain in possession of seller after sale transaction is over, the 'possession' is with seller, but 'ownership' is with buyer. The Act uses the term 'general property' implying that sale involves total ownership and not a specific right limited by conditions.

Delivery of goods refers to a voluntary transfer of possession of goods from one person to another. Delivery may be constructive or actual depending upon the circumstances of each case. A contract may provide for the immediate delivery of the goods or immediate payment of the price or both. Alternatively, the delivery or payment may be made by instalments or be postponed.

4) Consideration is Price: Price is an essential ingredient for all transactions of sale and in the absence of the price or the consideration, the transfer is not regarded as a sale. The transfer by way of sale must be in exchange for a price. It has been held that price normally means **money considerations for a sale of goods sec 2 (10).** The price can be paid fully in cash or it can be partly paid and partly promised to be paid in future. The price can be fixed by the agreement between the parties before the conveyance of the property. When goods are exchanged for goods, it is a contract of **barter or exchange**-(*Commissioner of Income Tax v Motor and General Store ltd.* AIR, 1968.S.C.200). When there is no consideration for the contract and the transfer is gratuitous, the transaction will be by way of gift.

The consideration in a contract of sale has to be price i.e., money. If goods are offered as the consideration for goods, it will not amount to sale. It will be barter. If there is no consideration, it will be called gift. But where the goods are sold for definite sum and the price is paid partly in kind and partly in cash, the transaction is a sale.

Consideration is an essential for a valid contract as per the Indian Contract Act, 1872. It is the duty of a buyer who has received and appropriated the goods to pay a reasonable price. According to Section 2(10) 'price' means the money consideration for the sale of goods. If the price is not fixed, the contract is *void ab initio.*

Section 9 lays down how the price may be fixed in a contract of sale:

a) It can be fixed by the contract itself; or

b) It can be fixed in a manner provided by the contract, such as appointment of a valuer; or

c) It can be determined by the course of dealings between the parties; or

d) If the price is not capable of being fixed in any of the ways mentioned ways, the buyer is bound to pay reasonable price. What is a reasonable price is a question of fact dependent on the circumstances of each particular case. It is not necessary that reasonable price should be equal to the market price.

Section 10 makes it clear that if the third party appointed under the agreement to fix the price cannot or does not make such valuation, then the agreement to sell goods will become void. If the third party is prevented in his valuation due to the buyer or the seller, the party not at fault can file a suit for damages against the party in fault.

5) **Essential elements of a valid contract:** All essential elements of a valid contract must be present in the contract of sale. viz., competent parties, free consent, legal object and so on. The transfer of possession and ownership under the Act has to be voluntary and not be tainted with fraud or duress.

Time: Any stipulation with respect to time is not deemed to be of essence to a contract of sale unless a different intention appears from the terms of the contract.

Unless all these ingredients of sale are duly proved, mere entry or endorsement made by the registering authority under sec 31 of the motor vehicles act showing transfer of ownership of the vehicle. Thus, to constitute a transaction of sale of goods the essential ingredients of sale under the sale of goods act have to be proved.

Contract under statutory compulsion- sometimes a contract may not be entered into by the normal process of negotiation, but under a statutory compulsion. When the goods are supplied under a statutory compulsion. When the goods are supplied under a statutory compulsion whether that results in sale or not, is the question which has arisen in a number of cases.

Coffee Board Karnataka v Commissioner of Commercial Taxes, it has been held that the compulsory delivery of coffee by the coffee growers to the coffee board constitutes a sale and not compulsory acquisition, and the state can impose purchase tax on the same.

Performance – they may provide that the delivery of the goods will be made either immediately or by instalments or on some future date. Similarly, regarding the payment of price too the contract may require either immediate payment, or payment by instalments or the payment on some future date.

Compliance of the provisions of the sale of goods act

The transfer of title in any goods, e.g., a car depends on fulfilment of the provisions of the sale of goods act, rather than the provisions of the Motor vehicles Act, 1939.

Transfer of general property: There must be a transfer of general property as distinguishes from special property in goods from the seller to the buyer. For e.g., if A owns certain goods, he has general property in the goods. If he pledges them with B, B has special property in the goods.

Valuation by a third party-: It has noted that one of the modes of determinations of the price may be by the valuation being made by a third party. Sec 10(1) provides that if a third party who is supposed to make valuation cannot or does not make such valuation, the agreement is thereby avoided.

The effect of perishing of goods may be discussed under the following heads:

Sections 7 and 8 deal with the effect of perishing of goods on the rights and obligations of the parties to a contract of sale. Under these Sections, the word 'perishing' means not only physical destruction of the goods but it also covers:

(a) Damage to goods so that the goods have ceased to exist in the commercial sense, i.e., their merchantable character as such has been lost by water and becomes almost stone or where sugar becomes sharbat and thus are unsaleable.

(b) Loss of goods by theft (*Barrow Ltd. vs. Phillips Ltd.*);

(c) Where the goods have been lawfully requisitioned by the government (*Re Shipton, Anderson & Co.).*

It may also be mentioned that it is only the perishing of specific and ascertained goods that affects a contract of sale. Where, therefore, unascertained goods form the subject-matter of a contract of sale, their perishing does not affect the contract and the seller is bound to supply the goods from wherever he likes, otherwise be liable for breach of contract. Thus, where A agrees to sell to B ten bales of Egyptian cotton out of 100 bales lying in his godown and the bales in the godown are completely destroyed by fire, the contract does not become void. A must supply ten bales of cotton after purchasing them from the market or pay damages for the breach.

EFFECT OF DESTRUCTION OF GOODS:

Perishing of goods at or before making of the contract (Sec. 7):

Goods perishing before making of contract -A contract for the sale of specific goods is void if at the time when the contract was made, the goods have, without the knowledge of the seller, perished. The same would be the case where the goods become so damaged as no longer to answer to their description in the contract.

This may again be divided into the following sub-heads:

(i) **In case of perishing of the whole of the goods***:*

Where specific goods form the subject- matter of a contract of sale (both actual sale and agreement to sell), and they, without the knowledge of the seller, perish, at or before the time of the contract, the contract is void. This provision is based either on the ground of mutual mistake as to a matter of fact essential to the agreement, or on the ground of impossibility of performance, both of which render an agreement void ab-initio.

Illustrations:

(a) A sold to B a specific cargo of goods supposed to be on its way from England to Bombay. It turned out, that before the day of the bargain, the ship conveying the cargo had been cast away and the goods were lost. Neither party was aware of the fact. The agreement was held to be void (*Hastie vs Conturier*).

(b) A agrees to B to sell a certain horse. It turns out that the horse was dead at the time of bargain, though neither party was aware of the fact. The agreement is void.

(ii) In case of perishing of only 'a part' of the goods. Where in a contract for the sale of specific goods, only part of the goods is destroyed or damaged, the effect of perishing will depend upon whether the contract is entire or divisible.

If it is entire (i.e., indivisible) and only part of the goods had perished, the contract is void. If the contract is divisible, it will not be void and the part available in good condition must be accepted by the buyer.

Illustration:

1. There was a contract for the sale of a parcel containing 700 bags of Chinese groundnuts of different qualities. Unknown to the seller, 109 bags had been stolen at the time of the contract. The seller delivered the remaining 591 bags, and on the buyer's refusal to take them, brought an auction for the price. It was held that the contract, being indivisible, had become void by reason of the loss of the goods and the buyer was not bound to take delivery of 591 bags or pay for the goods (*Barrow Ltd. vs. Philips Ltd.)* (Note that, had there been all bags of the same weight and quality for certain price per bag, the contract would have been divisible and the buyer could not have avoided the contract as to those goods which had actually perished).

2. Perishing of goods before sale but after agreement to sell Sec. 8:

Goods perishing after the agreement to sell but before the sale is affected -- An agreement to sell specific goods becomes void if subsequently the goods, without any fault on the part of the seller or the buyer, perish or become so damaged as no longer to answer to their description in the agreement before the risk passes to the buyer, 'Fault' means wrongful act or default [Sec 2(5)]

Where there is an agreement, to sell specific goods and subsequently the goods, without, any fault on the part of the seller or buyer, perish before the risk passed to the buyer, the agreement is there by avoided. This Provision is based or the ground of Supervening impossibility of performance which makes a contract void.

If only part of the goods agreed to be sold perish, the contract becomes void if it is indivisible. But if it is divisible then the parties are absolved from their obligations only to the extent of the perishing of the goods (i.e., the contract remains valid as regards the part available in good condition).

It must further be noted that if fault of either party causes the destruction of the goods, then the party in default is liable for non-delivery or to pay for the goods, as the case may be (Sec. 26). Again, if the risk has passed to the buyer, he must pay for the goods, though undelivered [unless otherwise agreed risk prima facie passes with the property (Sec. 26).]

Illustrations:

A buyer took a horse on a trial for 8 days on condition that if found suitable for his purpose, the bargain would become absolute. The horse died on the 3rd day without any fault of either party. Held, the contact, which was in the form of an agreement to sell, becomes void and the seller should bear the loss (*Elphick vs. Barnes*)

A, had contracted to erect machinery on M's premises, the price was to be paid on completion. During the course of the work, there was a fire which completely destroyed the premises and the machinery. It was held that both parties were excused from further performance and A was not entitled to any payment as the price was payable on the completion of entire work (*Appleby vs. Myers.).*

Effect of Perishing of Future Goods:

As observed earlier, a present sale of future goods always operates as an agreement to sell [Sec. 6(3)]. As such there arises a question as to whether Section 8 applies to a contract of sale of future goods (amounting to an agreement to sell") as well? The answer is found in the leading case of *Howell vs. Coopland*, where it has been held that future goods, if sufficiently identified, are to be treated as specific goods, the destruction of which makes the contract void. The facts of the case are as follows:

Illustration:

C agreed to sell to H 200 tons of potatoes to be grown on C's land. C sowed sufficient land to grow the required quantity of potatoes, but without any fault on his part, a disease attacked the crop and he could deliver only about ten tons. The contract was held to have become void.

Classification of goods

'Goods' have been defined under sec 2(7) of the Sale of Goods Act, 1930, to include every kind of movable property, including stocks, shares, crops, grass, severable objects, etc. It is supplemented by the definitions of movable and immovable property under sec 3(36) and sec 3(26) of the General Clauses Act, 1897.

This primarily investigates the dilemma regarding the scope of definition of "goods" for the purposes of Sale of Goods Act, 1930 (hereinafter referred to as the 'Act'). I have differentiated the position of law in England and India. However, due to the vastness of the definition I have limited the scope of my concept to three of the major commodities which have been subject of controversies, namely:

(1) Electricity,

(2) Lottery tickets, and

(3) Software programs.

Definition of "goods"

'Goods' is defined as per Section 2 (7) of the 'Act' as. "Every kind of movable property other than actionable claims and money; and includes stock and shares, growing crops, grass, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale."

Definition of "Movable Property"

As per section **3(36) of the General Clauses Act 1897**, "movable property" is defined as "property of every description except immovable property." **Section 3(26)** of the same **Act** reads as, "Immovable property shall include land, benefits to arise out of land, and things attached to the earth, or permanently fastened to anything attached to the earth."

Hence, a conjoint reading of the two sections gives us a clear definition that anything that is attached to the land maybe termed as "movable property", provided that there is an element of severability involved. The element of severability is important while deciding on the nature of the property, and this element can be established by ascertaining the nature of the property, intention of the parties and the terms of the contract between them. For instance, timber falls under the ambit of "goods" as per S.2(7) because timber trees are severed from the land for the purpose of sale and hence, they become a commercial commodity- *M/s Mukesh Kumar Aggarwal & Co. V. State of M.P.*

Perumal v Ramaswami, AIR 1969 Mad.346.- if an oil engine is attached to the earth and it is used as long as it can, and it can be detached and shifted to some other place when it is not used, such an engine is not immovable property.

In the case of *Tata Consultancy Services v. State of Andhra Pradesh,* it was held that property as per Sale of Goods Act means general property over the goods and not merely a specific property. The usage of the word 'includes' further expands the definition, as it includes in the definition not only goods of the prescribed nature but it also imports those things that are specifically provided by the interpretation clause.

Difference between the English law and the Indian law

In English law as per **Sec. 61(1) of the Sale of Goods Act 1979, "**goods" include personal chattels which can be further divided into "choses in possession" and "choses in action". As per the English law only the former is included in the definition of "goods" whereas the latter which include commodities like shares, debentures, bills of exchange, and other negotiable instruments are excluded from the definition as they all are actionable claims. On the other hand, in India, the definition as elucidated in Sec.2(7) is much wider in scope than the English definition as it includes stocks and shares as within the scope of "goods".

The following discussion primarily focuses on the point that whether certain types of commodities can be included within the definition of "goods" or not.

- Electricity (water, gas) as "goods": Inclusion of intangible energy within the definition of goods

Electricity does not come under the definition of "goods" as per English law. There have been judicial decisions in England where electricity has been referred to as 'thing' and an 'article' and also as 'tangible personal property', but there has been no judicial decision which includes electricity within the definition of 'goods' for the purpose of Sale of Goods Act. Moreover, the legal possession of electrical energy is a challenging proposition as "it is capable of being kept or stored only by changing the physical or chemical state of other property which is itself the subject of possession."

In India however, the situation is quite different. In the Calcutta High Court case of *Associated Power Co. v. R.T. Roy* it was held that electricity comes under the ambit of 'goods' under the **article 366 (12)** of the Constitution as well as S. 2 (7) of the 'Act'. This proposition was affirmed in a Madras High Court case where the learned judge held that electricity was under the definition of 'goods' since it is capable of delivery, and it does not matter whether it is a tangible or intangible form of energy.

The **Law Commission of India in its 8th report** proposed that electricity and water should be included in the definition of 'goods' under S. 2(7) of the 'Act'. Meanwhile, the Supreme Court while discussing about the definition of 'goods' as mentioned in the Madhya Pradesh Sales Tax Act (2 of 1959), found that the definition included all kinds of movable property. The court further held that:

"The term "movable property" when considered with reference to "goods" as defined for the purposes of sales tax cannot be taken in a narrow sense and merely because electric energy is not tangible or cannot be moved or touched like, for instance, a piece of wood or a book it cannot cease to be movable property when it has all the attributes of such property……It can be transmitted, transferred, delivered, stored, possessed etc., in the same way as any other movable property."

However, Pollock & Mulla, in their commentaries, have expressed their concerns over the applicability of the 'Act' for electricity because, there is no contractual obligation on part of the public authority to supply 'electricity', rather it is a statutory obligation on part of the authority providing these 'goods'. The supply of such commodities would not amount to a 'sale' for the purposes of the 'Act'. As a result, any breach or failure on part of the public body to supply electricity would be dependent upon the terms of the statute governing the public body.

Thus, on one hand it can be said that 'electricity' comes under the definition of 'goods' however the applicability of the 'Act' in case of sale of electricity is a dubious proposition.

Electronic T.V. Signals are goods – *Jabalpur Cable Network Pvt Ltd v ESPN Software India Pvt. Ltd*, electronic T.V. Signals are in the form of energy just like electricity and are Goods.

Exclusion of Lottery tickets from the definition of "goods"

As per Black's Law Dictionary, 'lottery' is defined as '*a chance for a prize for a price'.* For the purposes of the 'Act' lottery tickets are clearly a movable property, however it has been a matter of debate that whether they are an actionable claim as defined under S.3 of Transfer of Property Act, 1882.

In the Supreme Court case of *H. Anraj v. Government of Tamil Nadu.* it was held that a lottery ticket primarily involved two rights: (1) the right to participate in the draw and (2) the right to win the prize, depending on chance. In that case it was held that the former right was a "transfer of a beneficial interest in movable goods" and hence was a sale within the meaning of Art 366 (29-A) (d) of the Constitution whereas the latter right was a chose in action and thus not "goods" for the purpose of levy of sales tax.

However, the ruling of this decision was challenged in a later Supreme Court verdict of *Sunrise Associates v. Government of NCT of Delhi.* It was held that sale of a lottery ticket amount to a sale of an actionable claim. The conclusion of the Court was based on the reasoning that there was no difference between right to win and right to participate in a lottery draw, as no purchaser pays the consideration for a right to participate in the draw, instead he pays it for the right to win.

Thus, the classification by *H. Anraj case* of the right to participate as right *in praesenti* and the right to win as a right *in future,* was incorrect as both these rights are *in futuro.* As a result, the earlier judgment was overruled to that extent and "lottery tickets" were excluded from the definition of "goods".

Incomplete film- in *State of T.N. V Thiru Murugan Bros, sale of an incomplete film has been held* to be goods and the transaction is liable to sales tax. It is immaterial that in such a case no copyright is acquired.

Fixed deposit receipt is goods, in *State Bank of India v Smt. Neela Ashok Naik*, it has been held that fixed deposit receipt is goods. It may be pledged as collateral security. If the bank loan is not repaid, the bank may retain it as a collateral security and file suit for recovery of loan.

Conundrum surrounding Software programs

In the case of *TCS v. State of Andhra Pradesh* the Supreme Court held that a software program on a CD or a floppy drive would be a "good" for the purposes of levy of sales tax. A software program is a collection of instructions or commands that are given to a computer to perform a given task. The main area of debate is that "Do software programs – being intellectual creations of human mind – be treated as "goods" for the purposes of the 'Act' or not?"

One of the landmark cases in this regard was the case of *St Albans City and District Council v. International Computers Ltd* where Sir Iain Glidewell observed that a hardware device has no use of its own unless it is supplemented with a software and it was only because of necessity that software was contained in a physical medium like a disk or a floppy furthermore, in case the disk is sold and there is a defect with the program, then there would be a *prima facie* liability against the disk manufacturer as well. Thus, he held that the tangible disk and the software program both will be included within the definition of "goods".

In the *TCS case* a special mention was given to 'canned software', where it was held by the learned judge that once a software is uploaded on a medium like a CD or a floppy drive, it ceases to be a work of intellectual creation. This is primarily because each of these mediums becomes a marketable commodity in itself. "Marketability" of a commodity was the determining factor whether it is a "good" or not. It has also been held that "operational software" which was uploaded on a hard-disk does not lose its character as a tangible good.

It has also been a matter of debate as to inclusion of computer software within the definition of "goods" as defined in section 2[41] of the Uniform Commercial Code, 1952. It is argued that since "custom designed" computer software is a product of a labor-intensive process and it must be considered as a service rather than a good. However, sale of most of the software programs resemble sales of any other consumer product available for consumption, and it is usually sold through separate pre-existing packages. On the other hand, contracts for providing data processing services have been held to be contracts for services rather than contracts for "goods".

With the help of the above discussion, it is clear that despite of being an intangible commodity, "computer software" can be included in the definition of "goods" for the purposes of the 'Act'.

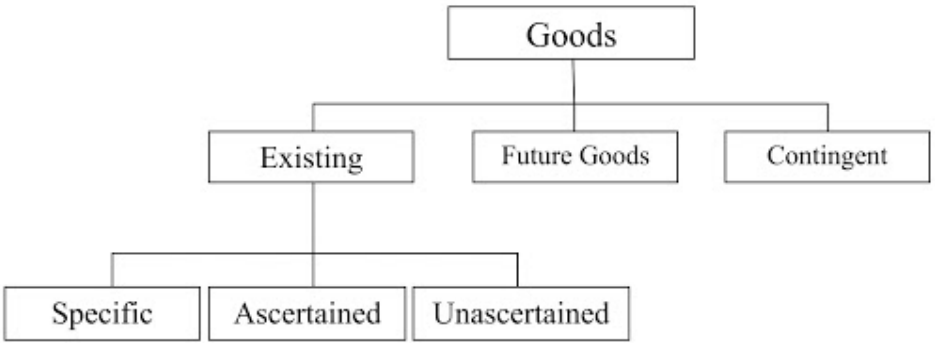
Exclusion of 'Money' from the definition

Money and actionable claim are specifically excluded from the definition of "goods" under S.2(7) of the 'Act', because it is the medium of exchange used at the time of sale of goods. Hence, money is not regarded as a "*chattel but as something 'sui generis'".* However, a coin which was intended to be sold as an item of curiosity will be said to be a "good", as it was passed on as a commodity and not as a currency.

Through these judgements have tried to identify some of the major controversies surrounding certain commodities and their inclusion in the definition of "goods" as per S.2(7) of the 'Act'. The discussion helped to prove that "electricity" (even being an intangible good) comes under the ambit of goods, while on the same hand lottery tickets (being movable goods per se) are excluded because they are "actionable claims". This helps us to show that being a movable property in itself is not a conclusive proof of being a "good". Also, the debate on software programs elucidated the importance on "marketability" aspect of "goods". Hence, it evident that due to rapid developments in science and technology, the definition of goods cannot be compartmentalized into straight jacket distinctions and the scope of this section will expand over time. *Old and rare coins*, however, are goods and they can be sold or purchased as such. But money constitutes consideration for sale of goods rather than itself being goods and recognized currency in circulation.

Goods may be classified into:

1. Existing goods;
2. Future goods; and
3. Contingent goods



1. **Existing goods**: At the time of sales if the goods are physically in existence and are in possession of the seller the goods are called 'Existing Goods'. The goods that are referred to in the contract of sale are termed as existing goods if they are present (in existence) at the time of the contract. In sec 6 of the Act, the existing goods are those goods which are in the legal possession or are owned by the seller at the time of the formulation of the contract of sale. The existing goods are further of the following types:

a) Specific goods: Goods identified and agreed upon at the time of the making of the contract of sale are called 'specific goods' [Sec. 2(14)]. It may be noted that in actual practice the term 'ascertained goods' is used in the same sense as 'specific goods,' These are those goods that are "identified and agreed upon" when the contract of sale is formed.

For example, you want to sell your mobile phone online. You put an advertisement with its picture and information. A buyer agrees to the sale and a contract is formed. The mobile, in this case, is specific good.

For example, where A agrees to sell to B, a particular radio bearing a distinctive number, there is a contract of sale of specific or ascertained goods.

B) Ascertained Goods: This is a type not defined by the law but by the judicial interpretation. This term is used for specific goods which have been selected from a larger set of goods.

For example, you have 500 apples. Out of these 500 apples, you decide to sell 200 apples. To sell these 200 apples, you will need to separate them from the 500 (larger set). Thus, you specify 200 apples from a larger group of unspecified apples. These 200 apples are now the ascertained goods.

(a) **Unascertained goods**. The goods, which are not separately identified or ascertained at the time of the making of the contract, are known as 'unascertained goods.' They are indicated or defined only by description. These are the goods that have not been specifically identified but have rather been left to be selected from a larger group.

For example, if A agrees to sell to B one bag of sugar out of the lot of one hundred bags lying in his godown; it is a sale of unascertained goods because it is not known which bag is to be delivered. As soon as a particular bag is separated from the lot for delivery, it becomes ascertained or specific goods.

For example, from your 500 apples, you decide to sell 200 apples but you don't specify which ones you want to sell. A seller will have the liberty to choose any 200 apples from the lot. These are thus the unascertained goods.

The distinction between 'specific' or 'ascertained' and 'unascertained' goods is important in connection with the rules regarding 'transfer of property' from the seller to the buyer.

2. **Future goods:** Future goods are goods to be manufactured or produced or yet to be acquired by seller. There cannot be present sale in respect future goods because the property cannot pass.

In sec 2(6) of the Act, future goods have been defined as the goods that will either be manufactured or produced or acquired by the seller at the time the contract of sale is made. The contract for the sale of future goods will never have the actual sale in it, it will always be an agreement to sell.

For example, -you have an apple orchard with apples in it. You agree to sell 1000 apples to a buyer after the apples ripe. This is a sale that has to occur in the future but the goods have been identified already and the agreement made. Such goods are known as future goods.

Example- A agrees to sell to B all the milk that his cow may yield during the coming year. This is a contract for the sale of future goods.
X agrees to sell to Y all the mangoes, which will be produced in his garden next year. It is contract of sale of future goods, amounting to 'an agreement to sell.'

Contingent Goods: Though a type of future goods, these are the goods the acquisition of which by the seller depends upon a contingency, which may or may not happen [Sec. 6 (2)]. Contingent goods are actually a subtype of future goods i n the sense that in contingent goods the actual sale is to be done in the future. These goods are part of a sale contract that has some contingency clause in it. For example, if you sell your apples from your orchard when the trees are yet to produce apples, the apples are a contingent good. This sale is dependent on the condition that the trees are able to produce apples, which may not happen.

Example

A agrees to sell specific goods in a particular ship to B to be delivered on the arrival of the ship. If the ship arrives but with no such goods on board, the seller is not liable, for the contract is to deliver the goods should they arrive.

Delivery- **T**he delivery of goods signifies the voluntary transfer of possession from one person to another. The objective or the end result of any such process which results in the goods coming into the possession of the buyer is a delivery process. The delivery could occur even when the goods are transferred to a person other than the buyer but who is authorized to hold the goods on behalf of the buyer.

There are various forms of delivery as follows:

- ***Actual Delivery***: If the goods are physically given into the possession of the buyer, the delivery is an actual delivery.
- ***Constructive delivery***: The transfer of goods can be done even when the transfer is affected without a change in the possession or custody of the goods. For example, a case of the delivery by attornment or acknowledgment will be a constructive delivery. If you pick up a parcel on behalf of your friend and agree to hold on to it for him, it is a constructive delivery.
- ***Symbolic delivery***: This kind of delivery involves the delivery of a thing in token of a transfer of some other thing. For example, the key of the godowns with the goods in it, when handed over to the buyer will constitute a symbolic delivery.

The Document of Title to Goods-From the Sec 2(4) of the act, we can say that this "includes the bill of lading, dock-warrant, warehouse keeper's certificate, railway receipt, multimodal transport document, warrant or order for the delivery of goods and any other document used in the ordinary course of business as proof of the possession or control of goods or authorizing or purporting to authorize, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented."

Mercantile Agent [Section 2(9)]-Mercantile agent is someone who has authority in the customary course of business, either to sell or consign goods under the contract on behalf of the one or both of the parties. Examples include auctioneers, brokers, factors etc.

Property [Section 2(11)]-In the Act, property means 'ownership' or the general property i.e., all ownership right of the goods. A sale constitutes the transfer of ownership of goods by the seller to the buyer or an agreement of the same.

Insolvent [Section 2(8)]-The Act defines an insolvent person as someone who ceases to pay his debts in the ordinary course of business or cannot pay his debts as they become due, whether he has committed an act of insolvency or not.

Price [Section 2(10)]-In the Act, the price is defined as the money consideration for a sale of goods.

Quality of Goods-In Sec 2(12) of the Act, the quality of goods is referred to as their state or condition.

SALE & AGREEMENT TO SELL

A contract of sale is a generic term and includes both an actual sale and an agreement to sell. Section 4 provides that if the property in goods is transferred from the seller to the buyer under a contract, the contract is called a sale. Where the transfer of the property in the goods will take place at a future time or is subject to some condition which has to be fulfilled, the contract is called an agreement to sell. Such an agreement to sell becomes a sale when the prescribed time lapses or the conditions are fulfilled.

Basis of Distinction	Sale	Agreement to Sell
Contract	It is an executed contract.	It is an executory contract.
Transfer of property	The property in the goods sold passes to the buyer at the time of contract. It passes immediately.	The property passes when it becomes sale on the expiry of prescribed time or the fulfilment of certain conditions. It takes place at a future time or subject to fulfilment of conditions.
Conveyance of property	It creates a right in rem – a right to enjoy the goods against the whole world including the seller.	It creates a right in personam – right against the seller.
Transfer of risk	The transfer of risk takes place immediately. It is related to ownership and when ownership is transferred, the risk also passes to the person. If there is loss of goods, it will fall on the buyer even though the goods maybe in the possession of the seller.	There is no transfer of risk of loss of goods as ownership is not transferred. The loss will be borne by the seller even though the goods are in possession of the buyer.

Right of seller in case of breach	Since the property has passed to the buyer, the seller can sue the buyer for price of the goods.	The seller can only sue for damages, unless the price was payable at a particular date.
Right of buyer in case of breach	He can sue the seller for damages. He can also sue the third party who bought those goods for the goods.	He can sue the seller for damages only.
Insolvency of seller in possession of goods	He can claim the goods from the Official assignee or Receiver.	He cannot claim the goods but only a rateable dividend for the money paid.
Insolvency of buyer before paying the	The seller has to deliver the goods to the Official assignee except where he	The seller can refuse to deliver the goods to the Official Assignee or

SALE & HIRE PURCHASE AGREEMENT

A Hire purchase agreement is an agreement for hire of goods where the person who hires the goods has an option to purchase the goods at the end. The possession of the goods is delivered to such a hirer and he has to pay via instalments. The property in the goods passes to the hirer on the payment of the last instalments. The Hire purchase agreements are treated as bailment and the parties have the same rights as a bailor and bailee. The hirer has a right to terminate the agreement at any time before the property passes.

The test whether an agreement is sale or hire purchase was given in the case of Lee vs. Butler [1893 2 QB 318] – If a person taking the goods has no option to terminate the agreement, is a contract of sale irrespective of where the price is paid in instalments.

Basis of distinction	Contract of Sale	Hire Purchase Agreement
Law	A contract of sale is governed by the Sale of Goods Act, 1930.- sec 4(1)	They are governed by Hire Purchase Act, 1972- sec 2(c)
Nature of contract	It may be written, oral or implied.	It is an agreement to hire and an agreement to sell. It has to be in writing.
Possession	Possession may or may not transfer immediately.	Possession passes immediately
Transfer of ownership	The ownership of goods is transferred immediately.	It transferred only when the option to purchase is exercised and the last payment is made.
Buyer	The buyer becomes the full owner of the goods	The hirer is a bailee, and not the owner until he pays all the instalments of the price in full or exercises the option to purchase.
Transfer to third parties	The buyer can transfer a good title to third parties because ownership of goods has been transferred.	The hirer cannot transfer a good title to a third party as ownership has not been transferred.
Right to repossess	The seller can sue for price but he cannot repossess the goods.	The hire vendor has a right to repossess the goods if the hirer defaults in the payments.
Right to terminate	In a sale, there is no option to the buyer to return the goods bought.	The hirer can terminate the agreement before the ownership is transferred.

Sales Tax	In case of sale of taxable goods, sales tax is levied.	Even if taxable goods are hired, sales tax is not levied.

SALE OF GOODS & WORK AND LABOUR

A contract of sale of goods is one in which some goods are sold or are to be sold for a price. It requires the delivery of goods. But there are transactions where there is a contract of exercise of skill and labour, and the delivery of goods is subsidiary. These are the contracts for work or labour or the contracts for service. It is the intention of the parties that creates the difference – whether only delivery of goods is intended or exercise of skill and labour with regard to the goods has to be delivered.

Example: A commissions B to paint his portrait and supplies him with the material to paint. It is a contract for work and labour and not a contract of sale because the substance of the contract is the artist's skill and not the delivery of the material.

In a similar case of *Robinson vs. Graves* [1935 1 KB 579], A, a painter was orally commissioned by B to paint portrait of a lady. Later, B repudiated the contract before its completion. It was held that the contract was of work and labour because the substance of the contract was the skill and experience of the artist in producing the picture.

Example: A bought a portrait painted by B, a famous artist. It is a contract of sale and not a contract for work and labour because the substance of the work is the delivery of the portrait.

In *Lee vs. Griffin* [1861 30 LJ QB 252], a dentist was engaged by a lady to make false teeth 'to be fitted into her mouth'. The lady died before the completion of work and a question arose as to the nature of the contract. It was held that the contract was one of sale.

Where gold is given to a goldsmith for preparing ornament, it is a contract of work and labour. When a photographer takes a photograph, develops the negative and does other photographic work and then supplies the prints to his client, the contract is one of skill and labour and not that of sale of goods as held in the case of *Asst. Sales Tax Officer vs. B C Kame* **[**AIR 1977 SC 1642]

Sale and Barter: A sale is always for a price but in case of barter, the transfer of ownership of goods is in return for other goods – there is not price paid.

Sale by Pawnee of goods, where the bank, in the course of banking business, has sold the goods pledged with it, it would be covered within the meaning of the term 'SALE' of goods under sec 2(13) of the sale of goods act, 1930. In State *Bank of Travancore V Commercial Tax Officer*, the bank sold, in public auction, goods/ornaments/bullion pledged with the bank, in realization of security, in exercise of its rights as a pledgee. It is held to be sale within the meaning of sec 2(13) of the Act.

Conditions and Warranties

Whenever we buy any goods like electronic gadgets etc., we are concerned about the warranty periods. We ask the seller about the warranty to make sure

that even if the product is found to be faulty after purchase, we can easily get the product replaced or repaired. The terms "Condition" and "Warranty" are set out in the contract of sale in order to determine remedies the parties can claim in case of the breach by either of the parties. Here in this article, we will see the manner how these terms are defined, their differences and their legality in the light of Sale of Goods Act, 1930.

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

Section 12 of the Act draws a demarcation between a condition and a warranty. The determination of condition or warranty depends upon the interpretation of the stipulation. The interpretation should be based on its function rather than the form of the word used. The Sale of Goods Act 1930 (hereinafter the Act) contains various provisions regarding the sale of goods. One such provision is of conditions and warranties. In Section 12 of the Act the meaning of conditions and warranties are given as under-

(1) A stipulation in a contract of sale with reference to goods which are the subject thereof may be a condition or a warranty.

(2) A condition is a stipulation essential to the main purpose of the contract, the breach of which gives rise to a right to treat the contract as repudiated.

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

(4) Whether a stipulation in a contract of sale is a condition or a warranty depends in each case on the construction of the contract. A stipulation may be a condition, though called a warranty in the contract.

But our concern here is with 'Implied Conditions and Warranties'. If a stipulation forms the very basis of the contract, or, as stated in S.12(2) is essential to the main purpose of the contract, it is called a condition. On the other hand, if the stipulation is not essential to the main purpose of the contract, it is called warranty S. 12(3).

Parties may expressly provide any conditions or warranties in their contract. For

e.g., for a sale of red saree, to be worn by a woman at a function on a particular day, it is express condition that it should be red saree for a particular day and should reach on time. But is there any other condition? Yes, there can be other conditions also that are not exclusively said by parties but are impliedly understood. In the said illustration, the implied condition can be of a perfect saree, not to be torn, matching with selected piece etc. Let's have a deep look into this provision.

Conditions

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

Sec 12(2)- 'A condition is a stipulation essential to the main purpose of the contract, the breach of which gives rise to a right to treat the contract as repudiated'.

A condition is referred to as, an essential element attached to the subject matter of an agreement which is mentioned by the buyer to the seller and is either expressed or implied while entering into the contract. The buyer can refuse to accept the goods delivered by the seller, in case of non-compliance with the condition mentioned by the seller in the contract. The condition may be express or implied.

If while entering into a contract, the buyer mentions (in words or writing) that the goods are to be delivered to him before a given date, the date is taken as a condition to the contract since the buyer expressed it. Whereas, if a buyer contracts to buy a red-coloured

saree for her ‘wedding’ which is to be held on a date mentioned to the seller, then the time is the implied condition for the contract. Even if the buyer doesn’t mention the date of delivery (but has mentioned the date of the wedding or occasion), it is implied on the part of the seller that the garment is to be delivered before the mentioned date of the wedding. In this case, the seller is bound to deliver the garment before the date of the wedding as the delivery of the garment after the said date of the wedding is of no use to the buyer and the buyer can refuse to accept the same since the condition to the contract is not fulfilled.

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

Kinds of conditions

Expressed Condition

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

Implied Condition

There are several implied conditions which are assumed by the parties in different kinds of contracts of sale. Say for example the assumption during sale by description or sale by sample. Implied conditions are described in Section 14 to 17 of the Sale of Goods Act, 1930. Unless otherwise agreed, these implied

conditions are assumed by the parties as if it is incorporated in the contract itself. Let’s study these conditions briefly:

Warranty

Sec 12(3)- ‘A warranty is a stipulation collateral to the main purpose of the contract, the breach of which gives rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated’.

A warranty is referred to as extra information given with respect to the desired good or its condition. The warranty is of secondary importance to the contract for its fulfilment. Non-compliance of the seller to the warranty of the contract does not render the contract repudiated and hence, the buyer cannot refuse to buy the good but can only claim compensation from the buyer.

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

Kinds of Warranty

Expressed Warranty

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

Implied Warranty

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

- Warranty as to undisturbed possession

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

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

- Warranty as to freedom from Encumbrances

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

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

- Implied warranty to disclose Dangerous nature of the goods sold

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

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

CONDITION	**WARRANTY**
A condition is of primary importance.	A condition is of secondary importance.
Breach of condition leads to termination of the contract.	In case of a breach of warranty, the injured party is liable to be compensated.
The injured party can refuse to accept the goods as well as claim damages in case of breach of condition.	The Injured party can only claim damages in case of breach of warranty.
The injured party can refuse to accept goods not fulfilling the condition of the contract.	The Injured party cannot refuse to accept the goods not fulfilling the warranty.
A condition can be treated as a warranty on the wish of the buyer.	A warranty cannot be treated as a condition.
Defined in Section 12(2) of the Sale of Goods Act, 1930.	Defined in Section 12(3) of the Sale of Goods Act, 1930.

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

Important note on the differences Between Condition and Warranty

1. A condition is an obligation which requires being fulfilled before another proposition takes place. A warranty is a surety given by the seller regarding the state of the product.
2. The condition is vital to the theme of the contract while Warranty is ancillary.
3. Breach of any condition may result in the termination of the contract while the breach of warranty may not lead to the cancellation of the contract.
4. Violating a condition means violating a warranty too, but this is not the case with warranty.
5. In the case of breach of condition, the innocent party has the right to rescind the contract as well as a claim for damages. On the other hand, in breach of warranty, the aggrieved party can only sue the other party for damages.

Implied Conditions and Warranties under the Sale of Goods Act

Meaning- Apart from what may be provided by the parties in the contract, certain conditions and warranties as provided under S.14 to 17 are impliedly there in every contract of sale of goods. Thus, the stipulation that are implied in a contract of sale of goods corresponding to their nature of being a condition or warranty as according to the nature of contract is called as Implied Conditions and Warranties. They are binding in every contract unless they are inconsistent with any express condition and warranty agreed by the parties.

Section 14-17 of the Sale of Goods Act, 1930 deal with the implied conditions and warranties attached to the subject matter for the sale of a good which may or may not be mentioned in the contract.

Implied Conditions*:*

There are seven implied conditions in a contract of sale of goods.

- Condition as to Title [Section 14(a)]

Section 14(a) of the Sale of Goods Act 1930 explains the implied condition as to title as 'in the case of a sale, he has a right to sell the goods and that, in the case of an agreement to sell, he will have a right to sell the goods at the time when the property is to pass'.

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

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

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

In every contract of sale, unless the circumstances are such as to show a different intention, there is an implied condition on the part of the seller that in case of sale, he has a right to sell the goods and in the case of agreement to sell, he will have the right to sell goods at the time when property in them is to pass.

This means that the seller has the right to sell a good only if he is the true owner and holds the title of the goods or is an agent of the title holder. When a good is sold the implied condition for the good is its title, i.e., the ownership of the good. If the seller does not own the title of the said good himself and sells it to the buyer, it is a breach of condition. In such a situation the buyer can return the goods to the seller and claim his money back or refuse to accept the good before delivery or whenever he learns about the false title of the seller.

Rowland v Divall, – The plaintiff had purchased a car from the defendant and was compelled to return it to the true owner after having used it for a while. The plaintiff then sued the defendant for the purchase money, since the defendant didn't receive the consideration as per the condition of the title of ownership.

If the goods bear labels infringing the trademark of a third party, the seller has no rights to sell them. In *Niblett v Confectioners'* Material, the claimant purchased 1,000 tons of condensed milk from the defendant. The tins were labelled 'Nissly'. Nestle told the claimant that if they attempted to sell these on, they would apply for an injunction to prevent the sale as the label was very similar to Nestle's labels for their condensed milk. The claimants agreed not to sell them and brought an action against the sellers. It was held that, the sellers did not have the right to sell the goods and therefore the buyers were entitled to repudiate the contract.

In *Butterworth v Kingsway Motors*, R was in possession of a car under a hire-purchase contract with a finance company. Before exercising the option to purchase, R sold the car to X, who then sold it to Y. Y sold the car to KM, and KM sold it to B. The finance company recovered the car from B. It was held that at the time KM purported to sell, they were not the owners of the car. B was entitled to recover the whole of the purchase price paid to KM, because there was a total failure of consideration. Thus, it was observed that Where a seller having no title to the goods at the time of the sale, subsequently acquires a title, that title feeds the, that title feeds the defective titles of both the original buyer and the subsequent buyer.

- Sale by Description (Section 15)

Section 15 of the Sale of Goods Act, 1930 explains that when a buyer intends to buy goods by description, the goods must correspond with the description given by the buyer at the time of formation of the contract, failure in which the buyer can refuse to accept the goods.

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

When the goods are sold by description there is an implied condition that the goods supplied shall correspond with the description. Lord Blackburn *in Bowes v Shand* stated: If you contract to sell peas, you cannot oblige to take beans.

In *Shepherd v Kane*, A ship was contracted to be sold as "copper fastened vessel" to be taken with all faults, without any allowance for any defects whatsoever. The ship turned to be partially copper fastened. The court held that that the buyer was entitled to reject the goods.

When a descriptive word or phrase is used in a contract of sale to describe the product it creates an implied condition that the goods will correspond to the description. For example, a sale of Seedless Grapes signifies that the fruit will have no seeds. If it turns that the fruit is with seeds the buyer can reject the goods.

Some situations-Where the buyer has not seen the goods and relies on the description given by seller: In *Varley v. Whipp*, there was a contract for the sale of a second-hand reaping machine which the buyer had not seen. The seller described it as a new machine a year before and having cut only 50 to 60 acres. After delivery, the buyer found that the machine was not in accordance with the description given by seller. It was held that the buyer was entitled to reject the machine.

Where the buyer had seen the goods but relies not on what he had seen but on what was stated to him by the seller: In *Nicholson &Venn v Smith Marriot,* Table napkins sold at an auction which were said to be authentic property of Charles I, but that turned out to be false. Claimant was entitled to damages for breach of contract, but Hallet J held the claimant could've avoided the contract on the ground of mistake.

Packing of goods may sometimes be part of the description: In *Moore &Co v. Landauver & Co.*, M sold to L 300 TINS OF Australian Apple packed in cases containing 30 tins. M tendered a substantial portion in case containing 24 tins. It was held that l could reject all the tins as the goods were not packed according to the description given in the contract as the method in which the fruit was packed was an essential part of the description.

- Sale by Sample (Section 17)

When the goods are to be supplied on the basis of a sample provided to the seller by the buyer while the formation of a contract the following conditions are implied:

- Bulk supplied should correspond with the sample in quality, That the actual products would correspond with the sample with respect to the quality, size, colour etc.
- Buyer shall have a reasonable opportunity to compare the goods with the sample
- The good shall be free from any apparent defect on reasonable examination by the buyer.

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

According to S. 17 (1) - A contract of sale is a contract for sale by sample where there is a term in the contract, express or implied, to that effect. The purpose of a sample is to present to the eyes the real meaning and intention of the parties with regard to the subject matter of the contract which owing to the imperfection of language, it may be difficult or impossible to express in words.

According to S. 17 (2)- In the case of a contract for sale by sample there is an implied condition.

(a) that the bulk shall correspond with the sample in quality;(b) that the buyer shall have a reasonable opportunity of comparing the bulk with the sample;(c) that the goods shall be free from any defect, rendering them unmerchantable, which would not be apparent on reasonable examination of the sample.

In *Godley v Perry*, a retailer purchased from a wholesaler a number of toy catapults in a sale by sample. The retailer sold one of those catapults to a boy and when the boy tried to play with it, it broke into pieces because of manufacturing defect. The retailer was held bound to pay compensation to the boy and in his turn, he sued the wholesaler for indemnity. It was found that the retailer had done reasonable examination on his part, thus wholesaler had to indemnify him

- Sale by sample as well as Description (Section 15)

When the sale of goods is by a sample as well as a description the bulk of the goods should correspond with both, i.e., description and sample provided to the seller in the contract and not only sample or description.

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

S. 15- When the goods are sold by sample as well as description, it is not sufficient that the bulk of goods correspond with the sample if the goods do not correspond with the description.

In *Wallis v Pratt*, there was a contract for sale of seeds referred to as 'Common English Sainfoin'. However, the seeds supplied to the buyer were of a different quality. The defect also existed in the sample. The discrepancy in quality was discovered only after the seeds were sown. The buyer could recover damages as there was a breach of condition.

Before heading towards the further implied conditions let us know about the **'Doctrine of *Caveat Emptor'* meaning 'Buyer beware'**. This doctrine of caveat emptor is based on the fundamental principle that once a buyer is satisfied with the product's suitability, then he has no subsequent right to reject such product. This doctrine is enshrined through Section 16 of the Act; thus, it becomes important to study it.

Sometimes the goods purchased by the buyer may not suit the particular purpose for which the buyer wants them. The question in such case arise is, whether the buyer can reject the goods or he is supposed to take the risk of goods turning out not suitable for the required purpose.

The section provides that as a general rule, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale. It is incorporation of the rule contained in maxim caveat emptor which means buyer beware. According to this rule, the buyer himself should be careful while purchasing the goods and he should himself ascertain that the goods suit his purpose; but if the goods are subsequently found to be unsuitable for the purpose of the buyer, he cannot blame seller for the same.

For e.g. A purchase a horse from B. A need the horse for riding but he doesn't mention this to B. The horse is not suitable for riding but only for carriage. A can neither reject the horse nor can he claim any compensation.

In Re *Andrew Yule & Co.,* the buyer ordered for hessian cloth without specifying purpose for which he wanted the same. It was in fact needed for packing. Because of its unusual smell, it was unsuitable for the same. It was held that the buyer had no right to reject the cloth and claim damages.

Section 16 of the act incorporates *certain exceptions to the rule of caveat emptor* which are the next two implied conditions of a contract of sale also.

- *Condition as to Quality or Fitness (Section 16)*

The doctrine of Caveat Emptor is applicable in the case of sale/purchase of goods, which means 'Buyer Beware'. The maxim means that the buyer must take care of the quality and fitness of the goods he intends to buy and cannot blame the seller for his wrong choice. However, section 16 of the Sale of Goods Act 1930 provides a few conditions

which are considered as an implied condition in terms of quality and fitness of the good:

- When the buyer specifies the purpose for the purchase of the good to the seller, he relied on the sound judgment and expertise of the seller for the purchase there is an implied condition that the goods shall comply with the description of the purpose of purchase.
- When the goods are bought on a description from a person who sells goods of that description (even if he doesn't manufacture the good), there is an implied condition that the goods shall correspond with the description. However, in case of an easily observable defect that is missed by the buyer while examining the good is not considered as an implied condition.

S. 16(1) {First exception to caveat emptor}- Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgment, and the goods are of a description which it is in the course of the seller's business to supply (whether he is the manufacturer or producer or not), there is an implied condition that the goods shall be reasonably fit for such purpose.

In *Priest v Last,* B went to S, a chemist and demanded a hot water bottle from him, S gave a bottle to him saying that it was meant for hot water, but not boiling water. after few days while using the bottle B's wife got injured as the bottle burst out, it was found that the bottle was not fit to be used as hot water bottle. The court held that the buyer's purpose was clear when he demanded a bottle for hot water bottle, thus the implied condition as to fitness is not met in this case.

In *Frost v Aylesbury Dairy Co*, the claimant bought milk from the defendant and the account book supplied to him contained statements on the precautions taken to keep the milk free from germs. The claimant's wife died of typhoid fever contracted from milk supplied by the defendants. It was held that the claimant should be awarded.

Proviso to Section 16 (1)- No implied condition when the sale under patent or trade name: In *Chanter v Hopkins*, the buyer's order to the seller said: 'Send me your patent hopper and apparatus to fit up my brewing copper with your smoke consuming furnace'. The seller supplied the buyer the furnace and apparatus asked for but the same was not suitable for the purpose of buyer's brewery. It was held that the seller had supplied what was ordered and he was entitled to recover its price from the buyer.

Implied condition of merchantable quality- Sec. 16(2) {Second exception to caveat emptor}-S. 16 (2) contains another implied condition which is by way of exception to the rule of caveat emptor. It has been noted before in S.15 that when the goods are bought by description, there is an implied condition that the goods supplied shall answer the description.

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

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

Goods supplied shall be of merchantable quality where -the goods are bought by description; -from a seller who deals in the goods of that description (whether he is the manufacturer or producer or not), there is an implied condition that the goods shall be of merchantable quality.

In *Grant v Australian Knitting Mills*, Dr Grant purchased two pairs of woolen underwear and two singlets from John Martin & Co. There was nothing to say the underwear should be washed before wearing and Dr Grant did not do so. He suffered a skin irritation within nine hours of first wearing them. It was held that because of such a defect the underwear was not of merchantable quality.

In *Shivallingappa v. Balakrishna & Son,* the buyer ordered for the best quality of 'Toor dal'. The dal was loaded in rain and by the time it reached the destination, it became damages by moisture. It was held that since the damaged Toor dal could not be sold as that of best quality as it was no longer of merchantable quality. The buyer was entitled to claim damages.

Proviso to Sec. 16(2) “Condition negative when the goods examined by the buyer:
Thus, the proviso divides defect into two kinds-

Patent “Patent defects are those which can be found on examination by an ordinary prudence with the exercise of due care and attention. Latent “In latent defects, the implied condition of merchantability continues in spite of the examination of the goods by the buyer.”

Liability of all-natural consequences: In *Jackson v Watson*, the plaintiff purchased a tin of salmon from defendant. The contents of the tin being poisonous, his wife died. It was held the defendant were liable to pay damages.

Hence, the basic concept of caveat emptor is contained in the section 16 of the Act.

Conditions implied by trade usage - S. 16(3)-Sub-Section (3) of section 16 gives statutory force to conditions implied by the usage of a particular trade. It says: "An implied warranty or condition as to the quality or fitness for the particular purpose may be annexed by the usage of trade." In case of Peter *Darlington Partners Ltd v Gosho Co Ltd*, where a contract for the sale of canary seed was held subject to the custom of the trade that for impurities in the seed, the buyer would get a rebate on the price, but would not reject the goods.

Implied Warranty

- Enjoy Possession of the Goods [Section 14(b)]

In a contract of sale unless the circumstances of the case show different intention, there is an implied warranty that the buyer shall have and enjoy possession of goods

Section 14(b) of the Act mentions ‘an implied warranty that the buyer shall have and enjoy quiet possession of the goods’ which means a buyer is entitled to the quiet possession of the goods purchased as an implied warranty which means the buyer after receiving the title of ownership from the true owner should not be disturbed either by the seller or any other person claiming superior title of the goods. In such a case, the buyer is entitled to claim compensation and damages from the seller as a breach of implied warranty.

- Goods are free from any charge or encumbrance in favor of any third party [Section 14(c)]

Any charge or encumbrance pending in favors of the third party which was not declared to the buyer while entering into a contract shall be considered as a breach of warranty, and the buyer is be entitled to compensation and claim damages from the seller for the same.

- Implied warranty against encumbrances

There is an implied warranty that the goods sold shall be free from any charge or encumbrances in favour of any third party. If there is a charge or encumbrance on the goods sold and the buyer has to discharge the same, he is entitled to get compensation for the same from the seller. If the charge or encumbrance of the goods is known to the buyer at the time of the contract of sale, he becomes bound by the same sand does not have any right to claim compensation for discharging the same.

The provision of Implied conditions and warranties are provided in the Sale of Goods Act in order to protect the buyers in case of any fraud by the seller. However, it is seller's duty in the first place to look for the obvious defects and enquire about the quality of the product before entering into a contract of sale of goods since a seller cannot be held guilty for a customer's wrong choice. In order to ensure purchase of an appropriate good by the seller, it is suggested that the buyer conveys the purpose and gives a reasonable description of the goods so desired.

- Exclusion of implied terms and conditions

S. 62-Exclusion of implied terms and conditions. -Where any right, duty or liability would arise under a contract of sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by usage, if the usage is such as to bind both parties to the contract.

"As regards conditions and warranties, section 16(4) lays down that an express warranty or condition does not negative a warranty or condition implied by this Act unless inconsistent therewith. That means that when the parties expressly agree to such stipulation and the same are inconsistent with the implied conditions and warranties, the express conditions and warranties will prevail and the implied ones in S. 14 to 17 will be negative.

When does Condition sink to the level of Warranty?

Section 13 of the Act specifies the cases wherein a breach of Condition sink to the level of breach of Warranty. In the first two following points, it depends upon the will of the buyer, but the last one is compulsory and acts as estoppel against him:

1. When the buyer waives the condition, the condition is considered a warranty.
2. A condition would sink to the level of warranty where the buyer on his own will treat the breach of condition as a breach of warranty.
3. Wherein the contract is indivisible and the buyer has accepted the whole or part of goods, the condition is treated as a warranty. Consequently, the contract cannot be repudiated. However, the damages can be claimed.

At the time of selling or purchasing goods, both the buyer and seller put forth some preconditions with regards to the mode of payment, delivery, quality, quantity and other things necessary. These stipulations are either considered as condition or warranty differing from case to case. These concepts are necessary to be understood as it protects the rights of parties in case of breach of the contract.

- **Legal Principles regarding Transfer of Goods**

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

- Transfer of property in sale of Specific or Ascertained Goods

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

- Property when intended to pass (Section 19)

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

1. Where a contract for sale of ascertained or specific goods exists, a specified time is fixed as per the convenience and consensus of both the parties at which the property is intended to be transferred from the seller to the buyer.
2. One has to pay attention to the circumstances and conduct of both the parties

to the contract in order to understand the true intention of the contracting parties. Also, the terms of the contract should be given equal importance in the existing case.

3. Except if an alternate intention shows up, the principles laid under the Section 20 to 24 of the Act will help in finding out the intention of the contracting parties in respect with the time at which the goods are about to get transferred from the seller to the buyer.

- Specific goods in a Deliverable state (Section 20)

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

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

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

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

Section 21 of The Sale of Goods Act, 1930: certain goods to be put in a deliverable state: Where there is an existence of a contract for the sale of specific goods, the property concerned in the transaction will only be passed to the buyer, if the seller performs the necessary acts and omissions in order to put the goods in a deliverable state. Also, it is mandatory for the seller to notify the buyer regarding the alterations.

Example: A goes to a mall to buy a smart television from an electronics store. He selects a big fancy smart TV from the electronic section and asks for its home delivery. The manager agrees to deliver it to A's home. However, at the time where he selects the smart TV, it doesn't have an operating system installed. The manager promises to install the

operating system and on the next day, he informs “A” that his smart TV is now installed with the operating system and is ready for its delivery. Further, he asked for his permission to make the delivery. In order to summarize the example, the goods will only be transferred to “A” if the manager has installed the operating system making the smart TV ready for its use.

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

Section 22 of The Sale of Goods Act, 1930: Specific goods are in a deliverable state but the seller has to do something to ascertain the price:

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

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

- Transfer of property in sale of Unascertained Goods

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

- Sale of unascertained goods and appropriation (Section 23)

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

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

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

- Section 23(2) Delivery to the carrier:

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

- Goods sent on "sale or return"

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

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

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

(a) The goods therein will only pass to the buyer if the buyer either portrays his consent or acknowledges to the seller or does any act by which the transaction would be adopted.

(b) The goods therein will only pass to the buyer if the buyer doesn't express his consent or acknowledgement to the seller that he intends to reject the goods, however, holds the goods without giving a notice to the buyer then on the expiration of time frame for the return of the goods or if time hasn't been fixed,

(c) then on the completion of a reasonable time, the property will be passed to the buyer.

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

(d) In case of right to disposal

(e) The intention behind reserving the right of disposal of the goods is to make sure that the value of the product is paid before the property is transferred to the buyer. However, under the prepared value system, the ownership follows the possession. That is to say, the seller transfers the possession of the goods but retains the ownership until the buyer pays the appropriate amount.

(f) Reservation of Right to Disposal (Section 25)

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

(h) Section 25(1): As per the terms and conditions of the contract the seller of goods reserves the right of disposal of the goods in a situation where the sale of specific goods is concerned. Despite the delivery of the goods, the goods will not get transferred from the seller to the buyer unless the subsequent terms of the contract aren't appropriated or fulfilled.

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

Section 25(3): A few perspectives pertaining to the transfer of property during a sale of goods or property are encapsulated in Sales of Goods Act, 1930. The liabilities of the buyer and seller are determined in consonance with the provisions enshrined from section 18 to 25 of The Sale of Goods Act. The concept of possession of goods differs from passing of the goods as the latter in essence means transfer of ownership from the seller to the buyer while the former is confined to the custody of goods.

- Cases pertaining to Transfer of Property

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

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

(1) The forest and trees did not vest in the State under the Act;

(2) Even if they vested, the standing timber, having been sold to the appellant, did not vest in the State;

(3) In any event, a new contract was completed on 5 February 1955, and the appellant was entitled to its specific performance.

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

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

Hoogly Chinsurah Municipality vs Spence Ltd In the case,

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

The Sale of Goods Act, 1930 tells us about a few views regarding the transfer of property during a contract pertaining to the sale of goods. Section 18 to 25 of the Sale of Goods Act, 1930 provides the contracting parties several principles, through which rights and liabilities of the buyer and seller are determined. Passing of the goods from the seller to the buyer portrays the transfer of ownership from one party to another,

which is without an exception a different concept from that of the possession of goods as possession only involves custody of goods.

Transfer of Title

Nemo Dat Quod Non Habet- Sec. 27

The general rule relating to the transfer of title on sale is that "the seller cannot transfer to the buyer of goods a better title than he himself has." If the title of the seller is defective, the buyer's title will also be subject to the same defect.

Section 27 lays down to the same effect and provides that "where goods are sold by a person who is not the owner thereof and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had…"

This rule is expressed by the maxim "*nemo dat quod non habet*", which means that no one can give what he has not got, i.e., a seller cannot convey a better title than that of his own. When the seller himself is the owner of the goods which he sells or he is somebody's agent to dispose of the goods, he conveys a good title in the goods to the buyer. Difficulty arises when the seller is neither himself the owner nor has, he any such authority from the owner to sell the goods.

E.g., a person finds goods lying on the road and sells them, or a thief sells the goods after he has stolen them, or a person purchases the goods on credit or hire-purchase basis and disposes them off, or a person continuing in possession of the goods which he has already sold resells the goods. The question which in such cases arises is: Should the rights of the owner of the goods be protected and he be entitled to recover back the possession of the goods from one to whom they have been sold, or, should the buyer, who might have bought them in good faith and for value be protected and allowed to retain the goods defeating the rights and the title of the real owner?

In regard to this question, the general rule contained in section 27 is as follows: Subject to the provisions of this Act and of any other law for the time being in force, where goods are sold by a person who is not the owner thereof and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had…

Section 27, as a general rule, tries to protect the interest of the true owner when it provides that where the goods are sold by a person who is not the owner thereof and who

does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had.

This rule is a manifestation of the maxim "*nemo dat quod non habet",* which has been already explained above. If the title of the seller is defective, the buyer's title will also be subject to the same defect. This rule does not imply that buyer's title will always be a bad one. What it means is that the buyer cannot acquire a superior title to that of the seller. If a thief disposes of stolen goods, the buyer of such goods has the same title as the seller had. Similarly, where a person taking goods on hire-purchase basis sells them before he had paid all the instalments, the owner can recover the goods from the transferee, on default of payment, in the same way as he could have recovered them from the person to whom they had been given on the hire-purchase basis.

Exceptions to the rule the above stated general rule contained in section 27, as stated in the opening words of the section itself, is "subject to the provisions of this Act and of any other law for the time being in force." Various exceptions to this rule have been mentioned in this Act and the Indian Contract Act and in those exceptional situations, the seller of the goods may not be having a good title to the goods, yet the buyer of the goods gets a good title to them. The exceptions are as follows:

- Sale under the implied authority of the owner, or transfer of title by estoppel (S. 27) 2.
- Sale by a mercantile agent (proviso to S. 27)
- Sale by one of joint owners (S. 28)
- Sale by a person in possession under a voidable contract (S. 29)
- Sale by the seller in possession of goods, the property in which has passed to the buyer (S. 30(1))
- Sale by the buyer in possession of the goods before the property in them has passed to him (S. 30(2))
- Re-sale of the goods by an unpaid seller after he has exercised the right of lien or stoppage in transit (S. 54(3))
- Sale by finder of goods (S. 169, Indian Contract Act)
- Sale by a Pawnee when the pawner makes a default in payment (S. 176, Indian Contract Act.

Section 27 deals with the sale by a person who is not the owner. Imagine a sale contract where the seller –

- Is not the owner of the goods
- Does not have consent from the owner to sell the goods
- Has not been given authority by the owner to sell the goods on his behalf

In such cases, the buyer acquires no better title to these goods than the seller had, provided the conduct of the owner precludes the seller's authority to sell.

Let us see an example. Peter steals a mobile phone from his office and sells it to John, who buys it in good faith. However, John will get no title to the phone and will have to return it to the owner when he demands, i.e., there is no transfer of title. Now, this seems to be a really straight-forward rule. However, enforcing this rule can mean that innocent buyers might suffer losses in most cases. Therefore, to protect the interest of the buyers, certain exceptions are provided.

Exceptions to Section 27

In the following scenarios a non-owner of goods can transfer a better title to the buyer:

1] Sale by a Mercantile agent (Proviso to Section 27*)*

Consider a mercantile agent, who is in possession of the goods or a document to the title of the goods, with the consent of the owner. Such an agent can sell the goods when acting in the ordinary course of business of a mercantile agent. The sale shall be valid provided the buyer acts in good faith and has no reason to believe that the seller doesn't have any right to sell the goods. The transfer of title is valid in such a case.

2] Sale by one of the Joint Owners (Section 28)

Many times, goods are purchased in joint ownership. In many cases, the goods are kept in the possession of one of these joint owners by the permission of the co- owners. If this person (who has the sole possession of the goods) sells the goods, the property in the goods is transferred to the buyer. This is provided the buyer acts in good faith and has no reason to believe that the seller does not have a right to sell the goods.

Example: Peter, John, and Oliver are three friends to buy a 42-inch television set to watch the upcoming cricket World Cup. They unanimously decide to keep the television set at Oliver's house. Once the World Cup is over, the TV is still at his house. One day, Oliver's

office colleague Julia visits his house and he sells the TV to her. She buys it in good faith and has no knowledge about the fact that it was purchased jointly. In this case, she gets a good title to the TV.

3] Sale by a Person in Possession of Goods under a Voidable Contract (Section 29)

Consider a person who acquires possession of certain goods under a contract voidable on grounds of coercion, misrepresentation, fraud or undue influence. If this person sells the goods before the contract is terminated by the original owner of the goods, then the buyer acquires a good title to the goods.

Example: Peter fraudulently obtains a gold diamond ring from Olivia. Olivia can void the contract whenever she wants. Before she realizes the fraud, Peter sells the ring to Julia – an innocent buyer. In this case, Olivia cannot recover the ring from Julia since she didn't void the contract before the sale was made.

4] Sale by a Person who has already sold the Goods but Continues to have Possession [Section 30 (1)]

Consider a person who has sold goods but continues to be in possession of them or of the documents of title to them. This person might sell the goods to another buyer.
If this buyer acts in good faith and is unaware of the earlier sale, then he will have a good title to the goods even though the property in the goods was passed to the first buyer. A pledge or other disposition of the goods or documents of title by the seller in possession are valid too.

5] Sale by Buyer obtaining possession before the Property in the Goods has Vested in him [Section 30 (2)]

Consider a buyer who obtains possession of the goods before the property in them is passed to him, with the permission of the seller. He may sell, pledge or dispose of the goods to another person.

If the second buyer obtains delivery of the goods in good faith and without notice of the lien or any other right of the original seller, he gets a good title to them.
This rule does not hold true for a hire-purchase agreement which allows a person the possession of the goods and an option to buy unless the sale is agreed upon.
Example: Peter takes a car from John under the conditions that he will pay Rs. 5,000 every month as rent of the vehicle and that he can choose to purchase it for Rs. 100,000 to be paid

in 24 equal installments. Peter pays Rs. 5,000 for three months and then sells the car to Oliver. In this case, John can recover his car from Oliver since Peter had neither purchased the car nor agreed to purchase it. He only had an option to buy the car.

6] Estoppel

If an owner of goods is stopped by the conduct from denying the seller's authority to sell, the buyer gets a good title. However, to get a good title by estoppel, it needs to be proved that the original owner had actively suffered or held out the seller in question as a person authorized to sell the goods.

Let us see an example. Peter, John, and Oliver are having a conversation. Peter tells John that he owns the BMW car parked nearby which actually belongs to Oliver. However, Oliver remains silent. Subsequently, Peter sells the car to John. In this case, John will get a good title to the car even though the seller is Peter who has no title to it. This is because, Oliver, by his conduct, did not deny Peter's authority to sell the car.

7] Sale by an Unpaid Seller [Section 54 (3)]

If an unpaid seller exercises his right of lien or stoppage in transit and sells the goods to another buyer, then the second buyer gets a good title to the goods as against the original buyer. So, in such a case transfer of title will occur.

8] Sale under the Provisions of other Acts

- Sale by an Official Receiver or Liquidator of the Company will give the purchaser a valid title.
- Purchase of goods from a finder of goods will get a valid title under circumstances [Section 169 of the Indian Contract Act, 1872]
- A sale by a Pawnee can convey a Good Title to the buyer [Section 176 of the Indian Contract Act, 187

Performance of the Contract

According to the Sales of Goods Act 1930, the performance of the contract of sale comes under chapter IV from **Section 31 to Section 44** it is described how the goods are being displaced and how their possession is being transferred from one person to another voluntarily. There are basically two parties for the agreement, one is the seller and the

other one is the buyer. The seller sells the goods and the buyer buys the goods.

Who is a seller?

The definition of the seller is given in Section 2(13) of the Sale of Goods Act, 1930. The seller can be defined as a person who agrees to sell goods.

Rights of the Seller (Section 31)

- He can reserve the rights of the goods until and unless payment of goods is done.
- He can assume that the buyer has accepted the goods or not.
- He will only deliver the goods when the buyer would apply for the delivery.
- He can make the goods delivered in instalments when so agreed by the buyer.
- He can have the possession of the goods until the buyer hasn't paid for the goods.
- He can stop the delivery of goods and resume possession of the goods unless and until the payment is done for the goods.
- He can resell the goods under certain conditions.
- He can bring the goods back if it is not delivered to the buyer.
- He can sue the buyer if the buyer fails to make the payment on a certain day, in terms of the contract.

Duties of seller

- He should make an arrangement for the transfer of property to the buyer.
- He should check whether the goods are delivered properly or not.
- He should give a proper title to the goods which he has to pass to the buyer.
- He should deliver the goods according to the terms of the agreement.
- He should ensure that the goods supplied should be agreed to the implied condition and warranties.
- He should keep the goods in a deliverable state and deliver the goods when the buyer asks for it.
- He should deliver the goods within a specific time fixed in the contract.
- He should bear all the expenses for which the good should be delivered.

- He should deliver the goods as said by the buyer in the contract in an agreed quantity.
- To deliver the goods in instalments only when the buyer wants.
- He should make arrangements for the goods while they are in the custody of the carrier.

Who is a buyer?

The definition of the buyer is given in Section 2(1) of the Sale of Goods Act, 1930. The buyer can be defined as a person who buys goods from the seller.

Rights of the Buyer (Section 31)

- He should get the delivery of the goods as per contract.
- He can reject the goods if the quality and quantity are not as specified in the contract.
- To deny the contract when goods are delivered in instalments without any agreement to the effects.
- The seller should inform him when the goods are to be sent by sea route, so that the buyer may arrange for their insurance.
- He can examine the goods for checking whether they are in the agreement with the contract.
- If he has already paid, he can sue the seller for recovery of the price if the seller fails to deliver the goods.
- He can also sue the seller for damages or the seller's wrongful neglect or the seller refuses to deliver the goods to the buyer.
- He can sue the seller for damages for breach of a warranty or for breach of a condition.
- He can sue the seller for the damages of breach of contract.

Duties of the Buyer

- He should accept the delivery of goods when the seller is prepared to make the delivery as per the contract.
- To have possession on it he should pay the price for the goods as per the contract.
- He should apply for the delivery of the goods.
- He can ask to deliver the goods at a particular time.
- He should accept delivery of the goods in instalments and pay for it according to the contract.
- He should bear the risk of failure of delivery of goods if the delivery point is a distant place.
- He should pay the price on the transfer of possession of the goods as given in the term of the contract.
- He has to pay for not accepting the goods.

Delivery

There are many rules and definitions governing the law on sales in sections 31 to 40 of the Sale of Goods Act, 1930. In this article, we will be looking at various definitions and duties of buyers, sellers, and third parties (wherever applicable).

Definition of Delivery

According to Section 2 (2) of the Sale of Goods Act, 1930, delivery means voluntary transfer of possession of goods from one person to another. Hence, if a person takes possession of goods by unfair means, then there is no delivery of goods. Having understood delivery, let's look at the law on sales

Section 33 of the Sale of Goods Act, 1930 defines delivery as a voluntary transfer of possession from one person to another. It is also the process of transporting goods from a source location to a predefined destination. Cargos (physical goods) are primarily delivered via roads and railroads on land, shipping lanes on the sea and airline networks in the air.

The basic elements of delivery are:

- There must be two parties.
- One party out of those two parties should have the possession of the goods.
- One party should transfer possession to the other.
- This should be done voluntarily.

Mode of delivery

- When the seller transfers the possession of the goods to the buyer or to a person who is authorised on behalf of the buyer it's called physical or actual delivery.
- If the actual delivery is not done and only the control of the goods is transferred, then it is called symbolic delivery. In this case, neither physical nor symbolic delivery is made.
- In constructive delivery, the individual possessing the products recognizes that he holds the merchandise for the benefit of, and at the disposal of the purchaser. Constructive delivery is also called attornment.

Constructive delivery may be affected in the following three ways.

- Where the seller, after having sold the goods, agrees to hold them as bailee for the buyer
- Where the buyer, who is already in possession of the goods as bailee of the seller, holds them as his own, after the sale, and
- Where a third party, for example, a carrier/transporter, who holds the goods, as bailee for the seller, agrees and acknowledges holding them for the buyer.

❖ Rules regarding delivery

The delivery and payment of price are concurrent conditions unless the two parties agree.

- If the intention of the seller is to deliver the goods in parts then the delivery is called a valid delivery. But if goods are delivered in parts and the seller is not intending to contract fully then there is a breach of contract.
- If a part-delivery of the goods is made in progress of the delivery of the whole, then it has the same effect for the purpose of passing the property in such goods as the delivery of the whole. However, a part- delivery with the intention of severing it from the whole does not operate as the delivery of the remainder (Section 34).
- According to Section 35 of Sale of Goods Act 1930 unless there is a contract to the contrary then the buyer must apply for delivery. But if it is mentioned

in the contract that the seller has to deliver the goods then the seller has to deliver without the permission of the buyer.

- If no place is decided for the delivery of the goods that, they are to be delivered at a place at which the seller and the buyer are in the time of sale.
- There should be an appropriate time for the delivery.
- The expenses of delivery are to be carried out by the seller unless there is a contract to the contrary.

If the seller delivers the wrong quantity of goods to the buyer then the following cases may take place:

- If the quantity of goods is less as per the contract then the buyer can reject the goods.
- If the quantity of goods is more than that of contract than the buyer can keep the number of goods as per the contract and reject the rest or he may also reject the total.
- If the goods ordered are mixed with the goods of different descriptions (i.e. goods with a different title or different quality), the buyer may reject the goods or accept the goods.
- If there is no contract for the instalment delivery, the seller cannot force the buyer to accept the instalment delivery.
- The buyer has the right to check and examine the goods.
- If the buyer once accepted the goods then he cannot reject the goods.

According to Section 36(3) of the Sale of Goods Act, 1930, if at the time of delivery, the goods are in possession of a third party then there will be no delivery unless and until the third party tells the buyer that the goods are being held on his behalf. This section would not create any impact on the transfer of title of the goods.

Law on Sales in depth.

1] The Duty of the Buyer and Seller (Section 31)

It is the duty of the seller to deliver the goods and the buyer to pay for them and accept them, as per the terms of the contract and the law on sales.

2] Concurrency of Payment and Delivery (Section 32)

The delivery of goods and payment of the price are concurrent conditions as per the law on sales unless the parties agree otherwise. So, the seller has to be willing to give possession of the goods to the buyer in exchange for the price. On the other hand, the buyer has to be ready to pay the price in exchange for possession of the goods.

Rules Pertaining to the Delivery of Goods in depth

a. Delivery (Section 33)

The delivery of goods can be made either by putting the goods in the possession of the buyer or any person authorized by him to hold them on his behalf or by doing anything else that the parties agree to.

b. Effect of part-delivery (Section 34)

If a part-delivery of the goods is made in progress of the delivery of the whole, then it has the same effect for the purpose of passing the property in such goods as the delivery of the whole. However, a part-delivery with an intention of severing it from the whole does not operate as a delivery of the remainder.

c. Buyer to apply for delivery (Section 35)

A seller is not bound to deliver the goods until the buyer applies for delivery unless the parties have agreed to other terms in the contract.

d. Place of delivery [Section 36 (1)]

When a sale contract is made, the parties might agree to certain terms for delivery, express or implied. Depending on the agreement, the buyer might take possession of the goods from the seller or the seller might send them to the buyer.

If no such terms are specified in the contract, then as per law on sales

- The goods sold are delivered at the place at which they are at the time of the sale
- The goods to be sold are delivered at the place at which they are at the time of the agreement to sell. However, if the goods are not in existence at such time, then they are delivered to the place where they are manufactured or produced.

e. Time of Delivery [Section 36 (2)]

Consider a contract of sale where the seller agrees to send the goods to the buyer, but not time of delivery is specified. In such cases, the seller is expected to deliver the goods within a reasonable time.

f. Goods in possession of a third party [Section 36 (3)]

If at the time of sale, the goods are in possession of a third party. Then there is no delivery unless the third party acknowledges to the buyer that the goods are being held on his behalf. It is important to note that nothing in this section shall affect the operation of the issue or transfer of any document of title to the goods.

g. Time for tender of delivery [Section 36 (4)]

It is important that the demand or tender of delivery is made at a reasonable hour. If not, then it is rendered ineffectual. The reasonable hour will depend on the case.

h. Expenses for delivery [Section 36 (5)]

The seller will bear all expenses pertaining to putting the goods in a deliverable state unless the parties agree to some other terms in the contract.

i. Delivery of wrong quantity (Section 37)

- Sub-section 1 – If the seller delivers a lesser quantity of goods as compared to the contracted quantity, then the buyer may reject the delivery. If he accepts it, then he shall pay for them at the contracted rate.
- Sub-section 2 – If the seller delivers a larger quantity of goods as compared to the contracted quantity, then the buyer may accept the quantity included in the contract and reject the rest. The buyer can also reject the entire delivery. If he wants to accept the increased quantity, then he needs to pay at the contract rate.
- Sub-section 3 – If the seller delivers a mix of goods where some part of the goods is mentioned in the contract and some are not, then the buyer may accept the goods which are in accordance with the contract and reject the rest. He may also reject the entire delivery.

- Sub-section 4 – The provisions of this section are subject to any usage of trade, special agreement or course of dealing between the parties.

j. Installment deliveries (Section 38)

The buyer does not have to accept delivery in installments unless he has agreed to do so in the contract. If such an agreement exists, then the parties are required to determine the rights and liabilities and payments themselves.

k. Delivery to carrier [Section 36 (1)]

The delivery of goods to the carrier for transmission to the buyer is prima facie deemed to be 'delivery to the buyer' unless contrary terms exist in the contract.

l. Deterioration during transit (Section 40)

If the goods are to be delivered at a distant place, then the liability of deterioration incidental to the course of the transit lies with the buyer even though the seller agrees to deliver at his own risk.

m. Buyers right to examine the goods (Section 41)

If the buyer did not get a chance to examine the goods, then he is entitled to a reasonable opportunity of examining them. The buyer has the right to ascertain that the goods delivered to him are in conformity with the contract. The seller is bound to honour the buyer's request for a reasonable opportunity of examining the goods unless the contrary is specified in the contract.

Acceptance of Delivery of Goods (Section 42)

A buyer is deemed to have accepted the delivery of goods when:

- He informs the seller that he has accepted the goods; or
- Does something to the goods which is inconsistent with the ownership of the seller; or
- Retains the goods beyond a reasonable time, without informing the seller that he has rejected them.

Return of Rejected Goods (Section 43)

If a buyer, within his right, refuses to accept the delivery of goods, then he is not bound to return the rejected goods to the seller. He needs to inform the seller of his refusal though. This is true unless the parties agree to other terms in the contract.

Refusing Delivery of Goods (Section 44)

If the seller is willing to deliver the goods and requests the buyer to take delivery, but the buyer fails to do so within a reasonable time after receiving the request, then he is liable to the seller for any loss occasioned by his refusal to take delivery. He is also liable to pay a reasonable charge for the care and custody of goods.

Who is an Unpaid seller?

As defined by Section 45 of Sale of Goods Act, 1930, A person has sold some goods and has not got the whole price and if the transaction is done through negotiable instruments like cheque, bill of exchange and a promissory note, then the person can be said as an unpaid seller.

Sec-45. "Unpaid seller" defined—

(1) The seller of goods is deemed to be an "unpaid seller" within the meaning of this Act—

(a) when the whole of the price has not been paid or tendered;

(b) when a bill of exchange or other negotiable instrument has been received as conditional payment, and the condition on which it was received has not been fulfilled by reason of the dishonor of the instrument or otherwise.

(2) In this Chapter, the term "seller" includes any person who is in the position of a seller, as, for instance, an agent of the seller to whom the bill of lading has been endorsed, or a consignor or agent who has himself paid, or is directly responsible for, the price.

Illustration- If **A** is a seller and he delivers the goods to **B** and transfers the possession, and if **B** hasn't paid the sum then A becomes an unpaid seller.

Rights of an unpaid seller

Section 46 of the Sale of Goods Act 1930, discusses the rights of an unpaid seller. This can be of two types:

- Against the goods – ***jus in rem*** (right against property)
- Against the buyer – ***jus in personam*** (right against the person)

Right against the goods

- Right to a lien which means the seller has the right on the possession over the goods.
- Right to stoppage in transit which means the seller can call up the carrier transporter and tell not to deliver the goods.
- Right to resale means the seller can again sell the goods as he has the possession of the goods.

And the rights like the right to lien, the right to stoppage in transit and the right to resale are also applicable for the agreement which is made for sale.

Rights against the buyer

- The seller has the right to sue the buyer for the price if the seller has already sold the goods and the buyer hasn't paid the sum.
- The seller has the right to sue for the damages, for e.g. if the seller has sent the carrier for the delivery and the buyer isn't available to receive the delivery and the goods returned back by the carrier to the seller then he can sue the buyer for damages like the packing of goods, transportation charges and so many.
- If the buyer hasn't paid the price of the goods to the seller after the delivery within a stipulated time period as given in the contract, then the seller can sue for the interest on the buyer.

Rights of Unpaid Seller against Goods in detail.

An unpaid seller has certain rights against the goods and the buyer. In this refer to the sections of the Sale of Goods Act, 1930 and look at the rights of an unpaid seller against goods namely rights of lien, rights of stoppage in transit etc.

Rights of Lien

Seller's Lien (Section 47)

According to subsection (1) of Section 47 of the Sale of Goods Act, 1930, an unpaid seller, who is in possession of the goods can retain their possession until payment. This is possible in the following cases:

1. He sells the goods without any stipulation for credit
2. The goods are sold on credit but the credit term has expired.
3. The buyer becomes insolvent.

Subsection (2) specifies that the unpaid seller can exercise his right of lien notwithstanding that he is in possession of the goods acting as an agent or bailee for the buyer.

Part-delivery (Section 48)

Further, Section 48 states that if an unpaid seller makes part-delivery of the goods, then he may exercise his right of lien on the remainder. This is valid unless there is an agreement between the buyer and the seller for waiving the lien under part- delivery.

Termination of Lien (Section 49)

According to subsection (1) of Section 49 of the Sale of Goods Act, 1930, an unpaid seller loses his lien:

- If he delivers the goods to a carrier or other bailee for transmission to the buyer without reserving the right of disposal of the goods.
- When the buyer or his agent obtain possession of the goods lawfully.
- By waiver.

Further, subsection (2) states that an unpaid seller, who has a lien, does not lose his lien by reason only that he has obtained a decree for the price of the goods.

When is lien lost?

As already discovered, lien relies upon physical ownership of products. As soon as the possession is misplaced, the lien is also misplaced. The unpaid dealer of goods loses his lien thereon inside the following instances:

1. When he provides the products to a carrier or other bailee for the motive of transmission to the customer without reserving the rights of possession of the products.
2. When the buyer lawfully obtains ownership of the goods.
3. When the seller expressly or impliedly waives his rights of lien. An implied waiver takes place while the seller offers a fresh time period of credit or allows the customer to just accept an invoice of trade payable

   at a particular date to a sub-sale which the purchaser may additionally have made.

Accordingly, when a refrigerator after being bought, will be delivered to the purchaser and if it no longer functions well, the buyer takes it again to the seller for repairs, here we can say that the seller could not exercise his lien over the fridge.

Rights of Stoppage of Goods in Transit

The right of stoppage in transit method is the right of stopping the transit of the goods even if they may be with a carrier for the cause of transmission to the buyer; resuming the ownership of the customer and retaining possession until they made the payment of the good. Hence, this right is an extension of the right of lien because it entitles the seller to regain ownership even if the seller has parted with the possession of the products.

When can this right be exercised? (Section 50)

An unpaid seller can exercise this right in the simplest way when:

- The purchaser becomes insolvent

The buyer is said to be bankrupt when he has denied paying his debts inside the normal route of business, or if he cannot pay his money then it will be due. [Section 2(8)]

- The property has exceeded the buyer

If assets have not surpassed the buyer then this right is called the “right of withholding shipping”. [Section 46(2)]

- The products are within the route of transit

This means that goods should be neither with the seller nor with the buyer nor with their agent. The product has to be within the custody of a carrier as an intermediary. At that time, the carrier needs not to be either a seller’s agent or customer’s agent. Because, if he is the seller’s agent then the products are still in the arms of seller in the eye of

regulation and consequently there may be no transit, and if he is the customer's agent, the consumer gets transport in the attention of law and hence query of stoppage does now not rise up.

Right of Stoppage in Transit

This right is an extension to the right of lien. The right of stoppage in transit means that an unpaid seller has the right to stop the goods while they are in transit, regain possession, and retain them till he receives the full price.

If an unpaid seller has parted with the possession of the goods and the buyer becomes insolvent, then the seller can ask the carrier to return the goods back. This is subject to the provisions of the Act.

Duration of Transit (Section 51)

Goods are in the course of transit from the time the seller delivers them to a carrier or a bailee for transmission to the buyer until the buyer or his agent takes delivery of the said goods.

Some scenarios of the transit ending:

- The buyer or his agent obtain delivery before the goods reach the destination. In such cases, the transit ends once the delivery is obtained.
- Once the goods reach the destination and the carrier of bailee informs the buyer or his agent that he holds the goods, then the transit ends.
- If the buyer refuses the goods and even the seller refuses to take them back the transit is not at an end.
- In some cases, goods are delivered to a ship chartered by the buyer. Depending on the case, it is determined that if the master is functioning as an agent or carrier of the goods.
- If the carrier or other bailee wrongfully refuses to deliver the goods to the buyer or his agent, the transit ends.
- If a part-delivery of the goods has been made and the unpaid seller stops the remaining goods in transit, then the transit ends for those goods. This is provided that there is no agreement to give up the possession of all the goods.

How Stoppage is Affected (Section 52)

There are two ways of stopping the transit of goods:

1. The seller takes actual possession of the goods
2. If the goods are in the possession of a carrier or other bailee, then the seller gives a notice of stoppage to him. On receiving the notice, the carrier or bailee must re-deliver the goods to the seller. The seller bears the expenses of the re-delivery.

Effect of Stoppage

Even if the unpaid seller exercises his right of stoppage in transit, the contract stays valid. The buyer can ask for delivery of the goods after making the payment.

Right of Lien vs. Rights of Stoppage in Transit

	Right of Lien	**Rights of Stoppage in Transit**
Essence	Retain possession	Regain possession
Who has the possession of the goods?	The seller.	The carrier or other bailee. The buyer should not have received the goods.
Buyer insolvent	Not a mandatory requirement	The right can be exercised only when the buyer becomes insolvent.

In simple words, the right of stoppage in transit begins when the right of lien ends.

The principal points of difference among these rights of an unpaid seller are as follows:

1. The seller's lien attaches when the purchaser is in default, whether or not he is solvent or bankrupt. The right of stoppage in transit arises best while the customer is bankrupt.
2. Lien is to be held only when the goods are in actual possession of the seller at the same time as the right of stoppage is available, when the seller has half part with his own and the products are within the custody of an independent service.
3. The right of lien comes as soon as the seller has possession over the products to the carrier for the motive of transmission to the purchaser.

On the other hand, the right of stoppage in transit starts after the seller has introduced the goods to a carrier for the purposes of transmission to the buyer and maintains until the customer has acquired the ownership. The right of lien includes preserving the possession of the goods when the right of stoppage includes regaining ownership of the goods.

Pledge by the Buyer (Section 53)

Unless the seller agrees, the right of lien or stoppage is unaffected by the buyer selling or pledging the goods. The principle is simple: the second buyer cannot be in a better position that the seller (first buyer). However, if the buyer transfers the document of title or pledges the goods to a sub-buyer in good faith and for consideration, then the right of stoppage is defeated.

There are two exceptions to make note of:

a. The seller agrees to resale, mortgage or other disposition of the goods

If the seller agrees to the buyer selling, pledging or disposing of the goods in any other way, then he loses his right to lien.

b. Transfer of the document of title of goods by the buyer

When the seller transfers the document of title of goods to the buyer and the buyer further

transfers it to another buyer who purchases the goods in good faith and for a price, then:

- If the last-mentioned transfer is by way of sale, the original seller's right of lien and stoppage is defeated.
- If the last-mentioned transfer is by way of a pledge, the original seller's right of lien or stoppage can be executed subject to the rights of the pledgee.

Right of Resale (Section 54)

The right of resale is an important right for an unpaid seller. If he does not have this right, then the right of lien and stoppage won't make sense. An unpaid seller can exercise his right of resale under the following conditions:

- Goods are perishable in nature: In such cases, the seller does not have to inform the buyer of his intention of resale.
- Seller gives a notice to the buyer of his intention of resale: The buyer needs to pay the price of the goods and ask for delivery within the time mentioned in the notice. If he fails to do so, then the seller can resell the goods. He can also recover the difference between the contract price and resale price if the latter is lower. However, if the resale price is higher, then the seller keeps the profits.
- Unpaid seller resells the goods post exercising his right of lien or stoppage: The subsequent buyer acquires a good title to the goods even if the seller has not given a notice of resale to the original buyer.

  Resale where the right of resale is reserved in the contract of sale: If the contract of sale specifies that the seller can resell the goods if the buyer defaults, then the seller reserves his right of sale. He can claim damages from the original buyer even if he does not give a notice of resale to him.
- Property in the goods has not passed to the buyer: The unpaid seller can exercise his right of withholding delivery of goods. This is similar to the right of lien and is called quasi-lien.

Suits for breach of contract

Sections 55 and 56 focus on seller's remedies against the buyer and entitles the seller to either sue for price of the goods or ask for damages for non- performance of the contract. **Sections 57, 58 and 59** lay down the remedies available to the buyer against the seller in the event the latter breaches the contract. The buyer can seek damages for non-delivery

of goods, damages for breach of warranty or specific performance of the contract. Sections 60 and 61 give rise to those special situations wherein a remedy for breach is available to both the buyer and seller."

It relates to suits for the Breach of a Contract. It shall be divided roughly, into 3 parts

- Seller's Remedies against Buyer – **Sections 55** and **56**
- Buyer's remedies against Seller – **Sections 57, 58** and **59**
- Remedies available to both buyer and seller – **Sections 60** and **61**

In every contract of sale, a seller is under an obligation to deliver the goods sold and buyer is under an obligation to pay the requisite amount set or *quid pro quo* something in return, under the contract of sale, by them. This is known as reciprocal promise as per Section 2(f) of the Indian Contract Act. In other words, any set of promises made which forms the consideration or part of the consideration for each other are called reciprocal promises and every contract of sale of goods consists of reciprocal promises.

In certain cases, when a buyer refuses or fails to pay the requisite amount to the seller, the seller becomes an unpaid seller and can exercise certain rights against the buyer. These rights are considered as seller's remedies in case there is a breach of contract by the buyer. These remedies can be against:

1. Buyer
2. Goods

According to **Section 45(1) of Sale of Goods Act, 1930**, the seller is considered as an unpaid seller when:

a- When the whole price has not been paid and the seller has an immediate right of action for the price.

b- When Bills of Exchange or other negotiable instrument has been received as conditional payment, and the pre-requisite condition has not been fulfilled by reason of the dishonor of the instrument or otherwise. For instance, X sold some goods to Y for $50 and received a cheque. On presentment, the cheque was dishonored by the bank. X is an unpaid seller.

Seller also includes a person who is in a position of a seller i.e., agent, consignor who had himself paid or is responsible for the price.

Rights against buyer

1- Suit for the price

When any goods are passed on to the buyer and the buyer has wrongfully neglected or refused to pay as per the terms and conditions of the contract, the seller may sue him as per the **Section 55(1) b**ecause once the property has been passed the buyer is bound to pay the price. But in the case due date of payment has been passed and goods had not been delivered yet, the seller can sue the buyer for the wrongful neglect or refusal on his part according to **clause 2 of Section 55.**

In case the price is due in foreign currency the damages must be calculated at the rate of exchange prevailing at the time when the price was due not on the judgement date.

2- Suit for damages

In case there is a wrongful refusal on the part of buyer for acceptance of goods and payment of money, the seller can sue him for damages of non-acceptance as per **Section 56.** For calculating the quantum of damages Section 73 and 74 of the Indian Contract Act applies.

In case the goods have a ready market, the seller has to resell the goods and buyer have to pay the losses if incurred. If the seller does not resell the goods the difference between contract and market price at the day of breach is taken as a measure for damages. If the difference between them is nil seller gets nominal value.

There is a duty of mitigation on the part of the seller, which means that injured has to make reasonable efforts to minimize the loss from that breach. For instance, if the seller can resale the goods, the difference in price in contract and resale price is given to the seller but if the seller deliberately refuses to resale the goods and its market value reduces then the buyer will not be liable for the exaggerated loss.

The nature of the duty of mitigation has been explained by the supreme court in case of *M. Lachia Shetty V Coffee Board***,** where, a dealer who bid at an auction of coffee had been accepted, refused to carry out the contract, consequently, coffee was reauctioned at next best bidding price and dealer who refused the bid have to give the difference in the amount of loss to the board.

3- Suit for interest

As stated under **Section 61**, where there is a specific agreement between buyer and seller with regards to interest on the price of goods from the date on which payment becomes due, the seller may recover interest from a buyer. But if there were no such agreement the seller may charge interest from the day; he notifies the buyer.

If there is no contract to the contrary, the court of law may award interest to the seller at such rate as it thinks fit on the amount of the price from the date on which amount is payable.

4- Repudiation of the contract before the due date

According to **Section 60,** the rule of anticipatory breach contract applies, wherein, if buyer repudiates the contract before the date of delivery the seller can consider the contract as rescinded and can sue for damages of the breach.

According to this Section, if one party repudiates before due date other has two courses of action. Either he may immediately accept the breach and bring the action of damages the contract is rescinded and damages will be assessed according to the prices then prevailing or he can wait for the date of delivery. In the second case, the contract is open at risk and will be a benefit to both parties. Ma be the party changes is mind and agree to perform and damages will be assessed according to prices on the day of delivery.

Rights against goods

a- Lien

Lien is a right which seller of goods can exercise when a buyer has not paid the price of goods, under this right seller can retain the possession of goods as an agent or bailee for the buyer. The seller can retain his possession as per Section 47 under the following circumstances:

1- In case the buyer is insolvent.

2- When the term of goods sold on credit is expired.

3- Goods sold without any stipulation as to credit.

When the goods are sold on credit the right to lien is suspended during the term of credit and lien exist only for the price of goods, not any additional charges.

According to Section 48 if the seller has delivered a part of unpaid goods, he can exercise his right of lien on rest. In *Grice V Richardson,* the sellers had delivered a part of the three parcels of tea comprised in the sales, and they had not been paid for the part which

remained with them. They were allowed to keep it till the payment of the price. Where, however, a part of goods delivered which show an agreement to waive the lien, the seller cannot the remainder.

Termination of lien takes place when the seller losses the possession of goods. As per Section 49, under following circumstances right of lien is terminated-

1- Waiver of lien-

The right of lien is an implied right attached by law in every contract of sale, the seller has the autonomy to waive this right, it may be expressed or implied from the conduct of the seller.

2- When buyer or agent lawfully obtains possession of goods.

Once the buyer got the possession of goods from the seller, all the rights of the seller in respect to goods are ceased even if the price is not paid. The seller can recover the price as a normal debt because the acceptance of possession gives absolute, unqualified and indefeasible right of goods to the buyer. When the goods are given again to the seller for repair, he cannot access the right of lien.

3- When the seller delivers goods to a carrier or other bailee for the purpose of transmission to the buyer without reserving the right of disposal of the goods.

When the seller has delivered goods to the carrier for transmission, his right of lien is ceased but the right to stoppage in transit is still accessible by him. In case seller regains possession of goods in transit by stoppage his right to lien is revived.

Like in *Valpy V Gibson***,** the goods were delivered to the buyer's shipping agent, who had put them on board a ship. But the goods were returned to the seller for repacking, while they were still with the sellers the buyer became insolvent and seller being unpaid seller claimed to retain the goods in the exercise of their lien. It was held that they have lost their lien by delivery to the shipping agent. On the contrary, when the seller has reserved the rights of disposal his right of lien continues till the end of the transit. And the seller cannot lose his right to lien just because he has obtained a decree for the price of goods.

b- Stoppage

When the goods have been transferred to carrier or bailee for the purpose of transmission to the buyer, who has become insolvent, the seller has the right to stop the goods in transit in order to protect himself against the loss that may arise due to insolvency. As per Section 50, there are four essential requirements for stopping the goods in transit:

1. Unpaid seller.
2. Buyer insolvent.
3. Property should have passed to the buyer.
4. Property should be in course of transit.

The course of transit depends upon the capacity of middleman to hold the goods. Middleman should be an intervening person between the seller who has parted with the goods and the buyer who has not yet received the goods as held in the case of *Schotsmans v Lancashire & Yorkshire Rly co.*

Section 5 lays down the rules and regulations related to commencement and end of the transit, this Section is divided into seven sub-Sections which solve all the issues related to commencement and end of transit:

1- **Delivery to the buyer-** Goods are considered to be in transit from the time when they are delivered to the carrier or other bailee for the purpose of transmission to the buyer, till the goods are received by the buyer himself or his agent takes delivery of them.

For example, in the case of *Great Indian Peninsula v Hanmandas,* the seller consigned the goods with the GIP Ry Co for transportation to the buyer. On the arrival at the destination, the company had delivered the goods to the buyer who had loaded them on his cart, but the cart had not yet left the railway compound when a telegram was received by the company to stop the goods. The company did not do so and were sued by the seller in damages. It was held that the transit had ended as soon as the goods were handed over to the buyer.

But when the buyer denies accepting the delivery even when it has been landed at the place of destination, the transit does not end. This happened in the case of *James v Griffin* where on arrival of goods at the port of destination in the river Thames, the buyer sent his son to have goods landed, but told him that on account of his insolvency he did not intend to receive the goods and would like the seller to have them. When goods were so lying the seller's instruction to stop them was received. The buyer's trustee in bankruptcy claimed the goods. It was held that the goods were still in transit.

2- **Interception by the buyer-** When the buyer or the agent takes the delivery of the goods from the carrier, the transit ends even before their arrival at the appointed destination.

In case the carrier delivers the goods before the arrival of the buyer, although it is wrongful and the carrier may be held liable for the damages but the transit ends here.

In the case of *Lyons v. Honffnung,* the buyer takes his seat as a passenger in a ship which was carrying the goods. The court said that this does not amount to delivery to the buyer before their arrival at the appointed destination.

3- **Acknowledgement to the buyer**- The transit is considered to come to an end when the goods arrive at the appointed destination and the carrier acknowledges to the buyer or his agent that he is now holding the goods on his behalf. It is immaterial if the gods are still in the carrier or the buyer has indicated another destination. In order to put an end to the original contract of carriage, a very clear acknowledgement is required.

In the case of *Whitehead v. Anderson,* a quantity of timber was consigned on board. When the ship arrived at the destination, the buyer went bankrupt. The buyer's agent came to the board and told that he has come to take possession. The captain said that he will deliver only when the freight is paid. Before this could be done, the seller sent a notice to stop and asked to send the goods to be delivered to the agent of the seller. The court said that since the transit has not ended, the carrier was within his rights in returning the goods to the seller. The captain agreed to deliver the goods on a condition and if the condition is not fulfilled, the buyer does not acquire the constructive possession of goods.

1- **Rejection by the buyer**– When the buyer rejects the goods and the carrier or other bailee continues to possess them, the goods are held to be still in transit. This will also include the case when the seller himself refuses to take back goods.

2- **Delivery to ship charted by the buyer**- It is a question of fact whether the carrier is acting independently or as an agent of the buyer at the time when the goods are delivered to a ship charted by buyer. As soon as the goods are loaded on the ship, the transit ends if the carrier is acting as an agent of the buyer.

Thus, **for instance,** *Rosewear china clay co ltd, re*, the contract was for the sale of china clay at FOB Fowey. The buyer chartered a ship and instructed the seller to load to the goods at Fowey, which was accordingly done. The destination of the ship was not told to the seller nor any bill of lading signed. The seller gave notice stopping the goods.

3- **Wrongful refusal to delivery**- When the carrier wrongfully denies delivering the goods to the buyer or his agent the transit is at the end. It is obvious that goods should have arrived at their destination because otherwise, the carrier has the right to refuse to deliver them.

In the case of ***Bird v. Brown,*** the court discussed as to when it is wrongful to refuse the delivery of goods. In this case, the goods arrived at the destination but the buyer has become insolvent. A merchant was acting for the seller who gave stop notice to the seller without authority.

Subsequently, the trustee of the buyer demanded the goods as the buyer was insolvent. The carrier refused to deliver the goods and handed them to the merchant. The court said that after the formal demand for goods by the trustee, there could be no valid stoppage in transit.

4- **Part delivery**- in the case when the goods have been delivered partly, the seller has a right to stop the delivery of the rest of the goods unless the part delivery shows an agreement to the possession of the whole. **For instance**, A sells to B 20kg of wheat, 10kg has been transferred to B but rest 10kg is still in transit, in case B fails to pay A has a right to stop the goods in transit.

c- Resale

Exercising the right of lien or stoppage does not rescind the agreement but reselling of goods does and without this right, the other two rights of lien and stoppage would not be of much usage because he can only retain goods under these right till the buyer pays back the money.

The unpaid seller can exercise his right under following conditions and circumstances-

1- Seller before reselling the goods needs to send a notice to the buyer except in the case of perishable goods, giving him last chance to pay the price and take back the goods within a reasonable time. If the buyer does not pay the money back seller has the right to resell the goods. If the seller fails to give notice of his intention to resell, he cannot claim damages from the buyer and he has to give any profit.

2- If there is any loss in the resale of goods, he can claim the loss from the buyer, on the contrary, if there is profit buyer cannot claim it.

3- Seller gives rightful ownership to buyer after the resale it does not matter notice of resale is given or not to defaulted buyer.

Sometimes the seller reserves exclusive right to resale the goods if the buyer makes a default in payment, in such cases the buyer cannot ask for profit on resale if no notice is served and seller has the exclusive right to resale.

For instance, *R V Ward V Bignall,* there was a contract of sale of two cars, vanguard and zodiac for 850$. The buyer deposited 25$ but afterwards did not pay the price despite a reasonable notice. The seller then tried to resell but could be sold only a vanguard for 359$. he then claimed damages for 475$ representing the balance of price and 22$ as advertising expenses. Court held that once the seller resells the goods the contract is rescinded and he cannot claim the money but he can ask for advertising expenses and a shortfall in the price of the vanguard.

Rights against seller

1- Damages for non-delivery

Section 57 states that, whenever any seller or refuses to deliver the goods to the buyer, the buyer may sue for non-delivery of goods. If the buyer has paid any amount, he is entitled to recover it. Quantum of damages is decided through market forces, contract and market price on the day of the breach is considered as damages. If the buyer wants to claim that damages, he must prove it in the court of law, otherwise, he cannot get a penny more than refund i.e., the amount he has already paid. Buyer must try to keep the loss at a minimum by purchasing the goods from other sources instead of waiting for the market to fluctuate.

2- Suit for specific performance

Acc t**o Section 58** when goods are specific or ascertained and there is a breach of contract committed on the part of the seller then the buyer can appeal to the court of law for specific performance. The seller has to perform the contract and he does not have any option of retaining the goods by paying damages. The power of the court to order specific performance is subject to the provisions of chapter II of Specific Relief Act, 1963.

Thus on the sale of ship buyer was allowed to recover the ship specifically in the case of *Behnke V Bede Shopping,* there was a ship named the city which holds a unique value to the plaintiff but she was a cheap vessel being old but her engines were new and as to

satisfy the German regulations and hence plaintiff could as a German shipowner have her at once put on the German register. A very experienced ship-valuer has said that he knew only one other comparable ship, but that may not be sold. Thus, on sale of a ship buyer was allowed to specifically recover the ship.

3- Suit for breach of warranty

As stated under **Section 59,** the buyer cannot reject the goods solely on the basis of breach of warranty on the part of the seller or when a buyer is forced to treat a breach of condition as a breach of warranty. But he may sue the seller for damages or set up against the seller the breach of the warranty in the extinction of the price.

The measure of damages is directly and naturally occurring loss in ordinary events from breach of warranty. *Mason v. Burningham*, the buyer of a second- hand typewriter spends some money on getting it overhauled. Afterwards, the typewriter was seized from her as stolen property. this was a breach on the part of the seller of warranty of quiet possession. She was held entitled to recover damages including the cost of repair. She did a natural thing in having the typewriter repaired and the amount she had spent was a loss directly and naturally resulting from the breach.

4- Suit for anticipatory breach

According to Section 60, the rule of anticipatory breach contract applies, wherein, if any party repudiates the contract before the date of delivery the other party can consider the contract as rescinded and can sue for damages of the breach.

According to this Section, if one party repudiates before due date other has two courses of action. Either he may immediately accept the breach and bring the action of damages the contract is rescinded and damages will be assessed according to the prices then prevailing or he can wait for the date of delivery. In the second case, the contract is open at risk and will be a benefit to both parties. Maybe the party changes is mind and agree to perform and damages will be assessed according to prices on the day of delivery.

Conclusion

The seller becomes an unpaid seller when either he had not been paid in full or the buyer has failed to meet the maturity of bills of exchange or any other negotiable instrument accepted by seller as a condition precedent. Under this situation, the seller can resell the goods if he had exercised the right of lien or stoppage in transit, after giving notice to the buyer and the new buyer will have good title over the goods. In this case, the seller has the right to sue the buyer for failure to pay the required amount as well as a lien. On the contrary, if the seller fails to deliver goods to the buyer, he may sue the seller for non-performance and can claim damages or specific performance.