

**B U S I N E S S
L A W**



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Business Law



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Business Law

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PREFACE

We have immense pleasure in placing the book 'Business Law' before the esteemed readers. The book is the crop of a long period of Industrial and teaching experience. We do not claim any originality, but we have taken effort to present the subject in simple and systematic manner.

We hope that the book is a good guide to all those who are students of Business Law. It will also useful for other students who are doing management courses. We will be much grateful to those who forward us useful suggestions for improving the standard of the book.

The authors feel very grateful to the publishers, for their motivation and special interest they have taken in the publication of this book.

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I thank almighty of God, for his blessing which encouraged me to preparation of this book. My special thanks go to my Parents, my Husband, Children and Family. Words are inadequate in offering my thanks to Fellow Faculty Members for their invaluable inputs for the development of the book. I extend special thanks to Empyreal Publishing House and its whole team, for the fine spirit of co-operation shown to achieve task

Mrs. J. Angel Priya

I thank almighty of God, for his grace which encouraged me to write this book. The publication of this book is possible due to encouragement and motivation from my Family, I am thankful for their blessings and kind cooperation they have showered on me. I also wish to say a very special thanks to my Parents, my Wife and Daughter. I wish to express my deep sense of gratitude to my Colleagues, for their support and cooperation. Finally, I thank to Empyreal Publishing House and its whole team understanding the task skilfully.

Dr. P. Adichiappan

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Chapter - 1

Nature of Contract

1.1 INTRODUCTION

A Contract is an agreement enforceable by law. Let us discuss the elements of a contract and describe the essentials of a valid contract. We will explain the different types of contracts.

1.2 CONTRACT

“An agreement enforceable by law is a contract.” Therefore, a contract has two important elements, one is the agreement, and the other is the obligation, which is enforceable by law Sec.2 (h).

Agreement:

Agreement is the outcome of the consensus between the parties who enter into a contract, i.e., the promise made between them, represents concurrence of their minds. (Sec 13).

Offer (Proposal):

“When one person signifies to another his willingness to do or to abstain from doing anything with a view to obtaining the assent of the other to such act or abstinence, he is said to make a proposal” (Sec.2 (a)).

Acceptance:

“When the person to whom the proposal is made, signifies his assent thereto, the proposal is said to be accepted. A proposal when accepted becomes a promise” Sec 2 (b).

1.3. ESSENTIAL OF A VALID CONTRACT

1. Capacity of the parties: Only those persons who are competent to enter into a contract can create valid obligations.

2. Free Consent: Absence of consent does not create a legal obligation. For an agreement to become a contract the parties to an agreement should give their consent to the agreement out of their own free will.

3. Lawful consideration and object: Without consideration a promise can't be enforceable by law. However, consideration need not be in money or in kind. It may be of an act, abstinence, a promise to do, or not to do something. But consideration should be lawful.

4. Intention to create legal relationship: Social obligation can't bring legal relationship. For example: Father promised his son pay Rs.100 per day for pocket expenses.

5. Possibility of performance: Example: A promised B that he would make the Sun raises in the West if B pays him Rs.1 lakh, and B agreed to it, this agreement does not create any legal obligation as it would not be enforceable by law.

6. Meaning should be certain: Example: A agrees to sell B's horse. There is nothing whatever to show which horse is intended. The agreement is void for uncertainty.

7. Legal Formalities (If required): An agreement to make a gift for natural love and affection should not only be in writing but registered also (Sec.25).

8. Agreements not declared void: Indian Contract Act has specifically declared some agreements to be not enforceable at law e.g. Agreements in restraint of trade, Agreements in restraint of marriage, wagering agreements etc.

1.4 KINDS OF CONTRACTS

1. Valid Contract: It is an agreement, which fulfils all the essentials of enforceability and can be enforced by either of the parties at the courts of law.

2. Voidable contract: An agreement, which is enforceable by law at the option of one or more of the parties thereto, but not at the option of the other or others, is a Voidable Contract.

Circumstances in which a contract is voidable are:

(A) At the conception

- Consent caused by Fraud (Sec.14, 17 and 19)
- Consent caused by coercion (Sec.14, 15 and 19)
- Consent caused by misrepresentation (Sec.14, 18 and 19)
- Consent caused by undue influence (Sec.14, 16 and 19A)
- When one party induces another to enter into an agreement the object of which is unlawful though it is not known to the other party.

(B) By Subsequent Default

- Where offer of performance is not accepted (Sec.38)
- When one party prevents performance of reciprocal promise (Se.53)
- When a party fails to perform at the time fixed, if time is the essence of the contract (Sec.55)

3. Void Contract: [Sec 2(j)] "A contract which ceases to be enforceable by law becomes void when it ceases to be enforceable". Void contract is one, which was a valid contract when it was made but becomes void later on. Those agreements which are voidable initio (from the very beginning) are called Void Agreements and those, which become void later on are called Void Contracts.

Following circumstances will transform a valid contract into a void contract.

-
- **Contingent Contract:** A contingent contract to do or not to do something on the happening of an uncertain future event becomes void, when the event becomes impossible (Sec.32).
 - **Repudiation of a voidable contract:** When a voidable contract is rescinded by the party at whose option it is voidable, the contract becomes void.
 - **Subsequent impossibility (Sec.56):** A Contract, which becomes impossible to perform, after it is made, becomes void.
 - **Subsequent illegality (Sec.56):** A Contract becomes void if it becomes illegal after it is made.

4. Void Agreement: An agreement not enforceable by law is called a void agreement. If any of the essentials of obligations (enforceability), other than free consent, is missing the agreement cannot be enforced at Courts of Law.

5. Illegal Agreement: An illegal agreement is one which is forbidden by law i.e. it is entered into with the intention of violating the law. Example: A agrees to steal furniture for B for a consideration of Rs.1, 00,000. It is illegal and therefore it is void. It also attracts the penal provisions of the law it is violating.

6. Unlawful Agreements: (Sec.23). In simple words an agreement may be unlawful because it is:

- **Immoral:** Contrary to sound and positive morality as recognized by law, e.g. cohabitation.
- **Opposed Public Policy:** Contrary to the welfare of the State as tending to interfere with the civil or judicial administration, or with individual liberty of citizens.
- **Illegal:** Contrary to positive law, being forbidden either by statutes law or common law.

7. Unenforceable Contract: Contracts, which have all the essentials of enforceability but cannot be enforced due to certain technicalities like insufficiency of stamp, etc. are termed as unenforceable contracts.

8. Express Contract: It is one where the intention of parties is stated in words either written or spoken. Example: A goes to B's shop and asks him to supply 10 boxes @ Rs.20 per box. B tells him that he is ready to supply the boxes at the mentioned rate. This is an Express Contract. The same intention of the parties may be expressed in writing signed by both the parties.

9. Implied contract: The evidence of an implied contract is to be deduced from the acts or conduct of the parties. No exchange of words either written or spoken takes place, but the manifestation of their intentions is inferred from their respective acts or conduct.

10. Quasi Contracts: These are those obligations which are imposed by the Contract Act and do not arise from a consensus between the parties. Example: A, a tradesman, leaves goods at B's house by mistake. B treats the goods as his own. B is bound to pay A for them, the obligation is imposed by law.

11. An Executed Contract: It is one where both the parties to a contract have discharged their respective responsibilities by performing them. All transactions of Cash sales are the examples of Executed Contracts.

12. An Executory Contract: It is one where one or both the parties are yet to perform their respective promises. It is partly Executed and partly Executory.

13. Unilateral Contract: It is one where at the time when the contract is made one party has already performed his obligation and the obligation on the part of the other party only, is outstanding. Thus where A goes to a bus stand ticket counter and buys a ticket for journey. A has performed his duty under the contract i.e., to pay the scheduled fare. But the bus authority is yet to perform its promise i.e., of carrying him from one point to another. This is Unilateral Contract.

14. Bilateral Contract: As against Unilateral Contract, a Bilateral Contract is one where at the time of entering into the contract both the parties to the contract are yet to perform their respective promises.

1.5 OFFER AND ACCEPTANCE

Sec.2 (e) defines an agreement as "Every promise or every set of promises forming consideration for each other". A proposal when accepted becomes a promise., for Ex. A received Rs.10,000 from B and promises to supply him 10 bags of rice after 10 days. It is a promise. It shall be a set of promises if A promises to supply 10 bags of rice after 10 days and B promises to pay him Rs.10, 000 after the rice is supplied.

Thus, **Agreement = Offer + Acceptance.**

Offer

'Offer' and 'Proposal' are synonymous terms. According to sec. 2(a), "when one person signifies to another his willingness to do or to abstain from doing anything with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal". The person making the proposal is called the "Promisor" and the person to whom the offer is made is called the "Promisee" [Sec.2(c)].

Rules Regarding a Lawful Offer

A valid offer must be in conformity with the following rules:

- Terms of an offer should be definite or should be capable of being made definite
- Offer should be made with an intention to create legal relationship
- There is no valid offer where:

(i) it is mere statement of intention;

(ii) It is an invitation to offer

- Offer must be communicated
- Offer should not contain a term the non-compliance of which would amount to acceptance
- Offer may be express or implied
- An offer may be general or specific

Acceptance

The proposal is said to be accepted, when the person to whom the proposal is made signifies his assent. A proposal once accepted becomes a contract. Where two parties make offers to each other with identical terms, without knowing each other's offer. These offers are called **Cross Offers**.

Rules Regarding Acceptance

- Acceptance must be absolute and unqualified
- The Acceptance must be expressed in some usual and reasonable manner, unless the proposal prescribes a manner in which it is to be accepted
- Acceptance by performing Conditions or receiving Consideration
- Acceptance must be communicated
- Acceptance should be given within stipulated time and before the offer is revoked
- Where an offeree accepts an offer knowing that it has been made by the offer or under a mistake, the contract is not binding upon the offer or

Revocation of Proposal and Acceptances

"A proposal may be revoked at any time before that communication of its acceptance is complete as against the proposed, but not afterwards".

Communication of Revocation

"The communication of a revocation is complete... As against the person who makes it, when it is put into a course of transmission to the person to whom it is made, so as to be out of the power of the person who makes it. As against the person to whom, when it comes to his knowledge".

Agreement to Agree in Future

Agreement to enter into an agreement upon terms of to be settled afterwards between the parties is a contradiction in terms. It is absurd to say that a man enters into an agreement till the terms of agreement are settled; until those terms are settled, he is perfectly at liberty to retire from the bargain".

1.6 CONSIDERATION

Consideration is one of the elements of obligation. An agreement becomes enforceable only if it is supported by consideration. (Sec.10) “All agreements are contracts if they are made for a lawful consideration” It clearly shows that consideration is an important pre-requisite of a valid contract. (Sec.25) “An agreement made without consideration is void” Hence the rule is “No Consideration, No Contract.”

Essentials of Consideration

Based on definition

- Consideration must move at the desire of the promisor
- It may move from promisee or from any other person on behalf of promisee
- Consideration may be past, present or future
- Consideration must be real and not illusory
- Consideration may consist of an act, abstinence or promise
- Based on other provisions
- Consideration must be lawful
- Consideration need not be adequate to the value of the promise

1.7 EXCEPTIONS TO THE RULE OF CONSIDERATION

An agreement without consideration is enforceable, if it is made out of:

- Love and affection
- Compensation for voluntary services
- Promise to pay a time barred debt
- Contract of Agency
- Gift already made

1.8 COMPETENCE TO CONTRACT

Competence to contract is one of the essential elements of enforceability of any agreement. According to Sec.10 ‘All agreements are contracts if they are made by the parties competent to contract. As regards the meaning of competence, Sec.11 of the Contract Act states that “Every person is competent to contract who is of the age of majority according to the law to which he is subject, and who is of sound mind, and is not disqualified from contracting by any law to which he is subject. The following persons are incapable of entering into a contract:

- A person who has not attained the age of majority i.e. a person who is a minor.
- A Person who is not of sound mind i.e. a person of unsound mind.

-
- A Person who is disqualified by any other law to which he is subject (i.e., other disqualifications.)

1.9 FREE CONSENT

“The term free consent consists of two requirements viz.: (i) There should be consent; and (ii) Consent should be free.

Consent: The term consent is defined by Sec. 13 as “Two or more persons are said to consent when they agree upon the same thing in the same sense”

Free Consent: “Consent is said to be free when it is not caused by (1) Coercion, or: (2) Undue influence as defined in section 16, or (3) Fraud, or: (4) Misrepresentation, or: (5) Mistake. Consent is said to be so caused when it would not have been given but for the existence of such coercion, undue influence, fraud, misrepresentation or mistake.’ (Sec.14)

1.10 COERCION

“Coercion is the committing or threatening to commit any act, forbidden by the Indian Penal Code or the unlawful detaining or threatening to detain any property, to the prejudice of any person whatever, with the intention of causing any person to enter into agreement.” (Sec.15)

- Coercion is committing any act forbidden by the Indian Penal Code with the intention of causing any person to enter into an agreement.
- Coercion is the threatening to commit any act forbidden by the Indian Penal Code, with the intention of causing any person to enter into an agreement.
- Coercion is the Unlawful detaining of any property to the prejudice of any person, whatever, with the intention of causing any person to enter into an agreement.
- Coercion is the threatening to detain, unlawfully, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement.

1.11 UNDUE INFLUENCE

[Sec. 16(1)] “A Contract is said to be induced by ‘undue influence’ where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.’

Three conditions should be fulfilled:

- The relation between the contracting parties should be such that one party is in a position to dominate the will of the other; and

-
- Such party has used that dominant position to enter into a contract with the latter; and
 - Such party has obtained an unfair advantage over the other.

Difference between Coercion and Undue Influence

- **Type of pressure:** Physical or crude force; Mental pressure.
- **Burden of proof:** Prove how the coercion was exercised; prove that the other party was in a position to dominate his will and that the transaction is unconscionable.
- **Nature of transaction:** The party uses that position to obtain an unfair advantage over the other; a transaction, though fair but induced by coercion can still be avoided.

1.12 FRAUD

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

- The suggestion, as a fact, of that which is not true by one who does not believe it to be true;
- The active concealment of a fact by one, having knowledge and belief of the fact;
- A promise made without any intention of performing it;
- Any other act fitted to deceive;
- Any such act or omission as the law specially declares to be fraudulent. (Sec.17)

1.13 MISREPRESENTATION

Misrepresentation means and includes:

- The positive assertion in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;
- Any breach of duty which, without an intent to deceive, gains an advantage to the person committing it, or any one claiming under him, by misleading another to his prejudice or to the prejudice of any one claiming under him;
- Causing, however innocently, a party to an agreement to make a mistake as to the substance of the thing which is the subject of the agreement’.

1.14 MISTAKE

Salmond has described these contracts as “error in Causa”. As “error in consensus” i.e. there is no ‘consensus ad idem’: because of some misunderstanding, called ‘Mistake’, parties do not agree upon the same thing in the same sense. According to Indian Contract Act, Mistake is of two types, (1) Mistake as to law and (2) Mistake as to fact.

Mistake of Law (Sec.21): “A contract is not voidable because it was caused by a mistake as to any law in force in India, but a mistake as to a law not in force in India has the same effect as mistake of fact.” The reason of this rule lies in the legal maxim “Ignorance of law is no excuse”.

Mistake of Fact (Sec 20): “Where both the parties to an agreement are under a mistake as to a matter of fact, essential to the agreement, the agreement is void”.

Essentials of mistake

- Mistake must be mutual
- Mistake must relate to a fact
- Fact should be essential

Types of Mistakes

Mistake of fact can be divided into the following categories:

Bilateral Mistake

1. Mistake as to the subject Matter:

- i. Mistake regarding existence of subject matter:
- ii. Mistake regarding identity of the subject matter i.e. the two parties understand different things to be the subject matter:
- iii. Mistake regarding quantity of subject matter:
- iv. Mistake regarding title of the subject matter; Where both the parties believe that the seller has the right to sell the goods but unknown to both, the seller has no title to the goods.
- v. Mistake regarding the price of the subject matter.
- vi. Mistake regarding the quality of the subject matter.

2. Mistake as to the possibility of performance of the agreement: if both the parties to the agreement believe that the agreement is capable of being performed though it is not, the agreement is void.

In the following circumstances, even unilateral mistake will make the contract voidable.

- **Mistake as to the nature of transaction:** This is an exemption to the rule that mistake must be mutual. When one of the parties to a contract, without any fault of his own, is made to commit a mistake as to the nature of transaction the agreement would be void.
- **Mistake as to the person contracted with:** When the identity of the person is essential to the contract and a mistake is committed regarding that, the contract can be avoided.

REVIEW QUESTIONS

1. Not all agreements are enforceable by law. Why?
2. Distinguish between a void agreement and a void contract.
3. All contracts are agreements, but all agreements are not contracts – Discuss.
4. Write short note on: (a) Valid contract, (b) void contract, (c) Void agreement (d) Illegal contract (e) Unilateral contract (f) Bilateral contract.
5. State the essentials of a valid offer.
6. When is an offer complete? How and when may an offer be revoked?
7. Define ‘acceptance’, and state the legal rules governing valid acceptance.
8. What is the need for consideration in a contract?
9. What are the types of consideration?
10. Consideration must be real and not illusory. What does this mean?
11. “A contract without consideration is void”. Are there any exceptions to this rule? If so, explain.
12. ‘A stranger to a contract cannot sue, but a stranger to a consideration can sue’. Elucidate the statement.

Chapter - 2

Performance and Discharge

2.1 INTRODUCTION

In the previous lesson, we had discussed the nature of contract and consideration to contract. We will discuss the performance of contract and the various aspects relating to performance. We will explain breach of contract and remedies of breach of contract.

2.2 PERFORMANCE OF CONTRACTS

‘Performance of Contracts’ refers to the fulfillment of their respective legal obligations, created under the contract, by both the parties. It is a natural and normal mode of discharging a contract.

The various aspects relating to performance are:

1. Actual Performance

The parties to a contract must either perform, or offer to perform their respective promises, unless such performance is dispensed with or executed under the provisions of this Act or any other law.

Example: X bought goods from Y and promised to pay Rs.1000 to Y on 10th June. X went to Y on 10th June to give Rs.1000 in cash but Y did not accept it. Though X may not be discharged from the payment of Rs.1000 but he would not be liable to pay interest thereon from 10th June onwards.

For a tender to become legally valid it must fulfill the following conditions:

- It should be unconditional
- Offer must not be of a part only
- Proper time and place
- Able and willing
- Reasonable opportunity
- Tender of money
- Joint Promises

2. Refusal to Perform

When a party to a contract has refused to perform, or disabled him from performing, his promise in its entirety; the promise may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance.

3. Who can demand Performance

It is only the promisee who can demand performance of the promise under a contract, for the general rule is that ‘a person cannot acquire rights under a contract to which he is not a party.’

4. By whom Contracts must be performed

- i. By the promisor himself: Generally where personal skill, taste etc. are involved, it is presumed that the promisor would himself perform the contract.
- ii. By promises representative: Promises bind the representatives of the promisor in the case of death of such promisor before performance, unless a contrary intention appears from the contract.

5. Offer to Perform (Tender)

A party who has not already performed his obligation must offer to perform the same.

Example: a Promises to paint a wall for B, A must perform this promise personally.

6. Devolution of Joint Rights and Joint Liabilities (Joint Promises)

When two or more persons make a joint promise to other or others, they are known as joint promisors e.g. A and B sign a promissory note, they are joint promisors. When a promise is made to two or more persons, they are Joint Promises.

Following rules govern such promises:

- All promisor must jointly fulfill the promise
- Any one of the joint promisor may be compelled to perform
- Right of contribution between joint promisor
- Effect of release of one joint promisor

Example: A, B and C Jointly promise to pay D Rs. 5000. D may compel either A or B or C to pay him Rs. 5000.

7. Times and Place for Performance

- Within a reasonable time
- During usual hours of business
- Promise's duty to apply for performance
- Promisor should apply for fixing a reasonable place
- In the manner prescribed by promisee

8. Performance of Reciprocal Promises

Promises, which form the consideration or part of the consideration for each other are called reciprocal promises.

Rules regarding the performance of reciprocal promises are:

- When promises are to be performed simultaneously:
- In the order, which the nature of transaction requires:
- When the performance of a promise is dependent upon other:

-
- When one party prevents the other from performing his promise:
 - Where the promise is partly legal and partly illegal:

2.3 DISCHARGE OF A CONTRACT

A Contract is discharged, terminated when the rights and obligations created by it come to an end. A Contract is terminated in the following ways:

1. By performance (Sec.37): When the parties to a contract perform their respective promises, the contract comes to an end. Nothing remains to be performed.

2. By Tender (Attempted Performance): When a promisor makes an offer of performance tender and the offer is not accepted, the promisor is not responsible for non-performance, i.e. the promise is not discharged from his obligations.

3. By Supervening Impossibility: Impossibility is of two types:

i. Impossibility at the Time of Contract:

‘An agreement to do an act impossible in itself is void.’ Example A agrees with B to discover gold by magic. The agreement is void.

ii. Subsequent or Supervening Impossibility:

Where a contract originates as one capable of performance but later due to change of circumstances its performance becomes impossible, it becomes void by subsequent or supervening impossibility (Section 56).

4. Mutual Agreement

A contract is created by the parties to it. Therefore, it can also come to an end by their mutual agreement. Termination by mutual agreement may occur in any one of the following ways.

- **Novation:** When a new contract is substituted for an existing contract, either between the same parties or between different parties, it is called novation.
- **Alteration:** When one or more of the terms of a contract are changed it is called alteration. In case of alteration, parties to the contract do not change. Example: A agrees to supply to B 20 readymade pants, 10th of the size 32 and 10 of the size 34. Later on B requests A to supply all 20 pants of the size 32 only. A agrees to it. The old contract comes to an end.
- **Rescission:** When both the parties to a contract agree to put an end to the contract, without performing it, the contract is said to be rescinded by mutual agreement. Example: A promises to supply to B 20 shirts on 15th January and B promises to pay Rs 5000 on the same day after delivery on 10th January both the parties agree that the contract would not be performed. Parties are said to have rescinded the contract.

-
- **Remission:** When a party to a contract accepts, from the other party, a performance lesser than what he had contract for, he is deemed to have remitted the remaining performance, and the contract is discharged. Example: A owes B Rs. 500 rupees but pays on by Rs.200, and B accepts at in satisfaction of the whole debt. The whole debt is discharged.
 - **Waiver:** When a party to a contract abandons his right under the contract, the other party is released from his obligations. Example: A Pays Rs 1000 to B to paint a wall for him. Later on A forbids B to paint the picture. B is no longer bound to perform the promise.
 - **Merger:** When a superior right and an inferior right coincide and meet in one and the same person, the inferior right vanishes into the superior right. This is known as merger. Example: A has taken a house on lease from B for 10 years. After one year A buys the house from B. His rights of a lessee vanish into his rights of ownership and the contract of lease comes to an end.

5. By Lapse of Time

The Limitation Act provides the time limit in which certain rights can be enforced. If that time limit expires, the promise cannot enforce the promise and promisor is discharged.

6. By Operation of Law

This covers the following cases:

- Death
- Insolvency
- Merger
- Material alteration

7. By Breach of Contract

Breach is the non-performance of the promise by promise by the promisor. It entitles the promise to rescind the contract. It, therefore, operates as a mode of discharging a contract.

2.4 BREACH OF CONTRACT

As we discussed in the previous part breach of contract is a mode of discharge of the contract. Though the obligation created by the contract comes to an end but the aggrieved party is entitled to several remedies that are discussed in this part. The remedies depend upon whether the breach is (a) Actual or (b) Anticipatory or Constructive.

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- **Actual Breach:** Where a person fails to perform a contract when the performance is due, the other party can hold him liable for breach i.e. he can rescind the contract and sue for damages.
 - **Anticipatory Breach:** When a party to the contract, before the date of performance arrives, repudiates his liability under the contract or makes the performance of the contract impossible, there is an anticipatory (constructive) breach of contract. Anticipatory breach may be express or implied. Example: A promises to marry B in the month of April. But in the month of March A marries C. The marriage between A and B becomes impossible, this is a case of anticipatory breach.

2.5 REMEDIES OF BREACH OF CONTRACT

When a contract is broken the party who suffers from such breach is entitled to the following reliefs:

- **Rescission of the Contract:** He would not be required to perform his promises. Example: A, an advocate promises to plead B's case in the court of law if B gets him (A) a table before the date of hearing. B does not deliver a table to A. A can rescind the contract and becomes free from the obligation of pleading B's Case.
- **Suit for Damages:** The injured party can also file a suit for compensation for the loss it has suffered because of the breach of the contract. Example: A contracts to buy B's car for Rs.60,000 but B breaks his promise. B must pay to A, by way of compensation, the excess, if any, of the contract price which B can obtain for the car of the breach of promise.
- **Suit upon Quantum Meruit:** The expression 'Quantum Meruit' means 'as much as earned', i.e. reasonable remuneration for the services performed. The rule is invoked where there is no agreement for remuneration for the work done. Thus where a party to the contract has performed part of his promise and is prevented by the act or conduct of the other party, from completing it, he may sue on a Quantum Meruit. Example: A agreed to write a story for B, which B would publish in installments in his weekly magazine. B agreed to pay a lump sum amount for the entire storey. After a few installments were published, B abandoned the magazine. Held A could recover on Quantum Meruit for the work done under the contract.
- **Suit for specific performance of the contract:** Specific performance means the actual carrying out of the contract. In certain cases the court may direct the party in default to fulfill his promise. This remedy may be granted to the injured party instead of or in addition to the awarding of damages. It is usually granted where monetary compensation is not an adequate remedy. But it would not be granted if the court cannot supervise the contract (e.g. mining operations) or if the contract is for personal services. Example: A, a renowned painter agrees to paint a picture for B. Later on he refuses to do so. B pleads with the court that he cannot get such a

painting with any amount of money. Even if court is satisfied with the plea of B, it cannot grant specific performance because A cannot be compelled to paint a picture.

- **Suit for Injunction:** Injunction is the specific performance of the negative terms of the contract. It is an order of the court prohibiting a party from doing something. Example; A agrees to do a musical program at the theatre on that day. Later on A agrees to perform in the theatre of P. B cannot enforce a specific performance of A's musical program in his theatre. (Because court cannot effectively supervise it) but he can ask the court to restrain A from performing in P's theatre.

REVIEW QUESTIONS

1. What is meant by discharge of a contract?
2. When does discharge of a contract by operation of law take place?
3. What is meant by performance of a contract?
4. What do you understand by discharge of contract? State different ways in which a contract may be discharged.
5. What contract need not be performed?

Chapter - 3

Contract of Sale

3.1 INTRODUCTION

The law defining their respective rights and obligations is contained in the Indian Sale of Goods Act, 1930. Before 1930, law relating to sale of goods was contained in the Indian Contract Act, 1872. The departures made by the Sale of Goods Act are in regard to the consideration, implied conditions and warranties etc.

3.2 ESSENTIALS OF A CONTRACT OF SALE

‘A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price.’ [Section. (4) 1]. Important features of a contract of sale:

1. **Two Parties:** In a contract of sale, there has to be a seller and a buyer
2. **Mutual Consent:** Just the presence of two parties is not sufficient. The parties must agree on the transfer of property.
3. **Transfer of Property:** What a contract of sale stipulates is the transfer of property i.e. the ownership of goods and not the possession of the goods.
4. **Goods:** Goods means every kind of movable property other than actionable claims and money. But it includes stock and shares, growing crops, grass and things attached to or forming part of the land, which are agreed to be served before sale or under the contract of sale. [Sec.2 (7)]. Since the price of the goods is expressed in terms of the money, money itself cannot be bought, and hence, money is not considered as goods.
5. **Price:** Under a contract of sale, property in the goods is transferred to the buyer for a price. Price is the money consideration for the goods.
6. Varied requirement as to delivery and payment: The contract may provide for the immediate delivery of goods or immediate payment of the price or both.
7. **Requires no formalities:** A contract of sale may be made in writing or by words of mouth or may be implied from the contact of the parties.
8. **Absolute or Conditional:** An absolute contract of sale is technically called a ‘sale’. Thus, “where under a contract of sale the property in the goods is transferred from the seller to the buyer, the contract is called a sale...” [Sec. 4 (3)]. Thus a contract of sale is a generic term including ‘Sale’ as well as ‘an agreement to sell’

3.3 DISTINCTION BETWEEN “SALE’ AND ‘AGREEMENT TO SELL’

1. Transfer of property

In a sale the buyer becomes the owner immediately (i.e. as soon as the contract of sale is made). But in an agreement to sell the seller continues to be the owner unless it becomes a sale by the expiry of certain time or by the fulfillment of the conditions agreed upon.

2. 'Jus in rem' and 'Jus in Personam'

A sale creates 'Jus in rem' i.e. rights against the goods. Even if the seller sells these goods to another person, the buyer can follow his goods in the hands of the second buyers.

3. Risk of Loss

Risk prima facie passes with property (Sec.26). The buyer would bear the risk of loss, even if goods are in the possession of the seller. But in case of an agreement to sell the ownership remains with the seller and as such the seller would be liable for the loss.

4. Consequences of default

- a. When the buyer commits the default and does not pay the price of the contract is a sale, the seller can sue for the price, even if the goods are in the possession of the seller himself. But in an agreement to sell, he cannot sue him (buyer) for the price of the goods even if the goods happen to be in the possession of the buyer.
- b. When the seller commits default and refuses to sell goods or sells the goods to some other person, then if the contract is a sale they buyer can recover his goods, even from a second buyer (Except under certain circumstances) and sue the seller for breach of contract as well, but in case the contract is only an 'agreement to sell', the buyer can only sue the seller for the breach of contract but cannot recover the goods.

5. Where the buyer becomes insolvent

Where the contract is a 'sale' the seller would have to part with the goods and can receive in buyer's insolvency, only ratable dividend for the price due. But, in an agreement to sell, the seller may refuse to deliver the goods to the official receiver/assignee of the buyer's property unless he is paid the full price.

6. Insolvency of the seller

If it is a sale, the buyer can recover it from the official receiver/assignee. But in an agreement to sell buyer cannot recover the goods even if he has paid the price in advance.

3.4 SALE DISTINGUISHED FROM OTHER TRANSACTIONS

1. Sale, Barter and Exchange

If the goods are exchanged for goods only it is called 'Barter' and sale. If money is exchanged for money (say \$ 10 for Rs.450) it is called 'Exchange' only. But where goods are exchanged for a money consideration, it is called a 'Sale'. If the consideration consists partly of money and partly of goods, it would be a 'Contract of Sale'.

2. 'Hire purchase' and 'Agreement to sell'

In a contract of sale there is an agreement to buy but in 'hire purchase', hirer has the option to buy the goods if he pays all the installments. Hence if he does not exercise his

option, the owner cannot sue for breach of contract but can take his goods back. In an agreement to sell, if the buyer refuses to buy the goods the seller can sue him for breach of contract.

3. Sale and contract for work and Labour

If the essence of the contract is the rendering of service and exercise of skill it is a contract of work and labour, though goods are also delivered under the contract. But if the delivery of goods is the essence of the contract although some labour on the part of the seller may be necessary, it would be a contract of sale.

3.5 KINDS OF GOODS

The goods are classified by sec 6, as follows:

- a) **Existing goods:** Existing goods are those which are owned or possessed by the seller at the time of the contract of sale.

Existing good may be further classified into (i) specific; (ii) ascertained; and (iii) unascertained. 'Specific goods mean goods identified and agreed upon at the time a contract of sale is made' [Sec.2 (14)]. Ascertained goods are those, which are identified and agreed upon after a contract of sale is made. The goods, which are only defined by description and not specifically identified at the time a contract of sale is made, are called unascertained goods.

- b) **Future Goods:** A future goods means goods to be manufactured or produced or acquired by the seller after the making of the contract of sale'. [Sec.2 (6)], Example: A agrees to sell to B the entire crop of onion that his land would yield, at Rs.10, 000 per ton. This is a contract for the sale of future goods because goods are still to be produced.

- c) **Contingent goods:** Contingent goods are those the acquisition of which by the seller depends upon a contingency, which may or may not happen [Sec.6(2)]. Example: A agrees to sell the cow to B if A inherits C's property including the cow. C donates the entire property to a trust. The contract becomes void.

3.6 DOCUMENT OF TITLE TO GOODS

A document of title to goods is one which enables its possessor to deal with the goods described in it as if he were the owner. It is used in the ordinary course of business as proof of the possession or control of goods. It authorizes, either by endorsement or by delivery, its possessor to transfer or receive goods represented by it [Sec.2(4)]. It symbolizes the goods and confers a right on the purchaser to receive the goods or to further transfer such right to another person. This may be done by mere delivery or by proper endorsement and delivery.

Conditions to be fulfilled by a document of title of goods

- It must be used in the ordinary course of business.

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- The understanding to deliver the goods to the possessor of the document must be unconditional.
 - The possessor of the document, by virtue of holding such document must be entitled to receive the goods unconditionally.

Some instances of documents of title of goods are given below:

Bill of Lading: It is a document which acknowledges receipt of goods board a ship and is signed by the captain of the ship or his duly authorized representative.

Dock warrant: It is a document issued by a dock owner, giving details of the goods and certifying that the goods are held to the order of the person name in it or endorsee. It authorizes the person holding it to receive possession of the goods.

Warehouse-keeper's or Wharfinger's Certificate: It is a document issued by a warehouse-keeper or a wharfinger stating that the goods specified in the document are in his warehouse or in his wharf.

Railway Receipt: It is a document issued by the railway acknowledging receipt of goods. It is to present by the holder or consignee at the destination to take delivery of the goods.

Delivery Order: It is a document containing an order by the owner of the goods to the holder of the goods on his behalf, asking him to deliver them to the person named in the document.

3.7 TRANSFER OF PROPERTY

The primary rules for ascertaining when the property in goods passes to the buyer are as follows:

- Where there is a contract for the sale of unascertained goods, no property in the goods is transferred to the buyer unless and until the goods are ascertained (Sec.18).
- Where there is a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred (Sec.19).
- **Specific goods:** In case of a contract for the sale of specific goods (a) in a deliverable state, if the contract is unconditional, property passes as soon as the contract is entered into [Sec.20], (b) if the seller has to do something to put them in a deliverable state, property passes only when such thing is done and notice thereof is given to the buyer[Sec.21], (c) in a deliverable state if the seller has to do something for the purpose of ascertaining the price, property will pass only when such act is done and notice thereof is given to the buyer [Sec.22]

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- **Unascertained goods:** In case of unascertained or future goods sold by description, property passes only when goods according to the description are unconditionally appropriated to the contract and the buyer is given a notice thereof. Delivery to a carrier (the seller not reserving right of disposal, Sec.25) amounts to an unconditional appropriation (Sec.23).
 - **Goods sent on approval:** In case of goods delivered by a buyer on approval or 'on sale or return' property passes when he signifies his approval or acceptance or when he does some act adopting the transaction. If he retains the goods without giving notice of rejection, property passes when the time agreed for returning the goods expires or after a reasonable time has expired (Sec.24).

3.8 CONDITION

A term or a stipulation in a contract of sale with reference to goods may be either a condition or a warranty. A condition is a term, which is essential main purpose of the contract and hence is the foundation of the contract. The effect of a breach of condition is that it gives the right to the aggrieved party treat the contract as void and also to claim damages, if any.

3.9 WARRANTY

A warranty is a term which is collateral to the main purpose of the contract and hence only a subsidiary promise. The breach of warranty does not give right to the aggrieved party to treat the contract as void but entitles him claim damages only. In the absence of the contrary, time of delivery of goods is treated as condition and for payment of price, as warranty.

In the following cases, the breach of a condition will be treated as breach of warranty only:

- When the buyer waives the conditions; or
- When the buyer treats the breach of condition as a breach warranty and does not treat the contract as void; or
- Where the contract of sale is inseparable and the buyer has accepted the goods or part thereof; or
- Where the contract is for specific goods, the property in which has passed to the buyer.

Conditions and warranties may be express or implied. When they are definitely written in the contract, they are called express conditions and warranties. They are called implied conditions and warranties, when they are not written in the contract but applied to the contract either by operation of law or by trade custom.

Implied Conditions

1. As to title to goods: There is an implied condition that the seller has a right to sell in case of sale and that in the case of agreement to sell, he will have the right to sell the goods at the time when the property is to pass.

Example: A purchased a car from B for a certain price and used it for some period. Subsequently, it was found that the car was stolen by B and therefore, A returned back the car to the true owner. It was held that A could recover the full price paid to B.

2. Sale by description: The implied condition is that the goods delivered must correspond with the description.

Example: Where a machine was described as almost new and used very little but when delivered, was found to be an old and repaired one, it was held that the buyer was entitled to reject the machine.

3. Sale by sample: The implied condition is

- That the goods delivered shall correspond with the sample,
- That the buyer shall have a reasonable opportunity of comparing the bulk with the sample and
- That the goods shall be free from any defect rendering them un-merchantable, which would not be apparent on reasonable examination of the sample.

Drummond & Sons Vs Van Ingen & co: Where worsted coating was supplied corresponding with the sample but not suitable for stitching due to a later defect, it was held that the buyer was entitled to reject the goods.

4. Sale by sample as well as description: In the case sale of goods by sample as well as description, the goods delivered must correspond with both sample as well as description.

5. As to quality or fitness: The general rule is 'Caveat Emptor', i.e. let the buyer beware. So, the seller need not disclose the faults in the goods he sells nor need he guarantee that the goods are fit for the purposes of the buyer. So, the buyer takes them as they come.

But there are no implied conditions as to fitness or quality of goods when they are sold under the patent or trade name.

E.W.Evans Vs Stella Benjamin: Where a refrigerator was sold, it was held that the name of the article itself implies that it is fit for particular purpose.

6. As to Merchantability: In case of sale of good by description, there is an implied condition that the goods shall correspond with the description and also that they shall be of merchantable quality.

Grant Vs Australian Knitting Mill Ltd: The buyer was supplied woolen underpants by the manufacturers. The buyer wore them for some time and contracted a skin disease. Held that the buyer was entitled to damages.

Exception: if the buyer has examined the goods, there is no implied condition as to quality of goods as regards defects which such examination must have revealed.

7. As to wholesomeness: In the case of sale of visions, there is an implied condition that they are fit for immediate use.

Example: A, purchased a bun from B and injured his teeth by biting a stone in the bun. B was held liable.

Implied Warranties

1. **Warranty of quiet possession:** There is an implied warranty that the buyer shall have and enjoy quiet possession.
2. **Warranty against Encumbrances:** There is an implied warranty that the good shall be free encumbrance or charge in favor of any third party not declared or known to the buyer before or at the time of contract.

REVIEW QUESTIONS

1. Define a contract of sale, explaining its important features.
2. Distinguish a 'sale' from 'an agreement to sell'.
3. Define the term 'Goods' as used in the Sale of Goods Act and mention the 'kinds of goods'.
4. What do you mean by 'Price' in a Contract of Sale? How is it determined?
5. What would be the legal consequences if the goods are not delivered in time and the payment is not made in time?
6. Distinguish between a 'Condition' and a 'Warranty' in a Contract of Sale.
7. What are implied warranties in a Contract of Sale?
8. What constitutes Acceptance of goods?
9. Define the rule of 'Caveat Emptor'. Is it inconsistent with the provisions of Indian Sale of Goods Act? Explain, in brief, the exceptions to this maxim.
10. What conditions are implied in a Contract of Sale?

Chapter - 4

**Rights and Duties of
Buyer and Seller**

4.1 INTRODUCTION

In the last lesson, we had discussed the various aspects of contract of sale. Let us explain the rights and duties of buyer in this unit. We will also point out the rights and responsibilities of seller. The rights of an unpaid seller are also listed out.

It is the duty of the *seller* to deliver the goods, and of the *buyer* to accept and pay them in accordance with the terms of the contract of sale. *Buyer's Rights* (or *seller's duty*): The most important duty of the *seller* is to deliver the goods to the *buyer* according to the terms of the contract of sale.

Sellers Obligations

A seller “must deliver the goods, hand over any documents relating to them and transfer the property in the goods, as required by the contract”. These obligations would include, but not be limited to, the following: a seller delivering the goods, providing any documentation, and transferring the property but not the passing of title.

- Time and Place of Delivery
- Seller’s Delivery of Goods
- Sellers Delivery of Documentation
- Time for Delivery
- Conformity of the Goods

Time and Place of Delivery:

The time for delivery of the goods is of the essence under the CISG, because the obligation of the buyer to pay for the goods arises upon delivery.

Seller’s Delivery of Goods:

At the heart of many international sale transaction disputes is the question whether the goods delivered conform to the contract.

Sellers Delivery of Documentation:

Based on party autonomy, the terms of the contract control this issue and can range from documents of title, bills of lading, warehouse receipts, insurance policies, invoices, certificate of origin, and certificate of control or quality.

Time for Delivery:

The time for delivery of the goods is of the essence under the CISG, because the obligation of the buyer to pay for the goods arises upon delivery.

Conformity of the Goods:

At the heart of many international sale transaction disputes is the question whether the goods delivered conform to the contract.

Buyer's Obligations

The characteristics of an international sale of goods contract consists of the obligation of the seller delivering the goods and transfer the property in the goods to the buyer, which for its part agrees to pay the price for the goods and take delivery of them. The primary “obligation of a buyer under the contract of sale is to pay the price for the goods delivered”.

- Payment and Take Delivery
- Take Delivery
- Buyer's Obligation upon Delivery

Payment and Take Delivery:

The CISG regulates international sale of goods, which can be defined as a contract by which the seller agrees to deliver the goods and transfer the property in the goods to the buyer, which for its part agrees “to pay the price for the goods and take delivery of them”.

Take Delivery:

In parallel with a buyer's duty to pay, a buyer also has a duty to take delivery. This obligation consists in carrying out all the acts that could reasonably be expected of a buyer in order to enable the seller to make delivery and in taking over the goods.

Buyer's Obligation upon Delivery:

Pursuant to the provisions of the CISG, a buyer must examine or have goods examined within a period as short as practical under the circumstances and if defects are found it must notify the seller about them within a reasonable period of time.

4.2 RIGHTS OF BUYER

- The buyer has the right to have the delivery of goods as per the contract.
- He has the right to reject the goods, if the seller sends to the buyer a different quantity of goods than he ordered.
- He has the right to repudiate the contract, if the seller violates the terms and conditions.
- He has the right to examine the goods.
- He has the right against the seller for breach of contract. He may file a suit for damages or suit for price or suit for specific performance or suit for breach of warranty.

4.3 DUTIES OF BUYER

- He must apply for delivery of the goods.
- He must accept the goods and pay the price.

- If the goods are delivered by installments, he may refuse to accept such deliver.
- Where the seller sends to the buyer a quantity of goods less than or more than the goods ordered for, the buyer may refuse or accept the entire goods or accept partly and reject the rest. where he accepts, he must pay for them.
- Where the seller sends goods of a different description along with the goods ordered for, he may accept the goods ordered for and reject the rest.

Rights and Duties of the Buyer

Sl. No.	Rights of a Buyer	Sl.No.	Duties of the Buyer
1	He has the right to have delivery of the goods as per the contract.	1	It is the duty of the buyer to accept the goods and pay for them in accordance with the terms of the contract
2	If the seller does not send, as per the contract, the right quantity of goods to the buyer, the buyer can reject the goods.	2	It is the duty of the buyer to apply for delivery.
3	The buyer has a right not to accept delivery of the goods by installments by the seller.	3	It is the duty of the buyer to demand delivery of the goods within a reasonable time.
4	If the goods are sent by sea route by the seller, the buyer has a right to be informed by the seller so that he may get the goods insured.	4	If the contract specifically provides for the delivery of the goods by the seller by installments, the buyer shall accept such a delivery.
5	The buyer has a right to examine the goods which he has not seen earlier before giving his acceptance for the same.	5	It is the duty of the buyer to take the risk of deterioration in the goods which is necessarily incident to the course of transit. Example: Rusting of iron.
6	If the seller wrongfully refuses to deliver the goods to the buyer as per the contract, the buyer may sue the seller for damages for non delivery. The amount of damages will be the difference between the contract price and the market price of the goods.	6	If the buyer refuses to accept the goods, it is his duty to inform the seller about it.
7	If the contract is for the sale of specific or ascertained goods,	7	If the seller delivers the goods as per the contract, it becomes the

Sl. No.	Rights of a Buyer	Sl.No.	Duties of the Buyer
	the buyer may sue the seller for the specific performance of the contract in case of breach of contract by the latter.		duty of the buyer to take delivery of the same within a reasonable time. He remains liable to the seller for any loss arising on account of his refusal to take delivery.
8	The buyer may sue the seller for damages for the breach of any implied warranty as per the provisions of this Act.	8	If the ownership rights have already been passed on to the buyer by the seller, the former has the duty to pay the price as per the terms of the contract.
9	If the seller rejects the contract before the date of delivery, the buyer may either treat the contract as still existing and wait till the date of delivery or he may treat the contract as cancelled and sue the seller for damages for the breach. The second case is known as the anticipatory breach of contract.	9	If the buyer wrongfully refuses to accept and pay for the goods, he will have to compensate the seller for damages for non-acceptance.
10	If, in view of the breach of contract by the seller, the price has to be refunded to the buyer, the buyer has a right to claim interest on the amount.		

4.4 RIGHTS OF SELLER

- In the absence of a contract to the contrary, delivery of goods and payment of price are concurrent conditions. So, he may refuse to deliver the goods if the buyer has not paid the price.
- He is entitled to sue for the recovery of price or damages in case of default of the buyer.
- The unpaid vendor has-right of lien, right of stoppage of goods in transit and right to re-sell the goods.

4.5 DUTIES OF SELLER

- He must prepare the invoice showing the cost of the goods, procure bill of lading and ship the goods at the port of shipment within the time fixed within a reasonable time, if no time is fixed.
- He must deliver the goods when applied for the buyer. Such delivery may be actual constructive or symbolic delivery.
- The goods must be delivered at the place fixed by the contract. Where the contract does not specify the place, goods must be delivered at the place where the goods are at the time of contract. In case of sale of future goods they must be delivered at the place where they are manufactured or produced.
- Delivery must be made during business hours.
- He must get the goods insured when they are delivered to a carrier or wharfinger.
- He has to bear the cost of delivery.

Rights and Duties of the Seller

Sl. No.	Rights of a Seller	Sl.No.	Duties of the Seller
1	To reserve the right of disposal of the goods until certain conditions are fulfilled. (sec 25 (1)	1	To make the arrangement for transfer of property in the goods to the buyer.
2	To assume that the buyer has accepted the goods , where the buyer (i) Conveys his acceptance; (ii) Does an act adopting the sale; or (iii) Retains the goods without giving a notice of rejection, beyond the specified date (or reasonable time), in a sale on approval. (sec 24)	2	To ascertain and appropriate the goods to the contract of sale
3	To deliver the goods only when applied for by the buyer (sec 35)	3	To pass an absolute and effective title to the goods, to the buyer.
4	To make delivery of the goods in installments, when so agreed (sec 39 (1)	4	To deliver the goods in accordance with the terms of the contract (sec 31)

Sl. No.	Rights of a Seller	Sl.No.	Duties of the Seller
5	To exercise lien and retain possession of the goods, until payment of the price (sec 47 (1)	5	To ensure that the goods supplied conform to the implied / express conditions and warranties.
6	To stop the goods in transit and resume possession of the goods, until payment of the price (sec 49 (2) and 50	6	To put the goods in a deliverable state and to deliver the goods as and when applied for by the buyer (sec 35)
7	To resell the goods under certain circumstances (sec 54)	7	To deliver the goods within the time specified in the contract or within a reasonable time and a reasonable hour. [sec 36 (2) and (4)]
8	To withhold delivery of the goods when the property in the goods has not passed to the buyer (sec 46 (2)	8	To bear all expenses of and incidental to making a delivery i.e. up to the stage of putting the goods into a deliverable state (sec 36 (5)
9	To sue the buyer for price when the property in the goods has passed to the buyer or when the price is payment on a certain day, in terms of the contract, and the buyer fails to make the payment (sec 55)	9	To deliver the goods in the agreed quantity. (Sec. 37 (1).
		10	To deliver the goods in installments only when so desired by the buyer. (Sec 38 (1))

4.6 SALE BY NON-OWNERS

The general rule of law is that “no one can give that which one has not got”. This is expressed in Latine maxim “nemo dat qut habet”, So, a person has no title to goods cannot convey property in goods to the transferee or buyer, For example, if A steals an article and sells it to B, B does not become the owner of the article. But to this rule the following are exceptions:

1. Sale by a person not the owner or Title by Estoppels

Where the owner by his conduct, or by an act or emission, leads the buyer to believe that the seller has the authority to sell and Induces the buyer to buy the goods, he

shall be stopped from denying the fact of want of authority of the seller. The buyer in such a case gets a better title than that of the seller.

2. **Sale by Mercantile Agent**

A sale by a mercantile agent is valid provided-

He is in possession of goods or documents of title to goods with the consent of the owner;

- He sells them in the ordinary course of business;
- The buyer has acted in good faith; and
- He has no notice of seller's defective title.

3. **Sale by one of Joint-Owners**

A sale by one of the several joint-owners is valid if:

- He is in sole possession of goods with the consent of the other co-owners:
- The buyer has acted in good faith; and
- He has no notice of want of right to sell.

4. **Sale by a person in possession of goods under a voidable contract**

A sale by a person who is in possession of the goods under a voidable contract is valid if:

- He sells them before the contract is rescinded;
- The buyer has acted in good faith; and
- He has no notice of the seller's defective title.

5. **Sale by seller in possession of goods after sale**

When a seller, after having sold the goods previously, re-sells them to another buyer, he conveys good title to such another buyer provided.

- He is in possession of goods or document of title of goods as seller, but not as bailee or hirer etc;
- The buyer has acted in good faith;
- The buyer has no notice of the previous sale; and
- The buyer has actually received the possession of goods.

Sale by buyer in possession of goods after sale

- A sale by a buyer who has bought or agreed to buy the goods is valid if.

-
- He is in possession of the goods or documents of title to goods with the consent of the seller;
 - The buyer has acted in good faith; and
 - He has not noticed lien or any other right of the owner.

6. **Sale by unpaid seller**

Where an unpaid seller who has exercised his right of lien or stoppage in transit re-sells the goods, the buyer acquires a good title to the goods as against the original buyer.

7. **Sale by finder of lost goods**

A finder of goods may sell under certain circumstances.

8. **Sale under orders of court**

A person who purchases goods under a court sale gets good title.

9. **Sale by a pledge**

A pledge can sell and convey good title, under certain circumstances.

4.7 RIGHTS OF AN UNPAID SELLER

The seller of goods is deemed to be an 'unpaid-seller' where:

- The whole of the price has not been paid or tendered or
- When a bill of exchange or any other negotiable instrument has been given as conditional payment but the same has been dishonored.

An unpaid vendor has the right of withholding the delivery of goods when the property in goods has not passed to the buyer.

Rights of an unpaid seller against the goods

He has the following rights when the property in goods has passed to the buyer.

I. Right of Lien

The unpaid vendor, who is in possession of the goods, can retain such possession until the price is paid or rendered. This right of lien extends to the whole of goods in the possession of the unpaid vendor and can be exercised only for the recovery of the price of goods but not the amounts like godown rent, incurred in storing the goods in exercise of lien for the practice.

He can exercise the right of lien:

- Where the goods have been sold without any stipulation as to credit;
- Where the goods have been sold on credit, but the term of credit has expired and the price remains unpaid;

-
- Where the buyer becomes bankrupt.
 - This right of lien is lost:
 - When the goods are delivered by him to a carrier or other bailee for the purpose of transmission without reserving the right of disposal;
 - When the buyer or his agent lawfully obtains the possession of goods.
 - When the unpaid vendor has given up his right of lien.

II. Right of stoppage of goods in transit

When the seller has parted with the possession of goods, he may regain and retain such possession by stopping the goods in transit, from being delivered to the buyer. This right is available

- (1) When the goods are in transit and
- (2) When the buyer becomes bankrupt.

The unpaid vendor must give notice of his claim to the carrier or other bailee, who is in possession of the goods, in order to exercise this right of stoppage. Such notice takes effect when it reaches the carrier or his agent who is in actual possession of goods. On receipt on notice of the stoppage, the carrier must re-deliver the goods to or according to the directions of the seller. The seller shall have to bear the expenses of such re-delivery.

III. Right of Re-Sale

The unpaid vendor can re-sell the goods:

- Without notice to the buyer if the goods are perishable goods and
- With notice to the buyer of his intentions to re-sell, if the goods are not perishable.

He can retain the profit resulting from such re-sale and claim damages from the original buyer for loss if any. But if he does not give notice to the buyer of his intention to re-sell the goods where necessary, he must pay back the surplus or profit to the original buyer and bear the loss, if any.

REVIEW QUESTIONS

1. What do you mean by delivery? What are the rules relating to delivery?
2. Who is an unpaid seller? What are the rights of an unpaid seller against the goods?
3. What are the rights of a buyer against a seller in different circumstance?
4. “Delivery does not amount to acceptance of goods”. Comment.
5. Enumerate the rights and duties of the buyer in respect of the sale of goods.
6. “The right of stoppage in transit is an extension of the unpaid sellers’ lien” Discuss.

Chapter - 5

Contract of Agency

5.1 INTRODUCTION

Law relating Agencies is contained in Chapter X of the Indian Contract Act, 1872 (Section 182 to 238). Agency is a contractual relation between two parties created by agreement express or implied. The relationship of agency arises wherever one person called the agent has authority to act on behalf of another called the principal.

Any one may be an Agent Section 184 of the Contract Act provides that any person may become an agent. In other words, even a minor can be employed as agent and the principal shall be bound by the acts of such an agent. Section 183 states that person who is the age of majority and is sound mind can become a principal. Thus, a minor cannot act as principal. Section 185 lays down that “No consideration is necessary to create an agency”. A contract of agency is one of goods faith.

5.2 ESSENTIALS OF CONTRACT OF AGENCIES

- The relationship of an agency is based upon a contract.
- The contract may be either express or implied.
- There should be the appointment by the principal of an agent.
- The principal should confer authority on the agent to act for him.
- The authority conferred should be such as will make the principal answerable to third parties.
- The object of the appointment must to establish relationship between principal and the parties.
- The relationship of the agency is based on confidence between the principal and the agent.

5.3 CLASSIFICATION OF AGENTS

1. Express or Implied agents
2. General, Special or Universal agents
3. Agents or Sub-agent: Another broad classification of agents is Mercantile (or commercial) agents and Non-Mercantile (or non-commercial) agents. Examples of mercantile agents: Banker, Factor, Broker, Auctioneer, Commission Agent and Del Credere Agent

5.4 CREATION OF AGENCY

An agency may be constituted in following ways:

1. By express agreement;
2. By implication or law, i.e., from the conduct of the parties or from the necessity of the case,

3. By ratification,

4. By operation of law.

Express Agency

The contractual relation between principal and agent is created by expressed agreement is known as express agency.

Implied Agency

In implied agency, the contractual relation is created by implied agreement. Implied agency includes: (a) Agency by estoppels, (b) Agency by holding out, (c) Agency by necessity.

Agency by Estoppel (Sec.237)

In many cases, an agency may be implied from the conduct of the parties, though no express authority has been given.

Agency by Holding out

Where a person permits another by a long course of conduct to pledge his credit purposes, he is bound by the act of such person in pledging his credit for similar purposes, though in some cases without the previous permission of his master. This is a case of agency by 'holding out'.

Agency by Operation of law

Sometimes, an agency arises by operation of law. When a company is first formed, its promoters and its agents are recruited and implied by operation of law. A partner is the agent of the firm for the purposes of the business of the firm.

Agency by Necessity

Sometimes extraordinary circumstances require that a person who is not really an agent should act as an agent of another. Before an agency of necessity can be inferred, the following conditions should be fulfilled; (a) There should be a real and definite necessity for the creation of the agency, (b) It should be impossible to obtain the principal's instructions, (c) The person acting as an agent should act bona fide and in the interest of parties concerned.

Agency by Ratification

Agency by precedent and Subsequent Authority

A contract of agency may be formed either precedent authority or by subsequent authority. Agency by subsequent authority is known as agency by ratification. Ratification is a kind of affirmation or approval of a previous unauthorized act or acts relating to a contract.

Illustration

A without having any authority of B acts as B's agent and enters into a contract with C. The contract will be binding on B, if he ratifies or approves of the same.

Ratification may be express or implied by the conduct of the person on whose behalf the acts are done (Sec.197).

Essential of a Valid Ratification

To make ratification valid, the following conditions must be fulfilled.

- Act must have been done on behalf of the person ratifying
- The principal must be in existence at the time of the act that is to be ratified
- Ratifier should be competent to ratify the act
- The transaction must have been subsisting at the time when it is ratified
- The principal must have signified his unconditional acceptance of the act
- Ratification must have been made with full knowledge of all the materials facts
- Whole transaction must be ratified
- Ratification may be one act or of a series of acts
- Ratification must be made within a reasonable time
- Act to be ratified should not be void or illegal
- Ratification must not injure a third person
- Ratification relates back to the date of the act of the agent

Universal Agent

A universal agent is an agent whose authority to act for the principal is universal or unlimited. In other words, a universal agent is an agent who is authorized to do any legal on behalf of his principal.

5.5 SUB-AGENT AND SUBSTITUTED AGENT

Sub-Agent

Section 191 defines a sub-agent as “person employed by and acting under the control of the original agent in the business of the agency”.

Substituted agent

A substituted agent is a person appointed by the agent to act for principal in the business of the agency with the knowledge and consent of the letter. A substituted agent is deemed to be an agent to the principal and not his sub-agent.

Difference between Sub-Agent and Substituted Agent

Both a sub-agent and substituted agent are appointed by the agent. But, however, the following are the points of the distinction between the two.

-
- The agent not only appointed a sub-agent but also delegates to him a part of his own duties. The agent does not delegate any part of his task of the substituted agent.
 - A sub-agent does his work under the control of the agent but a substituted agent works under the instructions of the principal.
 - Privity of contact is established between a principal and a substituted agent. But there is no Privity of contract between the principal and the sub-agent.
 - The sub-agent is responsible to the agent alone and is not generally responsible to the principal. But a substituted agent is responsible to the principal and not to the original agent who appointed him.
 - In the case of a substituted agent, the agent's duty ends once he has named him, but in the case of a sub-agent, the agent remains answerable for the acts of the sub-agent as long as sub-agency continues.

5.6 RIGHTS, DUTIES AND LIABILITIES OF AN AGENT

Rights of an Agent

- An agent is entitled to receive agreed remuneration.
- An agent may retain out of any sums received on account of the principal in the business of the agency, all moneys due to himself in respect of advances made or expenses properly incurred by him in conducting such business and also such remuneration as may be payable to him for acting as agent (Sec. 217).
- In the absence of any contrary, the agent is entitled to particular lien i.e., right to retain goods.
- The employer of an agent is bound to indemnify him against the consequences of all lawful acts done by such agent in exercise of authority conferred upon him (Sec.222).
- The principal must pay compensation to his agent in respect of injury caused to such agent by the principal's neglect or want of skill (Sec.225).

Duties of an Agent

- To follow the instruction of the principal
- To work with reasonable skill and diligence
- To render proper accounts
- To Communicate with the principal in difficult situations
- Not to deal on his own account
- To pay all sums to his principal
- Not to set up adverse title

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- Not to delegate his authority
 - Not to use agency information against principal
 - Termination of agency on principal's death or insanity
 - Not to put himself in a position where interest and duty conflict

Cases of Personal Liability of an Agent

- Where the agent acts for a foreign principal
- Where the agent acts for an undisclosed principal
- Where the agent acts for a disclosed principal who cannot be sued
- Where an agent received or pays money by mistake or fraud
- Where the agent signs the negotiable instruments in his own name
- Where the agent exceeds his authority
- Where the contract expressly provides
- Where an agent acts for a non-existing principal
- Where according to trade usage, an agent is personally liable

5.7 TERMINATION OF AGENCY

Agency may be terminated in the same manner as any other contract, viz., by the operation of law or by the acts of the parties. In certain cases, the agency is irrevocable, i.e., it cannot be terminated.

Termination of Agency by Acts of the Parties

- By agreement between principal and agent;
- By revocation of the agent's authority by the principal;
- By renunciation of business by the agent.

Termination of Agency by Operating of Law

- By performance of the contract of agency
- By efflux of time
- By death in insanity of the agent or principal
- By the insolvency of the principal and in some cases that of the agent
- By the destruction of the subject matter of agency
- Where the principal or agent is an incorporated company, by its dissolution
- By the principal becoming an alien enemy

Irrevocable Agency

When an agency (i.e., the relationship between the principal and agent) cannot be terminated is said to be an irrevocable agency.

The following are examples:

Where the agency is coupled with interest

When the agency is created for the purpose of securing some benefit over and above his remuneration as an agent.

Where the agent has incurred a personal liability

When an agent has incurred personal liability, the agency becomes irrevocable.

Where the agent had partly exercised the authority

Section 204 of the Act lays down that the principal cannot revoke the authority given to agent after the authority has partly exercised so far as regard such acts and obligations as arise from acts already done in the agency.

REVIEW QUESTIONS

1. What is an agency of estoppels?
2. What is agency by ratification?
3. What do you understand by an agent's right of retainer?
4. Who is a sub-agent?
5. What is the difference between a sub-agent and a substituted agent?
6. What is meant by implied authority of an agent?
7. Define the term 'agency'. What are the essential and legal rules for a valid agency?
8. Briefly explain the various modes by which an agency may be created.
9. What are the different kinds of agents? How they can be classified?

Chapter - 6

Company and its Kinds

6.1 INTRODUCTION

The word company ordinarily means as association of a number of persons for some common purpose. In its legal form a company is an artificial person created by law. Section 3 (1) (i) of the Companies Act, 1956 defines a Company as, “A company formed, and registered under this act or an existing company”. ‘An existing company’ means a company formed and registered under any of the former Companies Act.

Haney’s defines, “A company is an incorporated association which is an artificial person created by law, having a separate entity with a perpetual succession and a common seal”.

6.2 ESSENTIAL CHARACTERISTICS OF A COMPANY

Registration and Legal Entity

A company must be registered. It is an artificial person created by law. A company is a distinct legal entity and distinct from its members.

Limited Liability

The Liability of the members of a company having share capital is limited to the extent of the nominal value of the shares held by them. Shareholder cannot be called upon to pay more than the unpaid value of his shares, whatever may be the level of indebtedness of the company. In the case of a guarantee company, the liability of members is limited to such amount as the members may undertake to contribute to the assets of the company.

Separate Property

A company has every right to acquire as well as transfer property in its own name, as it is a legal person. No shareholder has any legal or equitable interest in the property of the company...

Perpetual Succession

A company has a perpetual succession. In spite of a change in the membership of the company its continuity is not affected. It is said, ‘men may come and go, but the Company goes for ever’.

Common Seal

The company being an artificial person cannot sign its name on a contract. The common seal is used as a substitute for its signature. The common seal bears the name and place of the company, and date of its incorporation engraved on it.

Transferability of Shares

The shares of a company are freely transferable except in the case of a private company.

Capacity to Sue and be Sued

As legal person it can sue and be sued in its own name.

Concept of Corporate Personality

A company is a legal person, since in the eyes of law it is capable of having legal rights and obligations just like a natural person. Like any other person it can acquire and own property, transfer property, enter into contracts and sue and be sued in its own name. Being a legal person, a company has a separate legal entity, a personality distinct from its members or shareholders.

Lifting or Piercing the Corporate Veil

Ordinarily, Courts recognize the separate legal entity of the company and consider themselves bound by the principle laid down in the case of Salomon Vs Salomon&Co.Ltd. But in reality there is no such separation between the economic interest of the company and its members. In exceptional cases, Courts may disregard the concept of corporate entity to look at the persons behind the company. They may lift the corporate veil to probe into the economic realities behind the scene. This is known as the ‘lifting or piercing the corporate veil’.

Some of the cases necessitating the lifting of the corporate veil may briefly be indicated below.

In the Interest of Revenue

Where it appears that a company has been formed or is being used for the only purpose of evading taxes or for avoiding tax liability, the Courts may ignore the separate entity of the company and lift the veil to look into the persons responsible for tax evasion.

Avoidance of Welfare Legislation

Where it appears that the company has used the ‘veil of incorporation’ as a means of avoiding social welfare legislation, it is the duty of the Court to lift the corporate veil and discover the true state of affairs.

For checking fraud or improper conduct

Where it appears that the company has been formed for some fraudulent purpose or to conceal the real identity of the owners, the Courts will lift the corporate veil to find out the real owners of the company.

Against Public Policy

Where the principle of separate entity conflicts with public policy the Court may lift the corporate veil in defense of the public policy.

Avoidance of Legal obligation

The Court will also disregard the legal personality of a company where the corporate veil is being used to avoid legal obligation.

Under Companies Act, 1956

The following instances necessitate lifting of corporate veil to identify the persons responsible for such acts:

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- Reduction in membership below the statutory minimum.
 - Fraudulent conduct of business.
 - Failure to refund application money.
 - Contracts made in personal name of directors.
 - Mis-statements in Prospectus.
 - Ultra vires acts.

6.3 KINDS OF COMPANIES

On the Basis of Incorporation

Chartered Companies

Companies set up as a result of a royal charter granted by a king or queen of a country are known as chartered companies.

Example: East India Company, the Bank of England etc. These companies are non-existent since Independence.

Statutory Companies

Companies set up by Special Acts of Parliament or State Legislatures are called Statutory Companies. Example: Reserve Bank of India, Life Insurance Corporation of India, Unit Trust of India etc.

Registered Companies

Companies registered under the Indian Companies Act, 1956 or under any of the previous Companies Acts are called registered companies. Most of the companies in India belong to this category.

Licensed Companies

Companies established for the promotion of Arts, Science, Religions, Charity or any other similar objects can obtain licence under Sec.25 from the Central Government and enjoy certain privileges.

Foreign Companies

A company incorporated outside India under the Law of the country or incorporation but having established its business in India is called a foreign company.

On the Basis of Liability

Companies with Limited Liability: It is a company where the liability of the shareholder remains limited to the nominal value of the shares held by him.

Companies Limited by Guarantee

In a guarantee company the liability of a shareholder is limited to the amount he has voluntarily undertaken to contribute towards the assets of the company to meet out any

deficiency at the time of its winding up. Such a company may or may not have a share capital.

Unlimited Companies

Here the liability of its members is unlimited. In other words, their liability extends to their private properties also. Unlimited companies are almost non-existent these days.

On the Basis of Number of Members

Private Company: As per Section 3(1) (iii), a private company means a company which by its Articles restricts the right to transfer its shares if any, and limits the number of its members to fifty and prohibits invitation of shares from the public.

Public Company: According to Section 3(1) (iv), a public company means a company which is not a private company.

On the Basis of Control

Holding Company

A company exercising control over another company is called a holding company. [Sec.4 (4)].

Subsidiary Company: The company so controlled is called a subsidiary company. [Sec.4(1)].

On the Basis of Ownership

Government Company: Definition (Sec.617): A Government company means any company in which not less than 51% of the paid up share capital is held by the Central Government or by any State Government or Governments, or Partly by the Central Government and partly by one or more State Governments and includes a company which is a subsidiary of a Government company.

Foreign Company: Foreign Company means any company incorporated outside India which has a place of business in India.

6.4 PRIVATE COMPANIES

- A private company can be registered with a minimum of two members.
- It is entitled to commence business immediately after incorporation.
- It is not required to issue a prospectus.
- It is not required to hold a statutory meeting.
- It can proceed to allot shares before minimum subscription is received.
- Restrictions on further issue of capital do not apply to private companies.
- The minimum number of directors of a private company is two.

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- It is not necessary for the directors to file a written consent to act as directors, to the Registrar.
 - It is not necessary for directors to take up qualification shares.
 - It is not required to maintain a separate Index of Members.
 - Two members present can form a quorum in any meeting of a private company.
 - The directors are not liable to retirement by rotation.
 - The restrictions regarding remuneration of directors are not applicable.
 - Restrictions regarding appointment of Managing Director for more than five years at a time are not applicable.

6.5 INCORPORATION OF A COMPANY

A company is said to have been incorporated or registered when it gets the Certificate of Incorporation from the Registrar of Companies. Certain steps have to be taken and necessary legal formalities completed for that purpose. The steps and formalities required for incorporation of company vary according to the type of the company concerned.

Steps for the Incorporation of a Public Company Limited by Shares

Application for approval of name

The first step is that of obtaining approval of the Registrar of Companies for the proposed name with which the company is to be registered. A company may adopt any name which is not prohibited under the Emblems and Names (Prevention of Improper Use) Act, 1950 and which is not identical with or does not closely resemble the name of a company already registered.

Preparation of Memorandum of Association

The next step is the preparation of the Memorandum of Association of the company. It is the constitution of the company which defines the objects and scope of the company's activities and its relation with outside world.

Preparation of Articles of Association

It is the document containing the rules and regulations relating to the internal management of the company.

Printing, Signature and Stamping of Memorandum and Articles

The next step is to arrange for the printing, signature and stamping of the Memorandum and Articles.

Preparation of Other Documents

- i. Power of Attorney
- ii. Preliminary Agreements, if any.
- iii. Consent of the Directors in Form No.29.
- iv. Particulars of Directors in Form No.32.
- v. Notice of Registered Address in Form No.18.
- vi. Statutory Declaration.

Filing of Document for Registration

The following documents are to be filled with the Registrar along with registration fee for Registration of the company:

- i. Memorandum of Association printed and duly stamped.
- ii. Articles of Association printed and duly stamped.
- iii. Name availability letter received from the Registrar of Companies
- iv. The consent is to be given in Form No.29.
- v. Notice of the situation of the registered office is to be given in Form No.18.
- vi. Appointment of Director, Manager or Secretary to be filed in Form No.32.
- vii. Power of Attorney empowering the attorney of the promoters.
- viii. A declaration that all the requirements of the companies Act, 1956 and the rules there under have been complied with in respect of registration and matters precedent and incidental thereto shall be filed with the Registrar.

Certificate of Incorporation

When the requisite documents are filed with the Registrar, if the Registrar is satisfied as to the compliance of statutory requirements, he retains and registers the Memorandum, the Articles and other documents filed with him and issues a 'Certificate of Incorporation'. i.e. of the formation of the company. A company comes into existence as a legal person upon the issue of the certificate of incorporation.

REVIEW QUESTIONS

1. Define the term company. What are its characteristics?
2. "The company is a legal entity distinct from its members". In what cases do the court disregard this principle?
3. Define a Private company. Distinguish it from a Public Company.
4. Write note on: (a) Holding Company, (b) Statutory Companies.

Chapter - 7

**Memorandum of
Association**

7.1 INTRODUCTION

The Memorandum of Association is the charter of the company, and provides the foundation on which the structure of the company is built. It defines the scope of the company's activities as well as its relation with the outside world. Section 2 (28) of the Companies Act defines a Memorandum as 'the memorandum of association of a company as originally framed or as altered from time to time in pursuance of any previous Company Laws or of this Act'. Under Contents Section 13 of the Act specifies the contents of the memorandum.

The importance of the memorandum is that it lays down the ambit of the powers of the company, the area within which the company can operate and beyond which it cannot go. The purpose of the memorandum is to enable the shareholders, creditors and those who deal with the company to know what its permitted range of enterprise is. The Memorandum of Association must be (a) printed, (b) divided into paragraphs, numbered consecutively, and (c) signed by each subscriber.

7.2 CONTENTS OF THE MEMORANDUM

Memorandum contains the following clauses.

Name Clause

The memorandum of every company must state the name of the company with the word "Limited" as the last word of the name in the case of public limited company and with "Private Limited" as the last words of the name in the case of Private Limited Company.

Domicile (or) Situation clause

This clause mentions the name of the state in which the registered office of the company will be situated. This determines the jurisdiction of the court and indicates the domicile and nationality of the company. The full address of the company should be communicated to the Registrar within thirty days from the date of registration.

Object Clause

The memorandum must include under this clause statement (a) the main object of the company and objects incidental or ancillary to the main objects, and (b) any other objects. The objects clause lays down the scope of activities of the company and defines the extent of its powers. It 'States affirmatively the ambit and extent of powers which are given to the company by law'.

Liability Clause

A limited company has the liability of its members to the face value of the shares held by them. If the shares held by a member of the company are fully paid-up, his liability in the debts of the company will be nil.. Similarly, in the case of a company limited by guarantee, the liability of the member is limited to the amount of guarantee given by him.

Capital Clause

In the case of a limited company having share capital, the Companies Act requires that the memorandum shall state the amount of share capital with which the company is to be registered and the division thereof into shares of a fixed amount [Sec.13 (4)]. This is the maximum amount of share capital that the company is authorized by the memorandum to raise. Hence it is called the 'authorised', 'reistered' or 'nominal' capital.

Association Clause

Under this clause, subscribers to the memorandum express their assent to form a company and signify their agreement to associate for that purpose. The statement of agreement to form a company also mentions the 'subscribers' consent to take the numbers of shares shown against their respective names.

7.3 DOCTRINE OF ULTRA VIRES

'Ultra' means beyond and 'Vires' means powers. The term ultra vires a company means that the doing of the act is beyond the legal power and authority of the company. The doctrine of ultra vires is important in defining the limits of the powers conferred on the company by its memorandum of Association. According to this doctrine, the vires (power) of a company to enter into a contract or transaction is limited by the ambit of the object clause of the Memorandum and the provisions of the Companies Act. Whatever is not permitted by the objects clause and the Act, is prohibited by the doctrine of ultra vires. If a company engages in any activity or enters into any contract which is ultra vires (outside the power conferred by) the Memorandum or Act, it will be null and void. Thus under this doctrine, a company has powers to engage in only such activities or enter into such transactions:

- Which are essential to the attainment of the objects specified in the memorandum;
- Which are reasonably and fairly incidental to the main objects; and
- Which are permitted by the provisions of the Companies Act.

7.4 ALTERATION OF MEMORANDUM

Alteration of Name Clause

A company may change its name by a special resolution and with the approval of the Company Law Board (CLB) signified in writing. But a change of name which merely involves the deletion or addition of the word 'private' on the conversion of a private company into a public company or vice versa does not require the approval of the CLB.

If through inadvertence or otherwise, a company is registered by a name which, in the opinion of the CLB, is identical with, or too nearly resembles, the name of an existing company, the company

-
- a) May change its name, by ordinary resolution and with the previous approval of the CLB
 - b) Shall change its name if the CLB so directs within twelve months of its first registration or registration by its new name, as the case may be.

Where a company change its name, the Registrar shall enter the new name in the Register in the place of the old name and issue a fresh certificate of incorporation with the necessary alterations embodied therein to the company.

Alteration of Situation Clause

This may involve:

- a) Change of registered office from one place to another place in the same city, town or villages.
- b) Change of registered office from one town to another town within the state.
- c) Change of registered office from one state to another state.

In case of change of registered office from one place to another place in the same city, a notice is to be given within thirty days after the date of the change to the Registrar who shall record the same.

In case of change of registered office from one town to another town within the state, a special resolution is required to be passed at the general meeting of the shareholders and a copy of it is to be filed with the Registrar within thirty days. Then within thirty days of shifting to the office, a notice has to be given to the Registrar of the new location of the office.

In case of change of registered office from one state to another state, a special resolution is required to be passed at the general meeting of the shareholders and a copy of it is to be filed within the Registrar within thirty days. The alteration shall take effect only when it is confirmed by the CLB. A certified copy of the order confirming the alteration shall be filed by the company with the Registrar of each of the States and the Registrar of each state shall register the same. All the records of the company shall be transferred to the Registrar of the State in which the registered office of the company is transferred.

Alteration of Object Clause

By sec.17 (1), the objects of a company may be altered by special resolution so as to enable the company:

- To carry on its business more economically or more efficiently.
- To enlarge or change the local area of its operations.
- To carry on some business which under existing circumstances may conveniently or advantageously be combined with the objects specified in the Memorandum.

-
- To restrict or abandon any of the objects specified in the Memorandum.
 - To sell or dispose of the whole, or any part, of the undertaking, or of any of the undertakings, of the company, or
 - To amalgamate with any other company or body of persons.

Alteration of Liability Clause

A company limited by shares or guarantee cannot change its Memorandum so as to impose any additional liability on the members or to compel them to buy additional shares of the company unless all the members agree in writing to such change.

Alteration of Capital Clause

The procedure for alteration of capital and the power to make such alteration are generally provided in the Articles of Association of a company. If the power and procedure are not laid down in the Articles the company, must alter the Articles by passing a special resolution. If so authorized by the Articles, a company may alter its share capital so as to:

- Increase the amount of its share capital
- Consolidate and divide its share capital into shares of higher denomination
- Subdivide the existing shares into shares of lower denomination; however, the proportion between the amount paid and the amount, if any unpaid on each reduced share must be the same as it was for the share before reduction
- Cancel the unissued capital
- Convert all or any of its fully paid shares into stock and reconvert stock into shares.

7.5 ARTICLES OF ASSOCIATION

The rules and regulations, which are framed for the internal management of a company, are set out in a document known as the Articles of Association. The articles are framed to enable the company to carry out the aims and objects of the company set out in the Memorandum of Association.

Contents of Articles

The regulations and bylaws laid down in the Articles relate to the following:

- Share capital and its subdivision into different classes of shares, rights of shareholder and their variation
- The procedure for making allotment, calls on shares and transfer, transmission, forfeiture and surrender of shares, including lien on shares
- Alteration and reduction of capital
- Borrowing power

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- Appointment of Manager, Managing Director, Secretary
 - Declaration of divided
 - Procedure for convening, holding and conducting different kinds of meetings, voting rights and methods
 - Maintenance of books of account and their audit
 - Share Certificates and Share Warrants, conversion of shares into stock
 - Seal of the company
 - Winding up.

7.6 ALTERATION OF ARTICLES

The Articles of Association can be altered or added to by passing a special resolution in the extra-ordinary general meeting, provided:

- The alteration is not contrary to the provision of the Act;
- It is not inconsistent with or beyond the provisions of the Memorandum; and
- It does not increase the liability of a member without his written consent by compelling him to take more shares than he had held prior to the alteration.

Any alteration made in the Articles should be in the interest of the company as a whole, should not be such as to cause a breach of contract and should not be such as to constitute a fraud by the majority on the minority shareholders.

7.7 DOCTRINE OF CONSTRUCTIVE NOTICE

The Memorandum and Articles, on registration, assume the character of public documents. The office of the Registrar is a public office and documents registered there are open and accessible to the public at large. Therefore, every outsider dealing with the company is deemed to have notice of the contents of the Memorandum and Articles. This is known as Constructive Notice of Memorandum and Articles.

Under the doctrine of ‘constructive notice’, every person dealing or proposing to enter into a contract with the company is deemed to have constructive notice of the contents of its Memorandum and Articles. Where he actually reads them or not, it is presumed that he has read these documents and has ascertained the exact powers of the company to enter into contract, the extent to which these powers have been delegated to the directors and the limitations to such powers. He is presumed not only to have read them, but to have understood them properly. Consequently, if a person enters into a contract which is ultra vires the Memorandum, or beyond the authority of the directors conferred by the Articles, then the contract becomes invalid and he cannot enforce it, notwithstanding the fact that he acted in good faith and money was applied for the purposes of the company.

7.8 DOCTRINE OF INDOOR MANAGEMENT

The doctrine of indoor management follows from the doctrine of ‘constructive notice’ laid down in various judicial decisions. The hardships cause to outsiders dealing with a company by the rule of ‘constructive notice’ have been sought to be softened under the principle of ‘indoor management’. It affords some protection to the outsiders against the company.

According to this doctrine, after satisfying themselves the proposed transaction is intra vires the Memorandum and Articles, persons dealing with the company are not bound to enquire whether the internal proceedings were correctly followed. They are entitled to assume that the internal proceedings relating to the contract are regular as per the memorandum and articles.

When an outside enters into a contract with the company, he is presumed to have knowledge of the provisions of Memorandum and Articles as per the doctrine of constructive notice. But he is not required to go beyond that and to enquire whether the internal proceedings required by these documents have been regularly followed by the company. They need not enquire whether the necessary meeting was convened and held properly or whether necessary resolution was passed properly. They are entitled to take it for granted that the company had gone through all these proceedings in a regular manner. This is known as the Doctrine of Indoor Management.

Exceptions to the Doctrine of Indoor Management

No benefit under the doctrine of indoor management can be claimed by a person under the following circumstances:

- Where a person dealing with the company has actual or constructive notice of any irregularity in the internal proceedings of the company.
- Where a person did not in fact consult the Memorandum and Articles of the company and consequently did not act on knowledge of these documents.
- Where a person dealing with the company was negligent and, he had not been negligent, could have discovered the irregularity by proper enquiries.
- Where a person entered into a contract with an agent or officer of the company and the act of the agent/officer is beyond the authority granted to him.

REVIEW QUESTIONS

1. Define Articles of Association and Memorandum of Association and give their contents.
2. Distinguish between Memorandum and Articles of Association.
3. What do you understand by the doctrine of indoor management? State the exceptions to it.
4. Write short notes on: (a) Alteration of Object clause in a Memorandum (b) Constructive Notice (c) Doctrine of Indoor Management.

Chapter - 8

Prospectus

8.1 INTRODUCTION

Sec. 2 (36) defines a prospectus as, ‘any document described or issued as a prospectus and includes a notice, circular, advertisement or other document inviting deposits from the public or inviting offers from the public for the subscription or purchase of any shares in or debentures of body corporate’. Thus any document inviting the public to buy its shares or debentures comes under the definition of prospectus. It also applies to advertisements inviting deposits from the public.

The purpose of a prospectus, issued under the provisions of the Companies Act, 1956, is to invite the public for the subscription/purchase of any securities (shares/debentures) of a company.

There is no requirement that the buyer must have received the full *prospectus* from the seller. But the seller runs a risk on this score and may desire evidence in the form of a receipt for the earlier *prospectus*.

There is no requirement that the buyer must have received the full prospectus from the seller. But the seller runs a risk on this score and may desire evidence in the form of a receipt for the earlier prospectus. Moreover, the buyer's prior receipt approach that would "eliminate the often formalistic and unnecessary burden of physically delivering a formal prospectus and will provide issuers with the ability to decide what information to deliver to investors in connection with the marketing.

8.2 CONTENTS OF THE PROSPECTUS

Part I of Schedule II

General Information

- Name and address of Registered Office of the company.
- (a) Consent of the Central Government for the present issue.
- (b) Letter of content/industrial license. Declaration of the Central Government about non-responsibility for financial soundness on correctness of statements.
- Name of Stock Exchange where the present issue is to be listed.
- Declaration about refund of the issue if minimum subscription of 90 per cent is not received within 90 days from the closure of the issue.

(a) Date of opening of the issue.

(b) Date of closing of the issue.

(c) Date of earliest closing of the issue.

- Name and address of auditors and lead managers.

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- Whether rating from CRISIL or any other rating agency has been obtained for the proposed debenture/preference share issue. If yes, the rating should be indicated.
 - Names and addresses of the underwriters and the amount underwritten by them and declaration of the board that the underwriters have sufficient resources.

Capital structure of the Company

- Authorised, issued, subscribed and paid-up capital.
- Size of present issue giving separately reservation for preferential, allotment to promoters and others.
- Paid-up capital after the present issue.

Terms of the Present Issue

- Terms of payments.
- Rights of the instrument holders.
- How to apply, availability of forms, prospectus and mode of payment.
- Any special tax benefits for company and its shareholders.

Particulars of the Issue

- Objects.
- Project cost.
- Means of financing including contribution of promoters.

Company Management and Project

- History and main objects and present business of the company.
- Subsidiaries of the company, if any.
- Names, addresses and occupations of Manager, Managing Director and other Directors including nominee directors, whole-time directors.
- Location of project.
- Plant and Machinery, technology, process etc.
- Foreign collaboration.
- Infrastructure facilities.
- Schedule of the implementation of the project and progress so far made.
- Nature of products, marketing set up and export possibilities and export obligation, if any.

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- Future prospectus – expected capacity utilization during the first three years, from the date of commencement of production and the expected year when the company would be able to earn cash profit and net profit and stock market data.

Particulars in regard to the company and other listed companies under the same management within the meaning of Sec.370 IB which made any capital issue during the last three years.

- a) Outstanding litigation of the company.
- b) Particulars of default, if any, in meeting statutory dues, institutional dues, and towards instrument holders like debentures, fixed deposits and arrears of cumulative preference shares etc.
- c) Any material development after the date of the latest balance sheet, and its impact on performance and the prospects of the company.

Management Perception of Risk Factors

For example, sensitivity to foreign exchange rate fluctuation, non-availability of raw materials, cost time overrun etc.

Part II of Schedule II

A. General Information

- Consent of directors, auditors, advocates, managers to issue, registrar of issue, bankers to the company, bankers to the issue.
- Expert opinion, if any.
- Change, if any in directors and auditors during the last three years and reasons thereof.
- Authority for the issue and details of resolution passed for the issue.
- Procedure and time schedule for allotment and issue of certificates.
- Name and address of the company secretary, legal adviser, lead managers, auditors, bankers to the company, banker to the issue and brokers to the issue.

B. Financial Information

Report by Auditors

A report by the auditors of the company with respect to:

- a) its profit and loss and assets and liabilities, and
- b) The dividends paid by the company during the five financial years immediately preceding the issue of the prospectus.

Report by Accountants

- a) A report by the accountants who shall be named in the prospectus on the profits or losses of the business for the preceding five financial years, and on the assets and liabilities of the business to be acquired on a date which shall not be more than one hundred and twenty days before the date of the issue of the prospectus.
- b) A similar report on the accounts of a body corporate by an accountant who shall be named in the prospectus if the proceeds of the issue are to be applied in the purchase of shares of a body corporate so that it becomes a subsidiary of the acquiring company.

Statutory and other information

- Minimum subscription
- Expenses of the issue'
- Underwriting commission and brokerage
- Details of previous public or right issue
- Issue of shares otherwise than for cash
- Debenture and redeemable preference shares and other instruments, issued by the company outstanding and terms of issue.
- Option to subscribe
- Details of purchase of property
- Details of directors, whole-time directors, managing directors, as to their appointment remuneration, interest of directors, borrowing powers, qualification shares etc.
- Rights of members regarding voting, dividend, lien on shares
- Restriction if any on the transfer or transmission of shares or debentures
- Revaluation of assets if any
- Material contracts and inspection of documents

Part III of Schedule II

Provisions applying to Parts I and II of the Schedule.

- In the case of a company which has been carrying on business for less than five financial years, reference to five financial years means reference to that number of financial year for which business has been carried on.
- The report shall make any adjustments as respect of the figures of profits or losses or assets and liabilities and indicate that such adjustments have been made.

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- There should be a declaration that all the relevant provisions of the Companies Act, 1956 and the guidelines issued by the Government have been complied with and no statement made in prospectus in contrary to the provisions of Companies Act, 1956 and rule made there under.

Voluntary Disclosure

The prospectus is the window through which an investor can look into the soundness of the company's venture. The prospective buyer of shares is entitled to all true disclosures in the prospectus. It should not conceal any matter which ought to be revealed. In a nutshell, the prospectus should tell the truth, the whole truth and nothing but truth. This ruling is called 'the golden rule' for framing a prospectus. This ruling as laid down by V.C. Kindersley in *New Brunswick and Canada Railway and Land Company vs. Muggeridge*.

8.3 LIABILITIES FOR MIS-STATEMENT IN PROSPECTUS

Under Sec. 65 of the Companies Act, a prospectus will be deemed to contain an untrue statement, if:

- a) The statement included in the prospectus is misleading in the form or in the context in which it is included; and
- b) There is an omission from the prospectus of any matter which is calculated to mislead [Sec.65]

Civil Liability for Mis-Statement

Civil liability arises when there is a mis-statement or misrepresentation of fact in a prospectus or an omission of material fact calculated to mislead, and such a statement or omission has induced a shareholder to buy shares on the faith of such statement. Every director or promoter of a company, and all other persons including an expert who has authorized the issue of such prospectus are liable for such misstatement or misrepresentation to the allottee of shares. The shareholder who has purchased shares on the faith of such mis-statement has remedy in a civil action against the company, as well as directors, promoters, experts etc. for any loss or damage suffered by him.

Remedies against the company

For mis-statement or misrepresentation in a prospectus, the remedies available to a shareholder against the company are: (i) rescission of the contract, and (ii) damages for deceit. Any person, who takes shares on the faith of statements contained in a prospectus, can apply to the Court for rescinding or setting aside the contract on the ground that the statements are false or fraudulent or that some material information has been withheld.

Remedies against Directors, Promoters etc.

Against the directors, promoters, experts and other persons, the remedies available are: (i) damages for fraudulent misrepresentation under the general law; (ii) compensation

for loss or damage or loss suffered due to omission of statement under Sec.56 of the Act.

General Law

A share holder can hold persons responsible for the issue of a prospectus (directors, promoters etc.) liable for damages for any fraudulent misrepresentation or misstatement in the prospectus, if he was deceived by reason of acting on the faith of such prospectus. But the directors (or promoters etc) will not be held liable for such misstatement, if they honestly believed what they said in the prospectus to be true.

Compensation under Sec.62.

If a person purchases shares or debentures of a company on the faith of statements made in the prospectus and thereby suffers and damage or incurs loss, he is entitled to claim compensation for the loss or damage in a civil action against the directors, promoters, and all other persons who have authorized the issue of the prospectus [Sec.62(1)].

Damages under Sec.56.

If there is an omission from the prospectus of any matter required to be included by Sec.56, any subscriber for shares who has suffered loss due to the omission can bring action for damages, even if such omission does not make the prospectus false or misleading.

Criminal Liability for Mis-Statement

Knowingly including an untrue statement in the prospectus or fraudulently inducing a person to invest money in shares, gives rise to criminal liability on the part of the persons authorizing the issue of such a prospectus. Section 63 and 68 of the Companies Act provide for heavy punishment for such criminal liability.

If a prospectus contains any untrue statement, every person who has authorised the issue of the prospectus is punishable with imprisonment for a term which may extend to two years, or with fine which may extend to five thousand rupee, or with both.

The Act has also laid down that if a person knowingly or recklessly makes any statement, promise or forecast which is false, deceptive or misleading, or dishonestly conceals material facts, and thereby induces or attempts to induce another person to subscribe to the shares of a company, he shall be punishable with imprisonment for a term which may extend to five years, or with fine which may extend to ten thousand rupees, or with both (Sec.68).

REVIEW QUESTIONS

1. Explain the meaning and importance of prospectus.
2. Explain the legal provision relating to the issue and registration of a prospectus?
3. Discuss the civil and criminal liabilities of directors for misstatement in a prospectus.

4. Write short notes on:

(a) Statement in lieu of prospectus; (b) underwriting commission; (c) Minimum Subscription; (d) Deemed Prospectus; (e) Abridged Prospectus.

Chapter 9

Company Administration

9.1 INTRODUCTION

A company, though a legal entity in the eyes of the law, is an artificial person, existing only in contemplation of law. It has no physical existence. It has neither soul nor a body of its own. As such it cannot act in its own. It can do so only through some human agency. The persons who are in charge of the management of the affairs of a company are termed as directors. They are collectively known as Board of Directors.

9.2 DIRECTORS

The Companies Act defines a ‘director’ as “any person occupying the position of a director by whatever name called” [Sec.2 (13)].

We can only determine whether a person is director or not a director by referring to the nature of his office and functions. According to the functions performed by him, a director may be defined as a person who directs, conducts, manages and supervises the affairs of a company.

Only Individuals can be Directors

A body corporate, association or firm cannot be appointed director of a company, only an individual can be appointed as directors.

Number of Directors

Every public company shall have at least 3 directors and every other company shall have at least 2 directors. Subject to this statutory minimum limits, the Articles of a company may prescribe the maximum a minimum number for its Board.

Share Qualification of Directors

The Articles of a company usually require its directors to hold a certain number of shares. Such shares are called qualification shares. The nominal value of the qualification shares should not exceed Rs.5,000. He should obtain his qualification shares within 2 months after his appointment as director.

Number of Directorships

A person cannot hold office at the same time as director in more than 20 companies.

Where a person already holding the office of director in 20 companies is appointed as a director of any other company, the appointment can take effect only when such person has, within 15 days of his appointment, effectively vacated his office as director in any of the companies in which he was already a director.

9.3 APPOINTMENT OF DIRECTORS

First Directors

The first directors are usually named in the articles of association of the company. If not, they shall be determined in writing by the subscribers of the memorandum. If this also is not done, all the subscribers of the memorandum shall be deemed to be the first directors of the company.

According to Sec.255, directors are appointed by a company in a general meeting. While one-thirds of the directors can be appointed permanently, the remaining two-thirds are liable to retire by rotation. Of these, only one-third are liable to retire at any annual general meeting. Retiring directors are also eligible for re-appointment.

Appointment of Directors by the Board of Directors

As additional Directors

(Sec.260). The Board of Directors may appoint additional directors within the maximum strength fixed by the articles. Such additional directors hold office only up to the date of the next annual general meeting of the company.

In a Casual Vacancy

(Sec.262). Casual vacancy can be filled up by the board if the articles permit it. A casual vacancy may arise due to reasons such as death, resignation, disqualification or failure of an elected director to accept the office or due to any other reason. The director appointed in a casual vacancy shall hold office only up to the date on which the director whose place has been filled up was to retire.

As alternate Director

(Sec.313). The Board of Directors if authorized by the articles or by the company's resolution at the general meeting may appoint an alternate director. Such an alternate director is to act for the original director during his absence for a period of more than three months from the State in which the meetings of the company are held. The alternate director can continue as director only for the period for which the original director was eligible. Further on the return of the original director, the alternate director must vacate the office of directorship.

Appointment of Directors by Third Parties (Sec.255)

Sometimes the articles may give a right to financial institutions, debenture holders and banking companies which have lent money to the company to nominate directors on the board of the company with a view to ensuring that the funds advanced by them are used by the company for the purpose for which they are borrowed. The number of directors so nominated should not exceed one-third of the total strength of the board and they are not to retire by rotation.

Appointment of Directors by the Central Government

The Central Government may appoint such number of directors of the board of a company as the Company Law Board may by an order in writing specify as being necessary to effectively safeguard the interest of the company, its shareholders or the public interest. They are appointed to prevent oppression of the minority shareholders or to prevent mismanagement of the company or in the public interest. They are appointed for a maximum period of three years. They are not required to hold qualification share and are not liable to retire by rotation but they can be removed by

the Central Government at any time and other persons may be appointed by it in their place.

9.4 POWERS OF DIRECTORS

The power of the Directors can be broadly divided into two:

Statutory powers and

Managerial powers

Statutory Powers

These powers are laid down in the companies Act, 1956. They confer upon the Board of Directors is the right to exercise all such powers and do all such acts as the company itself has the authority to exercise and do. Thus, the powers of the directors are provided in the Companies Act.

Powers to be exercised only at Board Meeting

Sec.292 of the Companies Act provides that the Board of Directors shall exercise the following powers by means of resolutions passed at a meeting of the Board:

- The power to make calls on shares;
- The power to issue debenture of the company;
- The power to borrow money otherwise than on debentures;
- The power to invest the funds of the company; and
- The power to make loans.

Powers to be exercised by the Board only with the consent of the shareholders in the General Meeting

- Sell, lease or dispose the whole or part of the company's undertaking,
- Remit or allow time for repayment of debt due by a director,
- Invest any amount received on the acquisition of any property or under-excess of the maximum laid down in the Act,
- Appoint a sole selling agent for more than 5 years,
- Issue bonus shares, and
- Reorganize the share capital of the company.

Other Powers to be exercised at Board meetings

- The power to appoint Additional Directors,
- The power to fill-up casual vacancy in the office of director,
- The power to accord sanction to a Director to enter into certain specified contracts with the company.

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- The power to appoint as Managing Director.
 - The power to invest in any shares of any other body corporate.
 - The power to make declaration of solvency in the case of members voluntary winding up.

Managerial Powers

- Power to make contracts on behalf of the company.
- Power to decide the terms of issue of additional shares and debentures.
- Power to issue, allot, forfeit and transfer shares of the company.
- Power to appoint Directors to fill up any casual vacancies, Additional Directors or Alternate Directors.
- Power to set organizational objectives and formulate major policies.
- Power of determining the organizational structure of the company.

9.5 DUTIES OF DIRECTORS

General Duties

- To establish the general objectives and to determine the business of the company;
- To issue directions for the implementation of these policies and to review and check up the performance;
- To delegate powers to any committee or the chief executive or others, if permitted by the Articles; and
- To appoint officers and other employees, including managerial personnel, of the company.

Statutory Duties

- To disclose interests in contracts or arrangements proposed to be entered into by the company (Sec.299).
- To disclose particulars of shares held in other companies (Sec.308).
- To disclose names, addresses, occupations etc. for entry in the Register of Directors.
- To determine minimum subscription and issue prospectus.
- To hold statutory and annual general meetings and lay before these meetings the reports, accounts, returns etc. required by the Act.
- To convene extraordinary general meeting if requisitioned by members.
- To circulate and file with the Registrar the resolutions, reports accounts etc. required by the Act.
- To issue, allot, forfeit and transfer shares.

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- To recommend declaration and payment of dividends as per the Act.
 - To maintain books and registers required under the Act and the Articles.
 - To do all other acts required under the Act and the Articles.

Fiduciary Duties

As agents of the company, the directors hold a position of trust in relation to the company. They are duty bound (a) to exercise their powers honestly and bonafide for the benefit of the company as a whole; and (b) not to place themselves in a position where there is a conflict between their duties to the company and their personal interests.

Thus, the first duty of the directors is to act honestly and with utmost good faith. They exercise their powers bonafide for the benefit of the company and must not use it for their own personal interests. If they make any profit by the use of their powers, as directors, they must account for the same to the company.

Duty of Care and Skill

The directors have a common law duty to exercise reasonable care and skill in the discharge of their duties. If they fail to do so, they will be liable for damages under the common law.

Duty not to Delegate

Directors are expected to perform their functions personally and not to delegate them to someone else who is not a director.

Duty to Disclose Interest

Directors of a company are duty bound to disclose their interests in contracts or arrangements proposed to be entered into by the company. This safeguard is necessary to prevent any conflict between the personal interests of the director and his duty to the company.

Remuneration of Directors

The remuneration payable to the directors of a company, including any managing or whole-time director, is determined either by the Articles of the company, or by a resolution passed by the company in general meeting. The Articles may also require that a special resolution is to be passed for the purpose. The amount of remuneration and its mode of payment must be in accordance with the provisions of Sec. 198 and 309.

Overall Maximum Managerial Remuneration

The total managerial remuneration to the managing/whole-time directors and/or manager of a public company or a private company which is a subsidiary of a public company in respect of any financial year must not exceed 11 per cent of the net profit of the company for that financial year. The percentage aforesaid shall be exclusive of any

fees payable to directors for attending meetings of the Board of Directors or any committee thereof.

9.6 REMOVAL OF DIRECTORS

1. Shareholders (Sec.284)

The shareholders may, by passing an ordinary resolution at their general meeting, remove a director before the expiry of his period of office.

2. Central Government (Secs.388-B to 388-E)

The Central Government may exercise this power where in its opinion there are circumstances suggesting:

- That the director concerned in the conduct and management of the affairs of the company is or has been guilty of fraud, misfeasance, persistent negligence or default in carrying out his obligations and functions under the law, or breach of trust; or
- That the business of the company is not or has not been conducted and managed by the director in accordance with sound business principles or prudent commercial practices, or
- That the company is or has been conducted and managed by the director in a manner which is likely to cause, or has caused, serious injury or damage to the interest of the trade, industry or business to which such company pertains; or
- That the business of the company is or has been conducted and managed by the director with intent to defraud its creditors, members or any other person or against public interest.

Company Law Board

Where, on an application to the Company Law Board for prevention of oppression or mis-management, the company Law Board finds that the relief ought to be granted, it may be an order provide for the termination, setting aside or modification of any agreement between the company and the director. When the appointment of a director is to be terminated or set aside he cannot sue the company for damages or compensation for loss of office.

Managing Director

Section 2 (26) of the companies Act defines a managing director as. “a director who, by virtue of an agreement with the company, or of a resolution passed by the company in general meeting, or by its Board of Directors, or by virtue of its memorandum or Articles of Association, is entrusted with substantial powers of management which would not otherwise be exercisable by him, and includes a director occupying the position of a managing director, by whatever name called”.

A managing director is also a director, but he enjoys substantial powers to act as the Chief Executive under the control and supervision of the board. Thus, he is both a director and manager. As a director he takes a seat in the Board meeting and participates in the policy-making function. As a manager or chief executive, he is responsible for the day-to-day management of the company.

REVIEW QUESTIONS

1. Briefly state the provisions of the Companies Act regarding the appointment of the directors of a company.
2. What are the qualifications of a director? When is a person disqualified for appointment as a director of the company?
3. Who is managing director? How a managing director is appointed?

Chapter - 10

Meetings and Resolutions

10.1 INTRODUCTION

A 'Meeting' may be defined as any gathering, assembly or coming together of two or more persons for the transaction of some lawful business of common concern. Like any other association, a company must also hold meetings for its proper functioning. The shareholders or members of a company, who are the real owners, must have the opportunity to collectively discuss the affairs of the company and to exercise their ultimate control over the management of the company. Similarly, the directors, in whom the management of the company is vested, must come together periodically to function as a team and take collective decisions regarding the business policy of the company and to exercise overall supervision over the management. Thus, the management of a company is really carried on through meetings of shareholders and directors and the resolutions adopted therein.

10.2 KINDS OF COMPANY MEETING

Broadly speaking, company meeting may be classified as follows:

Meetings of Shareholders or Members

This meeting may be of four types:

- i. Statutory Meeting
- ii. Annual General Meeting
- iii. Extraordinary General
- iv. Class Meetings

Meetings of Directors

- i. Meetings of Board Directors
- ii. Meeting of Committees of Directors
- iii. Meetings of Creditors, Debenture holders and Contributories

10.3 STATUTORY MEETING

This is the first meeting of the shareholders of a public company. It must be held within a period of not less than one month or more than 6 months from the date at which the company is entitled to commence business. It is held only once in the lifetime of a company. A private company and a company limited by guarantee and not having a share capital need not hold such a meeting.

The purpose of the statutory meeting with its statutory report is to put the shareholders of the company in possession of all the important facts relating to the new company. What shares have been taken up, what moneys received etc. This also provides an opportunity to the shareholders of meeting to discuss the whole situation, the management and prospects of the company.

The Board of Directors must, at least 21 days before the day on which the meeting is to be held, forward a report, called the ‘statutory report’ to every member of the company. This report contains all the necessary information relating to formational aspect of the company for the information of the shareholders.

Contents of Statutory Report

- The total number of shares allotted, distinguishing those allotted as fully or partly paid up otherwise that in cash, the extent to which they are partly paid up, the consideration for which they have been allotted and total amount received in cash;
- An abstract of the receipt and payments under distinctive heads up to a date within seven days of the date of report;
- An account of estimate of the preliminary expenses of the company.
- The names, addresses and occupations of the managing director, director, and also its secretary and auditors of the company;
- The particulars of any contract which, and the modification or proposed modification of which, are to be submitted to the meeting for approval;
- The extent to which underwriting contracts, if any, have not been carried out and the reason therefore;
- The arrears, if any, due on calls from directors, managing director or manager, and
- The particulars of any commission or brokerage paid, or to be paid, in connection with the issue or sale of shares to any director, managing director or manager.

10.4 ANNUAL GENERAL MEETING

Every company must in each year (i.e. calendar year) hold, in addition to any other meetings, a general meeting as its annual general meeting and must specify the meeting as such in the notice calling it. A period of not more than 15 months should pass between the date of one annual general meeting of a company and that of the next. The company may, however, hold its first annual general meeting within a maximum period of 18 months from the date of its incorporation.

Importance of Annual General Meeting

It is only at the annual meetings a company that the shareholders can exercise any control over its affairs. The shareholders also get an opportunity to control over its affairs. The shareholders also get an opportunity to discuss the affairs and review the working of the company.

10.5 EXTRAORDINARY GENERAL MEETING

Any general meeting other than an annual general meeting is called an extraordinary general meeting (Art.47 of Table A, Schedule I). It is called for transaction some

urgent or special business which cannot be postponed till the next annual general meeting.

Extraordinary general meetings are required for transacting different types of business. Example.

- Alteration of the Memorandum and Articles of Association;
- Alteration of the share capital;
- Removal of director before the expiry of his term.

Authority for Convening Extraordinary General Meeting

An Extraordinary General Meeting may be called or convened:

By the Board of Directors

The Articles usually empower the Board of Directors to call an extraordinary general meeting, whenever it thinks fit.

By the Board of Directors on the Requisition of Members

Section 169 of the Companies Act also empowers the members to requisition or demand the convening of an extraordinary general meeting. The requisition must be signed by (i) Members holding at least one-tenth of the paid-up capital carrying voting power; or (ii) members enjoying one-tenth of the total voting power of all members entitled to vote on the matter in view.

By the Requisitions

If the Board fails to call the meeting within 21 days and the meeting is not held within 45 days of the requisition, the requisitioners themselves may call the meeting within 3 months of the date of requisition.

By the Company Law Board

The Company Law Board can also order an extraordinary general meeting to be called, held or conducted, if for any reason it is not practicable to call or hold such a meeting. The Company Law Board may pass order for calling such a meeting on its own initiative or on the application of any director or any member entitled to vote at the meeting.

10.6 CLASS MEETINGS

These are meetings held by a particular class of shareholders (e.g. Equity or Preference Shareholders) for the purpose of making changes in the Articles of the company as regards their rights and privileges or for the purpose of conversion of one class of shares into another. These meetings can be attended by the shareholders of that class only. The Articles usually provide for the holding of class meetings. The Articles usually provide for the holding of class meetings and lay down the rules and procedure for convening and holding such meetings.

Meetings of Debenture Holders and Creditors

Meeting of debenture holders are called by the company with the purpose of (i) varying the terms of the security, or (ii) modifying the right of debenture holders. These meetings are usually held by a company to enable it to issue fresh debenture or to vary the rate of interest payable to existing debenture holders.

Meeting of creditors are called for:

- Compromising a disputed matter with creditors or compounding of debts; or
- Securing the consent of the creditor to any scheme of re-organization, reconstruction or amalgamation; or
- Securing the consent of creditors and debenture holders at the time of winding up.

10.7 REQUISITES OF A VALID MEETING

If the business transacted at a meeting is to be valid and legally binding, the meeting itself must be validly held. A meeting will be considered to be validly held, if:

- It is properly convened by proper authority and by a proper notice.
- Duly elected Chairman properly constitutes it with requisite quorum of members, and
- It is properly conducted, i.e. according to rules.

Proper Authority to Convene Meeting

A meeting must be convened or called by a proper authority. Otherwise it will not be a valid meeting. The proper authority to convene general meetings of a company is the Board of Directors. The decision to convene a general meeting and issue notice for the same must be taken by a resolution passed at a validly held Board meeting.

Notice of Meetings

A meeting in order to be valid must be convened by a proper notice issued by the proper authority. It means that the notice convening the meeting by properly drafted according to the Act and the rules, and must be served on all members who are entitled to attend and vote at the meeting.

For general meeting of any kind at least 21 days notice must be given to member. A shorter notice for Annual General Meeting will be valid, if all members entitled to vote give their consent. Every notice of meeting of a company must specify the place and the day and hour of the meeting, and shall contain a statement of the business to be transacted thereat.

Quorum

Quorum is the minimum number of members who must be present at a meeting as required by the rules. Any business transacted at a meeting without a quorum is invalid. The main purpose of having a quorum is to avoid decisions being taken at a

meeting by a small minority which may be found to be unacceptable to the vast majority of members.

The number constitution a quorum at any company meeting is usually laid down in the Articles of Association. In the absence of any provision in the Articles, the provisions as to quorum laid down in the Companies Act, 1956 (under Sec.174) will apply. The Articles may provide for a larger quorum, but it cannot provide for a smaller quorum than that laid down in the Act. Sec.174 of Companies Act provides that the quorum for general meetings of shareholders shall be five members personally present in case of a public company; and two members personally present for any other company.

Agenda

The word 'agenda' literally means 'things to be done'. It refers to the programme of business to be transacted at a meeting. Agenda is essential for the systematic transaction of the business of a meeting in the proper order of importance. It is customary for all organizations to send an agenda along with the notice of a meeting to all members. The business of the meeting must be conducted in the same order in which the items are placed in the agenda and the order can be varied only with the consent of the meeting.

Proxy

The term 'Proxy' is used to refer to the person who is nominated by a shareholder to represent him at a general meeting of the company. It also refers to the instrument through which such a nominee is named and authorized to attend the meeting.

Chairman of a Meeting

'Chairman' is the person who has been designated or elected to preside over and conduct the proceeding of a meeting. He is the chief authority in the conduct and control of the meeting.

A chairman is usually a member of the body over which he is to preside. He may be either appointed or designated before hand as chairman by the rules or elected at the meeting itself according to rules. In the case of a company, the Articles usually designate the Chairman of the Board of Directors to preside over the general meetings of the company. Where the rules do not designate a chairman or the designated chairman is absent at the commencement of the meeting, the meeting itself elects a pro tem (temporary) chairman to preside over the meeting.

10.8 MOTIONS AND RESOLUTIONS

A 'Motion' is a definite proposal put before a meeting for its consideration and adoption. A 'resolution' on the other hand is the formal expression of the decision of a meeting. When a motion has been duly voted upon and passed by a majority, with or without amendments, it is called a 'resolution'. A resolution once adopted and recorded in the minutes becomes the official decision of the meeting and cannot be rescinded or

revoked except by the consent of two-third majority in a meeting specially called for the purpose.

Kinds of Resolutions

- Ordinary Resolution
- Special Resolution
- Resolution requiring Special Notice

Ordinary Resolution

A resolution which is passed by a simple majority of votes cast by members present in person or by proxy is called 'ordinary resolution'. Simply majority means that the votes cast in favour of the resolution must be at least one more than 50 percent of the votes cast.

Usually, ordinary resolutions are required to transact 'ordinary businesses. In addition, ordinary resolutions are sufficient to transact following types of special business:

- Adoption of statutory report
- Removal of director from office before the expiry of his term
- Alteration of share capital
- Issue of shares at a discount
- Appointment of sole selling agents.

Special Resolution

A special Resolution is one, which is required for transacting special business and is required to be passed by a three-fourths majority of members present and vote in the meeting.

Special resolution is required to transact the following types of business:

- To change of name of the company
- To change of the domicile of the company
- To change the object clause
- To alter article of association
- To create reserve capital
- To reduce share capital
- To pay interest out of capital
- To decide winding up of the company

Resolutions requiring Special Notice

Section 190 of the Companies Act, 1956 provides as follows:

1. Where by any provision contains in the Act or in the Articles, special notice is required of any resolution, notice of the intention to move the resolution shall be given to the company not less than 14 days before the meeting at which it is to be moved, exclusive of the day on which the notice is served or deemed to be served and the day of the meeting.
2. The company, shall immediately after the notice of the intention to move any such resolution has been received by it, give its members notice of the resolution in the same manner as it gives notice of the meeting, or if that is not practicable, shall give them notice thereof, either by advertisement in a newspaper having an appropriate circulation or in any other mode allowed by the Articles, not less than seven days before the meeting.

According to Companies Act, a requiring special notice is required to transact the following types of business.

- Removal of a director before the expiry of his term or to appoint another director in place of a director so removed.
- Appointment as auditor of a person other than the retiring auditors or deciding that retiring auditors shall not be re-appointed.
- Articles may provide for additional matters for which special notice is required.

Minutes

‘Minutes’ have been defined as the written record of the business done at a meeting. The minutes comprise the official record of the proceedings and decisions of a meeting. They constitute a clear, concise, accurate and permanent record of the decisions and actions of a constituted body. Once approved and signed by the chairman, they are acceptable as evidence of the proceedings in a court of law.

REVIEW QUESTIONS

1. What are the various kinds of company meetings?
2. What do you understand by a statutory meeting?
3. What are the objects on holding an annual general meeting of a company?
4. Write short notes on (a) Special Resolution; (b) Minutes of the Meeting; (c) Resolutions requiring special notice.

Chapter - 11

Winding Up

11.1 INTRODUCTION

Winding up of a company is a process an end to the life of a company. It is a proceeding by means of which a company is dissolved and in the course of such a dissolution its assets are collected, its debts are paid off out of the assets of the company or from contribution by its members if necessary. If any surplus is left, it is distributed among the members in accordance with their rights.

11.2 MODELS OF WINDING UP

There are three modes of winding up of a company. These are: (a) compulsory winding up by the court, (b) voluntary winding up, which is itself of two kinds: (i) member's voluntary winding up, (ii) Creditors voluntary winding up, and (c) winding up under the supervision of the court.

11.3 COMPULSORY WINDING UP BY COURT

A company may be wound up by an order of the court. This is called Compulsory winding up. Section 433 lays down the following grounds for the winding up of a company by the court:

- If the company has by a special resolution resolved that it may be wound up by the court.
- If a company makes a default in delivering the Statutory Report to the Registrar or in holding the statutory meeting, the court may order winding up of the company either on the petition of the Registrar or on the petition of the Contributory.
- Where a company does not commence its business within a year from its incorporation, or suspends its business for a whole year.
- Where the number of members is reduced below 7 in the case of a public company and below 2 in case of a private company.
- The court may order for the winding up of a company if it is unable to pay its debts. The basis of an order for winding up under this clause is the company has ceased to be commercially solvent.
- The last ground on which the court can order the winding up of a company is when the court is of the opinion that is just and equitable that the company should be wound up. The following are the instances where the courts have exercised their discretion under this clause:
 - i. Where there is a deadlock in the management,
 - ii. Where it is impossible to carry on the business of the company except at a loss,
 - iii. Where the company has ceased to carry on its authorized business and is engaged in an illegal business

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- iv. Where the object for which the company is formed is impossible of further pursuit,
 - v. Where the minority is being disregarded or oppressed,
 - vi. Where there is lack of confidence in directors,
 - vii. Where a company has been conceived and brought forth in fraud.

Persons eligible to file petition for winding up

The following persons can file a petitions: 1. The Company; 2, Any Creditor or creditors including any contingent prospective creditors or creditors; 3 Any Contributory or contributories; 4. All or any of the aforesaid parties, together or separately; 5. The Registrar; 6. Any Person authorized by the Central Government under Section 243.

Commencement of Winding up

The winding up of a company by the Court is deemed to commence at the time of the presentation of the petition for winding up. But where, before the presentation of the petition, a resolution has been passed by the company, for voluntary winding up, the winding up shall be deemed by the company, for voluntary winding up, the winding up shall be deemed to have commenced at the time of the passing of the resolution. [Section 441].

Official Liquidator

Under the present Act, the only person who is competent to act as the liquidator in a winding up is the Official Liquidator. For the purpose of winding up, there shall be attached to each High Court an Official Liquidator appointed by the Central Government, who may be either a whole time or part time officer. In District may appoint one or more deputy or assistant official liquidators to assist the official liquidator. On a winding up order being made, the official liquidator, by virtue of his office, becomes the liquidator of the company.

Statement of Affairs of the Company

After a winding up order is made or the official liquidator is appointed as provisional liquidator, a statement as to the affairs of the company must be made out and submitted to the official liquidator. It must be in the prescribed form and verified by an affidavit. The statement must contain the following particulars:

- The assets of the company stating separately the cash balance in hand and at the bank, if any, and the negotiable securities, if any, held by the company.
- Debts and liabilities of the company.
- The names, residences and occupations of its creditors, stating separately the amount of secured and unsecured debts.

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- The debts due to the company and the names, residences and occupations of the persons from whom they are due and the amount likely to be realized on account thereof.
 - Such further or other information as may be prescribed, or as the official liquidator may require.

Duties of the Liquidator

The liquidator of a company in compulsory winding up must perform such duties in reference thereto as the court may impose. These are as under:

- To submit preliminary report
- To take over company's assets
- To convene meetings of creditors and contributories
- To keep proper books
- To submit accounts
- To submit information in pending liquidation.

Powers of Official Liquidator

The powers of the liquidator can be divided into two classes: (a) those which can be exercised with the sanction of the court, and (b) those do not require such sanction.

Powers to be exercised with the sanction of the Court

- To institute or defend suits, prosecutions or other legal proceedings in the name and on behalf of the company.
- To carry on business of the company s far as it may be necessary for the beneficial winding up of the company.
- To sell the immovable and movable property and actionable of the company by public action or private contract.
- To raise money on the security of any asset of the company.
- To do all other acts as may be necessary to wind up the company and to wind up the company and to distribute assets.

Powers to be exercised without the sanction of the Court

The following powers do not require sanction of the court for their exercise:

- To do all acts and execute in the name of the company all deeds, receipts, documents etc. and to use the company's seal for that purpose, where necessary.
- To inspect the records and returns of the company on the files of the Registrar without payment of any fees.

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- To prove, rank and claim in the insolvency of any contributory and to receive dividend out of his estate.
 - To draw, accept, make and endorse bill of exchange, hundi or promote in the name of and on behalf of the company.
 - To make out in his official name, letters of administration to any deceased contributory and in his official name, to do all things necessary for obtaining any money from a contributory or his estate.
 - To appoint agents where necessary.

Contributory

Section 428 defines the term 'contributory'. It means every person who is liable to contribute to the assets of the company in the event of its being wound up and includes the holders of fully paid up shares. A debtor to the company is not a contributory or a person who guarantees such debtor. When a company goes into liquidation, every member whether past or present, has to contribute to the assets of the company. The list of contributories is made out in two parts A and B in accordance with section 426. The A list comprises the present members and the B list those of past members, who have ceased to be members within one year preceding the winding up. The 'A' contributories, i.e., those in the list of present members are primarily liable for everything and must be first individually exhausted before any 'B' contributory can be called upon.

11.4 VOLUNTARY WINDING UP

The object of a voluntary winding up is that the company and its creditors are left to settle their affairs without going to the court, but they may apply to the court of any directions or orders if and when necessary. This form of winding up is by far the most common and the most popular form. A company may be wound up voluntarily when (a) the period fixed by the Articles for the duration of the company has expired or an event upon which the company is to be wound up has happened and the company in general meeting has passed a special resolutions; (b) The company has for any cause, whatever passed a special resolution to wind up voluntary (section 484). The company may be wound up by special resolution even if it is prosperous.

A voluntary winding up commences from the date of the passing of the resolution (Section 486). From the commencement of the winding up, the company ceases to carry on its business except so far as may be required for the beneficial winding up of such business. But the corporate status and powers continue until it is dissolved.

Types of voluntary Winding Up

A voluntary winding up may be: (a) A members' voluntary winding up. (b) A creditor's voluntary winding up.

Members' Voluntary Winding Up and Declaration of Solvency

Section 488 provides that where it is proposed to wind up a company voluntarily, the directors or a majority of them, may, at a meeting of the Board, make a declaration verified by an affidavit that the company has no debts or that it will be able to pay its debts in full within a period not exceeding 3 years from the commencement of winding up as may be specified in the declaration. Such declaration shall be made within five weeks immediately preceding the date of the passing of the resolution for winding up and shall be delivered to the Registrar before that date. Where such a declaration is duly made and delivered, the winding up following shall be called members voluntary winding up.

Creditor's Voluntary Winding Up

Where the declaration of solvency is not made, the winding up is referred to as creditors' voluntary winding up. The provisions for creditors' voluntary winding up are similar to those applicable to the members' voluntary winding up except that in the former, it is the creditors who appoint the liquidator, fix his remuneration and generally conduct the winding up. Section 500 to 509 deal with creditors voluntary winding up.

11.5 DISTINCTION BETWEEN MEMBER'S VOLUNTARY WINDING UP AND CREDITORS' VOLUNTARY WINDING UP

No	Members' Voluntary Winding Up	Creditors' Voluntary Winding Up
1	Such winding up takes place only when the company is in a position to pay its debts.	Such Winding up takes place only when the company is not in a position to pay its debts.
2	Declaration of solvency is made by the Directors.	No such declaration is made.
3.	Only meeting of members is called.	Meeting of the members and creditors are called.
4.	The liquidator is appointed and remuneration is fixed by the company itself.	The liquidator in fact is appointed by the creditors and remuneration is fixed by the Committee of Inspection.
5.	No Committee of Inspection is appointed.	Committee of Inspection is appointed.
6.	The liquidator can exercise some powers with the sanction of a special resolution of the company.	The liquidator exercises powers with the sanction of the court.
7.	Meeting of members is called on completion of proceeding of winding up.	Meeting of members and creditors is called when the proceeding for winding up has been completed.

11.6 WINDING UP SUBJECT TO SUPERVISION OF COURT

At any time after a company has passed a resolution for voluntary winding up the court may make an order that the voluntary winding up will continue, but subject to the supervision of the court and with such liberty for creditors, contribute and others to apply to the court on such terms and conditions as the court thinks fit.[Section 522]. A petition for the continuance of a voluntary winding up subject to the supervision of the court must be deemed to be a petition for winding up by the court[Section 523]. The court on making a supervision order may appoint an additional liquidator or liquidators. The court may remove any liquidator so appointed. The court may appoint or remove a liquidator on the application of the Registrar [Section 524]. A liquidator appointed by the court will have the same powers and be subject to the same obligation as if he had been duly appointed as a liquidator in a voluntary winding up [Section 25].

11.7 DISSOLUTION OF A COMPANY

The court makes an order for the dissolution of a company on any of the grounds stated below:

- a) When the affairs of a company have been completely wound up, or
- b) When the court is of the opinion that the liquidator cannot proceed with the winding up of a company for want of funds or assets; or
- c) When it is just and reasonable in the circumstances of the case that an order of dissolution of the company should be made, or
- d) For any other reason whatsoever.

The company is dissolved from the date of the order of the Court [Sec.481].

REVIEW QUESTIONS

1. Explain the grounds on which the court would consider it just and equitable to wind up a company.
2. Who can present a petition for the winding up a company by the Court?
3. State the procedure for the member's voluntary winding up of a company.
4. Who is a contributory? What is the nature and extent of his liability?
5. What do you understand by 'winding up' subject to the supervision of the court?

Chapter - 12

**Foreign Exchange
Management Act**

12.1 INTRODUCTION

Foreign Exchange transactions were regulated in India by the Foreign Exchange Regulation (FERA), 1973. This act also sought to regulate certain aspects of the conduct of business outside the country by Indian companies and in India by Foreign companies. The FEMA was widely described as a draconian and obnoxious law. Following the economic liberalization ushered in 1991, some amendments to the FEMA were effected in 1993.

The main objective of FEMA, framed against the background of severe foreign exchange problem and the controlled economic regime, was conservation and proper utilization of the foreign of the foreign exchange resources of the country. There was a lot demand for a substantial modification of FEMA in the light of the ongoing economic liberalization and improving foreign exchange reserves position. Accordingly, a new Act, the Foreign Exchange Management Act (FEMA), 1999, replaced the FERA.

12.2 OBJECTIVES

What is Foreign Exchange?

Foreign exchange, or forex, is the conversion of one country's currency into another. In a free economy, a country's currency is valued according to the laws of supply and demand. In other words, a currency's value can be pegged to another country's currency, such as the U.S. dollar, or even to a basket of currencies. A country's currency value may also be set by the country's government.

However, most countries float their currencies freely against those of other countries, which keeps them in constant fluctuation.

The Government of India formulated FEMA or Foreign Exchange Management Act to encourage the external payments and across the border trades in India. It was formulated in the year 1999 while it replaced FERA (Foreign Exchange Regulation Act). This was meant to close all the loopholes and drawback of FERA and hence major economic reforms were introduced under this act. It was primarily formulated to de-regularize and have liberal Indian economy.

Factors Affecting Currency Value

The value of any particular currency is determined by market forces based on trade, investment, tourism, and geo-political risk. Every time a tourist visits a country, for example, they must pay for goods and services using the currency of the host country. Therefore, a tourist must exchange the currency of his or her home country for the local currency. Currency exchange of this kind is one of the demand factors for a particular currency.

- Foreign exchange, also known as forex, is the conversion of one country's currency into another.

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- The value of any particular currency is determined by market forces related to trade, investment, tourism, and geo-political risk.
 - Foreign exchange is handled globally between banks and all transactions fall under the auspice of the Bank for International Settlements.

Another important factor of demand occurs when a foreign company seeks to do business with another in a specific country. Usually, the foreign company will have to pay in the local company's currency. At other times, it may be desirable for an investor from one country to invest in another, and that investment would have to be made in the local currency as well. All of these requirements produce a need for foreign exchange and contribute to the vast size of foreign exchange markets.

Foreign exchange is handled globally between banks and all transactions fall under the auspice of the Bank for International Settlements (BIS).

The FEMA, which came into effect from January 1,2000, extends to the whole of India and also applies to all branches, office, and agencies outside India, owned or controlled by a person resident in India.

The objectives of FEMA are:

- To facilitate external trade and payment
- To promote the orderly development and maintenance of foreign exchange market.

12.3 CURRENT ACCOUNT TRANSACTIONS

The terms 'current account' and 'capital account' are used in the context of balance of payments of a country. Current account transactions are those related to export and import of services, income on investment and unilateral payment (gifts, remittances for family maintenance etc.) According to FEMA, current account transaction means a transaction other than a capital account transaction and without prejudice to the generality of the foreign such transactions includes:

- Payment due in connection with foreign trade, other current business, services and short term banking and credit facilities in the ordinary course of business;
- Payment due as interest on loans and as net income from investment;
- Remittances for living expenses of parents, spouses and children residing abroad, and
- Expenses in connection with foreign travel, education and medical care of parents, spouse and children.

Under section 5 of FEMA, the Government of India, in public interest and in consultation with Reserve Bank is empowered to impose reasonable restrictions on certain current account transaction. Subject to these restrictions, any person may sell

or draw foreign exchange to or from an authorized dealer if such sale or withdrawal is a current account transaction. Government of India has framed the Foreign Exchange Management (Current Account Transaction) Rules, 2000 in terms of which drawl of exchange for certain transactions have been prohibited and restrictions have been placed on certain transactions.

12.4 CAPITAL ACCOUNT TRANSACTIONS

Capital account transaction related to changes in assets and liabilities abroad held by residents and changes in assets and liabilities in India of Non-residents. Any person may sell or draw foreign exchange to or from an authorized person for a capital account transaction permitted by the Reserve Bank in consultation with the Central Government.

The Reserve Bank may, however, without prejudice to the generality of this, prohibit, restrict or regulate the following.

- Transfer or issue of any foreign security by a person resident in India;
- Transfer or issue of any security by a person resident outside India;
- Transfer or issue of any security or foreign security by any branch, office or agency in India of a person resident outside India;
- Any borrowing or lending in foreign exchange in whatever form or by whatever name called;
- Any borrowing or lending in rupees in whatever form or by whatever name called between a person resident in India and a person resident outside India;
- Deposits between person resident in India and person resident outside India;
- Export, Import or holding of currency or currency notes;
- Transfer of immovable property outside India, other than a lease not exceeding five years, by a person resident in India;
- Acquisition or transfer of immovable property in India, other than a lease not exceeding five years, by a person resident outside India,
- Giving of a guarantee or surety in respect of any debt, obligation or other liability incurred:
 - a) By a person resident in India and owed to a person resident outside India; or
 - b) By a person resident outside India.

Any person resident in India may hold, own, transfer or invest in foreign currency, foreign security or any immovable property situated outside India if such currency,

security or property was acquired, held or owned by such person when he was resident outside India or inherited from a person who was resident outside India.

12.5 DEALING IN FOREIGN EXCHANGE

Section 3 of FEMA imposes restriction on dealing in foreign exchange and foreign security and payment to and receipt from any person outside India. Accordingly, except as provided in terms of the Act, or with the general or special permission of the Reserve Bank, no person shall:

- Deal in any foreign exchange or foreign security with any person other than an authority person;
- Make any payment to or for the credit of any person resident outside India in any manner;
- Receive otherwise through an authorized person, any payment by order or on behalf of any person resident outside India in any manner;
- Enter into any financial transactions in India as a consideration for or in association with acquisition or creation or transfer of a right to acquire, any asset outside India by any person.

Further, save as otherwise provided in this Act, no person resident in India shall acquire, hold, own, possess or transfer any foreign exchange, foreign security or any immovable property situated outside India.

Major Provisions of FEMA Act 1999:

Here are major provisions that are part of FEMA (1999)

- Free transactions on current account subject to reasonable restrictions that may be imposed.
- RBI controls over capital account transactions.
- Control over realization of export proceeds.
- Dealing in foreign exchange through authorized persons like authorized dealer or money changer etc.
- Appeal provision including Special Director (Appeals)
- Directorate of enforcement
- Any person can sell or withdraw foreign exchange, without any prior permission from RBI and then can inform RBI later.
- Enforcement Directorate will be more investigative in nature
- FEMA recognized the possibility of Capital Account convertibility.
- The violation of FEMA is a civil offence.

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- FEMA is more concerned with the management rather than regulations or control.
 - FEMA is regulatory mechanism that enables RBI and Central Government to pass regulations and rules relating to foreign exchange in tune with foreign trade policy of India.

12.6 ADMINISTRATION OF THE ACT

The FEMA has assigned an important role to the Reserve Bank of India in the administration of this Act. The rules, regulations and norms pertaining to several sections of the Act are to be laid down by the RBI, in consultation with the Central Government.

The Act requires the Central Government to appoint as many officers of the Central Government as Adjudicating Authorities for holding inquiries pertaining to contravention of the Act. There is also a provision for appointing one or more Special Directors (Appeals) to hear appeals against the order of the Adjudicating Authorities. The Central Government shall also establish an Appellate Tribunal for Foreign Exchange to hear appeals against the orders of the Adjudicating Authorities and the Special Director (Appeals).

The FEMA provides for the establishment, by the Central Government, of a Director of Enforcement with a Director and such other officers or class of officers as it thinks fit for taking up for investigation the contraventions under this Act.

12.7 COMPARISON BETWEEN FERA & FEMA

Important differences between FERA and FEMA have been summed up as follows:

In FEMA, only the specified acts relating to foreign exchange are regulated, while in FERA, anything and everything that has to do with foreign exchange was controlled.

The aim of FEMA is facilitating trade as against that of FERA, which was to prevent misuse. In other words, the theme of FERA was: ‘everything that is specified is under control’. While the theme of FEMA is : ‘everything other than what is expressly covered is not controlled.’ Thus there is a lot of deregulation.

FEMA is a much smaller enactment – only 49 sections as against 81 of FERA.

In the process of simplification, many of the “laid downs” of the erstwhile FERA have been withdrawn.

Many provisions of FERA like the ones relating to blocked accounts, Indians taking up employment abroad, employment of foreign technicians in India, contracts in evasion of the act, vexatious search, culpable mental state etc., have no appearance in FEMA.

REVIEW QUESTIONS

1. Outline the objectives of FEMA.
2. Explain the provision of FEMA relating to foreign exchanges.

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3. Explain capital account transaction and its regulations.
 4. What is meant by current account transactions? State its legal provisions.
 5. Give the comparisons between FEMA and FERA.

Chapter - 13

**Consumer Protection
Act, 1986**

13.1 INTRODUCTION

The Consumer Protection Act, 1986 marks the growth of the enlightened consumer movement in our country. It intends to provide simple, speedy and inexpensive redressal to consumer grievances, particularly against unfair trade practices or unscrupulous exploitation of consumers.

The salient features of the act are summed up as under:

- The act applies to all goods and services unless specifically exempted by the Central Government.
- It covers all the sectors whether private, public or cooperative.
- The provisions of the act are compensatory in nature.

(1) This Act may be called the Consumer Protection Act, 1986.

(2) It extends to the whole of India except the State of Jammu and Kashmir.

(3) It shall come into force on such date as the Central Government may, by notification, appoint and different dates may be appointed for different States and for different provisions of this Act.

(4) Save as otherwise expressly provided by the Central Government by notifications, this Act shall apply to all goods and services.

Appropriate laboratory

"Appropriate laboratory" means a laboratory or organization

- (i) recognised by the Central Government;
- (ii) recognised by a State Government, subject to such guidelines as may be prescribed by the Central Government in this behalf; or
- (iii) any such laboratory or organisation established by or under any law for the time-being in force, which is maintained, financed or aided by the Central Government or a State Government for carrying out analysis or test of any goods with a view to determining whether such goods suffer from any defect;

13.2 RIGHTS OF CONSUMER

- The right to be protected against the marketing of goods which are hazardous to life and property;
- The right to be informed about the quality, potency, purity, standard and price of goods so as to protect the consumer against unfair trade practices.
- The right to be assured, wherever possible, access to a variety of goods at competitive prices;

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- The right to be heard and to be assured that consumers' interests will receive due consideration at appropriate forums;
 - The right to seek redressal against unfair trade practices or unscrupulous exploitation of consumers; and
 - The right to consumer's education.

13.3 CONSUMER PROTECTION COUNCILS

The act envisages establishment of Consumer Protection Councils at the Central and State levels whose main object will be to promote the rights of the consumers.

To provide simple, speedy and inexpensive redressal of consumer grievances, the act envisages a three-tier quasi-judicial machinery at the National, State and District levels. At the national level, there will be a National Consumer Disputes Redressal Commission (to be known as the 'National Commission'). At the state level, there will be Consumer Disputes Redressal Commissions (to be known as 'State Commission') and at the district level, District Consumer Disputes Redressal Forums (to be known as 'District Forums').

The provisions of this act are in addition to and not in derogation of the provisions of any other law for the time being in force.

The following are the essentials for a well developed consumerism for the protection of consumers' rights.

Consumer Education

The Consumer is given information about various consumer goods and services. This relates to prices, what the consumer can expect, standard trade practices, etc. Consumers are also made aware of their rights and responsibilities and the ways of getting the grievances redressed.

Product Rating

In order to guide the consumer in his choice of products, some of the agencies carry out tests and reports the results of such tests.

Liaison with Government and with Producers

Another important role of consumer organization is to maintain liaison with producers on the one hand and government authorities on the other. As government has a key role in protecting consumer rights, the consumer organizations have an important role to see the government play its role.

Objectives of Councils

The objects of the Central Council are to promote and protect the rights of the consumers such as:

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- The rights to be protected against marketing of goods and services which are hazardous of life and property.
 - The right to be informed about the quality, quantity, potency, purity, standard and price of goods and services so as to protect the consumer against unfair trade practices.
 - The right to be heard and assured that consumers interests will receive due consideration at appropriate forums.
 - The right to seek redressal against unfair trade practices or unscrupulous exploitation of consumers
 - The right to Consumer Education.

13.4 CONSUMER AND CONSUMERISM

All of us are consumers of goods and services. The producers of some goods and services also consume various other goods and services produced by others. In the Consumer Protection Act, the word ‘consumer has been defined separately for the purpose of goods and services.

For the purpose of goods, a consumer means a person belonging to the following categories:

- One who buys any goods for a consideration which has been paid or promised or partly paid and partly promised or under any system of deferred payment.
- It includes any user of such goods other than the person who actually buys goods and such use is made with the approval of the purchaser.
- One who hires any service or services for a consideration which has been paid or promised or partly promised or under any system of deferred payment.
- It includes any beneficiary of such service other than the one who actually hires the service for consideration and such services are availed with the approval of such person.

Philip Kotler defines Consumerism as “a social movement seeking to augment the rights and powers of the buyers in relation to sellers”. Boyd and Allen state that “although often abused as a term, consumerism may be best defines as the dedication of those activities of both public and private organizations which are designed to protect individuals form practices that impinge upon their rights as consumer.” Consumerism, interpreted as a collective endeavor of the consumer to protect their interests, is a manifestation of the failure of the business, including that of the public sector, and the government to guarantee and ensure the legitimate rights of the consumers.

Appeal against the decision of a District Forum can be filed before the State Commission within a period of thirty days. Appeal against the decision of a State

Commission can be filed before the National Commission within a period of 30 days. Appeal against the orders of the National Commission can be filed before the Supreme Court within a period of 30 days.

There is no fee for filing appeal before the State Commission or the National Commission. Procedure for filing the appeal is the same as that of compliant, except that the application should be accompanied by the orders of the District forum/State Commission, as the case may be, and reasons for filing the appeal should be specified.

13.5 CONSTITUTES A COMPLAINT

What Constitutes a Complaint?

Under the Act, complaint means any allegation in writing made by a complainant in regard to one or more of the following:

- That he has suffered loss or damages as a result of any unfair trade practices adopted by any trader.
- That the goods mentioned in the complaint suffer from one or more defects.
- That services mentioned in the complaints suffer from deficiencies in any respect.
- That a trader has charged for the goods mentioned in the complaint, a price in excess of the price.

(i) Fixed by or under any law for the time in force; or

(ii) Displayed on goods; or

(iii) Displayed on any packet containing such goods.

13.6 TO FILE A COMPLAINT

Where to file a Complaint?

If the cost of the goods or services and compensation asked for, is less than Rs.20 lakhs, then the complaint can be filed in the District Forum. If the cost of the goods or services and compensation asked for is more than Rs.20 lakhs but less than Rs.1 crore, the complaint can be filed before the State Commission. If the cost of goods or services and compensation asked for, exceeds Rs.1 crore, the complaint can be filed before the National Commission at New Delhi.

13.7 TO FILE A COMPLAINT

How to file a Complaint?

Procedures for filing complaints and seeking redressal are simple and speedy.

There is no fee for filing a complaint before the District Forum, the State Commission or the National Commission.

The complainant or his authorized agent can present the complaint in person.

The complaint can be sent by post to the appropriate Forum Commission.

A complaint should contain the following information:

- a) The name, description and the address of the complainant;
- b) The name, description and address of the opposite party or parties, as the case may be, as far as they can be ascertained;
- c) The facts relating to complaint and when and where it arose;
- d) Documents, if any, in support of the allegations contained in the complaint;
- e) The relief which the complainant is seeking.

The complaint should be signed by the complainant or his authorize agent.

13.8 RELIEF AVAILABLE TO CONSUMERS

Depending on the nature of relief sought by the consumer and facts, the Redressal Forums may give orders for one or more of the following reliefs;

- a) Removal of defects from the goods;
- b) Replacement of the goods;
- c) Refund of the price paid; or
- d) Award of compensation for the loss or injury suffered.

REVIEW QUESTIONS

1. What are the objectives of Consumer Protection Act?
2. Specify the rights of consumers.
3. Discuss the procedure of filing complaint under Consumer Protection Act.
4. What is the procedure for appeal under Consumer Protection Act?
5. Write short notes on (a) National Commission; (b) State Commission; (c) District Forum.
6. Explain the requisites to promote consumer protection.

Chapter - 14

Trade Mark & Patent

14.1 INTRODUCTION

In this lesson, let us define trade mark and patent. We will also list out the different types of patents. The procedure for obtaining trademark and patent will be discussed. A trademark (also written trade mark or trade-mark) is a type of intellectual property consisting of a recognizable sign, design, or expression which identifies products or services of a particular source from those of others, although trademarks used to identify services are usually called service marks. The trademark owner can be an individual, business organization, or any legal entity. A trademark may be located on a package, a label, a voucher, or on the product itself. For the sake of corporate identity, trademarks are often displayed on company buildings. It is legally recognized as a type of intellectual property.

14.2 TRADE MARK

A trademark identifies the brand owner of a particular product or service. Trademarks can be used by others under licensing agreements; for example, Bully land obtained a license to produce Smurf figurines; the Lego Group purchased a license from Lucas film in order to be allowed to launch Lego Star Wars; TT Toys Toys is a manufacturer of licensed ride-on replica cars for children. The unauthorized usage of trademarks by producing and trading counterfeit consumer goods is known as brand piracy.

It means

- i. A registered trade mark or a mark used in relation to goods for the purpose of indicating or so as to indicate a connection in the course of trade between the goods and some person having the right as proprietor to use the mark; and
- ii. In relation to the other provisions of this Act, a mark used or proposed to be used in relation to goods for the purpose of indication or so as to indicate a connection in the course of trade between the goods and some person having the right, either as proprietor or as registered use the mark whether with or without any indication of the identity of that person, and includes a certification trade mark registered as such under the provision of this Act [Section 2 (1) (v)].

Objectives

The trade and Merchandise Marks Act, 1958 came into force with effect from 25th November 1959. The act extends to the whole of India. The objects of the Act are to provide for

- Registration of trademarks,
- Protection of trademarks,
- Prevention of the use of fraudulent marks on merchandise.

14.3 REQUISITES OF A TRADE MARK

The definition of “Trade Mark” as given above does not bring out the constituents of an ideal trademark. There are nine requisite conditions to be ideal trademark as set out in *Corn Products Refining Company Vs. Sangrilla Food Product Ltd.*, AIR, 1960, S.C.142, based on passage from Milton Wright’s Work.

The characteristics of an ideal trademark as in Milton Wright’s “Inventions, patents and Trade Mark” are reproduced below:

- It should be easy to speak, spell and remember.
- It should be simple in design as well as attractive in appearance and sound.
- The sound must be attractive.
- It should be distinguishable.
- It should express the desirable qualities of merchandise.
- It should be possible to be affixed on goods and should be different from other trademarks of the same class of goods.
- It should be capable of being registered and protection.

Requisites for registration regarding Part A/B of Register

Esc. 9 of the Trade & Merchandise Marks act, 1958 lays down that:

A trademark shall not be registered in Part A of the register unless contains at least one of the following essential:

- a) The name of a company, individual or firm represented in a special particular manner.
- b) The signature of the application for registration or some predecessor in his business.
- c) One or more invented words.
- d) One or more words having no direct reference to the goods and not being, accounting to its ordinary signification, a geographical name or a surname or a personal name or any common abbreviation thereof or the name of a sect, caste or tribe in India.
- e) Any other distinctive mark.

A name signature or word, other than such as fall within the descriptions in clauses (a), (b), (c) and above shall not be registerable in part A of the register except upon evidence of its distinctiveness.

The expression “distinctive” in relation to the goods in respect of which a trademark is proposed to be registered, means adapted to distinguish goods with which the proprietor

of the trademark is connected in the course of a trade from goods in the case of which no such connection subsists.

A trade mark shall not be registered in Part B of the register unless the trade mark in relation to the goods in respect of which it is proposed to be registered is distinctive, or is not distinctive but is capable of distinguishing goods with which the proprietor of a trade mark is or may be connected in the course of trade from goods in the case of which no such connection subsist.

In determining whether a trademark is distinctive or a capable of distinguishing as above, the tribunal may have regard to the extent to which

- i. A trade mark is inherently distinctive or is inherently capable of distinguishing as above, and
- ii. By reason of the use of the trade mark or any other circumstances, the trade mark is in fact so adapted to distinguish or is in fact capable of distinguishing as above.

14.4 PROCEDURE FOR REGISTRATION OF TRADE MARK

- Any person claiming to be the proprietor of a trade mark used or proposed to be used by him, who is desirous or registering it, shall apply in writing to register in the prescribed manner for the registration of his trade mark either in Part A or in Part B of the register.
- An application shall not be made in respect of goods comprised in more than one prescribed class of goods.
- Every application as above shall be filed in the office of the Trade Marks Registry within whose territorial limits the principal place of business in India of the application of in the case of joint applicant, the principal place of business in India or the application whose name is first mentioned in the application, as having a place of business in India, is situated provided that where the applicant or any of the joint applicants does not carry on business in India the application shall be filled in the office of the Trade Marks Registry within whose territorial limits the place mentioned in the address for service in India as disclosed in the application is situate.
- The Registrar may refuse the application or may accept it absolutely or subject to amendments, modification, conditions or limitations.
- In the case of an application for registration of a Trade mark (other than a certification trade mark) in Part A of the register, the Registrar may, if the applicant so desires, instead of refusing the application, treat it as an application for registration in Part b of the register and deal with the application accordingly.
- In the case of a refusal or conditional acceptance of an application, the Registrar shall record in writing the grounds for such refusal or conditional acceptance and the materials used by him in arriving at his decision.

14.5 CONSEQUENCES OF REGISTRATION

The consequences of registration of a trademark are as follows:

No Action for Infringement of Unregistered Mark

According to Section 27 of the Act no person shall be entitled to institute any proceeding to prevent or to recover damages for infringement of an unregistered mark. In other words, the protection under the Act is available only to the registered mark.

Exclusive Right of Use

On registration of a trade mark the registered proprietor gets, under Section 28 of the Act, the exclusive right to use the mark. He is also entitled for relief in respect of any infringement of his trademark.

Prime Facie Evidence

According to Section 31 of the Act, registration is prime facie evidence of its validity. The objective of Section 31 is to facilitate proof of title by a plaintiff suing for infringement of his trademark. He has only to produce the certificate of registration of his trademark and that would be prime facie evidence of his title.

Registration to be Conclusive as to Validity after Seven Years

According to Section 32, in all legal proceedings relating to a trade mark registered in Part A of the register the original registration of the trade mark shall be valid in all respects even after expiration of seven years. This validity is subject to the following conditions:

- a. The original registration was not obtained by fraud;
- b. The trademark was registered without contravention of the provisions of Section 11 of the Act; or
- c. The trademark was not, at the commencement of the proceedings, distinctive of the goods of the registered proprietor.

Act of Infringement of a Certification of Trade Marks [Section 66-68]

The Act lays down that the right conferred by Section 66 is infringed by any person who not being the registered proprietor of the certification trade or a person authorised by him in that behalf under the regulations deposited under Section 65, using it in accordance, therewith, uses in the course of trade, a mark which is identical with or deceptively similar to, certification trade mark in relation to any goods in respect of which it is registered, and in such manner as to render the use of mark, likely to be taken as being as a trade mark.

Relief in Suits for Infringement or Passing off action

Section 106 of Trade and Merchandise Marks Act, 1958 lays down that the relief which a court may grant in a suit for infringement or for passing off under Section 105 shall include an injunction as the court may order and award damages or an account or

profits together with or without an order and award damages or an account of profits together with or without an order for delivery of the infringing labels and marks for destruction as the plaintiff may opt to demand.

Notwithstanding anything provided in as above, the court shall not grant relief for damages except the normal one or an account of profit in the following cases:

- a) Where in a suit for infringement of trademark, the infringement complained of is in relation to a certification trade mark; or
- b) Where in a suit for infringement, the defendant satisfies the court,
 - i. That at the time he commenced to use the trade mark complained of in the suit, he was unaware and had no reasonable ground for believing that the trade mark of the plaintiff was on the register or that the plaintiff was registered use using by way of permitted use.
 - ii. That when he became aware of the existence and nature of the plaintiff's right in the trade mark, he forthwith ceased to use the trade mark in relation to goods in respect of which it was registered; or
- c) Where in a suit for passing off, the defendant satisfies the court,
 - i. That at the time he commenced to use the trade mark complained of in the suit, he was unaware and had no reasonable ground for believing that the trademark of the plaintiff was in use.
 - ii. That when he became aware of the existence and nature of the plaintiff's trade mark, forthwith cease to use the trade mark complained of.

14.6 PATENT

Patent system provides legal production for novel product and process when a patent is granted on an application. Patent documents contain full technical details of the invention with drawings and descriptions. The word patent comes from the Latin term 'Litterae patentes' meaning an open letter. Such letters were used by medieval monarchs to confer rights and privileges.

In India the Patent system came into being with the enactment of the Exclusive Privileges Act on the 3rd March 1856. After several amendments and modifications, the Indian Patents & Designs Act, 1911 was passed consolidating the Acts relating to both Patents and Designs. After independence of India, the law on Patents in the country was taken up for review in order to make the patent system more conducive to the national interest. Thus the Patents Act, 1970 has been the outcome of this effort and it has now fully replaced the Indian Patents & Designs Act, 1911.

Varieties of Patents

There are three types of patents viz.

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- An ordinary patent
 - A patent of addition for improvement in or modification of an invention for which a patent has been applied for on granted. A patent of addition remains in force only as long as the patent for the original invention remains in force and no renewal fees and payable in respect thereof. In case the original patents is revoked, the patent of addition may be made an independent patent by the authority ordering the revocation and it will continue thereafter for the unexpired terms of the original patent subject to the payment of the prescribed renewal force.
 - A patent granted in respect of a convention application filed under the sec.135 of the act under reciprocity arrangements. The convention application has to be made within only year from the date of the first application made in a convention country in respect of that invention.

14.7 PROCEDURE FOR OBTAINING A PATENT

The following are the successive steps in the procedure for obtaining a patent:

- Filing an application for a patent at the appropriate office with a provisional or complete specification;
- Filing complete specification, if a provisional specification accompanies the application;
- Examination and acceptance of the application
- Overcoming opposition, if any, to the grant of a patent; and
- Sealing of the patent.

14.8 ADVANTAGES OF PATENTS

There are certain advantages of obtaining a patent. These are

- The patentee would have the exclusive right to use his investment and it would make no difference if the invention becomes well known to other from the date of the patent (which would be the date on which the complete specification is filed).
- The patentee would be able to bring a suit for infringement of a patent and pray for an injunction, damages or an account of profits against a person who infringes his patent.
- The patentee, if he does not have the means or is not himself in a position to work the invention patented commercially, he would be able to sell his patent and grant licenses to other persons to exploit the patent, and thereby earn money.
- The holder of an exclusive license would have the rights of a patentee and would also to enforce rights by taking proceedings against the infringement of the patent.

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- A patentee could make improvements in or modifications of an invention described or disclosed in the complete specification of the main invention and obtain the grant of a patent for the improvement or modification as a “Patent of Addition”.

REVIEW QUESTIONS

1. Define the term invention. Bring out clearly as so what constitutes invention.
2. Explain the procedure for registration of patents and trade mark.
3. What are the characteristics of a trademark?

Chapter - 15

**Trade Related Intellectual
Property Rights (Trips), RTP and
IDR Act 1951**

15.1 INTRODUCTION

Intellectual property is the property created by the human intellect. In other words, intellectual property related to information, which can be incorporated in tangible object and reproduced in different locations. For example, patents, designs, trademarks and copyrights. Like the movable and immovable property intellectual property is also governed by the law of the country which is for the time being in force, namely Law of Intellectual Property Rights.

Protection of the rights of the intellectual property generated by human intellect has come to be recognized, in the modern times, as an important tool, not only to promote inventiveness but also to ensure adequate return to the investments made. The subject of Intellectual Property Rights (IPR) has also become important for the technological, industries and economic development of a country.

15.2 INDUSTRIAL PROPERTY AND INTELLECTUAL PROPERTY

Intellectual Property is usually divided into two broad areas, namely Industrial Property and Copyright Act. Industrial Property consists mainly of patents, industrial designs and trademarks. Copyright related to the artistic creations such as poems, novels, music, paintings, cinematographic works, computer software/programs etc. The above said forms of industrial property along with the copyright are referred to as intellectual property.

However, in the recent times the term intellectual property is used to include all property resulting from the exercise of the human intellect. Accordingly other forms of intellectual property such as utility models, plant variety, geographical indications, and integrated circuits have come into existence in many development countries.

15.3 EFFICIENT MANAGEMENT OF INTELLECTUAL PROPERTY

Perhaps no other subject has revoked so much attention all over world, particularly in the developing countries, as the Intellectual Property Rights (IPR). Consequent on the coming into force of the GATT Agreement and the establishment of World Trade Organisation (WTO) the potential knowledge as a creator of wealth is also gaining currency the world over. But only the knowledge that is protected or product able can have the potential to create wealth. The inclusion of IPR in the form of Trade Related aspects of intellectual property this realization.

Intellectual Property is just one part of the successful marketing equation, and its true importance varies greatly according to each specific invention or idea. No one can predict with certainty about the cost of securing intellectual property protection is justified in a particular case. Protecting an invention or idea is often a difficult exercise. Some ideas and inventions simply cannot be protected while other is eligible for only narrow or partial production. Securing even a narrow or partial protection can often be expensive and time consuming and the ultimate result may be uncertain or even disadvantageous to the inventor (applicant). The decision to seek protection for an idea

should be approached with same caution and skepticism; one would being to any other commercial transaction, such as taking out a loan or starting a new business. Just because a new idea or an invention may be eligible for legal protection does not mean that the cost of obtaining the legal protection is justified from business point of view.

In other words, for the management of the portfolio of intellectual property efficiently substantial knowledge of the subject is very essential. Such knowledge will facilitate evaluation of the intellectual property generated, ensuring timely and effective production of such property to enhance its value and utilize it for forging strategic allowances to derive maximum economic benefits.

15.4 TRADE RELATED ASPECTS OF INTELLECTUAL PROPERTY (TRIPS)

The Trade Related aspect of Intellectual Property (TRIPS) in the GATT agreement covers seven categories. These are trademarks, copyrights, geographical indications, industrial designs, patents, integrated circuits and trade secrets. The principal objectives of the TRIPS are to establish certain norms and standards to be followed by the member countries in respect of IPR, especially in the area of patents.

The main provisions of the TRIPS in the Agreement relating to patents are:

- The member countries to provide product production in all the fields of Science & Technology without any exception,
- The duration of the patents to be uniformly at least 20 years from the date of filing.
- The grant of compulsory license to be given on the individual merits of the case and after approaching the owner of the patent for obtaining license of reasonable terms and conditions,
- The burden of proof in the cases of process patents leading to the production new products to be placed on the defendant in the circumstances enumerated in the agreement,
- Availability of patent right regardless of whether the products are locally produced or imported,
- Providing protection for the microorganisms and microbiological processes, and
- Enactment of an effective system for the production of new plant varieties.

Out of the seven categories it is mainly in the area of patents that the norms and standards envisaged in the TRIPS, there are some difficulties in complying with the requirements particularly by the developing countries. The difficulties are due to the differences in their own policies and regulations. For example, in India the patents law permits only “process” protection in food, pharmaceutical and chemical sectors. In other words product production in these areas are not possible. The term of patent is only seven years from the date of filing or five years from the date of grant

whichever period shorter. Every patent granted in the above said three areas will be deemed to be endorsed with the words “licenses of right” after the expiry of three years from date of grant.

15.5 COPYRIGHT

Copyright is the right to copy and make use of literary, dramatic, musical, artistic works, cinematographic films, records and broadcast. Copyright is a proprietary right of the artist, author or creator and comes into existence as soon as the work is created. After the 1984 amendment of Copyright Act, it is no possible to protect computer programs/ software under this legislation. Copyright Act, 1957 is administered by Registrar of Copyrights, New Delhi. “Copyright” is the exclusive right of the author in artistic, musical or literary works for a specified period. Both civil and criminal proceeding can be initiated against violation of copyright. The author or his legal heir can restrain or claim damages in respect of distortion alteration or modification of the work which would be prejudicial to his honor or reputation. In other words a Copyright Owner has the exclusive right to reproduce, publish and sell the matter, broadcast, perform in public, make cinematographic film, translate, adopt etc.

Meaning of Copyright

Copyright means the exclusive right in the case of literary, dramatic or musical work:

- To reproduce the work in any material form
- To publish the work
- To perform the work in public
- To produce, reproduce, perform or publish any translations of the work
- To make any cinematograph film or a record in respect of the work
- To communicate the work by radio diffusion or by loudspeaker
- To make any adoption of the work

Similarly copyright exists in artistic work, cinematographic film and records.

Copyright is granted in respect of the “expression” only and not in respect the idea itself.

Registration of Copyright

Registration of Copyright is not compulsory. The advantage of copyright registration is that the particulars of a work once entered in the register of copyright constitute prima facie evidence of ownership in the work.

Benefits of Copyright

Author, artist or creator of a literary, dramatic, musical or artistic work, cinematographic film, record or software is entitled to make exclusive use of the work.

Copyright Extended to Computer Software

The concept of copyright, which earlier had its roots in the common law, subsequently comes to be governed by national laws in each country. With the 1984 amendment of Copyright Act and consequent enlargement of the definition of “literary work” it is now possible to protect computer programs (Software) under the Copyright Act.

Ownership of Copyright (Sec.17)

First owner of Copyright is the author or the creator of literary, dramatic, musical work, subject to the provision

- a) That in case of literary, dramatic or artistic work made by the author in the course of employment in a newspaper, magazine or similar periodical proprietor of the newspaper, magazine or the periodical so far as it relates to publication of the work in any newspaper, magazine or similar periodical. But in all other respects of the author is the owner of copyright.
- b) That in respect of photograph taken, painting or portrait drawn or an engraving or cinematograph film for valuable consideration at the instance of any person, such person is the owner of copyright in it,
- c) That a work made in the course of author’s employment other than (a) and (b) above the employer is the owner of copyright.

15.6 ASSIGNMENT OF COPYRIGHT

The Copyright Act 1957 recognizes assignment of copyright. But such an assignment must be in writing.

Term of Copyright

Original literary, dramatic, musical, artistic work enjoys copyright protection for the lifetime of the author plus 60 years. In the case or copyright in cinematograph and work of corporate bodies/Govt./International Organizations, the term of copyright is 60 years. In the case of broadcasting authority or an organization, the broadcasting reproduction right in respect of programme broadcast by it the term is a period of 25 years after the broadcast.

Benefit of Registration

Though there is no special benefit on account of Copyright Registration, such as registration is useful as evidence.

Infringement of Copyright

The “Act” confers on the owner exclusive rights of reproduction of the “work”. In case someone reproduces the work without a license it constitutes infringement. Such a right extends to translation or adoption of work. The law relating to industrial property such as trademarks and patents are being amended with a view to meet the requirements of Multilateral trading arrangement as India is a signatory to the agreement establishing

W.T.O. Fortunately the law relating to copyright has moved with times and we have succeeded in enacting a globally acceptable law on the subject.

15.7 DESIGN

The Design Act, 2000 is also administered by the Controller General of Patents, Design and Trade Marks.

“A design” is an idea or conception as to features of shape, configuration, pattern of ornament applied to an article. Such designs form a special branch of industrial property.

Registration of Design

Registration of design is possible only when it is identifiable either it's being embedded in actual article or on a paper in such a way that shape or other feature of the article are made clear to the eye. If the article is capable of being made in different materials included in different classes it is advisable to register the design in different classes. Registration of design grants exclusive right to promoter of design to apply the design to any article in any class in which the design is registered.

Validity Period of Registration

Registration of design grants the exclusive right to apply the design for a period of 5 years from the date of registration, which can be extended for further two periods of 5 years each.

Benefits of Registration of Design

The registration of a design upon the registered proprietor “Copyright” in that design for the period of registration. “Copyright” means the exclusive right to apply a design to any article in any class in which the design is registered. The duration of registration of design is initially 5 years from the date of application, which may be extended by two periods of 5 years each.

Before making of articles to which registered design has been applied, the proprietor of such design should ensure that the article are marked with the words REGISTERED or REGD and also the number appearing in the certificate of Registration (excepting classes, 9,13 or 14 where it is not practical to do so).

What is Registerable?

Design of an article

If the feature or shape, configuration, pattern or ornament given to the article by any individual process is new or original. The principle or mode of construction of the article cannot be registered as design. Further trademark or trade name or mere pictures or photographs cannot be registered as designs.

Novelty/Originality in Design

The novelty or originality of a design is judged solely by the eye with reference to external appearance of the finished article to which the design will be destroyed by the publication of the design. For the purpose of registration of design, goods to which the designs are to be applied are divided into fourteen classes.

Manner of Applying

A person claiming to be proprietor of design has to apply in Form 15 in case design is intended to be applied to a single article or in Form 17 in case it is intended to be applied to a number of articles. The application accompanied by the prescribed fee and four copies of the design may be forwarded to the Controller of Patents and Designs, Kolkata.

Payment of Fees

An application for registration of a design in any one of the classes No.1 to 14 should be accompanied with applicable fee in cash at the office or may be send by cheque, postal order, money order may payable to the controller of Patents and designs at Kolkata.

Marking of Articles

As stated above, where design registration has been effected, owner of a Registered design shall ensure that the articles to which the registered design are applied are marked with the word REGISTERED or an abbreviation REGD or RD as he may choose. Also the number appearing in registration certificate before making delivery of the said articles on sale. The requirement of this rule has been dispensed with as regards textile goods in which design printed or woven, other than handkerchiefs, and articles made by charcoal dust which are brittle and are not sold in single price.

15.8 RESTRICTIVE TRADE PRACTICE

Restrictive Trade Practice is a trade practice, which has the effect, actual probable, restricting, lessening or destroying competition. Such trade practices may tend to obstruct to the flow of production or to bring about manipulation of prices or conditions of delivery etc. to the common detriment.

Types of Restrictive Trade Practices

The following are the certain common types of restrictive trade practices:

Concert of Collusion-Cartels:

That is a collusive action on the part of manufacturing or suppliers in fixing prices or terms of sale to lesson competition, concert amongst manufacturers/suppliers to divide markets to eliminate competition.

Discriminatory Dealings and Price discrimination:

This is a practice of selling goods and services where there are no or nominal cost differences at different effective prices to district and separate group of customs.

Predatory (Loss header) Pricing:

This practice of temporarily selling at price below cost with the intention of driving out existing competitors or warding off competitors about to enter into the market so that the market power of the person resorting to such a trade practice is either enhanced or maintained.

Tie-Up Sales:

Manufacturers or suppliers of fast moving products may tie-up sales of such products with slow moving products resulting in competition in the field of slow moving products.

Full-Line Forcing:

This is the practice that requires a buyer to purchase quantities of each item in a product range in order to be able to buy any one of them. This is a more drastic variation of tie-up sales.

Exclusive Dealing:

This is a trade practice in which the supplier or the manufacturer insists that the dealer will exclusively deal with the products of the manufacturer/supplier, that is to say he will not deal with products of the competitor/competitors.

Territorial or Area Restriction:

This is a trade practice whereby a restriction is placed by the manufacturer on the dealer to make supplies only within a fixed area or designed territory and not sell beyond the area.

Re-sale price maintenance:

This is a trade practice under which a manufacturer fixes prices at which a retail shop must re-sell his product to the public or at which a wholesale business must re-sell that product to retailer.

Refusal to Deal:

A mere refusal to deal with one particular party would not amount to a restrictive trade practice, Refusal to deal covers vertical agreements between a manufacturer/seller and buyer that-(i) the buyer shall not sell the goods obtained from that seller to a particular person/class of persons, or (ii) the manufacturer/seller shall not sell his goods to anyone else but that buyer/class of buyers. It covers all concerted refusal to deal, group boycott of dealers or suppliers etc., whether the refusal to deal is restrictive or not would depend on its effect on competition and whether it result in or is likely to result in foreclosing markets to competitors and/or to coerce dealers to adopt trade practices which they might not otherwise adopt.

Controlling of Manufacturing Process:

Section 33 (1) (h) relates to any agreement not to employ or restrict the employment of any method, machinery or process in the manufacture of goods.

15.9 OBJECTIVES OF INDUSTRIES (DEVELOPMENT & REGULATION) ACT, 1951

The Industries ((Development & Regulation) Act, 1951 came into force on 8th may 1952, It has been amended from time to time, the latest being in 1991. The objectives the industries (Development and Regulation) Act, sought to accomplish were as follows:

- The regulation of industrial investment and production according to plan priorities and targets.
- Protection of small entrepreneurs against competition from large industries.
- Prevention of monopoly and concentration of ownership of industries.
- Balanced regional development with a view to reducing disparities in the levels of development of different regions of the economy.

It was hoped that through the instrument of industrial licensing, the State would be able to

- 1) Direct investment into the most important branches,
- 2) Correlate supply and demand in the domestic market,
- 3) Eliminate competition, and
- 4) Ensure the optimum utilization of social capital.

Main Provisions of IRDA Act

The following are the main provision of the Act:

- All scheduled undertaking should be registered with the Government.
- All undertaking which wish to have substantial expansion should get licenses from the Government. Similarly, all new undertaking should also obtain licenses from the Government.
- The Government was empowered to enquire into the affairs of any scheduled undertaking.
- If any undertaking failed to abide by the instructions of the Government, the Government was empowered to take over defaulting industry.
- Licenses are to be obtained and categories on the basis of new industries having substantial expansion, industries engaged in the production of new articles, industries seeking change of location and industries carrying on business.
- An advisory licensing body was set up with the representation of planning commission and the ministries to advise the government in the matters dealing with issue and grant of licenses.

Scope and Coverage of the Act

The Act confers very wide power on the Government in relation to industries. The main provisions of the Act are given below;

- It provides for the registration of the existing industrial enterprises.
- The Act empowers the Government to start an investigation into the affairs of any industrial undertaking in the case of unsatisfactory working of the undertaking and can even take it under its own management if it fails to carry out its instructions.
- It provides for the licensing of new industrial undertaking. Licensing is a permission from the Government which may include conditions such as the location, minimum size etc. License is required for (a) the establishment of new industrial undertaking pertaining to a scheduled industry; (b) substantial expansion to produce the same item or diversification to produce a new license but which has not been licensed previously; and (c) change of location of licensed/registered undertaking.
- The Act also provides for the establishment of (a) a central Advisory Council to advise the Government on the regulation and development of scheduled industries. (b) a Development council to each major industry, and (c) a Licensing Committee.

REVIEW QUESTIONS

1. What do you understand by Intellectual Property Rights?
2. State the distinction between Industrial Property and Intellectual Property?
3. Write short notes on (a) Patents (b) Copyrights (c) Industrial Designs (d) Trade Marks (e) TRIPS.
4. What are the objectives of regulating restrictive trade practices?
5. What are the 'gateways' by which restrictive trade practices are allowed to continue?
6. Briefly explain the procedure of the IDR Act 1951 for regulating scheduled industries.

Chapter - 16

Cyber Laws

16.1 INTRODUCTION

New communication system and digital technology have made dramatic changes in the way we live and the means to transact our daily business. There is a remarkable change in the way people transact business. Businessmen are increasingly using computers to create, transmit and store and retrieve and speedier to communicate. Although people are aware of the advantages which the electronic form of business provides, people are reluctant to conduct business or conclude and transaction in the electronic form, due to lack of appropriate legal framework.

The government of India realized the need for introducing a new law and for making suitable amendments to the existing laws to facilitate e-commerce and give legal recognition to electronic record and digital signatures in turn will facilitate the conclusion of contracts and the creation of legal rights and obligations through the electronic communication like internet. This gave birth to the Information Technology Bill, 1999. In May 2000, both the houses of the Indian Parliament passed the Information Technology Bill. The Bill received the assent of the President in August 2000 and came to be known as the Information Technology Act, 2000. Cyber laws are contained in the IT, Act, 2000. This Act aims to provide the legal infrastructure for e-commerce in India and would have a major impact for e-businesses and the new economy in India.

16.2 OBJECTIVES OF THE ACT

The Objectives of the Act are:

- To grant legal recognition for transactions carried out by means of electronic data interchange and other means of electronic communication commonly referred to as “electronic commerce” in place of paper based methods communication;
- To give legal recognition to digital signature for authentications of any information or matter which requires authentication under any law;
- To facilitate electronic filing of documents with government departments;
- To facilitate electronic storage of data;
- To facilitate and give legal sanction to electronic fund transfers between banks and financial institutions;
- To give legal recognition for keeping books of account by bankers in electronic form, Evidence Act, 1891 and the reverse bank of India act, 1934.

16.3 SCOPE OF THE ACT

The Act extends to the whole of India and unless otherwise provided I the Act, it applies also to any offence or contravention there under committed outside India by any person.

The Act shall not apply to the following:

- A negotiable instrument as defined in section 13 or Negotiable Instrument Act 1881;
- A power-of-attorney as defined in section 1 A of the Power of Attorney Act, 1882;
- A trust as defined in Section 3 of the Indian Trusts Act, 1882;
- A will as defined in Section 2 (R) of Indian Succession Act, 1925 including any other testamentary disposition by whatever name called;
- Any contract for the sale or conveyance of immovable property or any interest in such property.
- Any such class of documents or transaction as may be notified by the Central Government in the Official Gazette.

16.4 DEFINITIONS (SECTION 2)

- a) “Access” with its grammatical variations and cognate expressions means gaining entry into, instructing or communicating with the logical, arithmetical, or memory function resources of a computer, computer system or computer network;
- b) “Addressee” means a person who is intended by the originator to receive the electronic record but does not include any intermediary;
- c) “Affixing digital signature” with its grammatical variations and cognate expressions means adopting of any methodology or procedure by a person for the purpose of authentication an electronic record by means of digital signature;
- d) “Appropriate Government” means the Central Government except in the following two cases where it means the State Government:
 - (i) in matters enumerate in List II of the Seventh Schedule to the Constitution;
 - (ii) relating to any state law enacted under List III of the Seventh schedule to the Constitution.
- e) “A symmetric Crypto System” means a system of a secure key pair consisting of a private key for creating a digital signature and a public key to verify the digital signature;
- f) “Computer” means any electronic magnetic, optical or other high-speed data processing device or system with performs logical, arithmetic, and memory functions by manipulations of electronic, magnetic or optical impulses, and includes all input output, processing, storage, computer software, or communication facilities which are connected or related to the computer in a computer system or computer network;
- g) “Computer network” means the interconnection of one or more computer through:

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- (i) The use of the satellite, microwave, terrestrial line or other communication media;
and
 - (ii) Terminals or a complex consisting of two or more interconnected computer whether or not the interconnection is continuously maintained;
 - h) “Computer resources” means computer, computer system, computer network, data, computer data base or software;
 - i) “Computer system” means a device or collection of devices, including input and output support devices and excluding calculators which are not programmable and capable of being used in conjunction with external files, which contain computer programmes, electronic instructions, input data and output data, that performs logic, arithmetic, data storage and retrieval, communication control and other functions,
 - j) “Data” means a representation of information, knowledge, facts, concepts or instruction which are being prepared or have been prepared in a formalized manner, and is intended to be processed, is being processed or has been processed in a computer system or computer network, and may be in any form (including computer printouts magnetic or optical storage media, punched tapes or stored internally in the memory of the computer;
 - k) “Digital signature” means authentication of any electronic record by a subscriber by means of an electronic method or procedure in accordance with the provisions of Section 3;
 - l) “Electronic form” with reference to information means of any information generated, sent, received or stored in media, magnetic, optical, computer memory, micro film, computer generated micro fiche or similar device;
 - m) “Electronic record ” means data, record or data generate, image or sound stored, received or sent in an electronic form or micro film or computer generated micro fiche;
 - n) “Function” in relation to a computer, includes logic, control arithmetical process, deletion, storage and retrieval and communication or telecommunication form or within a computer;
 - o) “Information” includes data, text, images, sound, voce, codes, computer programmes, software and databases or micro film or computer generated micro fiche;
 - p) “Intermediary” with respect to any particular electro message means any person who on behalf of another person receives stores or transmits that message or provides any service with respect to that message;

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- q) “Key pair” in an asymmetric crypto system, means a private key and its mathematically related public key, which are so related that the public key can verify a digital signature created by the private key;
- r) “Originator” means a person who sends, generates, stores or transmits any electronic message or causes any electronic message to be sent, generated, stored or transmitted to any other person but does not include an intermediary;
- s) “Prescribed” means prescribed by rules made under this Act;
- t) “Private key” means the key of a key pair used to create a digital signature;
- u) “Public Key” means the key of a key pair used to verify a digital signature and listed in the Digital signature Certificate;
- v) “Secure system” means computer hardware, software, and procedure that:
- (i) are reasonable secure from unauthorized success and misuse;
 - (ii) provide a reasonable level of reliability and correct operation;
 - (iii) are reasonable suited to performing the intended functions; and
 - (iv) adhere to generally accepted security procedures;
- w) “Verify” in relation to a digital signature, electronic record or public key, with its grammatical variations and cognate expressions means to determine whether:
- (i) the initial electronic record was affixed with the digital signature by the use of private key corresponding to the public key of the subscriber;
 - (ii) the initial electronic record is retained intact or has been altered since which electronic record was so affixed with the digital signature.

16.5 CYBER REGULATIONS APPELLATE TRIBUNAL

The “Cyber Regulations Appellate Tribunal” has appellate powers in respect of order passed by any adjudicating officer. Civil courts have been barred from entertaining any suit or proceedings in respect of any matter which an adjudicating officer or Tribunal is empowered to handle.

Section 48 provides for establishment of one or more appellate Tribunals to be known as Cyber Regulations Appellate Tribunals. It shall consist of one person only (called the Presiding Officer of the Tribunal) who shall be appointed by notification by the Central Government. Such a person must be qualified to be a judge of a High Court or is or has been a member of the Indian Legal Service in the post in grade I of that service for at least three years. The Presiding Officer shall hold office for a term of five years up to a maximum age limit of 65 years, whichever is earlier.

Appeal to Cyber Regulations Appellate Tribunal

An appeal may be made by an aggrieved person against an order made by an adjudicating officer to the Cyber Appellate Tribunal. The appeal must be within forty five days from the date on which the order is received. The Cyber Appellate Tribunal may entertain an appeal after the expiry of the said period of forty-five days if it is satisfied that there was sufficient cause for not filing it within that period. However, no appeal shall be entertained if the original order was passed with the consent of both parties. The Tribunal after giving both the parties an opportunity of being heard shall pass the order as it thinks fit.

Power and Procedure of the Appellate Tribunal

Section 58 provides for the procedure and power of the Cyber Appellate Tribunal. The Tribunal shall also have the powers of the Cyber Court under the Code of Civil Procedure 1908.

Some of the powers specified are in respect of the following matters:

- Summoning and enforcing the attendance of any person and examining him on oath
- Requiring production of documents and other electronic records
- Receiving evidence on affidavits
- Reviewing its decisions
- Issuing commissions for examinations of witness, etc.

The appellant may either appear in person or may be represented by a legal practitioner to present his case before the Tribunal.

Section 60 provides for the period of limitation for admission of appeals from the aggrieved persons to the Cyber Appellate Tribunal.

Section 61 provides that no court shall have jurisdiction to entertain any suit or proceeding in respect of any matter which an adjudicating officer has jurisdiction to determine.

Power of Central Government to Make Rules

Section 87 of the Act confers on the Central Government the power to make rules by notifying in the Official Gazette and the Electronic Gazette, in respect of certain matters, some of which are;

- The manner in which any matter may be authenticated by a digital signature
- The manner and format in which electronic records shall be filed or issued
- The type of digital signature, manner and format in which it may be affixed

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- The security procedure for the purpose of creating same electronic record and secure digital signature
 - The qualifications, experience and terms and conditions of service of Controller, Deputy Controllers and Assistant Controllers
 - The period of validity of the license
 - The qualification, experience of an adjudicating officer, as well as other officers
 - The salary, allowances and terms and conditions of service of the presiding officer, etc.

Power of State Government to Make Rules

The State Government may be notification in the Official Gazette, make rules to carry out the provisions of this Act, Such rules may provide for all or any of the following matters:

- The electronic form in which filing, issue, grant receipt or payment shall be effected in respect of use of electronic records and digital signatures in Government and its agencies.
- The manner and format in which such electronic records shall be filed or issued and the fee or charges in connection of the same.
- Any other matter required to be provided by rules by the State Government. Every such rule shall be laid before each House of the State Legislature.

16.6 CYBER REGULATIONS ADVISORY COMMITTEE

The Cyber Regulations Advisory Committee shall be constituted by the Central Government. It shall consist of a chairperson and such member of official and non-official member as the Central Government shall deem fit. Such members shall have special knowledge of the subject matter or its interest principally affected. The committee shall advise the Central Government on any rules or any other purpose connected with the Act, and the Controller in framing regulations under this Act.

16.7 LIABILITY OF COMPANIES (SECTION 85)

Where a company commits any offence under this Act or any rule there under, every person who, at the time of the contravention, was in charge of and was responsible for the conduct of the business of the company shall be guilty of the contravention. However, he shall not be liable to punishment if he proves that the contravention took place without his knowledge or that he exercised all due diligence to prevent the contravention.

Further, where a contravention has been committed by a company, and it is proved that the contravention took place with the connivance or consent of or due to any negligence on the part of any director, manager, secretary or other officer of the company, such

officers shall be deemed to be guilty and shall be liable to be proceeded against and punished accordingly. For the purpose of this section, 'Company' includes a firm or other association of persons and 'director' in relation to the firm means a partner in the firm.

REVIEW QUESTIONS

1. What are the objectives of the Information Technology Act, 2000?
2. Define the following terms under the I.T. Act, 2000.
(a) Computer Network (b) Computer Resource (c) Digital signature (d) Electronic Record
3. Explain the following (a) Electronic Governance (b) Digital Signature Certification
4. What are the duties of certifying authorities under the I.T. Act, 2000?
5. What are the different types of penalties for damages to computer, computer system or Network under the I.T. Act, 2000?

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ABOUT THE BOOK

This book of Business Law is designed for those who are studying B.COM, BBA, M.COM and MBA. This book explains fundamental to advanced concepts of Business law in simple manner with detailed explanation. This book written in a student-friendly style, and focuses on importance of business legislations. Every effort has been made to make this book contemporary, exciting and visually appealing to encourage students to learn the law.



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