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THE INDIAN CONTRACT ACT 1872: INTRODUCTION TO LAW OF CONTRACT - AGREEMENTS & CONTRACTS

Unit Structure :

1.0 Objectives

1.1 Introduction

1.2 Meaning of Agreements

1.3 Meaning of Contracts

1.4 Essential Elements of Valid Contract

1.5 Summary

1.6 Questions

1.0 OBJECTIVES

After studying the unit, the students will be able to:

- Understand the meaning of Law.
- Know the meaning of Agreement and kinds of Agreement.
- Explain the meaning Contract and essentials of valid contract.

1.1 INTRODUCTION

Business law may be defined as that branch of legal system that regulates business activates and provides for an orderly conduct of business affairs and also for settlement of legitimate disputes in a just and systematic manner. In commercial and ordinary life, promises are made. Promise arises out of the acceptance of an offer or proposal. Sometimes, promises are performed, sometimes breach is committed. The Law of Contract deals with such promises which create legal obligations. This excludes those promises made in common life which may be morally binding but create no legal obligation (binding). These promises are made without a view to obtain the assent of the other.

The Law of Contract creates ***jus in personam and not jus in rem***. Right in personam means a right against a particular person or persons. Right in Rem on the other hand, is available against the whole world.

'Law in simple term means 'rules or the system of rules which a particular country or community recognizes as regulating the actions of its members

and which it may enforce by the imposition of penalties. It is a very wide term and includes different sets of rules regulating external human actions and conduct of individuals in their dealing with other individuals and with the Government.

Definitions of Law:

Salmond defined law as "the body of principles recognized and applied by the State in the administration of justice"

Holland defined law as "rule of external human action enforced by Sovereign Political Authority".

Austin has defined law as "A law is a rule of conduct imposed and enforced by the Sovereign".

The Indian Contract Act was passed and implemented to control various kinds of commercial and business activities. It deals with general principals of the Law of Contract and Special Contract.

The Contract Act came into force on 1st September 1872. The act is applicable to the whole of India except for the **State of Jammu and Kashmir**. The preamble of the Contract Act states where it is expedient to define and amend certain parts of the law relating to contracts. Therefore, this act is not a complete code of contracts.

The Law of Contract is the most important branch Business Law. It plays an important role in our day to day life and more in case of Trade, Commerce and Industry. The partnership Act, The sale of Goods Act, The Maharashtra Co-Operative Societies Act, The Negotiable Instruments Act, The Companies Act, Corporate Laws, The Consumer Protection act belongs to the law of contract but for technical reason are covered by separate Act

Meaning of Business Law:

Business law may be defined as that branch of legal system that regulates business activates and provides for an orderly conduct of business affairs and for settlement of genuine disputes in a systematic manner.

In commercial and ordinary life, promises are made. Promise arises out of the acceptance of an offer or proposal. Sometimes, promises are performed, sometimes breach is committed. The Law of Contract deals with such promises which create legal obligations. This excludes those promises made in common life which may be morally binding but create no legal obligation. These promises are made without a view to obtain the assent of the other. No value is given to such promises made. Such promises are not covered by the Indian Contract Act except for those provides under section 24 of the Act. Certain promise do not create legal obligation. Promises which do not give rise to legal obligations are not contracts. *For example,* A promise B to attend the dinner and fails to attend. This promise certainly does not create a legal obligation on the part of A to enable B to sue A for the price of non- consumed food. Law of Contract thus deals with agreements which create obligation. The Law of Contract creates *jus in*

personam and not jus in rem. Right in personam means a right against a particular person or persons. Right in Rem on the other hand, is available against the whole world.

Examples:

1. Amit Sells his Vehicle to Balram for Rs. 2 lakh. Amit has right to recover the price of the car from Balram only. The right of Amit is a ‘‘right in personam’’ i.e against a particular person Balram. This is *jus in personam.*

2. Savitri buys a Car and becomes the owner of the car. She has right to have a quiet possession of the car and enjoy against the whole world. Nobody in the world can disturb her right. The right of Savitri is *jus in rem,* i,e right against the whole world.

1.2 MEANING OF AGREEMENTS

Meaning:

Section 2 (e) of the Indian Contract Act defines an agreement as under:

“Every promise and set of promises, forming the consideration for each other is an agreement”.

The term ‘agreement’ for a common man means “to agree”. Here, one person offers or proposes to another, and the later agrees to the offer or proposal made. This results in an agreement.

Example: P offers to take **Q** for Movie and **Q** agrees to with **P** this results in an agreement. in the above example. **P** may be called an ‘Offeror’ or ‘Proposer’ or ‘Promisor’ While **Q** may be called an ‘Offeree’ or Acceptor or ‘Promise’.

It should be noted that a mere promise by two parties would not constitute an agreement. Offer and acceptance together constitute an agreement. Agreement is a promise or a set of reciprocal promises.

Hence: **Agreement = Offer + Acceptance.**

Agreement can also be a set of Promises, like **‘ P’** offers to take ‘**Q’** for movie and ‘**Q’** agrees to take **‘P’** to a restaurant after the show. Both agree**.**

The scope of an agreement is infinite, as one can enter into any kind of an agreement be it legal, illegal, impossible to perform etc. Though one can enter into any kind of agreement, all agreements may not be enforceable in the court of law if any party does not fulfill his obligation. In the above example if **‘Q’** fails to turn up at the thereafter agreeing to come. ‘P’ cannot go to the court. On the other hand, contract is an agreement which is enforceable. So Contract is an offer which when accepted is enforceable in the court of law, if any of the party backs out of his obligation.

Hence:

Contract = Offer + Acceptance+ Enforceability What is Enforceability?

It means an agreement which create some legal obligation; if this agreement is not followed by any party to contract, he can be sued.

Kinds of Agreements:

1. **Valid Agreement:**

   A valid agreement is one which is enforceable by law.

2. **Void Agreement:**

   An agreement not enforceable by law is said to be void [U/s 2(g)]. It has not legal existence at all and is without any legal effect. It does not give rise to any rights and obligations. Unlawful agreements are examples of void agreements. A Void agreement is not enforceable by law as they are opposed to the public policy like agreements in restraints of trade or in restraint of marriage or in restraint of legal proceedings.

3. **Enforceable Agreement:**

   An agreement enforceable by law is a contract [Sec. 2(h)]

4. **Voidable Agreement:**

   A voidable agreement is one 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. A Voidable agreement is valid so long as it is not avoided by the party entitled to do so.

5. **Unenforceable Agreement:**

   An unenforceable agreement is valid in law but is incapable of proof because of some technical defect, for example, Promissory note which is not at all stamped or is insufficiently stamped. Law recognizes the validity of the promissory note but cannot enforce the same due to it being not at all stamped or insufficiently stamped.

6. **Illegal Agreement:**

   An illegal agreement is something against the law and public policy. It is *void ab-inito.* Illegal agreement often involves a commission of crime. They are opposed to the public morals and as such, parties to such agreements are punishable under Indian Penal Code (IPC).

1.3 MEANING OF CONTRACT

1.2.1 Meaning:

Law of Contract is that branch of law which deals with making of legally valid agreements and also for interpreting these agreements. The law of

Contract is the basis of business law because majority of the transactions in business, trade occupation, commerce and ever in profession and our day-to-day life are based on contracts.

In the words of Pollock **'every agreement and promises enforceable by law is contract'** Section 2(h) of the Indian Contract Act, 1872 states that **"an agreement enforceable by law is contract".** This definition gives us two ingredients are as under:

- An agreement
- Enforceable by law.

It means: **Contract=an agreement + enforceable by law**.

An agreement which is enforceable by a court or law is called a Contract. An agreement which is not enforceable by a court of law cannot be called contract. **For example:** An agreement between A & B to stab C and share the belongings of C acquired through such crime.

An agreement becomes a Contract when:-

1. Agreement is **not** declared void by law.
2. Agreement is made **for a lawful object**.
3. It is made by **free consent of parties**.
4. Parties are **competent to contract**.
5. Agreement is made for **lawful consideration.**

All of us enter into contracts everyday knowingly or unknowingly.

For example

a. Purchasing goods from a shop

b. Going to watch a Cinema

c. Boarding a train

d. Boarding a bus

e. Buying milk or newspaper in the morning. Etc.

1.4 ESSENTIAL ELEMENTS OF VALID CONTRACTS- SECTION 10

An agreement, to be enforceable by law, must possess the essential elements of a valid contract as contained in section 10 of the Indian Contract Act. According to Section 10, "All agreements are contract if they are made by the free consent of the parties, competent to contract, for a lawful consideration and with a lawful object and are not expressly declared to be void."

Essentials valid contracts:

1. Offer and Acceptance.

In order to create a valid contract, there must be a 'lawful offer' by one party and 'lawful acceptance' of the same by the other party.

2. Intention to Create Legal Relationship.

In case, there is no such intention on the part of parties, there is no contract. Agreements of social or domestic nature do not contemplate legal relations.

For Example:

- P invites Q to have a dinner and Q accepts it. If P fails to serve the dinner, Q cannot sue 'P' for non-performance. The invitation for dinner is a social agreement.
- An agreement to have a cup of tea at a friend's house is a social agreement. A friendly agreement cannot be called Contract.
- 'A' gives a promise to his son to give him a pocket allowance of Rupees one hundred every month. In case A fails or refuses to give his son the promised amount, his son has no remedy against A.

Case: -[Balfour vs. Balfour(1919)2 K.B.571].

Facts of the Case: A husband agreed to pay £30 to his wife every month while he was abroad. As he failed to pay the promised amount, his wife sued him for the recovery of the amount.

Held: She could not recover as it was a social agreement and the parties **did not intend to create any legal relations**

3. Lawful Consideration:

In other words of Pollock, "Consideration is the price for which the promise of the another is brought. "consideration is known as quid pro-quo or something in return. Consideration must be real and lawful. An agreement to do something for others without getting anything in return is not enforceable.

Example: P promises to pay Rs.1,00,000/- on a certain date to Q without any promise in exchange. This is not a valid contract**.**

Example : A agrees to sell his pen to B for Rs.300/- . Here for A, the consideration for the watch is the money he gets from B and for B, the consideration for the money he gives, is the watch**.**

- Consideration may be …
- In cash or kind

- A promise to do or not to do something
- Past, Present, Future.

4. Capacity of parties:

The parties to an agreement must be competent t contract. If either of the parties does not have the capacity to contract, the contract is not valid.

According the following persons are incompetent to contract.

(a) Minors

(b) Persons of unsound mind, and

(c) Persons disqualified by law to which they are subject.

5. Free Consent:

'Consent' means the parties must have agreed upon the same thing in the same sense. A contract is made when one person makes an offer and another person accepts the offer. This acceptance of the offer should be made without any force or threat or coercion. According to Section 14, Consent is said to be free when it is not caused by-(a) Coercion (b) Undue influence (c) Fraud (d) Mis-representation, (e) Mistake.

An agreement should be made by the free consent of the parties.

6. Lawful Object:

The object of an agreement must be valid. Object has nothing to do with consideration. It means the purpose or design of the contract. Thus, when one hires a house for use as a gambling house, the object of the contract is to run a gambling house.

For Example: A promised to pay Rs.2,00,000/- to B to kill Q. The killing of a person is punishable under the IPC. Therefore, the promise is unlawful and void.

The Object is said to be unlawful if-

(a) It is forbidden by law;

(b) It is of such nature that if permitted it would defeat the provision of any law;

(c) It is fraudulent;

(d) It involves an injury to the person or property of any other;

(e) The court regards it as immoral or opposed to public policy.

7. Legal Formalities:

An oral Contract is a perfectly valid contract, expect in those cases where writing, registration etc. is required by some statute. In India writing is required in cases of sale, mortgage, lease and gift of immovable property, negotiable instruments; memorandum and articles of association of a company, etc. Registration is required in cases of documents coming within the scope of section 17 of the Registration Act.

8. Certainty of Meaning:

According to Section 29,"Agreement the meaning of which is not certain or capable of being made certain are void." An agreement contains terms as decided by the parties. The terms of agreement must be certain and unambiguous. If the terms of an agreement are uncertain, it is not a valid contract.

For Example: A agreed to pay Rs.3 lakh to B for an ultra-modern decoration of his drawn room. The agreement is void because the meaning of the term 'ultra- modern' is not certain.

However, an agreement to agree is not a concluded contract [Punit Beriwala v. Suva Sanyal AIR 1998 Cal. 44]

9. Possibility of Performance:

If the act is impossible in itself, physically or legally, if cannot be enforced at law.

For Example: Mr. A agrees with B to discover treasure by magic. Such Agreements are not enforceable.

10. Not Declared to be void or Illegal:

The agreement though satisfying all the conditions for a valid contract must not have been expressly declared void by any law in force in the country. Agreements mentioned in Section 24 to 30 of the Act have been expressly declared to be void for example agreements in restraint of trade, marriage, legal proceedings etc.

All the elements mentioned above must be present, in order to make a valid contract. If any one of them is absent the agreement does not become a contract.

1.5 SUMMARY

- Law of Contract is that branch of law which deals with making of legally valid agreements and for interpreting these agreements.
- Every promise and set of promises, forming the consideration for each other is an agreement.
- Contract = Offer + Acceptance+ Enforceability

- **Essential Elements of Contract:** Offer and Acceptance. Intention to Create Legal Relationship. Lawful Consideration, Capacity of parties, Free Consent,

Lawful Object, Legal Formalities, Certainty of Meaning, Possibility of Performance, Not Declared to be void or Illegal,

1.6 QUESTIONS

1. What is an agreement?
2. Distinguish between Agreement and Contract.
3. Distinguish between Void Contract and Voidable Contract.
4. Enumerate the essentials of Valid Contract.
5. Explain the following terms:
   a. Business b. Law
   c. Agreement d. Contract
   e. Voidable agreement f. Void agreement
   g. Illegal Agreement h. Unenforceable Agreement

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THE INDIAN CONTRACT ACT 1872: INTRODUCTION TO LAW OF CONTRACT - CAPACITY OF PARTIES TO CONTRACT

Unit Structure :

2.0 Objectives
2.1 Introduction
2.2 Meaning of Capacity.
2.3 Minor's Contract
2.4 Agreements by persons of unsound mind
2.5 Persons Disqualified by Law
2.6 Summary
2.7 Questions

2.0 OBJECTIVES

After studying the unit, the students will be able to:

- Understand the meaning capacity of parties.
- Know the effects of agreements/contract entered into by incompetent persons.

2.1 INTRODUCTION

Section 11 of the Contract Act deals with the competency of parties and provides 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 disqualified from contracting by any law to which he is subject."

2.2 MEANING OF CAPACITY

Hence: Section 10 says, all agreements are contracts, if they are made by the parties competent to contract.

Section. 10 require that the parties shall be competent to contract.

Section .11 Who is competent to contract.-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

Hence:

Following persons are not competent to contract.

(a) Minor

(b) Person of unsound mind, and

(c) Person disqualified by any law to which they are subject. Contract entered into by the persons mentioned above are void.

Every person is competent to contract:

(a) Who is of the age of **majority.**

(b) Who is of **sound mind.**

(c) Who is **not disqualified** from making a contract.

Therefore, the following persons are not competent to contract

(a) A person who is a **minor.**

(b) A person of **unsound mind.**

(c) A person who is **disqualified** from making a contract.

Although the above-mentioned categories of persons are not competent to contract, yet they may sometimes be making some bargains, taking some loans, or be supplied with some goods by third parties, or be conferred with some benefits etc., the position of such person in such like situations is being discussed below.

2.3 MINOR'S CONTRACT

THE POSITION OF A MINOR

Who is a Minor?

A person who has not attained the age of majority is a minor. Section 3 of the Indian Majority Act, 1875 provides about the age of majority. It states that a person is deemed to have attained the age of majority when he completes the age of 18 years, except in case of a person of whose person or property a guardian has been appointed by the Court in which case the age of majority is 21 years.

EFFECTS OF MINORS AGREEMENTS.

A minor's agreement being void is wholly devoid of all effects. When there is no contract there should be no contractual obligation on either side.

1. An agreement with or by minor is void

Section 10 of the Indian Contract Act requires that the parties to a contract must be competent and Section 11 says that a minor is not a competent. But either section makes it clear whether the contract entered into by a minor is void or voidable. Till 1903, court in India

wee not unanimous on this point the privy council made it perfectly clear that a minor is not competent to a contract and that a contract by minor is void *ab initio.*

The landmark case relating to the effects of minor's agreements is..

MOHRI BIBI V. DHARMO DAS GHOSE (1903)

Facts of the Case: ' A' a minor borrowed Rs. 20,000/- from B and as a security for the same executed a mortgage in his favor. He became a major a few months later and filled a suit for the declaration that the mortgage executed by him during his majority was void and should be cancelled. It was held that a mortgage by a minor was void and B was not entitled to replacement of money.

2. No ratification

An agreement with the minor is completely void. A minor cannot ratify the agreement even on attaining majority, because a void agreement cannot be ratified. A person who is not competent authorize an act cannot give it validity by ratifying.

3. Minor can be a promise or beneficiary

If a contract is beneficiary to a minor it can be enforced by him. There is no restriction on a minor from bring a beneficiary, for example, being a payee or a promisee in a contract. Thus a minor is capable of purchasing immovable property and he may sue to recover the possession of the property upon tender of the purchase money. Similarly a minor in whose favor a promissory note has been executed can enforce it.

4. No estoppel against a minor

Where a minor by misrepresenting his age has induced the other party enter into a contract with him, he cannot be made liable on the contract. There can be no estoppel against a minor. It means he is not estoppel from pleading his infancy in order to avoid a contract.

5. No Specific performance except in certain cases

A minor's contract being absolutely void, there can be no question of the specific performance of such contract. A guardian of a minor cannot bind the minor by an agreement for the purchase of immovable property ; so the minor cannot ask for the specific performance of the contract which the guardian had no power to enter into.

But a contract entered into by guardian or manager on minor's behalf can be specifically enforced if

(a) The contract is within the authority of the guardian or manager.

(b) It is for the benefit of the minor.

6. No insolvency

A minor cannot be declared insolvent as he is incapable of contracting debts and dues are payable from the personal properties of minor and he is not personally liable.

7. Partnership

A minor being incompetent to contract cannot be a partner in a partnership firm, but under Section 30 of the Indian Contract Act , he can be admitted to the benefits of partnership.

8. Minor can be an agent

A minor can act as an agent. But he will not to be liable to his principal for his acts. A minor can draw, deliver and endorse negotiable instruments without himself being liable.

9. Minor as Shareholder

A minor, being incompetent to contract cannot be a shareholder of the company. If by mistake he become a member, the company can rescind the transaction and remove his name from register. But, a minor may, acting through his lawful guardian become a shareholder by transfer or transmission of fully paid shares to him.

10. Minor's Liability for Necessaries

A minor who enters into a contract to purchase food, shelter, clothing, medical attention, and/or there goods or services necessary to maintain the minor's well -being will generally be liable for the reasonable value of those goods and services even if the minor disaffirms the contract.

The case of necessaries supplied to a minor or to any other person whom such minor is legally bound to support is governed by section 68 of the Indian Contract Act. A claim for necessaries supplied to a minor is enforceable by law. But a minor not liable for any price that he may promise and never for more than the value of the necessaries. There is no personal liability of the minor, but only his property is liable.

2.4 AGREEMENTS BY PERSONS OF UNSOUND MIND

As stated earlier, as per Section 11 of the Contract Act, for a valid contract, it is necessary that each party to it must have a 'sound mind'.

Meaning of Sound Mind

Section 12 of the Contract Act defines the term 'sound mind' as follows: "A person is said to be of sound mind for the purpose of making a contract, if, at the time when he makes it, he is capable of understanding it and of forming a rational judgments as to its effects upon his interests."

According to this Section, therefore, the person entering into the contract must be a person who understands what he is doing and is able to form a rational judgment as to whether what he is about to do is in his interest or not. The Section further states that:

(i) A person who is **usually of unsound mind**, but **occasionally of sound mind**, may make a contract when he is of sound mind." Thus a patient in a lunatic asylum, who is at intervals of sound mind, may contract during those intervals.

(ii) A person who is **usually of sound mind**, but **occasionally of unsound mind**, may not make a contract when he is of unsound mind." Thus, a same man, who is delirious from fever, or who is so drunk that he cannot understand the terms of a contract, or form a rational judgment as to its effect on his interest, cannot contract whilst such delirium or drunkenness lasts.

Unsoundness of mind may arise from:

- **Idiocy** – (Congenital- by birth) : It is God given and permanent and congenital (by birth), and therefore he can never understand the contract and make rational judgments. The mental powers of an idiot are completely absent because of lack of development of the brain.

- **Lunacy or Insanity** - It is a disease of the brain. A lunatic loses the use of his reason due to some mental strain or disease. Of course he may have lucid intervals of sanity.

- **Drunkenness** – Mere drinking is not hindrance to enter into a contract. But drunken state of mind is a hindrance to enter into a contract. When a person is so drunk that he cannot form rational judgments about the terms and conditions of the contract then such contract is a void contract. But if he is at such a state of mind where he has consumed alcohol but he can still understand the terms and conditions of the contract then that contract is valid as he could understand the terms and conditions of the contract, that is why it is said that mere drinking is not an hindrance to contract.

It produces temporary incapacity, till the drunkard is under the effect of intoxication, provided it is so excessive as to suspend the reason for a time and create impotence of mind.

- **Hypnotism** - it also produces temporary incapacity, till the person is under the impact of artificially induced sleep;

- **Mental decay on account of old age, etc**- When such person is not capable of understanding the contract and its effect upon his inter4est, he cannot enter into contract. A lunatic is not permanently of unsound mind. He can enter into a contract during lucid intervals, i, e during a period when he is not of sound mind.

2.5 PERSONS DISQUALIFIED BY LAW

The third type of incompetent persons, as per section 11, are those who are "disqualified from contracting by any law to which they are subject."

Who are disqualified Persons?

1. **Alien Enemies:**

   An alien that is citizen of a foreign country living in India can enter into contracts with citizens of India during peace time, by observing the restrictions imposed by the government in that respect. On the declaration of a war between his country and India, he will become an alien enemy and cannot enter into contracts

2. **Convicts:**

   A convict is a person, who is sentenced by any competent court to the imprisonment. A convict cannot enter into a valid contract while he was undergoing sentence, His incompetency is over, when the period of his sentence is over or his punishment is suspended.

3. **Foreign sovereigns and ambassadors:**

   While entering into contracts with foreign sovereigns and ambassadors, one must be cautious because whereas they can sue others to enforce the contracts entered upon with them, they cannot be sued without obtaining the prior sanction of the central Government as they are in a privileged position and are ordinarily considered incompetent to contract

4. **Company/ Corporation**:

   Company is also a person in the eyes of law. It is the creation of law for performing certain works. Such person has less significant capacity in comparison to natural person to make a contract. It is empowered by its memorandum. Corporation or Company can involve in to a contract within the jurisdiction of the memorandum and article of association if they cross the jurisdiction of memorandum and article of association that would be void.

2.6 SUMMARY

Following persons are not competent to contract
(a) A person who is a **minor.** (b) A person of **unsound mind.**(c) A person who is **disqualified** from making a contract.

EFFECTS OF MINORS AGREEMENTS.

A minor's agreement being void is wholly devoid of all effects. When there is no contract there should be no contractual obligation on either side. 1. **An agreement with or by minor is void,** 2. **No ratification,**3. **Minor can be a promise or beneficiary,,**4. **No estoppel against a minor ,**5. **No**

Specific performance except in certain cases, 6. **No insolvency,**7. **Partnership**

8. **Minor can be an agent,** 9. **Minor as Shareholder,**10. **Minor's Liability for Necessaries**

Unsoundness of mind may arise from:

Idiocy Lunacy or Insanity - Drunkenness – Hypnotism - Mental decay on account of old age, etc-

PERSONS DISQUALIFIED BY LAW

The third type of incompetent persons, as per section 11, are those who are "disqualified from contracting by any law to which they are subject."

Who are disqualified Persons? **1. Alien Enemies:2. Convicts:3. Foreign sovereigns and ambassadors: 4. Company/ Corporation**:

2.7 QUESTIONS

1. What are the capacities of the parties to the contract?
2. Write an elaborate note on Effects of Minors Agreement
3. Explain the status of an agreement entered into by a person of unsound mind.

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3

FREE CONSENT AND CONTRACT

Unit Structure :

3.0 Objectives

3.1 Introduction: Consent

3.2 Free Consent.

3.3 Coercion (Section 15)

3.4 Undue Influence (Section 16)

3.5 Fraud (Section 17)

3.6 Misrepresentation (Section 18)

3.7 Mistake (Section 20)

3.8 Summary

3.9 Questions

3.0 OBJECTIVES

After studying the unit the students will be able to:

- Know the meaning of consent
- Explain the meaning and effects of Coercion
- Know the Meaning and effects of Undue influence.
- Understand the meaning and effects of Misrepresentation.
- Know the Meaning and effects of Mistake.
- Explain the meaning and effects of fraud.

3.1 INTRODUCTION : CONSENT

Section 13 of Indian Contract Act "Consent" has defined as -Two or more persons are said to consent when they agree upon the same thing in the same sense (i, e *Consensus ad idem*)

The word Consent means agreeing that something should be happen. An agreement is valid only when it is the result of the free consent of all the parties to it.

3.2 FREE CONSENT

Section.14 defines "Free consent" as,

Consent is said to be free when it is not caused by-

- Coercion, as defined in section 15, or
- Undue influence, as defined in section 16, or (3) fraud, as defined in section 17, or (4)
- Misrepresentation, as defined in section 18, or
- Mistake, subject to the provisions of sections 20, 21 and 22. 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.

Free consent is one of the most important essential elements of a valid contract. The term free consent refers to meeting of free and fresh minds of two parties of an agreement when two parties take and understand, purpose, subject matter and terms and conditions of the agreement in the same sense it is free consent. Both of them must take things in the same way. They must not understand it in different way.

Two persons are said to consent, when they agree upon the same thing in the same sense. It is also known as consensus-ad- idem, which means identity of mind.

3.3 COERCION (SECTION 15)

"**Coercion"** is the committing, or threatening to commit, any act forbidden by the Indian Penal Code under (45 of 1860), 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 an agreement.

Example, "**A**" threatens to shoot "**B**" if she doesn't marry with him **"B**" marries "**A**" under threat. Since the marriage has been brought about by coercion, such marriage is not valid.

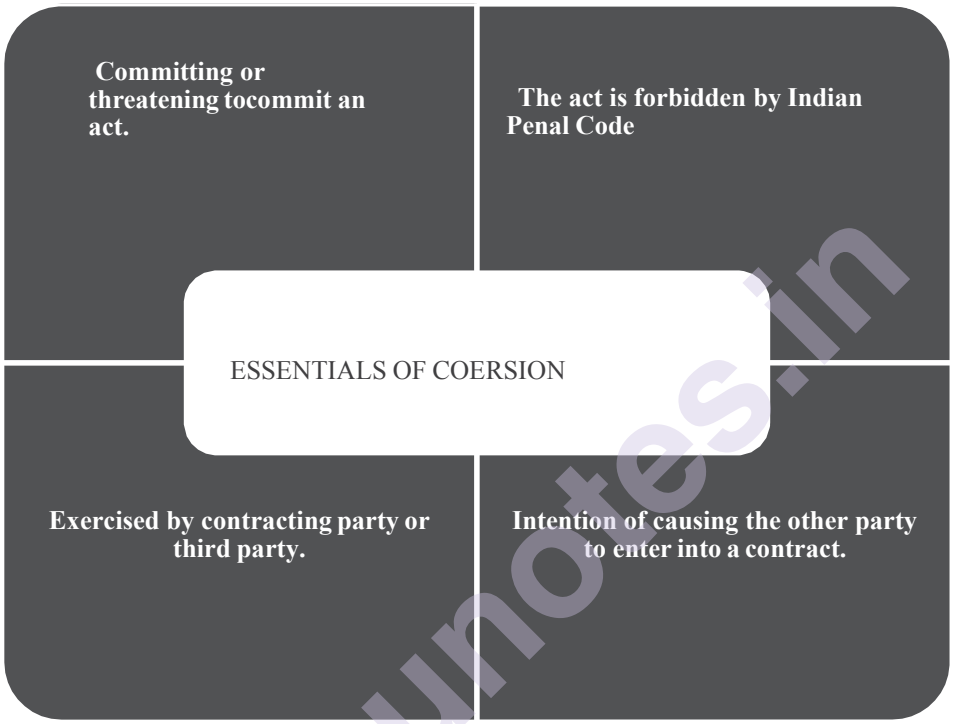
In simple words, coercion is the threat used by one party against another for compelling him to enter an agreement against his or her will. Section 15 of the Indian Contract Act defines coercion as the committing or threatening to commit any act forbidden by Indian Penal Code or an unlawful detaining or threatening to detain, any property of any person with the intention of inducing any person to enter into an agreement. It is immaterial whether the Indian Penal Code is or not in force in the place where the coercion is employed.

When a **person was forced to enter into a contract** by use or under the threat of use of physical force by the other person committing or threatening

to commit any act forbidden by Indian Penal Code, Coercion is said to have been employed.

EFFECT OF COERCION ON A CONTRACT:

- The contact becomes **voidable** at the option of the aggrieved person/party, the aggrieved party has two options may compel the other party for performance.
- If the aggrieved party decides to set aside the contract, he must compensate any benefits received by him under such contract.



Committing or threatening to commit an act.

Coercion means forcing someone to enter into a contract against their will. When threats are used under pressure to achieve the party's consent, i.e. it is not free consent.

Coercion may involve the actual infliction of physical and psychological harm in order to enhance the credibility of a threat. Then the threat of further harm can lead to the threatened person's cooperation or obedience.

Contract entered into by coercion is voidable. It implies that at the option of the party whose consent was not free, the contract is voidable. The aggravated party will, therefore, determine whether to enforce the contract or to cancel the contract.

Example

'SALMAN ' went out for an evening walk, 'CHALU PANDEY approaches 'SALMAN with a stranger, taken out his gun and asks 'SALMAN to give all his belonging to him immediately, otherwise he will shoot SALMAN,

he has removed all the belongings and handed over to the CHALU PANDEY . The consent of 'SALMAN' was obtained by coercion here.

The act must be forbidden by Indian Penal Code:

The word act prohibited by the Indian penal code makes it necessary in a civil action for the court to decide whether the alleged act of coercion is amount to an offence. A threat of bringing a false charm with the object of making another do a thing amount to blackmail or coercion.

In the case of **Ranganayakamma v Alwar Setti**, where the widow was prohibited from removing the corpse of her husband until she consented for the adoption. The court said that her consent was not free and it was coerced. It is clear that coercion is committing or threatening to commit any act which is contrary to law.

The act is forbidden by Indian Penal Code

Coercion can be exercised by contracting party or third party:

It does not always requires that only contracting party should exercise the coercion. Any third party on behalf of him can also exercise the same,

For Example: Mr. Amar employs Mr. Tapori to bit Mr. Sojwal to make Mr. Sojwal part with Rs. 1,00,000/-

Intention of causing the other party to enter into a contract:

It is required, that the coercion must be committed with the intention to make the person to enter into the contract by inducing the party wrongfully for obtaining assent or consent.

3.4 UNDUE INFLUENCE (SECTION 16)

Meaning:

It is a wrong pressure put on someone which prevents that person from acting independently.

(Section 16(2)) States that "A person is deemed to be in a position to dominate the will of another.

For Example-Spiritual adviser inducing his/her devotee to gift over

the property for securing "moksha".

Undue influence means and includes:

Under undue influence a party is compelled to enter into an agreement against his own will as a result of unfair persuasion by other party. It includes mental, moral and physical domination that deprives or makes unable the person to take his own judgement.

In dealings between parent and child, husband and wife, attorney and client, or doctor and patient, undue influence is generally presumed to have been exercised unless proven otherwise.

Following situation or circumstances, a person is deemed to be in a position to dominate the will of others.

- Where he holds **a real or apparent authority over the other**. For example, an employer may be deemed to be having authority over his employee.
- Master and Servant
- Parent and child
- Where he stands in a **fiduciary relationship** to other,
- The relationship of Solicitor with his client,
- Spiritual advisor and devotee.
- Doctor and Patient
- Guardian and Child.
- Where he makes a contract with a person whose **mental capacity is temporarily or permanently affected by the reason of age, illness or mental or bodily distress**"

Effects of Undue Influence:

When consent to an agreement is caused by undue influence, the contract is voidable at the option of the party whose consent was so caused. Any such contract may be set aside either absolutely, or if the party who was entitled to avoid it has received any benefit there under. Only a party to the contract can avoid or rescind the contract. This right does not lie in the hands of a third party.

Illustrations:

1) **A's** son has forged **B**'s name on a promissory note. **B,** under threat of prosecuting **A's** son, obtains a bond from **A**, for the amount of the forged note. If **B** sues on this bond, the Court may set it aside.

2) **A**, a money lender advances Rs 100 to **B**, an agriculturist and by undue influence, induces B to execute a bond for Rs 200 with interest at 6 per cent per month. The Court may set the bond aside ordering B to repay Rs 100 with such interest as may seem just.

Basis	**Coercion**	**Undue Influence**
Meaning	It refers to physical threat or force used by one party against the other for making him to enter into a contract.	It is said to exist when one of the parties to the contract obtains, through dominance, consent of another party to enter into a contract.

Nature	Consent is obtained under the threat of an offence	Consent is obtained by the dominant will of another.
Medium	Consent is obtained by force.	Consent is given in good belief but under moral influence.
Liability	Under the Indian Penal Code. Coercion is punishable	Thereis no criminal liability.
Force	Includes Physical force	Includes Mental force.

3.5 FRAUD (SECTION 17)

Meaning:

"Fraud" means and includes any act or **an active concealment of material facts** or misrepresentation made knowingly by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto of his agent or **to induce him to enter into the contract.**

"A false representation of fact made with the knowledge of its falsehood without belief in truth with intention that it should be acted upon by the party and actually inducing him to act upon it."

Section 17 of the Contract Act states,

"Fraud means and any of the acts stated 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 a contract."

It must have been committed by a party to the contract or by his agent in order to deceive the other party.

Example 1: Mr. Shah purchases the lan d from Mr. Khan, who has already sold his land to Mr. Rahul. In this example, Mr. Khan had committed fraud because he did not tell to Mr. Shah that i have already sold this land to Mr. Rahul.

Example 2: Mr. Amur tells Miss. Jolly knowing it to be false that his cow is pregnant. On this suggestion Miss. Jolly agrees to buy cow Rs. 45,000. It is a fraud.

Example 3: Miss. Tina borrow Rs. 10,000 from Mr. Nash and promises to return it after one month without any intention of performing it. In this example Miss. Tina has no intention to return the money when she promises to pay. It is also a fraud.

The term 'fraud' includes all acts committed by a person with an intention to deceive another person. Deception means to make the person to enter into a contract by defrauding him.

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

According to Section 17, fraud means and includes any of the following acts done with intent to deceive or to induce a person to enter into a contract.

Essential Elements of Fraud:

1. **A False representation must be there.**

   A False statement made recklessly without inquiring whether it is true or false would amount to fraud. But if a statement which turns out to be false is made in the honest belief that it is true there is no fraud.

2. **The Active concealment of material fact.**

   If a person conceals or hides a fact which is material or important to the contract and it is duty to disclose it, it will be a case of fraud. Mere non- disclosure is not a fraud, where there is no duty to disclose.

3. **A promise made without any intention of performing it.**

   Where a person orders and obtains possession of goods with the intention of not paying for them, he commits fraud. The initial intention not to perform the promise that is being made is a necessary element to prove fraud.

4. **Any such act or omission as the law specially declares to be fraudulent.**

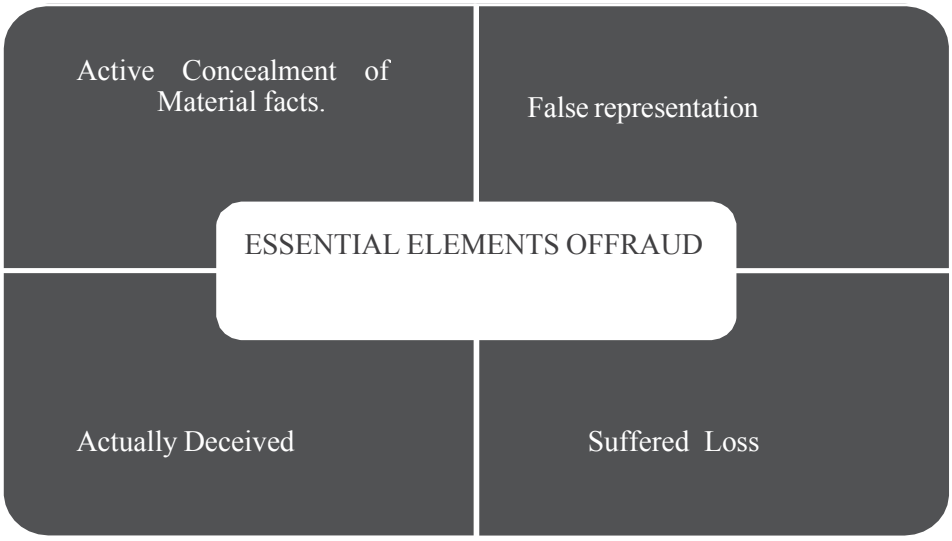
   It is fraudulent to conceive of any act that attempts to deceive law. Thus, where a contract is based against the policy of insolvency law, or a secret agreement is formed between the insolvent and the party, it is nothing short of a fraud on insolvency law.

5. **Suffering Loss.**

   The other party must have subsequently suffered some loss. There is no fraud without damage or damage without fraud does not give rise to an action.

For Example: M/S. GITANGALEE, Manufacturer of hair Shampoo. Claimed that whoever applies it, the hair will turn into Shiny and Smooth. Miss Riya believing in the statement bought the shampoo, applies on her hair, immediately her hair started falling.

ESSENTIAL ELEMENTS OF FRAUD



Whether mere Silence could lead to Fraud?

Mere silence is not fraud. Unless it was the duty of the person to speak or to provide any information as per act. A contracting party is not obliged to disclose each and everything to the other party. There are two exceptions where even mere silence may be fraud, one is where there is a duty to speak, and then keeping silence is fraud. Or when silence is in itself equivalent to speech, such silence is fraud.

A silence to the contract is under no obligation to disclose the whole truth to the other party. 'CAVEAT EMPTOR' *i.e.*, let the buyer beware is the rule applicable to contracts. There is no duty to speak is such cases and silence does not amount to fraud. Similarly, there is no duty to disclose facts which are within the knowledge of both parties.

Example : H sold to W some pings which to his knowledge suffering from fever. The pings were sold 'with all faults' and H did not disclose the facts of fever to W. Held there was no fraud. [Word v. Hobhs.) (1878) 4 AC 13]

Section17 makes it clear that mere silence as to the facts likely to affect the willingness of a person to enter into a contract is not fraud unless the circumstances of the case are such that regard being had to them it is the duty of person keeping silence to speak, or unless silence is equivalent to speech.

1. **Mere silence is not fraud:**

   A person is not bound to disclose the defect of his articles.

   Example: A sells by auction to **B,** a horse which **A** knows to be unsound. **A** says nothing to **B** about the horse's unsoundness. It is not fraud.

2. Silence is fraud if silence is equivalent to speech:

Again, where silence is equivalent to speech, silence amounts to fraud. For example, B says to A "If you do not deny it, I shall assume that the horse is sound." A says nothing. Here A's silence is equivalent to speech and as such, it is fraud.

Duty or obligation to speak:

In certain contracts, the law requires the parties to make full disclosure of material facts. Failure to disclose such facts would make the contract void or voidable. Such contracts are called ***Uberrimae fidei***, i.e., contracts requiring utmost good faith. In such contracts, party having any information regarding the subject-matter which is likely to affect the willingness of the other party to enter into transactions, is bound to disclose the information.

Following contracts are included in this category:

1. Contracts of insurance:

In contracts of insurance, the insured is required to disclose all material facts concerning the insurance which are likely to affect the risk and thus the willingness of the insurer. Failure to do so will result in avoidance of the policy. The policy can be avoided even if the mistake is innocent.

2. Contract of immovable property:

Under Sec. 55(i) (a) of the Transfer of Property Act, 1882, the seller is under an obligation to disclose to the buyer any material defect in the property or in the seller's title of which the seller is aware and the buyer is not aware, nor he (Buyer) could know with ordinary care.

Example: A knows that there is a crack in the Furniture. He sells this Furniture to **B** but does not disclose this defect to **B**. It is fraud .**B** can avoid the sale when he comes to know of the defect.

3. Allotment of shares in companies:

Companies Act requires the directors to make fullest possible disclosure in the prospectus to protect public interest, If the directors do not disclose the specified facts, the agreement to take shares can be avoided.

4. Contract of marriage:

Each party to an agreement for marriage is duty bound to disclose every material fact, otherwise the party is justified in breaking off the engagement.

Effects and Consequences of Fraud:

When consent to an agreement is caused by fraud, the agreement is a contract voidable at the option of the party whose consent was so caused.

A party whose consent to an agreement was caused by fraud has two remedies, namely:

- He may rescind the contract, or
- He may insist that the contract shall be performed and that he shall be put in the position in which have been, if the representation made had been true.

Example: A fraudulently informs **B** that **A's** estate is free from encumbrance. **B** thereupon buys the estates. The estate is subject to a mortgage. **B** may avoid the contract or may insist on its carried out and the mortgage debt repaid by **A.**

Apart from the above, the person defrauded may obtain rescission, restitution for damages. The aforesaid remedies are subject to an exception. A contract cannot be avoided on the ground of misrepresentation or silence amounting to fraud. If a party to whom an untrue or misleading statement was made had the means of discovering the truth with reasonable diligence. The party whose consent was obtained by fraud has the following rights:

1. Aggrieved party can avoid the contract.
2. He may also claim damages.
3. He, instead of avoiding the agreement, may insist that the contract shall be performed and may claim the difference or loss due to fraud.

In case of fraud the contract is voidable at the option of defrauded party. A party has the following three options:

1. Contract May be Avoided:

Defrauded party may avoid itself from the contract where his consent was obtained by fraud. In case of fraudulent silence, he cannot avoid if he had the means to discover the truth.

2. Act upon the Contract:

Second option for the defrauded party is that it may act upon the contract and may ask the other party to fulfill the terms and conditions of the contract.

3. Claims for Damages:

Third option for the defrauded party is that may claim for damages. Suit for damage can be filled.

3.6 MISREPRESENTATION (SECTION 18)

Meaning:

Introduction:

The Word '**Misrepresentation**' means a statement or positive assertion made by one party to the other, before or at the time of the contract relating to it.

Therefore, Misrepresentation is a false statement which the person making it **honestly, believes** to be true or which he does not know to be false.

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

Thus, misrepresentation means false representation made innocently with an honest belief as to its truth by a party without any intention to deceive.

The leading case on this point is:

DERRY V. PEEK (1889)

Facts of the Case: A representation in the prospectus of the Company that the company has been authorized by a special Act of Parliament to runs trams by steam or mechanical power. The authority to use steam was, in fact, subject to the approval of the board of Trade, but no mention was made of this. The Board refused consent and consequently the company was wound up. The plaintiff having bought some shares, sued the directors for fraud. But they were held not liable.

There is no fraud and they were not guilty of fraud as they honestly believed that once the parliament has authorized the use of steam, the consent of the board was practically concluded.

Essential Requirements of Misrepresentation:

- There should be a representation or positive assertion;
- Such representation must relate to a matter of fact which has become untrue; and
- It was made before the finalization of transaction with a view to induce the other party to enter into contract.
- It must actually have been acted upon by the party.
- It must have been either by the party himself or by his duly authorized agent.

Distinguish between Fraud and Misrepresentation.

FRAUD	MISREPRESENTATION
Defined Under Section 2 (17) of the Indian Contract Act, 1872	Defined Under Section 2 (18) of the Indian Contract Act, 1872
An intentional, deliberate false statement made by the person to deceive the party.	In misrepresentation the person making the false statement honestly believes it to be true.
The purpose of the fraud is to deceive the other parties to the contract.	There is no intention to deceive the other party when there is misrepresentation of fact.
The contract is voidable	Misrepresentation renders the contract voidable at the option of the party whose consent was obtained by misrepresentation.
Fraud, In certain cases is a punishable offence under Indian penal code.	Misrepresentation is not an offence under Indian penal code and hence not punishable.

3.7 MISTAKE (SECTION 20)

Meaning:

Mistake may be defined under **Section 20** of Indian Contract Act, 1872, as **"an erroneous belief about something"**. If the agreement is carried under an erroneous belief, it cannot be said that the parties enjoyed free consent i.e. both the parties shall understand the same thing in the same sense.

Mistake may be of two types:

1. **Mistake of law:**

   Mistake of law does not mean mistake in provisions of law but it means there is mistake in understanding or interpreting the provisions of any law by the party to contract. Hence mistake of law is where you are mistaken or ignorant about the law

2. **Mistake of fact:**

   A mistake of fact is just that: a mistake pertaining to some fact. For example, if you are 35 years old but I think you are 34, I have made a mistake of fact.

   A mistake of fact can act as a defense. Mistake of fact can be further divided as **bilateral** and **unilateral** mistake.

A. Bilateral Mistake:

As per Section 20 of the Act, where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement shall be void".

Example: A agrees to purchase **B's** Car for Rs. 90,000/- as a consideration. The day before execution of Contract the said car was destroyed by fire along with the garage. Both the party was unaware of the fact and still want to make a contract. This is a bilateral mistake from both the side and contract is not valid but void as the subject matter is destroyed.

B. Unilateral Mistake:

If the mistake is on the part of one person (One of the parties to the contract) the contract is valid.

Example: Amita brought Pickle from the shop keeper a sample of which had been shown to **Amita.** Erroneously **Amita** thought the pickle was old. The pickle was however new.

Hence bilateral mistake would avoid the contract whereas, unilateral mistake cannot.

Therefore, one party to the contract is under a mistake of fact, the contract is not voidable. Unilateral mistakes do not affect the validity of the contract unless they concern some fundamental fact and the other party is aware of the mistake.

A unilateral mistake may be:-

Mistake as to the nature of the transaction:

A contract shall be void if a party to the contract without any fault of his own makes a mistake about the changing nature of the contract. It may be because of blindness, illiteracy, or of the person entered the contract or due to the tactics or deliberate misrepresentation as to the nature of the document.

Case Study: 'Atul' Agree to sell his horse to **'Bunty'.** But unknown to both the parties, the horse had already died at the time of making of the Contract. Is it a valid contract? Why

Effects of Mistakes.

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 law not in force in India has the same effect as a mistake of fact.

Illustration:

A and **B** make a contract grounded on the erroneous belief that a particular debt is barred by the Indian Law of Limitation the contract is not voidable.

It is expected that everyone is supposed to know the law of the land. Ignorance of law is no excuse. If a person wants to avoid the contract for the reason that there was a mistake, the relief will not be granted to him.

- **Agreement void where both parties are under mistake as to matter of fact.**

Examples:

- '**A**' agrees to buy from **'B**' a certain horse. The horse was dead at the time of the contract, though both the party was aware of the fact. The agreement is void.
- '**A'** being entitled to an estate for the property of **'B'** , agrees to sell it to **'C'** . '**B** 'was dead at the time of the agreement, but both the parties were ignorant of the fact. The agreement is void.

When the type of mistake contemplated is section 20 is present in an agreement, the agreement is void. Section 20 requires that:

- Both the parties to the contract should be under a mistake.
- Mistake should as regard a matter of fact.
- The fact relating to which the mistake is made should be requisite to the agreement.

Distinguish Between Unilateral Mistake and Bilateral Mistake.

UNILATERAL MISTAKE	BILATERAL MISTAKE
One party is at mistake.	Both parties to contract is at mistake.
Contract is not Void or voidable.	Both parties to an agreement are under mistake of facts, agreement is void.
Provisions are applicable under section 22.	Provisions are applicable under section 20.

3.8 SUMMARY

- **Section 13 of Indian Contract Act "Consent" has defined** as -Two or more persons are said to consent when they agree upon the same thing in the same sense (i, e *Consensus ad idem*)
- Consent must be free from Coercion, Misrepresentation, Fraud, Undue Influence, and Mistake.
- "**Coercion"** is the committing, or threatening to commit, any act forbidden by the Indian Penal Code under (45 of 1860),
- Undue Influence- "A person is deemed to be in a position to dominate the will of another.

- "Fraud" means and includes any act or **an active concealment of material facts** or misrepresentation made knowingly by a party to a contract
- Therefore, Misrepresentation is a false statement which the person making it **honestly, believes** to be true or which he does not know to be false.
- Mistake may be defined under **Section 20** of Indian Contract Act, 1872, as **"an erroneous belief about something"**.

3.9 QUESTIONS

1. Define consent. When consent said to be free?
2. What is undue influence? State the effects of undue influence on the contract.
3. What is Coercion? Differentiate Coercion with Undue Influence.
4. What is Fraud? What are its essential elements?
5. Enumerate the effects of Mistakes.
6. Define the following terms:
   a. Consent
   b. Unilateral Mistake
   c. Fraud
   d. Misrepresentation
   e. Undue influence
   f. Coercion

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4

CONSIDERATION - LAWFUL CONSIDERATION AND LAWFUL OBJECT

Unit Structure :

4.0 Objectives

4.1 Introduction

4.2 Meaning and Definitions & Importance of consideration

4.3 Legal Rules of Consideration.

4.4 No Consideration No Contract Exceptions.

4.5 Types of Consideration.

4.6 Lawful Consideration and Lawful Object

4.7 Summary

4.8 Questions.

4.0 OBJECTIVES

After studying the unit**,** the students will be able to:

- Understand the meaning and definition of Consideration
- Know the essentials of valid consideration.
- Discuss the cases where an agreement though made without consideration will be valid.
- Explain the types of consideration.
- Know the meaning of Stranger to Contract and strange to consideration.

4.1 INTRODUCTION

Consideration is the foundation stone of every contract. The law enforces only those promises which are made for valid consideration. Where one party promises to do something, it must get something in return. This **'something in return'** is called consideration. Consideration is the **life-blood** of every contract.

If a promise is to be enforced as creating legal obligations, the law insists on the existence of consideration. A promise without consideration is null and void. It is called a naked promise or "***Nudum Pactum."*** **Thus**, if A promise to pay B Rs. 1000 without anything in return, this **constitutes** a bare promise and gives no right of action.

For a contract to be binding there must be valid consideration. Consideration is the promise given by both parties as the "price" of entering into the agreement. Without consideration there will be no contract.

For example, if **Anil** entered into an agreement with **Bhanu** for purchase of a Motor Car in exchange of nothing. Here there is no contract as the consideration value is nil.

In other case Anju entered into an agreement with Manu for Purchase of Motor car for Rs. 80,000/-, here the motor car is **consideration** for Manju and Rs.80,000/- is consideration for Anju. Hence here is a valid contract.

Consideration is in **Latin** term ***quid pro quo*** means something in return, it means Price for the Promise.

4.2 MEANING AND DEFINITIONS CONSIDERATION

Meaning and Definition:

Section **2(d)** of the Indian Contract Act defines consideration as under:

'When, at the desire of the promisor, the promise or any other person (i) has done, or abstained from dong or (ii) does or abstains from doing, or (iii) promises to do or to abstain from doing something, such act or abstinence or promise is called a consideration for the promise'.

Section 23 provides that agreement without consideration is void.

Definition: Consideration has been defined in many ways. According to **pollock" *Consideration is the price for which the promise of some other is brought and the promise thus given for value is enforceable.*"**

According to **Section 2 (d)** of the Indian Contract Act defines consideration as

(a) when at the desire of the promisor,

(b) the promise or any other person,

(c) has done or abstained from doing, or does or abstain from doing, or promises to do or abstain from doing,

(d) something, such act or abstinence or promise is called a consideration for the promise.

Example:- A agrees to dell his horse to B for Rs. 1000. Here A's promise to sell his horse is for B's consideration to pay Rs. 1000 is A's consideration to sell his horse to B.

4.3 LEGAL RULES OF CONSIDERATION.

Presence of consideration is one of the requisites of Valid Contract. Consideration must be of two directional natures. That means both parties should get benefited mutually. Then only the Contract becomes capable of

creating legal relations. Consideration may be in the form of cash, goods, act or Abstinence.

1. **Consideration must move at the desire of the promisor.** The consideration must move at the desire of the promisor. It is not necessary that it must be for the benefit of the promisor. It can be for the benefit of the third person also.

   Example: Prof. Vinayak is employed by an Institution to teach **Mercantile** Law, but he teaches "Economics". Prof. Vinayak has done **nothing** at the desire of the appointing authority i,e **Promisor**.

2. **Consideration may be Past, Present or Future:**

   Consideration are of three types namely Past, Present and Future consideration.

   - The consideration which is sent before formation of contract is called past consideration.
   - The consideration which gets passed at the time of formation of contract is called Present Consideration.
   - The Consideration which is to be passed in future i.e. after the contract is called Future Consideration. As per Indian Law three types of considerations are Valid. But as per England law Past Consideration is not valid.

3. **Consideration need not be adequate:**

   Consideration need not be required to be adequate it can be inadequate. It means if a person sell a Mobile Phone worth Rs.10,000/- in Rs. 5,000/- , it is a valid contract, provided mutually agreed upon by both the parties.

   Example: There is a Contract between A and B according to the terms of which A has to provide his house to B at a rent of one rupee. Court decides that it is a Valid Contract because Consideration need not be adequate.

4. **Consideration must be Lawful:**

   Consideration must be lawful. Presence of unlawful consideration makes the contract illegal and hence Void.

   Example*:* There is a Contract between X and Z according to which Z has to murder Y for a Consideration of Rs. 10000 from X. Here Consideration from Z to X is unlawful and it is illegal contract.

5. **Consideration must be real and not illusory:**

   Consideration must be real and of some value in the eyes of law. Consideration is not real when it is uncertain illusory or when it is physically or legally impossible to perform. Hence consideration should be possible to perform. An act does not recognize impossible

performance. It may be physically impossible or can be legal impossible.

Example: Ajay promises to discover treasure by magic if **Atul** pays him Rs.5000/- Consideration from Ajay is void because it is impossible to perform the promise.

4.4 NO CONSIDERATION NO CONTRACT EXCEPTIONS

Every agreement to be enforceable at law must be supported by valid consideration. An agreement made without consideration is void and is unenforceable except in certain cases. Section 25 specifies the cases where an agreement though made without consideration will be valid.

They are as follow:

1. Natural love and affection [Sec. 25(1)]

An agreement though made without consideration will be valid if it is in writing and registered and is made on account of natural love and affection between parties standing in a near relation to each other. An agreement without consideration will be valid provided-

- It is expressed in writing;
- It is registered under the law for the time being in force;
- It is made on account of natural love and affection;
- It is between parties standing in a near relation to each other.
- All these essentials must be present to enforce an agreement made without consideration.

2. Compensation for services rendered [Sec. 25(2)]

An agreement made without consideration will be valid if it is a promise to compensate wholly or in a part a person who has already voluntarily done something for the promisor or something which the promisor was legally compellable to do.

To apply this rule, the following essentials must exist:

(a) The act must have been done voluntarily;

(b) For the promisor or it must be something which was the legal obligation of the promiser;

(c) The promisor must be in existence at the time when the act was done;

(d) The promisor must agree now to compensate the promisee.

3. Time-barred debt [Sec. 25(3)]

A promise to pay a time-barred debt is also enforceable. But the promise must be in writing and be signed by the promisor or his agent authorized in that behalf. The promise may be to pay the whole or part of the debt. An oral promise to pay a time-barred debt is unenforceable.

4. Promise to Charities:

A mere promise to contribute to charity is not enforceable by law because it is without consideration.

If a person promises to contribute to charity and on this faith, the promise undertakes a liability to that extent not exceeding the promised **subscription**, the contract shall be valid and enforceable by law.

For Example: Shravan promises to pay Rs.50,000/- to the Management Committee of the Hospital by way of donation. The Management on the basis of Shravan's Promise, gets a Water Purifier system installed in the Hospital at the cost of Rs. 45,000/- on credit. Now Shravan refuses to pay the donation.

In the above case Shravan will have to pay Rs. 45,000/- to the school on account of donation as the management had incurred a liability on the faith of Shravan. Here is valid contract even though the consideration is absent.

4.5 TYPES OF CONSIDERATION

There are three different types of consideration are as under: -

1. Past Consideration:

When something is done before the date of the agreement, at the desire of the promisor, it is called 'past consideration.

Example:

A teaches the son of **B** at **B'**s request in the month of January, and in February **B** promises to pay **A** a sum of Rs 200 for his services. The services of **A** will be past consideration.

2. Present consideration.

Consideration which moves simultaneously with the promise, is called 'present consideration' or 'executed consideration'.

Example : A sells and delivers a book to **B,** upon **B**'s promise to pay for it at a future date. The consideration waiting from **A** is present or executed consideration since **A** has done his act of delivering the book simultaneously with the promise of **B.**

3. Future Consideration.

When the consideration on both sides is to move at a future date, it is called 'future consideration' or 'executory consideration'. It consists of an exchange of promises and each promise is a consideration for the" other.

Example: X agrees to sell a Sofa-cum-Bed for Rs. 20,000/- on first of the next month and **Y** agrees to pay the price 15 days after the date of delivery. In this contract, consideration for both the parties is future is future or executor.

4.6 LAWFUL CONSIDERATION AND LAWFUL OBJECT

Legality of Object and Consideration.

Two things are categorically prerequisite to form a valid contract. That is, lawful object and lawful consideration. Indian Contract Act provides us the criterion that accordingly we could make up such lawful object and lawful consideration. Let us discuss the legality of object and consideration of a contract.

Lawful Consideration and Lawful Object

Indian Contract Act Section 23 provides that consideration and / object of a contract is considered unlawful unless they are…

- Forbidden by law
- That they would defeat the purpose of the law
- Are fraudulent
- When it involves injury to any other person or property
- The courts regard them as immoral
- Are opposed to public policy.

Object or Consideration of a contract are not lawful when it is prohibited by law, they become unlawful in nature and such contract cannot be valid forever.

Forbidden by Law.

Unlawful consideration of object includes acts that are categorically punishable by the law. This also includes those that the appropriate authorities restricted through various rules and regulations.

Example: A received a license from the Excise Department Forest Department to sell a liquor in a certain area. The authorities at the department told him he cannot pass on such interest to another person. But the Excise Act has no such statute. So, A sold his interest to B and the contract was held as valid.

Consideration / Object Defeats the Provisions of the Law

When the contract is defeats the intention of the law and the court finds the actual intention of the parties to agreement is to defeat the provisions of the law the said contract will keep aside as it is not effective and non-enforceable as it is against the public policy.

For example:

- Amit agrees to sell his house to Balram for 3,00,000 rupees. Here, Balram's promise to pay the sum of 3, 00,000 rupees is the consideration for Amit's promise to sell the house and Amit's promises to sell the house is the consideration for Balram's promise to pay the 3,00,000 rupees. These are lawful considerations.

- Amar, Akbar and Anthony enter into an agreement for the division among them of gains acquired or to be collected, by them by fraud. The agreement is void for being object is unlawful.

- Hamid promises to obtain for Veena an employment in the public service and Veena promises to pay 1,00,000 rupees to Hamid. The consideration for the same is unlawful and hence the agreement is void.

Consideration / Object is Fraudulent.

Agreement involving unlawful and fraudulent consideration or objects are void by nature.

For example: Amar decides to sell new born baby to Bankim which he had stolen from the nearby maternity home and smuggle the outside the country. This is a fraudulent transaction as so it is void. Now Bankim cannot recover the money under the law if Amar does not deliver on his promise.

If Consideration is Immoral

If the court has regarded that the object or consideration is immoral, then such object and consideration are treated as immoral.

For example

Arvind lent money to Mala to obtain a divorce from her husband Kumar. It was agreed once Mala obtains the divorce Arvind would marry her. But the court passed the judgement that Arvind cannot recover money from Mala since the contract is void on account of unlawful consideration.

Consideration is Opposed to Public Policy

We prohibit certain contracts in the name of public policy for the betterment of the community.

Examples:

An Agreement to Traffic in Public Offices

Agreements to create Monopolies

An agreement to brokerage marriage for rewards

Interfering with the Courts: An agreement whose object is to induce a judicial or state officials to act corruptly and interfere with legal proceedings.

4.7 SUMMARY

- Consideration is the foundation stone of every contract. Where one party promises to do something, it must get something in return. This **'something in return'** is called consideration. Consideration is the **life-blood** of every contract.
- **Legal Rules as to consideration**: Consideration must move at the desire of the promisor, Consideration may be Past, Present or Future, Consideration need not be adequate, . Consideration must be Lawful, Consideration must be real and not illusory,
- **Lawful Consideration and Lawful Object:** Forbidden by law, That they would defeat the purpose of the law, Are fraudulent, When it involve injury to any other person or property, The courts regard them as immoral, Are opposed to public policy.

4.8 QUESTIONS

1. What is consideration and state its essential elements of consideration?
2. *"No consideration No contract"* Discuss.
3. Short Notes:
   a. Types of Consideration.
   b. Unlawful Consideration

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5

BREACH OF CONTRACT & REMEDIES FOR BREACH OF CONTRACT

Unit Structure :

5.0 Objectives

5.1 Introduction

5.2 Meaning of Breach of Contract

5.3 Remedies for Breach of Contract

5.4 Summary

5.5 Questions

5.0 OBJECTIVES

After studying the unit, the students will be able to:

- Understand meaning of performance of contract and Breach of Contract
- Understand the remedies of breach of contract.

5.1 INTRODUCTION

An agreement enforceable by law is called contract. Each and all parties in the contract are required to full fill their respective obligations to finalize the contract and if they fulfill their respective obligations the contract is performed and the contract comes to an end. If the parties to the contract denies to perform their promised obligation/s is known as contract is discharged by breach.

5.2 MEANING OF BREACH OF CONTRACT

What is a Breach of Contract?

Violation of any of the agreed terms and conditions of a binding contract leads to the breach of contract.

when two or more people enter into an agreement, and at least one party does not fulfill their part of the contract by failing to meet the contract terms without a legal excuse a breach of contract occurs.

There are a number of ways in which a breach of contract might occur but the most common includes:

- Failing to deliver services or goods
- Failing to complete a job

- Failing to pay in a timely manner
- Providing services or goods that are below a usual or normal level.

In simple terms, a breach of contract occurs when promises are broken or someone fails to provide required things that are included as the essential terms of the agreement.

Breach of Contract

Branch of contacts may be of two types:

1. Actual breach of contact.

2. Anticipatory breach of contact.

1. **Actual breach:** Actual breach means promisor fails to perform the contractual obligation on due date of performance. When a promisor fails or refuses to perform the promise upon the due date for performance then it is called actual breach of contract.

   Example: Dinkar Seth promise to supply 500 litter Oil to Ms Ranjana on the day of marriage of her daughter falls on 06.06.2021. If he fails to supply on that day it lead to actual breach of contract.

2. **Anticipatory breach of contact:** It occurs when a party to executory contract declares his intension of not performing the contract before the performance is due.

   Example: A" agrees to sell crops to B" by 30th June 2021, however before the due date that is on 28th June 2021, he wrote a letter to "B" stating his inability to deliver the crops as promised.

5.3 REMEDIES FOR BREACH OF CONTRACT:

When a promise is breached by any of the parties, means it is a breach of contract. So, when either of the parties does not keep their end of the agreement or does not fulfil their obligation as per the terms of the contract, it is a breach of contract. There are a remedies for breach of contract available to the wronged party.

- **Recession of Contract**

  When one of the parties to a contract does not perform his obligations, then the other party can cancel/ rescind the contract and deny the performance of his obligations.

  Provisions under section 65 of the Indian Contract Act, the party that rescinds the contract must restore any benefits he got under the said agreement. And section 75 states that the party that rescinds or cancels the contract is entitled to have damages and/or compensation for such a cancellation.

- **Sue for Damages**

  Section 73 provides that the party who had suffered, since the other party has not kept the promises, can claim compensation for loss or damages resulted to them in the normal course of business.

  Such damages will not be payable if the loss is abnormal in nature, i.e. not in the ordinary course of business. There are two types of damages according to the Act,

Damages for the Loss Suffered

'Damages' means that financial compensation collectable by the defaulting party to the affected party for the loss suffered by him once the agreed contract was broken. Therefore, the aggrieved party could bring an action for damages against the party who are guilty of the breach The party is guilty of the Breach and is liable to pay damages/ compensation to the aggrieved party.

Types of Damages

Normal Damages or General Damages

Damages that arise within the normal course of events from the Breach of Contract are referred to as normal damages.

Special Damages

Special damages are those damages that are collectable for the loss arising on account of some special or uncommon circumstances. That is, they undue the natural and probable consequences of the Breach of the Contract.

Special damages can be recovered only when the other party, while signing the contract, is informed of the special circumstances which are responsible for the special losses. Subsequent knowledge of special circumstances will not create any special liability.

Exemplary or Vindictive Damages.

Such damages are awarded against the party who has committed a Breach of the Contract with the thing of grueling the fallible as a defaulting party and to compensate the aggrieved party. Generally, these damages are awarded just in case of action on loss

Examples:

1. [1]A libel was committed by an author and its publisher against a distinguished naval officer. The officer sued for damages. He was awarded £ 15, 000 compensatory and £ 25, 000 exemplary damages against both defendants.

[1] https://accountlearning.com/types-of-damages-for-breach-of-contract-with-examples/

2. The bank disobeyed the customer's order to stop payment of a particular cheque and as a consequence another cheque for £ 25,000 was dishonored due to inadequate funds. The court awarded £ 250 as damages to the plaintiff.

Nominal Damages

These damages are in very less quantity. It is awarded merely to acknowledge the corrective measures of the party to say damages for the Breach of the Contract. Sometimes, the damages are not an adequate remedy for Breach of the Contract. In such cases, the Court could, at the suit of the party not in Breach, direct the party in Breach to hold out his promise as per the terms of the Contract.

Example: Aman contracted to purchase a Car from Bamman, a dealer. But he failed to purchase the Car. However, the demand for the Car far exceeded the supply, and Bamman could sell the Car agreed to be purchased without loss of profit. Bamman is entitled only to nominal damages.

- **Sue for Specific Performance**

  The party in breach will actually have to carry out his duties according to the contract. In certain cases, the courts may insist that the party carry out the agreement or perform in accordance with agreed terms of contract.

  If, any of the parties fails to perform the contract, the court may order them to act according to the court orders. This is a decree of specific performance and is granted instead of damages.

- **Injunction**

  An injunction is an order or the court, like a decree for specific performance. It simply means to prevent the person from doing something. An injunction is a court order restraining a person from doing a particular act.

  So, a court may grant an injunction to stop a party of a contract from doing something he promised not to do. In a prohibitory injunction, the court stops the commission of an act and in a binding injunction, it will stop the continuance of an act that is unlawful.

- **Quantum Meruit**

  Quantum meruit is a Latin phrase meaning "what one has earned". In the context of contract law, it means something along the lines of "reasonable value of services"

  At times when one party of the contract is prevented or interrupted from completing his performance of the contract by the other party, he can claim quantum meruit.

In this circumstances party must be paid a reasonable remuneration for the part of the contract he has already performed. This could be the remuneration of the services he has provided or the value of the work he has already done.

5.4 SUMMARY

If the parties to the contract denies to perform their promised obligation/s is known as contract is discharged by breach.

Types of Breach: 1. Actual breach of contact.2. Anticipatory breach of contact.

Types of Damages.

Normal Damages or General Damages, Special Damages, Exemplary or Vindictive Damages. Nominal Damages, Sue for Specific Performance, Injunction, Quantum Meruit.

5.5 QUESTIONS

1. What is a Breach of Contract?
2. Explain the remedies for breach of contract.
3. Write a note on various types of damages.

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6

SALE OF GOODS ACT

Unit Structure :

6.0 Objectives

6.1 Introduction

6.2 Scope of the Acts

6.3 Fundamental Concepts

6.4 Formation of Contract of sale/ Essentials of Valid Sales

6.5 Distinguish Between a Sale and an agreement to Sell

6.6 Summary

6.7 Questions.

6.0 OBJECTIVES

After studying the unit, the students will be able to:

- Define the fundamental concepts in the Sale of Goods ACT.
- Explain the essentials of Valid Sales.
- Distinguish between Sale and Agreement to Sale

6.1 INTRODUCTION

The sale of Goods Act 1930 deals with the law relating to sale of goods. The term Goods means every kind of movable property, other than Money and Actionable claims. The sale of Goods Act, 1930 is mainly based on the English Sale of goods Act, 1893.

Before the Sale of Goods Act,1930, the law relating to sale of goods was covered under the Chapter VII of Indian contract act, 1872, the provision of which were not suffice the purpose or not adequate. Therefore, new act called Sale of Goods Act, 1930 was passed. The presently act containing 66 sections came into force from 1stJuly, 1930 which extends to whole of India except the state of Jammu & Kashmir.

6.2 SCOPE OF THE ACT

The sale of Goods Act deals with 'Sale of Goods Act,1930,'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." 'Contract of sale' is a generic term which includes both a sale as well as an agreement to sell.

6.3 FUNDAMENTAL CONCEPTS

Definition of Contract of sale of goods:

Section 2(1) of the Act defines a contract of sale of goods as: a contract by which the seller transfers or agrees to transfer the property in goods to the buyer for a money consideration, called the price. Subsections (3) and (4) give different names to two transactions:(3) 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.

(4) Where under a contract of sale the transfer of the property in the goods is to take place at a future time or subject to some condition later to be fulfilled the contract is called an agreement to sell.

Important Concepts:

1. **Buyer [Section.2(1)]:**

   Buyer means a person who buys or agrees to buy the goods.

2. **Seller:-[Section 2(13)] :**

   Seller means a person who sells or agrees to sell the goods.

   Example: - Mr. Kashif sells the shop to Mr. Zahir. Mr. Kashif is a seller and Mr. Zahir is a buyer in this case.

3. **Goods: - [Section 2(7)]:**

   Goods have been defined by Section 2, sub-section 7 of the Sale of Goods Act 1930 as "every kind of movable property, other than actionable claims and money; and includes stock and shares, growing crops, grass and things attached to or forming part of land which are agreed to be served before sale or under a contract of sale.

4. **Delivery [Section 2(2)]:**

   Delivery means voluntary transfer of the possession of goods from one person to another.

   Kinds of Delivery

   a. **Actual or Physical Delivery:**

      When a seller delivers the goods physically to the buyer or his agent, to take the possession. It is called an actual delivery. If the seller has received the price but does not deliver the goods to the buyer. The buyer can sue the seller for price with reasonable interest.

      Example:- An agreement between Mrs. Sapna and Vasu for sale of car. Car has delivered to Mr. Vasu. This is called actual delivery.

b. Symbolic Delivery:

If the key of any store is delivered to any person, it will be considered the goods in the store are also delivered to that person. It is a symbolic delivery.

Example :- Mr. Ram sells the car to Mr. Bharat which are kept in the "Show Room". Mr. Ram gives the key of show room to Mr. Bharat . It is a symbolic delivery.

c. Constructive Delivery:

When there is a change in the legal character without any visible change in actual and visible custody it is called constructive delivery.

Example: Mr. Narad has bus, which he has rented out to Mr. Narayana. It is in the custody of Mr. Narayana. Mr. Narad sells and transfers complete title to Mr. Krishna. The bus remained in the custody of Mr. Narayana. There is no change in the custodian. Here only the title of the property has changed. Now Mr. Narayana agrees to hold on behalf of the buyer. It is called constructive delivery.

5. Price:

Price must be the consideration in the contract of sale. If goods are exchanged with goods, it is barter and not a contract of sale.

Example :- "X" sells a book to "Y" for Rs. 300. It is a contract of sale.

6. Transfer of Ownership:

To constitute the sale, contract the seller must transfer or agree to transfer the property ownership to the buyers. So, possession and ownership both will be transferred to buyer.

Example :- "X" sells the car to "Y" for 6 lac. The possession and ownership both will transfer to "Y".

7. Sale:

When ownership and possession of the goods is immediately transferred from seller to buyer it is called contract of sale.

Example:- "X" buys a pen from the "Y" and pays the whole price on his hand. It is a sale.

8. Agreement to Sell:

The contract is called agreement to sell, when the transfer of ownership in the goods is to take place at a future date.

Example :- Mr. X agrees to purchase Mr. Nitoo's bus for Rs. 30 lac. But the transfer of bus will take place after one year. It is agreement to sell.

Where under a contract of sale, the transfer of property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, the contract is called 'an agreement to sell' [Sec. 4(3)]. It is an executory contract and refers to a conditional sale.

Illustrations:

(a) On 1st January, **A** agrees with B that he will sell **B** his scooter on 15 January for a sum of Rs. 3,000. It is an agreement to sell, since A agrees to transfer the ownership of the scooter to **B** at a future time.

(b) **A** agrees to purchase **B'**s car for Rs. 50000, provided **B** stands surety for him with **C**. It is an agreement to sell for **B**. It becomes a sale when the condition is fulfilled by B.

6.4 ESSENTIALS OF VALID SALES/ FORMATION OF A CONTRACT OF SALE.

Section 4(1) of the Sale of Goods Act defines a contract of sale of goods as - "a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price."

This definition reveals the following essential characteristics of contract of sale of goods:

1. Two parties:

The first essential is that there must be two definite parties to a contract of sale, viz.., a buyer and a seller, as a person cannot buy his own goods.

2. Parties:

A minor or lunatic cannot be a transferor / vendor as he is not competent to contract under Section II of the Indian Contract Act, 1872. It has been held that a minor or a lunatic can be a transferee or purchaser in the case of transfer by way of sale or mortgage, represented by his Guardian.

3. Transfer of property:

'Property' here means ownership. Transfer of property in the goods is another essential of a contract of sale of goods. A mere transfer of possession of the goods cannot be termed as sale. To form a contract of sale the seller must either transfer or agree to transfer the property in the goods to the buyer.

4. Goods:

The subject-matter of the contract of sale must be 'goods', According to Section 2(7), "goods means every kind of movable property other than actionable claim and money; and

- Includes stock and shares,
- Growing crops, grass,
- And things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale.

Goodwill, trademarks, copyrights, patents right, water, gas, electricity, decree of a court of law, are all regarded as goods. Shares and stock are also included in goods.

5. Consideration:

The consideration for a contract of sale must be money consideration called the price. If goods are sold or exchanged for other goods, the transaction is barter, governed by the Transfer of Property Act and not a sale of goods under this Act. If goods are sold partly for money and partly for goods, this is the contract of sale.

6. Sale:

Where under a contract of sale, the property in the goods is immediately transferred at the time of making the contract from the seller to the buyer, the contract is called a 'sale' [Sec. 4(3)]. It refers to an absolute sale. There is immediate transfer of the ownership and mostly of the subject-matter of the sale as well (delivery may also be given in future). It is an executed contract.

6.5 DISTINGUISH BETWEEN A SALE AND AGREEMENT TO SELL

Basis of distinction	Sale	Agreement to sell
Transfer of ownership	Transfer of ownership of goods takes place immediately	Transfer of ownership of goods is to take place at a future time or subject to fulfilment of some condition.
Executed contract or Executory contract	It is an executed contract because nothing remains to be done.	It is an executory contract because something remains to be done.
Conveyance of property	Buyer gets a right to enjoy the goods against the whole	Buyer does not get such right to enjoy the goods. It only creates

	world including seller. Therefore, a sale creates jus in rem (Right against property).	jus in personam (Right against the person).
Rights of seller against the buyer's breach	Seller can sue the buyer for the price even though the goods are in his possession.	Seller can sue the buyer for damages even though the goods are in the possession of the buyer.
Effect of insolvency of seller having possession of goods	Buyer can claim the goods from the official receiver or assignee because the ownership of goods has transferred to the buyer.	Buyer cannot claim the goods even when he has paid the price because the ownership has not transferred to the buyer. The buyer who has paid the price can only claim rateable dividend.

6.6 SUMMARY

Essential Elements of Contract of Sale:

1. Two parties: 2. Parties: 3. Transfer of property: 4. Goods: 5. Consideration: 6. Sale:

Sale and Agreement to Sell: Under Transfer of ownership of goods takes place immediately but in respect of agreement to sell the transfer of ownership takes place at a later stage. Secondly Sale is a executed contract but agreement to sell is executory nature. Under Sale Seller can sue the buyer for the price even though the goods are in his possession. Whereas under Agreement to sell Seller can sue the buyer for damages even though the goods are in the possession of the buyer.

6.7 QUESTIONS

1. What are the essential elements of contract of sale?

2. Distinguish between Sale and Agreement to sale.

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7

CONDITION AND WARRANTY (Section 11-17)

Unit Structure :

7.0 Objectives

7.1 Introduction

7.2 Implied Conditions

7.3 Implied Warranties

7.4 Distinguish between Conditions and Warranties

7.5 Rights of Unpaid Seller

7.6 Summary

7.7 Questions

7.0 OBJECTIVES

After studying the unit, the students will be able to:

- Understand the fundamental concept of Condition and Warranty under Sale of Goods Act.
- Distinguish between condition and warranties
- Explain the term Unpaid Seller and Rights of Unpaid Seller.

7.1 INTRODUCTION

A condition is a stipulation essential to main purpose of the contract and hence it is the plinth or foundation of the contract. The effect of a breach of condition is that it gives the right to the distressed (an aggrieved) party to treat the contract as void and also to claim damages (compensation), if any.

A warranty is a term which is collateral to the main purpose of the contract and hence is only a subsidiary. The breach of warranty does not give right to the aggrieved party to treat the contract as void but entitles him to claim damages (Compensation) only.

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

- When the buyer waives the condition 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.

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

7.2 CONDITIONS- IMPLIED CONDITIONS

A condition U/s 12 (2) Condition:

"A stipulation essential to the main purpose of the contract, the breach of which gives rise to a right threat the contract as repudiated".

The actual meaning of a condition is an obligation which requires being fulfilled before another proposition takes place. A warranty is a surety given by the seller regarding the state of the product.

Example: Sumit buys from General stores ' Ghee' claimed to a pure cow ghee. It was found that the Ghee was mixed with 'Dalda'.Sumit can return the ghee to the shop keeper ,repudiate the contract and claim refund of price.

Implied Conditions in a contract that is not expressly stated or written. It maybe implied by fact and deed, viz. the parties' acting; or it may be implied by law, either case law or statute. Following are the implied conditions.

1. Conditions as to Title to Goods: **[Section 14(a)]:**

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.

Rowland Vs Divall:

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** had 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:(Section 15)

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: (Section 17)

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.

4. Sale by sample as well as description:

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

5. Conditions 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 the guarantee that the goods are fit for the purposes of the buyer. So, the buyer takes them as they come. But in the following cases, there is an implied condition as to quality or fitness of goods for any particular purpose.

- Where the buyer makes known the purpose to the seller, who is ordinarily dealing with sale of goods of that description and the buyer, relies on the judgments of the seller.
- Where the seller does not disclose the faults in his goods and such faults cannot be detected on reasonable examination.
- Where the seller makes a statement and the buyer relies upon it.

Case Law: A purchased a motor car from B for using it as a tourist car. **B,** the seller knew the purpose. The car turned out to be unfit for the purpose. Held, A the buyer could repudiate the contract. But there is not implied condition as to fitness or quality of goods when they are sold under the patent or trade name.

6. Conditions as to Merchant ability:(Section 16)

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.

Brant V/S Australian Knitting Mills 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 not implied condition as to quality of goods as regards defects which such examination must have revealed.

7. Conditions as to wholesomeness:

In the case of the implied condition is that the goods must be suitable for human consumption and are fit for immediate use.

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

7.3 IMPLIED WARRANTIES

A condition becomes a warranty when—

1. The buyer waives the conditions or opts to deal the breach of the condition as a breach of warranty; or

2. The buyer accepts the goods or a part thereof, or is not in a position to dismissed the goods for being faulty.

1. Implied Warranty of Quiet Possession:(Section 14)

In every contract of sale, unless there is a contrary intention, there are implied warranties that the buyers shall have and enjoy quiet possession of the goods. If the buyer's right to possession and enjoyment of the goods is in any way disrupted as a result of the seller's defective title, the buyer may sue the seller for damages for breach of this warranty.

2. Implied Warranty of Freedom from Encumbrances: [Section. 14 (c)]

The buyer is entitled to a further warranty that the goods shall be free from any charges or nuisance, in favour of any third party or known to buyer before or inference at the time when the contract is made.

Example: A, the owner of the watch, pledges it with **B**. After a week, **A** obtains possession of the watch from **B** for some limited purpose and sells it to **C**. **B** approaches **C** and tells him about the pledge affair. **C** has to make payment of the pledge amount to **B**.

There is breach of this warranty and **C** is entitled to claim compensation from **A**.

3. Warranty of disclosing the dangerous nature of goods to the ignorant buyer:

The third implied warranty on the part of the seller is that in case the goods sold are of dangerous nature he will warn the ignorant buyer of the probable danger.

Example: C purchases a tin of disinfectant powder from **A**. **A** knows that the lid of the tin is defective and if it is opened without special care, it may be dangerous, but tells nothing to **C. C** opens the tin in the normal way whereupon the disinfectant powder flies into her eyes and causes injury. **A** is liable in damages to **C** as he should have warned **C** of the probable danger.

7.4 DIFFERENCE BETWEEN CONDITION AND WARRANTY

Matter	CONDITION	WARRANTY
Stipulation	A condition is a stipulation essential to the main purpose of a contract.	The warranty is collateral to the main purpose of contract.
Rights	Breach of condition gives right to the party to reject the contract.	Breach of warranty gives right to the party to claim the damages only.
Superiority of Condition	A breach of condition may be treated as a breach of warranty.	Breach of warranty may not be treated as a breach of condition.
Link with Contract	A condition has a direct link with the essential part of the contract.	A warranty has no direct link with the essential part of the contract.

7.5 RIGHTS OF UNPAID SELLER

Meaning and Definition:

According to (section 45) the term seller includes 'any person who is in the position of a seller, as, for instance, an agent of the seller to whom the bill of lading had been endorsed, or a consignor or agent who has himself paid, or is directly responsible for, the price. The seller of goods is deemed to be an 'unpaid seller'

- When the whole of the price has not been paid or tendered; or
- Where a bill of exchange or other negotiable instrument has been received as a conditional payment, i.e., subject to the realization thereof, and the same has been dishonoured.

RIGHTS OF UNPAID SELLER

An unpaid seller has two-fold rights, viz.,;

I. Rights of unpaid seller against the goods, and

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

I. Rights of Unpaid Seller against the Goods.

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

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

1. Right of lien (Sec. 47)

'Lien' is the right to retain possession of goods and refuse to deliver them to the buyer until the price due in respect of them is paid or tendered. An unpaid seller in possession of goods sold is entitled to exercise his lien on the goods in the following cases:

- 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:
- Where the buyer becomes insolvent, even though the period of credit may not have yet expired.

2. Right of Stoppage of Goods in Transit: Sections 50-52

Meaning of Right of Stoppage of Goods in Transit:

The right of stoppage in transit means the right of stopping the goods while they are in transit, to regain possession and to retain them till the full price is paid.

The essential feature of stoppage in transit is that the goods should be in the possession of a middleman or some other person intervening between the vendor who has parted with and the purchaser who has not received them.

3. Right of Resale

The right of resale is a very valuable right given to an unpaid seller. In the absence of this right, the unpaid seller's other rights against the goods, namely, 'lien' and 'stoppage in transit,' would not have been of much use because these rights only entitle the unpaid seller to retain the goods until paid by the buyer. If the buyer continues to remain in default, then should the seller be expected to retain the goods indefinitely, especially when the goods are perishable? Obviously, this cannot be the intention of the law.

II. Rights of Unpaid Seller Against Buyer

When the buyer of goods does not pay his dues to the seller, the seller becomes an unpaid seller. And now the seller has certain rights against the buyer. Such rights are the seller remedies against the breach of contract by the buyer. Such rights of the unpaid seller are additional to the rights against the goods he sold.

1. Suit for Price
2. Suit for damages for non-acceptance
3. Repudiation of Contract before Due Date

1. Suit for Price

Under the contract of sale if the property of the goods is already passed but he refuses to pay for the goods the seller becomes an unpaid seller. In such a case. the seller can sue the buyer for wrongfully refusing to pay him his due.

But say the sales contract says that the price will be paid at a later date irrespective of the delivery of goods,. And on such a day the if the buyer refuses to pay, the unpaid seller may sue for the price of these goods. The actual delivery of the goods is not of importance according to the law.

2. Suit for Damages for Non-Acceptance

If the buyer wrongfully refuses or neglects to accept and pay the unpaid seller, the seller can sue the buyer for damages caused due to his non-acceptance of goods. Since the buyer refused to buy the goods without any just cause, the seller may face certain damages.

The measure of such damages is decided by the Section 73 of the Indian Contract Act 1872, which deals with damages and penalties. Take for example the case of seller A. He agrees to sell to B 100 liters of milk for a decided price. On the day, B refuses to accept the goods for no justifiable reason. A is not able to find another buyer and the milk goes bad. In such a case, A can sue B for damages.

3. Repudiation of Contract before Due Date

If the buyer repudiates the contract before the delivery date of the goods the seller can still sue for damages. Such a contract is considered as a rescinded contract, and so the seller can sue for breach of contract. This is covered in the Indian Contract Act and is known as Anticipatory Breach of Contract.

4. Suit for Interest

If there is a specific agreement between the parties the seller can sue for the interest amount due to him from the buyer. This is when both parties

have specifically agreed on the interest rate to be paid to seller from the date on which the payment becomes due.

7.6 SUMMARY

Meaning: The actual meaning of a condition is an obligation which requires being fulfilled before another proposition takes place. A warranty is a surety given by the seller regarding the state of the product.

Implied Conditions: Conditions as to Title to Goods*:* [Section 14(a)]: 2. Sale by Description:(Section 15) 3. Sale by Sample: (Section 17) 4. Sale by sample as well as description: 5. Conditions as to Quality or Fitness: 6. Conditions as to Merchant ability:(Section 16) 7. Conditions as to wholesomeness:

Implied Warranties: A condition becomes a warranty when— 1. The buyer waives the conditions or opts to deal the breach of the condition as a breach of warranty; or 2. The buyer accepts the goods or a part thereof, or is not in a position to dismissed the goods for being faulty.

Implied Warranties: Implied Warranty of Quiet Possession:(Section 14); 2. Implied Warranty of Freedom from Encumbrances: [Section. 14 (c)]; 3. Warranty of disclosing the dangerous nature of goods to the ignorant buyer:

Rights of Unpaid Seller: Right of lien; Right of stoppage of goods in transit; Right of resale [Sec. 46 (1)]. **Rights against the goods he sold:** Suit for Price; ;Suit for damages for non-acceptance; Repudiation of Contract before Due Date

7.7 QUESTIONS

1. Explain the meaning of Condition and Warranties under Sale of Goods Act.
2. Distinguish between Condition and Warranty
3. What are the Implied Conditions
4. Write a note on Implied warranties

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8

THE NEGOTIABLE INSTRUMENTS (AMENDMENT ACT, 2015)

Unit Structure :

8.0 Objectives

8.1 Introduction, Definition and Meaning

8.2 Characteristics of Negotiable Instrument

8.3 Promissory Notes and Bills of Exchange

8.4 Summary

8.5 Questions

8.0 OBJECTIVES

After studying the unit, the students will be able to:

- Understand the meaning of Negotiable Instruments.
- Understand the various types of Negotiable Instruments and their functions.

8.1 INTRODUCTION,DEFINITION AND MEANING

The term ***"negotiable instrument"*** means a document transferable from one person to another. However, the Act has not defined the term. It merely says that "A. negotiable instrument" means a promissory note, bill of exchange or cheque payable either to order or to bearer. [Section 13(1)]

The objectives of the Negotiable Instruments Act, is to legalise the system by which the instrument pass from one hand to other through negotiation.

As the commercial activities and trading increases at alarming rate the growing demand for money was not possible to meet with the current supply of coins in the time of British rule in India. To cope up with the scarcity of the coins the instruments of credit took the function of money.

Negotiable instruments are those documents which are generally use in commercial transaction and dealing of money.

8.2 ESSENTIAL FEATURES AND CHARACTERISTICS OF NEGOTIABLE INSTRUMENTS:

1. Writing and Signature:

Negotiable Instruments must be written and signed by the parties according to the rules relating to Promissory Notes, Bills of Exchange and Cheques. Demand Drafts are also construed as Negotiable

Instruments in the limiting case as they have the same property as Negotiable Instrument.

2. Money:

Negotiable instruments are payable by legal tender money of India. The liabilities of the parties of Negotiable Instruments are fixed and determined in terms of legal tender money.

3. Negotiability:

Negotiable Instruments can be transferred from one person to another by a simple process. In the case of bearer instruments, delivery to the transferee is sufficient. In the case of order instruments two things are required for a valid transfer: endorsement (i.e., signature of the holder) and delivery. Any instrument may be made non-transferable by using suitable words, e.g., "pay to X only."

4. Title:

The transferee of a negotiable instrument, when he fulfils certain conditions, is called the holder in due course. The holder in due course gets a good title to the instrument even in cases where the title of the transferor is defective.

5. Notice:

It is not necessary to give notice of transfer of a negotiable instrument to the party liable to pay. The transferee can sue in his own name.

6. Presumptions:

Certain presumptions apply to all negotiable instruments. Example: It is presumed that there is consideration. It is not necessary to write in a promissory note the words "for value received" or similar expressions because the payment of consideration is presumed. The words are usually included to create additional evidence of consideration.

7. Popularity:

Negotiable instruments are popular in commercial transactions because of their easy negotiability and quick remedies.

8. Evidence:

A document which fails to qualify as a negotiable instrument may nevertheless be used as evidence of the fact of indebtedness.

8.3 PROMISSORY NOTE AND BILLS OF EXCHANGE

PROMISSORY NOTE:

- A promissory note has been defined by Sec. 4 of the Act as follows: A "promissory note" is an instrument.
- in writing
- containing an unconditional undertaking
- signed by the maker
- to pay a certain sum of money only to, or
- to the order of, a certain person or
- to the bearer of the instrument.
- The person making the promise to pay is called the "maker"
- The person to whom the payment is to be made is called the "payee".

In other words, it is an unconditional written promise by one person to another in which the maker (Payer) promises to pay on demand on any future date, a stated sum of money to the specified person or to the bearer of the instrument.

A 'promissory note' is an instrument in writing containing an ***unconditional undertaking***, signed by the maker, to pay a certain sum of money only to, or to the order of, a certain person, or to the bearer of the instrument.

Illustrations:

Y signs instruments in the following terms:

1. "I promise to pay Z or order Rs. 1800."
2. "I acknowledge myself to be indebted to Z in Rs. 1800 to be paid on demand, for value received,"
3. "I promise to pay Z Rs, 1800, and all other sums which shall be due to him."
4. "I promise to pay Y Rs. 1800 seven days after my marriage with C."
5. "I promise to pay Y Rs. 1800 on D's death, provided D leaves me enough to pay that sum."
6. "I promise to pay Y Rs. 1800 and to deliver to him my black horse on 1 st January next."
7. "Mr. B. I.O.U, Rs.1,800".
8. "I promise to pay Y Rs. 1800, first deducting there out any money which he may owe me,''

The instruments respectively marked (1) and (2) are promissory notes. The instruments respectively marked (3), (4), (5), (6). (7) and (8) are not promissory notes."

SPECIMEN

PROMISSORY NOTE

Mumbai
Rs. 21,000/- August 15, 2022

"I acknowledge myself to be indebted to Ms. Jaya Singh in Rs. 21,000/- (Rupees Twenty One Thousands Only), to be paid on demand, for value received."

(Affix Stamp)

(Signature)
Mr. Sanjay Roshan
F-401, Sea View Soc.,
Bandra, Mumbai, 400050
(Maker)

To,
Ms. Jaya Singh
D-704, Top Apartments,
Juhu, Mumbai, 400049
(Payee)

Essentials Characteristics of a Promissory Note

1. **Writing:**

   Promissory note must be in writing. Writing includes print and typewriting. Oral promise a valid promissory note. Generally, consideration, Place and date of making is not essential requirement of the promissory note.

2. **Promise to pay:**

   - A Promissory note must contain an undertaking/Promise to pay.
   - Mere acknowledgment of debt is not sufficient.
   - Use of word "promise'' is not mandatory, but the maker should bind himself to pay.

   Example: "I have received a sum of Rs. 5,000 from Sohan. This amount will be repaid on demand''.

3. **Unconditional Promise:**

   The undertaking/ promise to pay should be unconditional and definite.

   Unconditional event means an event which is certain to happen but the time of its occurrence is uncertain.

   Examples:- "I promise to pay B Rs. 500, seven days after my marriage with C'' cannot constitute a promissory note because a condition as to marriage is attached.

A write – "I promise to pay C Rs. 25,000, 7days after the death of B''. This is a valid promissory note and is not conditional, since only the time of death of B is uncertain, but is sure to happen.

4. Signed by the maker:

Promissory note should be signed by the maker himself. Where it is written and the name of the maker appears in the instrument, but is not signed, it shall not treat a valid promissory note.

5. Payee to be a certain person:

Promissory note should specify the payee in clear terms i.e. by name, son of, and resident of, etc. The payment can also be identified by description.

6. Payment of Money only:

There must be a promise to pay only money and not other consideration, e.g. "I promise to pay B a sum of Rs. 50,000 and deliver him my Scorpio Car'' is not valid.

7. Certain some of money:

The amount to be paid must be certain; otherwise, the instrument will be invalid.

Example: A promises to pay **B** Rs. 800 and all other sums which become due. This is not a valid promissory note because the sum is not certain as no one knows what other sums will become due. However, a promise to pay money with interest is valid. If the rate of interest is not given, it will not be valid.

For example, A's promise to pay B Rs.5500 with interest accrued, is not valid.

8. Other formalities:

Promissory note must be stamped according to the Indian Stamp Act, otherwise it will be inadmissible in evidence. However, other formalities like place of making the instrument, date or the words, "value received" are not necessary.

9. Form of Promissory Note:

The law has not given any specific from of a promissory note. As such it may be in any form but it must satisfy all the essential conditions mentioned above. Sum payable must be certain.

Examples: - "I promise to pay Ketan , Rs. 12,000, and all other sums which shall be due'' is not valid since the sum is not certain.

10. Duly stamped and dated:

Stamps of requisite amount and description must be affixed on the instrument and duly cancelled either before or at the time of its execution. If the promissory note is not dated, it is presumed to have been made on the date of its delivery.

Kinds of Promissory Note

a) Promissory Note Payable on Demand: No Particular time or stipulated time period for payment is made.

b) After Sight (Payable after Date): Promissory Note is payable at a particular stipulated future date.

c) Joint Promissory Note:

This type of promissory note is prepared by two or more parties jointly. Here the liability of the persons who makes the promissory note is joint. In default of payment payee can take an action against all or any one of them or selective persons.

d) Joint and Several Demand Promissory Note:

This type of Promissory Note is obtained when the loan is granted to the borrowers jointly or where it is considered expedient to make the officials severally liable. For Example, In the case of Limited Companies, it is essentials that the directors or managing agents of the company should be made personally liable to bring home to them their personal liability in order to introduce a further element of security to the bank's advance.

Bill of Exchange – Section 5:

Meaning:

Section 5 defines a bill of exchange as…

- an instrument in writing
- containing an unconditional order,
- signed by the maker,
- directing a certain person to pay
- a certain sum of money only to or
- to order of, a certain person or
- to the bearer of the instrument.

There are three parties to a bill of exchange,

Drawer : The maker of the bill

Drawee : The person who is ordered to pay

Payee : The person to whom or to whose order the money is directed to be paid.

Essentials of a Bill of Exchange

1. **It must be in writing.** The bill of exchange shall be in writing. Simply words of order are invalid instrument and that doesn't fulfil the conditions to be a bill of exchange.

2. **It must contain an express order to pay.** The bill of exchange is an **unconditional order.** Hence, the instrument shall have the instruction i.e., an order to pay to certain person or to the order of.

3. **It must be signed by the drawer.** The drawer of the bill of exchange shall sign the instrument otherwise it would be invalid and not enforceable. He is the one who gives the order to pay. 4 **It must contain an unconditional order to pay**. The bill of exchange must not include an

4. **There must be three parties to the instrument**. Bill of exchange always has three parties to it. The **drawer** who makes the bill of exchange. The **drawee** who shall accepts the bill of exchange and eventually who becomes an **acceptor**. And finally, the **payee** who receives the sum of money as specifies in the instrument.

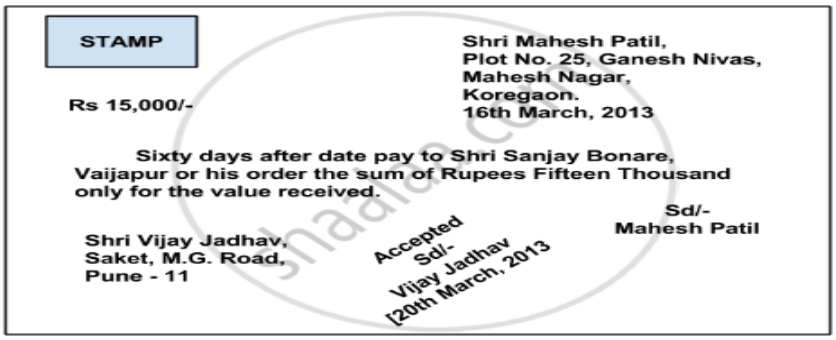
5. **The parties must be certain**. The names mentioned in there in the bill of exchange shall be certain. The parties shall be identifiable and when that is not the case the bill of exchange is not valid.

6. **The order must be to pay a certain sum of money**: The sum of money must be certain. In addition to the same of subtractions shall not be accepted unless there is an interest clause and the same shall be mentioned in percent. Other conditions to the sum of money shall be treat as void.

7. **The instrument must contain an order to pay money and money** only: The instrument must not contain any thing apart from money. It must contain money and money only.

8. **It must be stamped**: The stamp is affixed on every bill of exchange, except bill payable on demand. The value of stamp depends on the amount of the bill.

SPECIMAN BILLS OF EXHANGE



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Kinds of Bills of Exchange

Demand Bill:

Demand bill is payable on demand or when it is presented at the site. There Is no specific time for payment is made. So, the debtor can make the bill's payment when it is presented.

Inland Bills:

The bill drawn between two parties residing in the same country and payable also in that same country is known as inland bills.

Foreign Bills:

The bill drawn between two parties residing in two different countries is known as foreign bills. For instance, a bill is drawn in the USA where the seller is situated, and the buyer lives in the ``````````````````UK. So, the bill will be payable in the UK, the drawee or buyer's location.

Difference Between Bills of Exchange and Promissory Note

BASIS OF COMPARISION	BILL OF EXCHANGE	PROMISSORY NOTE
Meaning	BOE is an instrument in writing showing the indebtedness of a buyer towards the seller of goods.	A promissory note is a written promise made by the debtor to pay a certain sum of money to the creditor at a future specified date.
Defined in	Section 5 of Negotiable Instrument Act, 1881.	Section 4 of Negotiable Instrument Act, 1881.
Parties	There are Three parties, i.e. drawer, drawee and payee	There are Two parties, i.e. drawer and payee
Drawn by	It is drawn by Creditor	It is drawn by Debtor
Liability of Maker	Maker's liability is Secondary and conditional	Makers' liability is Secondary and conditional
Dishonour	Notice of Dishonour is necessary to be given to all the parties involved.	Notice of Dishonour Notice is not necessary to be given to the maker.

8.4 SUMMARY

Meaning: It is an unconditional written promise by one person to another in which the maker (Payer) promises to pay on demand on any future date, a stated sum of money to the specified person or to the bearer of the instrument.

Essential Features and Characteristics of Promissory Notes: Writing**:** Promise to pay**:** Unconditional Promise: Signed by the maker: Payee to be a certain person: Payment of Money only: Certain some of money: Other formalities:

Types of Promissory Notes: Promissory Note Payable on Demand: After Sight Payable after Date, Joint Promissory Note: Joint and Several Demand Promissory Note:

BILL OF EXCHANGE:

Meaning: an instrument in writing containing an unconditional order signed by the maker,

directing a certain person to pay a certain sum of money only to or to order of, a certain person or to the bearer of the instrument.

Essential Elements of Bills of Exchange: It must be in writing; it must contain an express order to pay. It must be signed by the drawer. It must contain an unconditional order to pay. The parties must be certain, the order must be to pay a certain sum of money,

The instrument must contain an order to pay money and it must be stamped.

8.5 QUESTIONS

1. Explain the term 'Negotiable Instrument' What are the essential feature and characteristics of of Negotiable Instruments.?
2. Explain the meaning of 'Promissory note' and its features.
3. Write an elaborate note on 'Bills of Exchange'
4. Distinguish between Promissory Note and Bills of Exchange.

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9

CHEQUES

Unit Structure :

9.0 Objectives

9.1 Meaning of Cheque

9.2 Characteristics of Cheques

9.3 Concept of Crossing of Cheques and Types of Crossing

9.4 Dishonour of cheques and Criminal Penalties

9.5 Summary

9.6 Questions

9.0 OBJECTIVES

After studying the unit, the students will be able to:

- Understand the meaning Of Cheque.
- Understand the various types of Cheques.
- Understand difference between the Cheque and Bills of Exchange
- Understand the term "Dishonour of cheque" and its Criminal Penalties'

9.1 MEANING OF CHEQUE

Cheque- Section -6

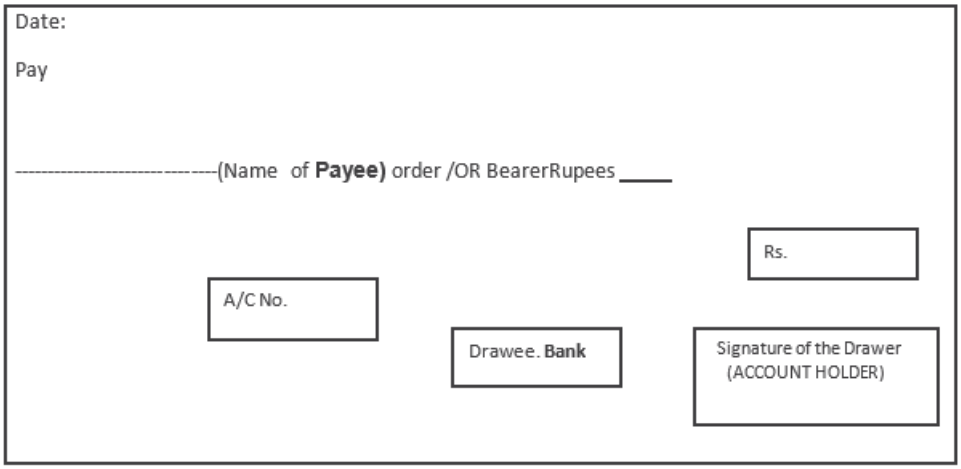
Section 6 of Negotiable Instrument Act defines Cheque as *"a bill of exchange drawn on a specified banker and not expressed to payable otherwise than on demand and it includes the electronic image of a truncated cheque and a cheque in the electronic form"*

Payable on Demand: It should be payable whenever the holder chooses to present it to the drawee that is banker.

Cheque in Electronic Form: Cheque drawn by using any computer resource and signed in a secure system with a digital signature and asymmetric crypto system; or electronic signature.

Truncated Cheque: Means a cheque which is truncated during the course of clearing cycle, either by clearing house or by bank whether paying or receiving payment immediately on generation of the electronic image for transmission, substituting the further physical movement of the cheque in writing.

SEPCIMEN OF A CHEQUE



9.2 CHARACTERISTICS OF CHEQUE

1. **It must be in writing:** A cheque must be in writing. An oral order to pay does not constitute a cheque.

2. **An unconditional order:** It is an unconditional order: A cheque cannot be drawn so as to be payable on condition. The drawer's order to the drawee bank must be unconditional. A conditional cheque shall be invalid.

3. **Drawn upon a Specified Banker:** The drawer issues cheque directing to a particular bank having deposit in it to pay the amount of cheque.

4. **Signed by the maker:** The cheque should be signed by the account holder. A cheque does not carry any validity unless signed by the original drawer. It should be dated as well.

5. **Amount in words and figures:** The amount of cheque should be mentioned in words and figures.

6. **Payable on demand:** The amount of cheque must be paid by the bank as soon as it is presented at its counter.

7. **It must contain an express order to pay:** Cheque should contain an express order to pay money and money only, request made in the cheque invalidate the instrument.

8. **The sum contained in the order must be certain.** The sum contain in the cheque must be certain. Uncertainty leads to instrument invalid.

9. **It does not require acceptance and stamp:** Like a bill of exchange, a cheque does not required acceptance from the drawee. There is, a custom among banks to mark cheques as 'good' for the purpose of clearance. But this marking is not an acceptance, further no revenue stamp is required to be affixed on cheques.

10. **Validity:** A cheque is generally valid for six months from the date it bears. Thereafter it is termed as stale cheque. A post-dated or antedated cheque will not be invalid. In both cases, the validity of the cheque is presumed to commence from the date mentioned on it.

9.3 CROSSING OF CHEQUE: SECTION. 123

Crossing Of Cheques

Meaning:

Crossing of cheques means an instruction to the drawee that is the paying bank that the payment is not to be made at the counter but through a bank.

When a cheque bears across its face two parallel transverse lines, or of two parallel transverse lines simply (either with or without the word, not negotiable) that addition shall be deemed a crossing and the cheque shall be deemed to be crossed generally.

Thus, a cheque can either be an open cheque, and the same can been cashed at the counter of the bank, or a crossed cheque that is a cheque with a special direction to at the paying banker to make payment only through a particular banker and not to pay it at the counter. Crossing of a cheque in general does not stop its negotiability but if words like '**Not Negotiable' 'or A/c. Payee only'** are used then it cannot be negotiated freely.

Parties to a cheque

1. **Drawer :**The person who draws the cheque.
2. **Drawee** : The banker on whom the cheque has been drawn, the payee, holder, Endorser, and Endorsee are the same as in a bill.

Types of Cheque

1. **Open Cheques / Bearer Cheques:**

   An open or bearer is a cheque which is payable at the counter of the drawee bank on presentation of the cheque. When the cheque is lost or stolen, it is not possible easily to trace the person who has received the payment.

2. **Crossed Cheque:**

   A crossed cheque is a cheque which is payable only through a specified banker and not directly at the counter of the bank. Crossing ensures security to the holder of the cheque as only the particular banker credits the funds to the account of the payee of the cheque. When two parallel transverse lines, with or without any words, are drawn generally, on the left hand top corner of the cheque.

   - A crossed cheque does not affect the negotiability of the instrument.
   - It can be negotiated the same way as any other negotiable instrument.

Hence Crossed cheque is a cheque which is not paid on the counter of a bank. The amount is credited by the bank to the account of payee. The significance of different types of crossed cheques is different in style.

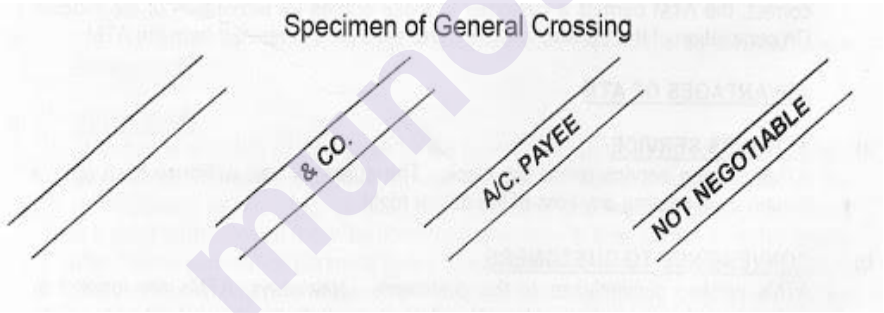
Types of Crossing of Cheques:

1. General Crossing: Section 123

A cheque is said to be crossed generally when it bears across its face any of the following:

- Two transverse parallel lines.
- Two transverse parallel lines with the word "And Company" or "And Co".
- Two transverse parallel lines with any abbreviation of the word "& Company".
- Two transverse parallel lines with the words "Not Negotiable".
- Two transverse parallel lines with the words "Account Payee Only".

The cheque crossed generally does not ceases to be negotiable further. The collecting banker can collect the proceeds of the cheque in the account of that person mentioned on the cheque. A crossed cheque can be made **bearer cheque** by cancelling the crossing and writing that the crossing is cancelled and affixing the full signature of drawer.



Significance of General Crossing-

- The effect of general crossing is that it gives a direction to the paying banker.
- The direction is that, the paying banker should not pay the cheque at the counter.
- It must be presented to the paying banker through any other bank and not the payee himself at the counter.

2. Special Crossing: Section 124

It is a cheque in which the name of the bank is written between the two parallel lines and hence it can be paid to that specific banker only. Inclusion of the name of a banker is essential in special crossing. Special Crossing can never be converted to General Crossing. In

Special Crossing paying banker to honor the cheque only when it is presented through the bank mentioned in the crossing and no other bank.

Essentials of special crossing

1. **Two parallel transverse lines are not at all essential** for a special crossing.
2. **The name of banker must be necessary** specified across the face of the cheque.
3. It must appear on the left-hand side preferably on the corner. It should not be obliterate the printed number of the cheque.
4. The **two parallel transverse lines and the words ?Not negotiable?** may be added to a special crossing.

Specimen Of Special Crossing

Significance of special crossing-

- It is also a direction to the paying banker.
- The direction is that, the paying banker should pay the cheque only to the banker, whose name appears in the crossing or to his agent.
- If the cheque specially crossed to a bank is presented by another bank, not in the capacity of its agent, the paying banker is justified in returning the cheque.
- A special crossing gives more protection to the cheque than a general crossing.

3. Restrictive crossing:

Besides the above two types of statutory crossing in recent years the practice of crossing cheques with the words **Account payee only has sprung up**. Such a crossing is termed as restrictive crossing

Essentials of restrictive crossing-

1. The two transverse parallel lines across the face of the cheque.
2. It must be presented in order to constitute any cheque as a crossed cheque.
3. The cheque will not be taken as a crossed cheque if this has not been done.

4. Double crossing:

When a cheque bears two separate special crossing, it is said to have been doubly crossed. Thus a paying bank shall pay a cheque doubly crossed only when the second banker is acting only the agent of the first collecting banker and this has been made clear on the instrument.

9.4 DISHONOUR OF CHEQUE

There was no effective legal provision before the year 1888 to restrict people from issuing cheques without having sufficient amount in their account or any harsh provision to punish them in the event of such cheque not being honoured by their bankers and returned unpaid. Dishonour of cheques is a civil liability accrued.

The processes to seek civil justice becomes a time consuming or a process of unusual length, and recovery by way of a civil matters takes a long time. To ensure immediate remedy against defaulters and to ensure credibility of the holders of the negotiable instrument a criminal remedy of penalty was introduced in Negotiable Instruments Act, 1881 in form of the Banking, Public Financial Institutions and Negotiable Instruments Laws (Amendment) Act, 1988 which were further modified by the Negotiable Instruments (Amendment and Miscellaneous Provisions) Act, 2002.

If the cheque is issued in favour of a person and the same is dishonoured due to insufficiency

of the funds in the account of the drawer (Who draw a cheque) a person suffers a lot. To avoid or stop such dishonour, it has been made an offence by an amendment of the Negotiable Instrument Act by the Banking, Public Financial Institution and Negotiable Instrument Laws (Amendment) Act, 1988.

A new Chapter VII consisting of Sections 138 to 142 has been inserted in the Negotiable Instrument Act.

Section 138 makes the dishonour of cheque an offence. The payee or holder in due course can have recourse against the drawer, who may be held liable for the offence.

The Negotiable Instruments Act, 1881 was amended in the year 1988 to add – Chapter XVII which pertains to penal provisions in case of dishonour of cheques for insufficiency of funds in the accounts.

Under Section 138 –

[1]Where any cheque drawn by a person on an account maintained by him with a banker for payment of any amount of money to another person from out of that account for the discharge, in whole or part, of any debt or other liability, is returned by the bank unpaid, either because of the amount of money standing to the credit of that account is insufficient to honour the cheque or that it exceeds the amount arranged to be paid from that account by an agreement made with that bank, such person shall be deemed to have committed an offence and shall, without prejudice to any other provision of this Act be punished with imprisonment [a term may be extended to 2 years], or with fine which may extend to twice the amount of the cheque, or with both.

Basic Essentials Of Section 138

1. Cheque Drawn by the person who has a account in the Bank i.e existence of Bank-Customer Relationship.
2. Cheque Drawn in discharge – debt or liability.
3. Discharge may be of full – part liability.
4. Cheque returned unpaid. (Returned to Payee/Holder/Person entitled to receive money)
5. Reasons for Return-
   - Insufficiency of Funds
   - Either the balance was insufficient – or it exceeded the amount arranged to be paid for overdraft.
6. Cheque presented in bank within 6 months from date of cheque.
7. Payee gave notice to drawer within 30 days of the refund of the cheque.
8. Drawer must make payment within 15 days from receipt of notice.
9. Cause of Action arises on 16th Day. (S.12(1) Limitation Act – excludes 16th Day)

[1] https://blog.ipleaders.in/dishonour-of-cheque/

If the above conditions are fulfilled the offence u/s 138 is made out – the Cognizance of which would then be taken by Metropolitan Magistrate/ Judicial Magistrate 1st Class as per S.142.

Punishment/S:

Maximum 2 years (earlier it was 1 year – to make the act more stringent vide 2002 Amendments – to was extended to the present 2 years.

Up to twice the amount of cheque as FINE

9.5 SUMMARY

Essential Features and Characteristics of Cheque: It must be in writing: An unconditional order: Drawn upon a Specified Banker: Signed by the maker: Amount in words and figures: Payable on demand: It must contain an express order to pay, the sum contained in the order must be certain. It does not require acceptance and stamp: Validity

Crossing of Cheque: Meaning: Crossing of cheques means an instruction to the drawee that is the paying bank that the payment is not to be made at the counter but through a bank.

Types of Crossing of the Cheque: General Crossing: Section 123, Special Crossing: Section 124, Restrictive crossing, Non-Negotiable Crossing

Dishonour of Cheque: Section 138 makes the dishonour of cheque an offence. The payee or holder in due course can have recourse against the drawer, who may be held liable for the offence.

9.6 QUESTIONS

1. What is cheque? What are its characteristics?
2. What are the different types of crossing of cheques?
3. Explain the criminal penalties in respect of 'Dishonour of Cheque'
4. Write a note on 'Dishonour of Cheque'

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10

THE CONSUMER PROTECTION ACT 1986

Unit Structure :

10.0 Objectives
10.1 Introduction
10.2 Reasons for Enactment of Act
10.3 Objectives and Reasons
10.4 Concepts and Definition.
10.5 Summary
10.6 Questions

10.0 OBJECTIVES

After studying the unit the students will be able to:-

- Understand rationale for enactment of specific act
- Understand the Objectives of the Act.
- Understand various concepts and definitions pertaining to the Consumer Protection Act.

10.1 INTRODUCTION

The Consumer Protection Act, 1986 seeks to provide for better protection of the interests of consumers and for that purpose to make provision for the establishment of consumer councils and other authorities for the settlement of consumer's disputes and for matters connected therewith. The interests of consumers were also protected even earlier under the provisions of several legislations but these legislations failed to protect the ultimate consumer from defective goods or deficient services, overcharging of prices and unscrupulous exploitation. Further, there is ignorance of the consumer of his rights. The consumers have not yet organised themselves into a powerful movement. The consumer needed better protection which led to the enactment of the Consumer Protection Act of 1986. The Act is a very important socio-economic legislation with its main thrust on giving speedy redressal and compensation to the consumer.

10.2 RATIONALE BEHIND THE ENACTMENT OF THE CONSUMER PROTECTION ACT

- Sellers were engaged in many unfair practices which tend to the rise of Consumer Movement by the dissatisfied customers.
- To give the protestation to the consumers from the exploitation in the marketplace, there was no legal system was available.

- In the 1960s, the consumer movement started rising in an organised form due to the rampant adulteration of edible oil and food, black marketing, hoarding, and rampant food shortages.
- Multiple Laws were prevailing, like Indian Contract Act. Like, Indian Contract Act, Sale of Goods Act, The Essential Commodities Act etc. The common consumer used to get confused which law should apply.
- Holding exhibitions and writing articles were largely the methods used till the 1970s, by the consumer organisations.
- To investigate the malpractices in ration shops and overcrowding of public road transports, consumer groups were formed.
- In the recent past, India saw a big rise in the number of consumer groups.
- Due to the above-mentioned efforts, the Government was forced to bring in legislation to protect the consumers from unfair business practices.
- Doctrine of Caveat Emptor gives the rise to Consumer Protection Movement. This doctrine used to hold buyer totally responsible though the seller knows the fault in the goods.

Therefore, a need felt that there should be appropriate law to provide requisite and urgent remedy to the aggrieved consumer which is compensatory in nature. Observing this Consumer Protection Act 1986 was enacted.

10.3 OBJECTIVES AND REASONS

1. Statement of Objects and Reasons are as under: -
    - The right to be protected against marketing of goods which are hazardous to life and property;
    - The right to be informed about the quality, quantity, potency, purity, standard and price of goods to protect the consumer against unfair trade practices;
    - The right to be assured, wherever possible, access to an authority of goods at competitive prices;
    - 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;
    - Right to consumer education.
    - Protection from spurious goods or fostering deceptive practices in the provision of services.

2. These objects are sought to be promoted and protected by the Consumer Protection Council to be established at the Central and State level.

3. To provide speedy and simple redressal to consumer disputes, a quasi-judicial machinery is sought to be setup at the district, State and Central levels. These quasi-judicial bodies will undertake the principles of natural justice and have been authorized to give relief of a specific nature and to award, wherever appropriate, compensation to consumers. Penalties for non-compliance of the sanctions or orders given by the quasi-judicial bodies have also been provided.

10.4 CONCEPTS AND DEFINITION.

1. Consumer [Sec.2(1)(d)]

Under Sub-Clause (i) of Section 2(1)(d), a consumer for the purpose of goods means any person, who :

(a) Buys any goods for consideration which has been paid or promised or partly paid and partly promised or under any system of deferred payment.

(b) Includes any user of such goods other than the person who buys them, when such use is made with the approval of the buyer.

The person claiming himself as 'consumer' should satisfy that

(i) There must be a sale transaction between the seller and the buyer,

(ii) The sale must be of goods,

(iii) The buying of goods must be for consideration,

(iv) The consideration has been paid or promised or partly paid and partly. Promised or under any system of deferred payment,

(v) The user of the goods may also be a consumer when such use is made with the approval of the buyer.

Who is not a consumer?

A person is not a consumer if he obtains goods for resale or for any commercial purpose. Commercial purpose does not includeuse by a consumer of goods bought by and used by him exclusivelyfor the purpose of earning his livelihood, by means of self- employment for e.g. buying a car to run it as a taxi or a widow purchasing a sewing machine for her lively hood etc.

When the manufacturer sells the goods to the wholesaler, who in turn sells the goods to a retailer, the wholesaler will be excluded from the definition of the word consumer as he has brought the goods for 'resale' or for 'commercial purpose'. A person buying the goods for resale or for commercial purpose,even if for consideration, is

not a consumer. Commercial purpose is commerce, mercantile, having profit as the main aim. It includes all business activities. A purchase of a car by a company for useby its business, by director and employees is purchased for commercial purpose.

2. Defects: Sec. 2(1)(f)

"Defect" means any fault, imperfection or shortcoming in the quality, potency purity or standard which is required to be maintained by or under any law for the time being in force underany contract, express or implied or as is claimed by the trader in relation to any goods.

Explanation: When the goods are sub standard or engaged with some inappropriate fault or imperfection in it is known as defects in the goods. In short when the goods are not in accordance with the standard sets by the law the goods called imperfect or defective.

- Supply of contaminated agricultural products which contain pesticides and harmful soil particles, which caused to food poisoning.
- Product made for children that contains choking hazards
- Products like a helmet that cracks or breaks from small impact
- Unstable structures, such as tables or chairs that collapse
- Mechanical defects on cars and other electronic goods.
- Defects in the clothing materials. Etc.
- Contaminated Packed Food and Water

3. Deficiency: Sec.2(1)(g)

"Deficiency means any fault, imperfection or shortcoming or inadequacy in the quality, nature and manner of performance which is required to be maintained or has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service ".

Explanation: Deficiency is in services. If there is imperfection or shortcoming or inadequacy in the nature or manner of performance of any services as per the standard sets by the law, there is said to be deficiency in services**.**

Cases:

a) Abhoya Kumar Panda V. Bajaj Auto Ltd.

The complainant purchased a Bajai Auto Trailer manufactured by the respondent. The vehicle suffered from a majorstructural manufacturing defect. The National Commission held that the manufacturer should not have sold initially a product which suffered from a major manufacturing defect.

Deficiency in telephone service.

b) Overbilling – In Union of India V. Nilesh Agarwal.

A complaint was made averring that there were excess charges in the telephone bill. The Rajasthan State Commission held that the complainant who is a subscriber is a 'consumer' and the telephone service provided by the Telecom Department is a 'service' for which he pays rent and over billing of telephone is "deficiency in service" within the meaning of the section.

4. **Consumer Dispute [Sec. 2(1)(e)]**

"Consumer Dispute" means a dispute where the personagainst whom a complaint has been made, denies, or disputes the allegations contained in the complaint.

Explanation: A complaint has been made against any person who denies the allegation made against him or her. Dispute must be pertaining to the goods delivered or services provided.

5. Complaint [Sec. 2 (1)(c)]

Complaint means any allegation in writing made by a complainant regarding one or more of the following:

(i) an unfair trade practices or a restrictive trade practice has been adopted by any trader.

(ii) the goods bought by him or agreed to be bought by him, eager suffer from one or more defects.

(iii) the service hired or availed of or agreed to be hired or availed of by him suffer from deficiency in any respect.

(iv) a trader has charged for the goods mentioned in the complaint a price in excess of the price fixed by or under any law for the time being in force or displayed on the goods or any package containing such goods.

(v) goods which will be hazardous to life and safety when used, are being offered for sale to the public in contravention of the provision of any law for the time being in force requiring traders to display information regarding the contents, manner, and effect of use of such goods.

10.5 SUMMARY

Rationale behind the enactment of the Consumer Protection Act

- Sellers were engaged in many unfair practices which tend to the rise of Consumer Movement by the dissatisfied customers.
- To give the protestation to the consumers from the exploitation in the marketplace, there was no legal system was available.
- seller knows the fault in the goods.

Objectives and Reasons: The right to be protected against marketing of goods which are hazardous to life and property; The right to be informed about the quality, quantity, potency, purity, standard and price of goods to protect the consumer against unfair trade practices;

Service [Sec.2 (1)(o)] "Service" means service of any description which is made available to potential users.

Consumer [Sec.2(1)(d)]

Under Sub-Clause (i) of Section 2(1)(d), a consumer for the purpose of goods means any person, who :

Buys any goods for consideration which has been paid or promised or partly paid and partly promised or under any system of deferred payment.

Defects Sec. 2(1)(f)

Means any fault, imperfection or shortcoming in the quality, potency purity or standard which is required to be maintained by or under any law for the time being in force underany contract

Deficiency: Sec.2(1)(g)

"Deficiency means any fault, imperfection or shortcoming or inadequacy in the quality, nature and manner of performance which is required to be maintained or has been undertaken to be performed by a person in pursuance of a contract or otherwise in relation to any service.

10.6 QUESTIONS

1. Explain the need for enactment of Consumer Protection Act.
2. Who can file a complaint under the consumer protection act and under what circumstances?
3. Who is a consumer and who is not a consumer under the consumer protection act?
4. What are an unfair trade practices?
5. Write a Short Note on :-
   a. Consumer Dispute
   b. Deficiency
   c. Defects
   d. Service
   e. Goods

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11

COMPANY LAW

Unit Structure :

11.1 Definition, meaning and features of Company.

11.2 Incorporation of Company

11.3 Membership of a company

11.4 Memorandum and Articles of Association

11.5 Prospectus

11.6 Meetings

11.7 Meaning of Transfer and Transmission of shares

11.8 Summary

11.9 Questions

11.10 References

11.0 OBJECTIVES

- To study the meaning and features of the company Law.
- To understand about the Incorporation and membership of the company.
- To Understand the memorandum and Articles of Association
- To study about the prospectus
- To study about the meetings.
- To understand about the Transfer and Transmission of shares.

11.1 MEANING OF A COMPANY

The word 'company' is derived from the Latin word (Com=with or together; panis =bread), and it originally referred to an association of persons who took their meals together. In the leisurely past, merchants took advantage of festive gatherings, to discuss business matters.

Nowadays, business matters have become more complicated and cannot be discussed at festive gatherings. Therefore, the company form of organization has assumed greater importance. It denotes a joint-stock enterprise in which the capital is contributed by several people. Thus, in popular parlance, a company denotes an association of likeminded persons formed for the purpose of carrying on some business or undertaking.

A company is a corporate body and a legal person having status and personality distinct and separate from the members constituting it.

It is called a body corporate because the persons composing it are made into one body by incorporating it according to the law and clothing it with legal personality. The word 'corporation' is derived from the Latin term 'corpus' which means 'body'. Accordingly, 'corporation' is a legal person created by a process other than natural birth. It is, for this reason, sometimes called an artificial legal person. As a legal person, a corporation can enjoy many of the rights and incurring many of the liabilities of a natural person.

An incorporated company owes its existence either to a special Act of Parliament or to company law. Public corporations like Life Insurance Corporation of India, SBI etc., have been brought into existence by special Acts of Parliament, whereas companies like Tata Steel Ltd., Reliance Industries Limited have been formed under the Company law i.e. Companies Act, 1956 which is being replaced by the Companies Act, 2013.

11.1.1 Definition of Company

In the legal sense, a company is an association of both natural and artificial persons (and is incorporated under the existing law of a country). In terms of the Companies Act, 2013 (Act No. 18 of 2013) a "company" means a company incorporated under this Act or under any previous company law [Section 2(20)].

In common law, a company is a "legal person" or "legal entity" separate from, and capable of surviving beyond the lives of its members. However, an association formed not for profit also acquires a corporate character and falls within the meaning of a company by reason of a license issued under Section 8(1) of the Act.

A company is not merely a legal institution. It is rather a legal device for the attainment of the social and economic end. It is, therefore, a combined political, social, economic and legal institution. Thus, the term company has been described in many ways. "It is a means of cooperation and organization in the conduct of an enterprise".

It is "an intricate, centralized, economic and administrative structure run by professional managers who hire capital from the investor(s)".

Lord Justice Lindley has defined a company as "an association of many persons who contribute money or money's worth to common stock and employ it in some trade or business and who share the profit and loss arising therefrom. The common stock so contributed is denoted in money and is the capital of the company.

The persons who contributed in it or form it, or to whom it belongs, are members. The proportion of capital to which each member is entitled is his "share". The shares are always transferable although the right to transfer them may be restricted."

From the foregoing discussion, a company has its own corporate and legal personality distinct which is separate from its members. A brief description of the various attributes is given here to explain the nature and characteristics of the company as a corporate body.

Historical Development

As we all know that India has drawn a lot of legislation from England. Similarly, in the case of Companies law, India enacted company law based upon the company law enacted in England. The three phases which influenced the Company legislations may be divided as

i) Colonization era;

ii) Period after World War II &

iii) Opening up of Indian markets in the year 1990.

Legislation Enacted

In the year 1850, the first Company enactment for the registration of the joint-stock company was introduced in India. This enactment as mentioned before was based upon the English Companies Act, 1844.

Later in the year 1857, the concept of limited liability was recognized in the companies legislation but the said limited liability was not extended to the banking company. The concept of limited liability into the Companies Act was introduced earlier in the English Companies Act of 1856. But by the year of 1858, the concept of limited liability was extended to banking company even in India.

In the year 1866 Companies Act was yet again passed for consolidating and amending the laws relating to incorporation, regulation and winding up of trading companies and other associations. This Act was based upon the Companies Act 1862 of England. This Act was recast in the year 1882 and was in use until 1913.

In the year 1913 another Indian Companies Act was enacted based upon English Companies Consolidation Act, 1908. Companies Act of 1913 was amended in the year 1914, 1915, 1920, 1926, 1930 and 1932. But the major amendment to the Companies Act of 1913 who was made in the year 1936 this amendment was based upon the English Companies Act. 1929. The act of 1913 regulated the Indian business company until 1956.

Major Changes brought forth by the Companies Act 1956

- Promotion and growth of Companies.
- Capital structure of the Companies.
- Company meetings and procedures.
- Company accounts and its presentation & powers and duties of the auditors of the company.
- Inspection and investigations of the affairs of the Company.
- The constitution of the Board of Directors, Powers and functions of directors, Managing Directors and Managers; and
- Administration of the Company Law.

The Amendments in the Companies Act, 1956

As any other legislation various amendments were made to the Companies Act 1956 as mentioned below:

Timeline of Amendments

1960 1962 1963 1964 1965 1966 1967 1969 1974 1977 1985 1988 1991 1999

2000 2002 2006 2013 2015 2017 2019 2020

The New Enactment of the New Society

The Companies Act, 2013 replaced the Companies Act, 1956. The legislators introduced ideas of the likes of:

- Corporate Social Responsibility (CSR)
- Class action suits
- Fixed term for the Independent Directors
- The provision of raising money from the public was made little stringent
- Prohibition on insider trading by company directors or key managerial personnel by declaring such activities as a criminal offence
- It permits shareholder agreements providing for the 'Right of First Offer' or 'Right of first Refusal' even in the case of Public Companies

The Companies Amendment Bill, 2020 was introduced to amend the Companies Act, 2013 with the intent of improving the ease of doing business in India, de-criminalizing various minor offences and regulating producer companies, amongst other aspects. On September 28, 2020, this Bill received the President's assent and was notified in the official gazette on the same date as the Companies (Amendment) Act, 2020.

11.1.2 Nature and Characteristics of a Company

Since a corporate body (i.e. a company) is the creation of law, it is not a human being it is an artificial juridical person (i.e. created by law); it is clothed with many rights, obligations, powers, and duties prescribed by law; it is called a 'person'.

Being the creation of law, it possesses only the powers conferred upon it by its Memorandum of Association which is the charter of the company. Within the limits of powers conferred by the charter, it can do all acts as a natural person may do.

The most striking characteristics of a company are:

(i) Corporate personality

A company incorporated under the Act is vested with a corporate personality so it redundant bears its own name, acts under a name, has

a seal of its own and its assets are separate and distinct from those of its members. It is a different 'person' from the members who compose it. Therefore, it is capable of owning property, incurring debts, borrowing money, having a bank account, employing people, entering into contracts and suing or being sued in the same manner as an individual.

Its members are its owners however they can be its creditors simultaneously. A shareholder cannot be held liable for the acts of the company even if he holds virtually the entire share capital.

A Company is an artificial person created by law. It is not a human being, but it acts through human beings. It is considered as a legal person which can enter contracts, possess properties in its own name, sue and can be sued by others etc. It is called an artificial person since it is invisible, intangible, existing only in the contemplation of law. It can enjoy rights and being subject to duties.

(ii) Limited Liability

The privilege of limited liability for business debts is one of the principal advantages of doing business under the corporate form of organization. The company, being a separate person, is the owner of its assets and bound by its liabilities.

The liability of a member as a shareholder extends to the contribution to the capital of the company up to the nominal value of the shares held and not paid by him. Members, even as a whole, are neither the owners of the company's undertakings nor liable for its debts. There are various exceptions to the principle of limited liability.

For example, if X holds shares of the total nominal value of 10000 and has already paid 4000/- as part payment at the time of allotment, he cannot be called upon to pay more than 6000/-, the amount remaining unpaid on his shares even if the company suffers losses worth crores of rupees. If he holds fully-paid shares, he has no further liability to pay even if the company is declared insolvent. In the case of a company limited by guarantee, the liability of members is limited to a specified amount of the guarantee mentioned in the memorandum.

In other words, a shareholder is liable to pay the balance, if any, due on the shares held by him, when called upon to pay and nothing more, even if the liabilities of the company far exceed its assets. This means that the liability of a member is limited.

(iii) Perpetual Succession

An incorporated company never dies, except when it is wound up as per law. A company, being a separate legal person is unaffected by death or departure of any member and it remains the same entity,

despite the total change in the membership. A company's life is determined by the terms of its Memorandum of Association.

It may be perpetual, or it may continue for a specified time to carry on a task or object as laid down in the Memorandum of Association. Perpetual succession, therefore, means that the membership of a company may keep changing from time to time, but that shall not affect its continuity.

The membership of an incorporated company may change either because one shareholder has sold/transferred his shares to another or his shares devolve on his legal representatives on his death or he ceases to be a member under some other provisions of the Companies Act.

Thus, perpetual succession denotes the ability of a company to maintain its existence by the succession of new individuals who step into the shoes of those who cease to be members of the company. Professor L.C.B. Gower rightly mentions,

"Members may come and go, but the company can go on forever. During the war, all the members of one private company, while in general meeting, were killed by a bomb, but the company survived — not even a hydrogen bomb could have destroyed it".

(iv) Separate Property

A company is a legal person and entirely distinct from its members, is capable of owning, enjoying and disposing of property in its own name. The company is the real person in which all its property is vested, and by which it is controlled, managed and disposed of.

Their Lordships of the Madras High Court in R.F. Perumal v. H. John Deavin, A.I.R. 1960 Mad. 43 held that "no member can claim himself to be the owner of the company's property during its existence or in its winding-up". A member does not even have an insurable interest in the property of the company.

(v) Transferability of Shares

The capital of a company is divided into parts, called shares. The shares are said to be a movable property and, subject to certain conditions, freely transferable, so that no shareholder is permanently or necessarily wedded to a company. When the joint-stock companies were established, the object was that their shares should be capable of being easily transferred, [In Re. Balia and San Francisco Rly., (1968) L.R. 3 Q.B. 588].

Section 44 of the Companies Act, 2013 enunciates the principle by providing that the shares held by the members are movable property and can be transferred from one person to another in the manner provided by the articles. If the articles do not provide anything for the transfer of shares and the Regulations contained in

A member may sell his shares in the open market and realize the money invested by him. This provides liquidity to a member (as he can freely sell his shares) and ensures stability to the company (as the member is not withdrawing his money from the company). The Stock Exchanges provide adequate facilities for the sale and purchase of shares.

Further, as of now, in most of the listed companies, the shares are also transferable through Electronic mode i.e. through Depository Participants in dematerialized form instead of physical transfers. However, there are restrictions with respect to transferability of shares of a Private Limited.

(vi) Common Seal

Upon incorporation, a company becomes a legal entity with perpetual succession and a common seal. Since the company has no physical existence, it must act through its agents and all contracts entered by its agents must be under the seal of the company. The Common Seal acts as the official signature of a company. The name of the company must be engraved on its common seal.

A rubber stamp does not serve the purpose. A document not bearing a common seal of the company, when the resolution passed by the Board, for its execution requires the common seal to be affixed is not authentic and shall have no legal force behind it.

However, a person duly authorized to execute documents pursuant to a power of attorney granted in his favour under the common seal of the company may execute such documents and it is not necessary for the common seal to be affixed to such documents.

The person, authorized to use the seal, should ensure that it is kept under his personal custody and is used very carefully because any deed, instrument or a document to which seal is improperly or fraudulently affixed will involve the company in legal action and litigation.

(vii) Capacity to sue or be sued

A company is a body corporate, can sue and be sued in its own name. To sue means to institute legal proceedings against (a person) or to bring a suit in a court of law. All legal proceedings against the company are to be instituted in its name. Similarly, the company may bring an action against anyone in its own name.

A company's right to sue arises when some loss is caused to the company, i.e. to the property or the personality of the company. Hence, the company is entitled to sue for damages in libel or slander as the case may be [Floating Services Ltd. v. MV San Fransceco Dipaloa (2004) 52 SCL 762 (Guj)].

A company, as a person distinct from its members, may even sue one of its own members. A company has a right to seek damages where a defamatory material published about it, affects its business.

Where video cassettes were prepared by the workmen of a company showing, their struggle against the company's management, it was held to be not actionable unless shown that the contents of the cassette would be defamatory. The court did not restrain the exhibition of the cassette. [TVS Employees Federation v. TVS and Sons Ltd., (1996) 87 Com Cases 37].

The company is not liable for contempt committed by its officer. [Lalit Surajmal Kanodia v. Office Tiger Database Systems India (P) Ltd., (2006) 129 Com Cases 192 Mad].

(viii) Contractual Rights

A company, being a legal entity different from its members, can enter into contracts for the conduct of the business in its own name. A shareholder cannot enforce a contract made by his company; he is neither a party to the contract nor be entitled to the benefit derived from of it, as a company is not a trustee for its shareholders.

Likewise, a shareholder cannot be sued on contracts made by his company. The distinction between a company and its members is not confined to the rules of privity but permeates the whole law of contract. Thus, if a director fails to disclose a breach of his duties towards his company, and in consequence, a shareholder is induced to enter into a contract with the director on behalf of the company which he would not have entered into had there been disclosure, the shareholder cannot rescind the contract.

Similarly, a member of a company cannot sue in respect of torts committed against the company, nor can he be sued for torts committed by the company. [British Thomson-Houston Company v. Sterling Accessories Ltd., (1924) 2 Ch. 33]. Therefore, the company as a legal person can take action to enforce its legal rights or be sued for breach of its legal duties. Its rights and duties are distinct from those of its constituent members.

(ix) Limitation of Action

A company cannot go beyond the power stated in its Memorandum of Association. The Memorandum of Association of the company regulates the powers and fixes the objects of the company and provides the edifice upon which the entire structure of the company rests.

The actions and objects of the company are limited within the scope of its Memorandum of Association.

In order to enable it to carry out its actions without such restrictions and limitations in most cases, sufficient powers are granted in the

Memorandum of Association. But once the powers have been laid down, it cannot go beyond such powers unless the Memorandum of Association, itself altered prior to doing so.

(x) Separate Management

The members may derive profits without being burdened with the management of the company. They do not have effective and intimate control over its working, and they elect their representatives as Directors on the Board of Directors of the company to conduct corporate functions through managerial personnel employed by them.

In other words, the company is administered and managed by its managerial personnel.

(xi) Voluntary Association for Profit

A company is a voluntary association for profit. It is formed for the accomplishment of some stated goals and whatsoever profit is gained is divided among its shareholders or saved for the future expansion of the company. Only a Section 8 company can be formed with no profit motive.

(xii) Termination of Existence

A company, being an artificial juridical person, does not die a natural death. It is created by law, carries on its affairs according to law throughout its life and ultimately is effaced by law. Generally, the existence of a company is terminated by means of winding up. However, to avoid winding up, sometimes companies adopt strategies like reorganization, reconstruction, and amalgamation.

11.1.3 Distinction between Company and Partnership

The principal points of distinction between a company and a partnership firm are as follows:

- A company is a distinct legal person. A partnership firm is not distinct from the several persons who form the partnership.
- In a partnership, the property of the firm is the property of the individuals comprising it. In a company, it belongs to the company and not to the individuals who are its members.
- Creditors of a partnership firm are creditors of individual partners and a decree against the firm can be executed against the partners jointly and severally. The creditors of a company can proceed only against the company and not against its members.
- Partners are the agents of the firm, but members of a company are not its agents. A partner can dispose of the property and incur liabilities as long as he acts in the course of the firm's business.
- A member of a company has no such power.

- A partner cannot contract with his firm, whereas a member of a company can.
- Distinction Between Memorandum and Articles of Association
- The doctrine of Indoor Management
- Exceptions to the Doctrine of Indoor Management
- Prospectus

11.2 PROCEDURE OF INCORPORATION

The Companies Act of 1956 sets down rules for the establishment of both public and private companies. The most commonly used corporate form is the limited company, unlimited companies being relatively uncommon. A company is formed by registering the Memorandum and Articles of Association with the State Registrar of Companies of the state in which the main office is to be located.

Foreign companies engaged in manufacturing and trading activities abroad are permitted by the Reserve Bank of India to open branch offices in India for the purpose of carrying on the following activities in India:

- To represent the parent company or other foreign companies in various matters in India, for example, acting as buying/selling agents in India, etc.
- To conduct research work in which the parent company is engaged provided the results of the research work are made available to Indian companies
- To undertake export and import trading activities
- To promote possible technical and financial collaboration between Indian companies and overseas companies.

Application for permission to open a branch, a project office or liaison office is made via the Reserve Bank of India by submitting form FNC-5 to the Controller, Foreign Investment and Technology Transfer Section of the Reserve Bank of India. For opening a project or site office, application may be made on Form FNC-10 to the regional offices of the Reserve Bank of India. A foreign investor need not have a local partner, whether or not the foreigner wants to hold full equity of the company. The portion of the equity thus not held by the foreign investor can be offered to the public.

Approval of Name

The first step in the formation of a company is the approval of the name by the Registrar of Companies (ROC) in the State/Union Territory in which the company will maintain its Registered Office. This approval is provided subject to certain conditions: for instance, there should not be an existing company by the same name. Further, the last words in the name are required to be "Private Ltd." in the case of a private company and "Limited" in the case of a Public Company. The application should mention at least four

suitable names of the proposed company, in order of preference. In the case of a private limited company, the name of the company should end with the words "Private Limited" as the last words. In case of a public limited company, the name of the company should end with the word "Limited" as the last word. The ROC generally informs the applicant within seven days from the date of submission of the application, whether or not any of the names applied for is available. Once a name is approved, it is valid for a period of six months, within which time Memorandum of Association and Articles of Association together with miscellaneous documents should be filed. If one is unable to do so, an application may be made for renewal of name by paying additional fees. After obtaining the name approval, it normally takes approximately two to three weeks to incorporate a company depending on where the company is registered.

11.4 MEMORANDUM AND ARTICLES

The Memorandum of Association and Articles of Association are the most important documents to be submitted to the ROC for the purpose of incorporation of a company. The Memorandum of Association is a document that sets out the constitution of the company. It contains, amongst others, the objectives and the scope of activity of the company besides also defining the relationship of the company with the outside world.

The Articles of Association contain the rules and regulations of the company for the management of its internal affairs. While the Memorandum specifies the objectives and purposes for which the Company has been formed, the Articles lay down the rules and regulations for achieving those objectives and purposes.

The ROC will give the certificate of incorporation after the required documents are presented along with the requisite registration fee, which is scaled according to the share capital of the company, as stated in its Memorandum. A private company can commence business on receipt of its certificate of incorporation.

A public company has the option of inviting the public for subscription to its share capital. Accordingly, the company has to issue a prospectus, which provides information about the company to potential investors. The Companies Act specifies the information to be contained in the prospectus.

The prospectus has to be filed with the ROC before it can be issued to the public. In case the company decides not to approach the public for the necessary capital and obtains it privately, it can file a "Statement in Lieu of Prospectus" with the ROC.

On fulfillment of these requirements, the ROC issues a Certificate of Commencement of Business to the public company. The company can commence business immediately after it receives this certificate.

Miscellaneous Documents

The documents/forms stated below are filed along with Memorandum of Association and Articles of Association on payment of filing fees (depending on the authorised capital of the company):

- Declaration of compliance, duly stamped
- Notice of the situation of the registered office of the company
- Particulars of Directors, Manager or Secretary
- Authority executed on a non-judicial stamp paper, in favour of one of the subscribers to the Memorandum of Association or any other person authorizing him to file the documents and papers for registration and to make necessary corrections, if any
- The ROC's letter (in original) indicating the availability of the name.

Tax Registration

Businesses liable for income tax must obtain a tax identification card and number [known as Permanent Account Number (PAN)] from the Revenue Department. In addition to this, businesses liable to withhold tax must necessarily obtain a Tax Deduction Account Number (TAN). Both the PAN and the TAN must be indicated on all the returns, documents and correspondence filed with the Revenue Department. The PAN is also required to be stated in various other documents such as the documents pertaining to sale or purchase of any immovable property (exceeding Rs. five lakh), sale or purchase of a motor vehicle, time deposit (exceeding Rs. 5 lakh), contract for sale or purchase of securities (exceeding Rs. 10 lakh), to name a few.

Rules Applicable

- Companies (Central Governments') General Rules and Forms,1956
- Filing Registering/Approving Authority
- One copy has to be submitted along with a forwarding letter addressed to the concerned Registrar of Companies.

Enclosures

The declaration must be submitted with the following annexure

- Document evidencing payment of fee
- Memorandum and Articles of Association
- Copy of agreement if any, which the proposed company wishes to enter into with any individual for appointment as its managing or whole-time director or manager
- Form 18
- Form 32 (except for section 25 company)
- Form 29 (only in case of public companies)

- Power of Attorney from subscribers
- Letter from Registrar of Companies making names available
- No objection letters from directors/promoters
- Requisite fees either in cash or demand draft

Fees

Fee payable depends on the nominal capital of the company to be registered and may be paid in one of the following modes. Cash/postal order (upto Rs.501-), demand draft favouring Registrar of Companies/Treasury Challan should be payable into specified branches of Punjab National Bank for credit Time-Limit

It should be submitted before incorporation or within 6 months of the name being made available.

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Requirements

The declaration has to be signed by an advocate of Supreme Court or High Court or an attorney or pleader entitled to appear before the High Court or a secretary or chartered accountant in wholetime practice in India who is engaged in the formation of the proposed company or person named in the articles as director, manager or secretary.

The Registrar of Companies has to be satisfied that not only the requirements of section 33(1) and (2) have been complied with but be also satisfied that provisions relating to number of subscribers, lawful nature of objects and name are complied with.

The Registrar will check whether the documents have been duly stamped and also whether the requirements of other laws are met.

Any defect in any of the documents filed has to be rectified either by all the subscribers or their attorney, or by any one subscriber holding the power of attorney on behalf of other subscribers.

This form is to be presented to the Registrar of Companies within three months from the date of letter of Registrar allowing the name.

This declaration is to be given on a non-judicial stamp paper of the requisite value. The stamp paper should be purchased in the name of the person signing the declaration.

This declaration is to be given by all the companies at, the time of registration, public or private.

The place of Registration No. of the company should be filled up by mentioning New Company therein.

The Registrar of Companies will now accept computer laser printed documents for purposes of registration provided the documents are neatly and legibly printed and comply with the other requirements of the Act. This will be an additional option available to the public to use laser print besides offset printing for submitting the memorandum and articles for the registration of companies.

Where the executants of a memorandum of association is illiterate, he shall give his thumb impression or marks which should be described as such by the subscriber or person writing for him.

An agent may sign a memorandum on behalf of a subscriber if he is authorised by a power-ofattorney to do so. In the case of an illiterate subscriber to the memorandum and articles of association, the thumb impression or mark duly attested by the person writing for him should be given. The person attesting the thumb mark should make an endorsement on the document to the effect that it has been read and explained to the subscriber. The Registrar of Companies will not accept zerox copies of the memorandum and articles of association for the purposes of registration of companies.

This declaration is to be presented by the person signing the declaration or by his bearer at the counter of the Registrar of Companies office.

Managerial Remuneration

- Any person in order to be appointed as the Managing Director of the company should be a resident of India. Any person, being a non-resident in India, must obtain an Employment Visa from the concerned Indian mission abroad at the time of their appointment as the Managing Director.
- Whereas private companies are free to pay any remuneration to its directors, public companies can remunerate their directors only within the specified limits.
- In case of public companies, in the event of absence or inadequacy of net profits in any financial year, managerial remuneration is limited to amounts varying from Rs 75,000 to Rs 2,00,000 per month, depending on the effective capital of the company. In case of an expatriate managerial person, perquisites in the form of children's education allowance, holiday passage money and leave travel concession provided to him would not form part of the said ceiling of remuneration.
- In case of a managerial position in two companies, remuneration can be drawn from one or both companies provided that the total remuneration drawn from the companies does not exceed the higher maximum limit admissible from any one of the companies of which he is a managerial person.

With whom to be filed

With the Registrar of Companies of the State in which the company is to be registered.

Documents required to be submitted

- A printed copy each of the Memorandum and Articles of Association of the proposed company filed along with the declaration duly stamped with the requisite value of adhesive stamps from the State/ Union Territory Treasury (For value of stamps to be affixed see Schedule printed in Part III Chapter 23). Below the subscription clause the subscribers to the Memorandum should write in his own handwriting his full name and father's, or husband's full name in block letters, full address, occupation, e.g., 'business executive, engineer, housewife, etc. and number of equity shares taken and then put his or her signatures in the column meant for signature. Similarly, at the end of the Articles of Association the subscriber should write in his own handwriting: his full name and father's full name in block letters, full address, occupation. The signatures of the subscribers to the Memorandum and the Article of Association should be witnessed by one person preferably by the person representing the subscribers, for registration of the proposed company before the Registrar of Companies. Under column 'Total number of equity shares' write the total of the shares taken by the subscribers e.g., 20 (Twenty) only. Mention date e.g. 5th day of August 1996. Place-e.g., 'New Delhi'.
- With the stamped copy, one spare copy each of the Memorandum and Articles of Association of the proposed company.
- Original copy of the letter of the Registrar of Companies intimating the availability of name.
- Form No. 18 - Situation of registered office of the proposed company.
- Form No. 29-Consent to act as a director etc. Dates on the consent Form and the undertaking letters should be the same as is mentioned in the Memorandum of Association signed by the director himself. A private company and a wholly owned Government company are not required to file Form No. 29.
- Form No. 32 (in duplicate). Particulars of proposed, directors, manager or secretary.
- Power of attorney duly typed on a non-judicial stamp paper of the requisite value. The stamp paper should be purchased in the name of the persons signing the authority.
- No objection letter from the persons whose name has been given in application for availability of name in Form No. 1-A as promoters/directors but are not interested at a later stage should be obtained filed with the Registrar at the time of submitting documents, for registration

- The agreements, if any, which the company proposes to enter with any individual for, appointment as managing or whole-time director or manager are also to be filed.

Fee payable

Cash or a bank draft/ pay order treasury challan should be drawn in the name of the Registrar of Companies of the State in which the Company is proposed to be registered as per Schedule X.

Reporting Requirements

Annual Accounts

The Indian company law does not prescribe the books of accounts required to be maintained by a company. It, however, provides that the same should be kept on accrual basis and according to the double entry system of accounting and should be such as may be necessary to give a true and fair state of affairs of the company.

The Indian company law requires every company to maintain proper books of account with respect to the following:

- All sums of money received and expended and the matters in respect of which the receipt and expenditure take place
- All sales and purchases of goods by the company
- The assets and liabilities of the company
- In case of companies engaged in manufacturing, processing, mining etc., such particulars relating to utilization of material or labour or other items of cost.

The first annual accounts of a newly incorporated company should be drawn from the date of its incorporation upto to the day not preceding the AGM date by more than 9 months. Thereafter, the accounts should be drawn from date of last account upto the day not preceding the AGM date by more than 6 months subject to the extension of the time limit in certain cases. The accounts of the company must relate to a financial year (comprising of 12 months) but must not exceed 15 months. The company can obtain an extension of the accounting period to the extent of 18 months by seeking a prior permission from the ROC.

The annual accounts must be filed with the ROC within 30 days from the date on which the Annual General Meeting (AGM) of the company was held or where the AGM is not held, then within 30 days of the last date on which the AGM was required to be held.

Books of accounts to be kept by company

Every company is required to maintain proper books of account with respect to all sums of money received and expended, all sales and purchases of goods, the assets and liabilities. Central Government may also specifically require the maintenance of certain additional particulars with respect to

certain classes of Companies. The books of account relating to eight years immediately preceding the current year together with supporting vouchers are required to be preserved in good order. Every profit and loss account and balance sheet of the company (together referred to as financial statements) is required to comply with the accounting standards issued by the Institute of Chartered Accountants of India. Any deviations from the accounting standards, including the reasons and consequent financial effect, is required to be disclosed in the financial statements.

The responsibility for the preparation of financial statements on a going concern basis is that of the management. The management is also responsible for selection and consistent application of appropriate accounting policies, including implementation of applicable accounting standards along with proper explanation relating to any material departures from those accounting standards. The management is also responsible for making judgements and estimates that are reasonable and prudent so as to give a true and fair view of the state of affairs of the entity at the end of the financial year and of the profit or loss of the entity for that period.

Annual Return

Every company having a share capital is required to file an annual return with the ROC within 60 days from the date on which the AGM of the company was held or where the AGM is not held, then within 60 days of the last date on which the AGM was required to be held.

Certain Accounting related issues

Depreciation

The company law in India permits the use of depreciation rates according to the nature of the classes of assets. Assets can be depreciated either on the basis of straight-line method (based on the estimated life of the asset) or on the basis of reducing balance method. The law prescribes the minimum rates of depreciation. A company may, however, provide for a higher rate of depreciation, based on a bonafide technological evaluation of the asset. Adequate disclosure in the annual accounts must be made in this regard.

Dividend

There is no limit on the rate of dividend but there are certain conditions prescribed with regard to computation of profits that can be distributed as dividend. Generally, no dividend can be paid for any financial year except out of the profits of that year after making an adequate provision for depreciation subject to certain conditions. Dividends may also be distributed out of accumulated profits.

Repatriation of profits

A company has to retain a maximum of 10% of the profits as reserves before the declaration of dividends. These reserves, inter alia, can be subsequently converted into equity by way of issue of bonus shares. Dividends are freely repatriable once the investment approval is granted.

Imposition of taxes

Currently, domestic companies are taxable at the rate of 35.875% (inclusive of surcharge of 2.5%) on its taxable income. Foreign companies are taxed at a marginally higher rate of 41% (including surcharge of 2.5%). However, in case where the income tax liability of the company under the provisions of the domestic tax laws works out to less than 7.5% of the book profits (derived after making the necessary adjustments), a Minimum Alternate Tax of 7.6875% (including a surcharge of 2.5%) on the book profits, would be payable. Domestic companies are required to pay a dividend distribution tax of 12.8125% (including surcharge of 2.5%) on the dividends distributed during the year.

Companies are required to withhold tax under the domestic law from certain payments including salaries paid to employees, interest, professional fee, payments to contractors, commission, winnings from games / lottery / horse races etc. Moreover, taxes have to be withheld from all payments made to non-residents at the lower of rates specified under the domestic law or under the applicable tax treaty, if any.

Penalty

- Imprisonment up to two years and fine
- Person liable for default
- Person signing the declaration

Certificate of Incorporation

After the duly stamped Memorandum of Association and Articles of Association, documents and forms are filed and the filing fees are paid, the ROC scrutinizes the documents and, if necessary, instructs the authorised person to make necessary corrections. Thereafter, a Certificate of Incorporation is issued by the ROC, from which date the company comes into existence. It takes one to two weeks from the date of filing Memorandum of Association and Articles of Association to receive a Certificate of Incorporation. Although a private company can commence business immediately after receiving the certificate of incorporation, a public company cannot do so until it obtains a Certificate of Commencement of Business from the ROC.

Memorandum of Association

A company is formed when a number of people come together for achieving a specific purpose. This purpose is usually commercial in nature. Companies are generally formed to earn profit from business activities. To incorporate a company, an application has to be filed with the Registrar of Companies (ROC). This application is required to be submitted with a number of documents. One of the fundamental documents that are required to be submitted with the application for incorporation is the Memorandum of Association.

Definition of Memorandum of Association

Section 2(56) of the Companies Act, 2013 defines Memorandum of Association. It states that a "memorandum" means two things:

- **Memorandum of Association as originally framed.**

  Memorandum as originally framed refers to the memorandum as it was during the incorporation of the company.

- **Memorandum as altered from time to time.**

  This means that all the alterations that are made in the memorandum from time to time will also be a part of Memorandum of Association.

The section also states that the alterations must be made in pursuance of any previous company law or the present Act.

In addition to this, according to Section 399 of the Companies Act, 2013, any person can inspect any document filed with the Registrar in pursuance of the provisions of the Act. Hence, any person who wants to deal with the company can know about the company through the Memorandum of Association.

Meaning of Memorandum of Association

Memorandum of Association is a legal document which describes the purpose for which the company is formed. It defines the powers of the company and the conditions under which it operates. It is a document that contains all the rules and regulations that govern a company's relations with the outside world.

It is mandatory for every company to have a Memorandum of Association which defines the scope of its operations. Once prepared, the company cannot operate beyond the scope of the document. If the company goes beyond the scope, then the action will be considered ultra vires and hence will be void.

It is a foundation on which the company is made. The entire structure of the company is detailed in the Memorandum of Association.

The memorandum is a public document. Thus, if a person wants to enter into any contracts with the company, all he has to do is pay the required fees to the Registrar of Companies and obtain the Memorandum of Association. Through the Memorandum of Association, he will get all the details of the company. It is the duty of the person who indulges in any transactions with the company to know about its memorandum.

Object of registering a Memorandum of Association or MOA

Memorandum of Association is an essential document that contains all the details of the company.

It governs the relationship between the company and its stakeholders. Section 3 of the Companies Act, 2013 describes the importance of memorandum by stating that, for registering a company,

a) In case of a public company, seven or more people are required.

b) In case of a private company, two or more people are required.

c) In case of a one-person company, only one person is required.

In all the above cases, the concerned people should first subscribe to a memorandum before registering the company with Registrar.

Thus, Memorandum of Association is essential for registration of a company. Section 7(1)(a) of the Act states that for incorporation of a company, Memorandum of Association and Articles of Association of the company should be duly signed by the subscribers and filed with the Registrar. In addition to this, a memorandum has other objects as well. These are,

1. It allows the shareholders to know about the company before buying it shares. This helps the shareholders determine how much capital will they invest in the company.

2. It provides information to all the stakeholders who are willing to associate with the company in any way.

Format of Memorandum of Association

Section 4(5) of the Companies Act states that a memorandum should be in any form as given in Tables A, B, C, D, and E of Schedule 1. The Tables are of different kinds because of different kinds of companies.

Table A – It is applicable to a company limited by shares.

Table B – It is applicable to a company limited by guarantee and not having a share capital.

Table C – It is applicable to a company limited by guarantee and having a share capital.

Table D – It is applicable to an unlimited company not having a share capital.

Table E – It is applicable to an unlimited company having a share capital.

The memorandum should be printed, numbered and divided into paragraphs. It should also be signed by the subscribers of the company.

Content of Memorandum of Association

Section 4 of the Companies Act, 2013 states the contents of the memorandum. It details all the essential information that the memorandum should contain.

Name Clause

The first clause states the name of the company. Any name can be chosen for the company. But there are certain conditions that need to be complied with.

Section 4(1)(a) states:

- If a company is a public company, then the word 'Limited' should be there in the name.

  Example, "Robotics", a public company, its registered name will be "Robotics Limited".

- If a company is a private company, then 'Private Limited' should be there in the name.

  "Secure "a private company, its registered name will be "Secure Private Limited".

- This condition is not applicable to Section 8 companies.

What are Section 8 companies?

Section 8 Company is named after Section 8 of the Companies Act,2013. It describes companies which are established to promote commerce, art, sports, education, research, social welfare, religion etc. Section 8 companies are similar to Trust and Societies, but they have a better recognition and legal standing than Trust and Societies.

What kind of names are not allowed?

The name stated in the memorandum shall not be,

- Identical to the name of another company.
- Too nearly resembling the name of an existing company.

According to Rule 8 of the Company (Incorporation) Rules,2014.

- If a company adds 'Limited', 'Private Limited', 'LLP', 'Company', 'Corporation', 'Corp', 'inc' and any other kind of designation to its name to differentiate it from the name of the other company, the name would still not be accepted.

Illustration: Precious Technology Limited is same as Precious Technology Company.

- If plural or singular forms are added to differentiate between names.

Illustrations: Greentech Solution is same as GreenTech Solutions.

- If type, and case of letters, or punctuation marks are added.

Illustration: Wework is same as We. Work.

- Different tenses are used in names.

Illustration: Ascend Solution is same as Ascended Solutions.

- If there is an intentional spelling mistake in the name or phonetic changes in the name.

Illustrations: Greentech is same as Greentek.

- Internet related designations are used like .org, .com, etc.

Illustration: Greentech Solution Ltd. is same as Greentech Solutions.com Ltd.

Exception: The name will not be disregarded if the existing company by a board of resolution allows it.

- Change in order of combination of words.

Illustration: Shah Builders and Contractors is same as Shah Contractors and Builders.

Exception: The name will not be disregarded if the existing company by a board of resolution allows it.

- Addition of a definite or indefinite article.

Illustration: Greentech Solutions Ltd is same as The Greentech Solutions Ltd.

Exception: The name will not be disregarded if the existing company by a board of resolution allows it.

- Slight variation in spelling of two names, including a grammatical variation.

Illustration: Colours TV Channel is same as Colors TV Channel.

- Translation of a name, from one language to another.

Illustration: Om Electricity Corporation is same as Om Vidyut Nigam.

- Addition of the name of a place to the name.

Illustration: Greentech Solutions Ltd. Is same as Greentech Mumbai Solutions Ltd.

Exception: The name will not be disregarded if the existing company by a board of resolution allows it.

- Addition, deletion or modification of numericals in the name.

Illustration: Greentech Solutions Ltd. Is same as 5 Greentech Solutions Ltd.

Exception: The name will not be disregarded if the existing company by a board of resolution allows it.

In addition to this, an undesirable name will also not be allowed to be chosen.

Undesirable names are those names which in the opinion of the Central Government are:

1. Prohibited under the Provisions of Section 3 of Emblems and Names (Prevention and Improper Use) Act, 1950.
2. Names which resemble each other, which are chosen to deceive.
3. The name includes a registered trademark.
4. The name includes any word or words which are offensive to a section of people.
5. Name which is identical to or too nearly resembles the name of an existing Limited Liability Partnership.

Furthermore, statutory names such as the UN, Red Cross, World Bank, Amnesty International etc. are also not allowed to be chosen.

Names which in any way indicate that the company is working for the government are also not allowed.

Reservation of a Name

Section 4(5)(i) of the Act states that for formation of the Company, the Registrar on receiving the required documents can reserve a name for 20 days. If the application is made by an existing company, then once the application is accepted, the name will be reserved for 60 days from the date of application. The company should get incorporated with the reserved name in these 60 days.

If after making the reservation of a name, it is found that some wrong information is given. Then two cases arise.

- In case the company has not been incorporated. In this case, the Registrar can cancel the reservation of the name and impose a fine of Rupees 1,00,000.
- In case the company has been incorporated. In this case, after hearing the reasons of the company, the Registrar has 3 options. These are, o On being satisfied, he can give 3 months' time to the company to change the name by passing an ordinary resolution.
    - o He can strike off the name from the Register of Companies. o He can file a petition of winding up of the company.

Rule 8 and 9 of the Company (Incorporation) Rules, 2014 state that the application for reservation of name under section 4(4) should be filed on Form INC – 1.

Registered Office Clause

The Registered Office of a company determines its nationality and jurisdiction of courts. It is a place of residence and is used for the purpose of all communications with the company.

Section 12 of the Companies Act, 2013 talks about Registered Office of the company.

Before incorporation of the company, it is sufficient to mention only the name of the state where the company is located. But after incorporation, the company has to specify the exact location of the registered office. The company has to then get the location verified as well, within 30 days of incorporation.

It is mandatory for every company to fix its name and address of its registered office on the outside of every office in which the business of the company takes place. If the company is a one-person company, then "One-person Company" should be written in brackets below the affixed name of the company.

Change in place of Registered Office should be notified to the Registrar within the prescribed time period.

Object Clause

Section 4(c) of the Act details the object clause. The Object Clause is the most important clause of Memorandum of Association. It states the purpose for which the company is formed. The object clause contains both, the main objects and matters which are necessary for achieving the stated objects also known as incidental or ancillary objects. The stated objects must be well defined and lawful according to Section 6(b) of the Companies Act, 2013.

By limiting the scope of powers of the company. The object clause provides protection to:

Shareholders – The object clause clearly states what operations will the company perform. This helps the shareholders know their investment in the company will be used for what purpose.

Creditors – It ensures the creditors that capital is not at risk and the company is working within the limits as stated in the clause.

Public Interest – The object clause limits the number of matters the company can deal with thus, prohibiting diversification of activities of the company.

Doctrine of Ultra Vires

If the company operates beyond the scope of the powers stated in the object clause, then the action of the company will be ultra vires and thus void.

Consequences of Ultra Vires

1. Liability of Directors: The directors of the company have a duty to ensure that company's capital is used for the right purpose only. If the capital is diverted for another purpose not stated in the memorandum, then the directors will be held personally liable.

2. Ultra Vires Borrowing by the Company: If a bank lends to the company for the purpose not stated in the object clause, then the borrowing would be Ultra Vires and the bank will not be able to recover the amount.

3. Ultra Vires Lending by the Company: If the company lends money for an ultra vires purpose, then the lending would be ultra vires.

4. Void ab initio – Ultra Vires acts of the company are considered void from the beginning.

5. Injunction – Any member of the company can use the remedy of injunction to prevent the company from doing ultra vires acts.

Liability Clause

The Liability Clause provides legal protection to the shareholders by protecting them from being held personally liable for the loss of the company.

There are two kinds of limited liabilities:

Limited by Shares – Section 2(22) of the Companies Act, 2013 defines a company limited by shares. In a company limited by shares, the shareholders only have to pay the price of the shares they have subscribed to. If for some reason they have not paid the full amount for the shares and the company winds up, then their liability will only be limited to the unpaid amount.

Limited by Guarantee – It is defined in Section 2(21) of the Companies Act, 2013.A company limited by guarantee has members instead of shareholders. These members undertake to contribute to the assets of the company at the time of winding up. The members give guarantee of a fixed amount that they will be liable for.

Non-profit Organizations and other charities usually have a structure of companies limited by guarantee.

Capital Clause

It states the total amount of share capital in the company and how it is divided into shares. The way the amount of capital is divided into what kind of shares. The shares can be equity shares or preference shares.

Illustration: The share capital of the company is 80,00,000 rupees, divided into 3000 shares of 4000 rupees each.

Subscription Clause

The Subscription Clause states who are signing the memorandum. Each subscriber must state the number of shares he is subscribing to. The subscribers have to sign the memorandum in the presence of two witnesses. Each subscriber must subscribe to at least one share.

Association Clause

In this clause, the subscribers to the memorandum make a declaration that they want to associate themselves to the company and form an association.

Memorandum of Association for One-Person-Company

A one-person company is called so because it can be formed by one person. The minimum capital required to form a one-person company is 1,00,000 Rupees.

It is a new concept which has been introduced to promote entrepreneurship. All the laws which are applicable on private companies will be applicable on one-person company.

Section 2(62) of the Companies Act, 2013 defines one-person company.

A one-person company is a separate legal entity from its owner. It is mandatory for the company to be converted into a private limited company in case its annual turnover crosses the 2 Crore mark.

In case of one-person-company, in addition to all the other clauses, the Memorandum of Association contains a clause called the Nomination Clause. This clause mentions the name of an individual who will become the member in case the subscriber dies or becomes incapacitated. The nominee must be an Indian citizen and resident of India i. e. he must have been living in India for at least 182 days in the preceding year. A minor cannot be a nominee.

The individual whose name is mentioned should give his consent in written form and it is required to be filed with the Registrar of Companies at the time of incorporation.

If the nominee wants to withdraw, he shall give it in writing and the owner of the company will have to nominate a new person within 15 days.

What's the use of Memorandum of Association?

1. It defines the scope & powers of a company, beyond which the company cannot operate.
2. It regulates company's relation with the outside world.
3. It is used in the registration process; without it the company cannot be incorporated.

4. It helps anyone who wants to enter into a contractual relationship with the company to gain knowledge about the company.

5. It is also called the charter of the Company, as it contains all the details of the company, its members and their liabilities.

Subscription of Memorandum of Association

Subscribers are the first shareholders of the company. They are the people who agreed to come together and form the company. The name of each subscriber along with their particulars are mentioned in the memorandum.

Different kinds of companies require different number of subscribers for incorporation.

- Private Company: In case of a private company, the minimum number of subscribers required are 2.
- Public Company: In case of a public company, 7 or more subscribers are required.
- One-Person-Company: In case of one-person-company, only one person is required.

Who can Subscribe?

Rule 13 of the Companies (Incorporation) Rules, 2014 describes the provisions of subscribing to the memorandum.

There are specific kinds of persons (natural or artificial) who can subscribe to the memorandum.

These are:

- Individuals – An individual or a group of individuals can subscribe to the memorandum.
- Foreign citizens and Non-Resident Indians – Rule 13(5) of the Companies (Incorporation) Rules, states that for a foreign citizen to subscribe to a company in India, his signature, address and proof of identity will need to be notarized.

The foreign national must have visited India and should have a Business Visa.

For a Non-Resident Indian, the photograph, address and identity proof should be attested at the Embassy with a certified copy of a passport. There is no requirement of Business Visa.

1. Minor – A minor can only be a subscriber through his guardian.

2. Company incorporated under the Companies Act – The company can be a subscriber to the memorandum. The Director, officer or

employee of the company or any other person authorized by the board of resolution.

3. Company incorporated outside India – Foreign Company is defined in Section 2(42) of the act; it states that a foreign company is a company incorporated outside India. A company registered outside India can also subscribe to the memorandum by fulfilling the additional formalities.

4. Society registered under the Societies Registration Act, 1860.

5. Limited Liability Partnership – A partner of a limited liability partnership can sign the memorandum with the agreement of all the other partners.

6. Body corporate incorporated under an Act of Parliament or State Legislature can also be a subscriber to the memorandum.

Subscription to Memorandum of Association

Every subscriber should sign the memorandum in presence of at least one witness. The following particulars of the witness should also be mentioned.

1. Name of the witness
2. Address
3. Description
4. Occupation

If the signature is in any other language then, then an affidavit is required that declares that the signature is the actual signature of the person.

According to Circular No. 8/15/8, dated 1-9-1958. The subscriber can also authorize another person to affix the signature by granting a power of attorney to the person. Department Circular No. 1/95, dated 16th February 1995 states that only one power of attorney is required.

The person who is granted the power of attorney may be known as an agent.

He should also state the following particulars in the memorandum:

1. Name of the agent
2. Address
3. Description
4. Occupation

Particulars to be Mentioned in Memorandum of Association

Rule 16 of the Companies (Incorporation) Rules, 2014 details the particulars that are to be mentioned in the memorandum.

Every Subscriber's following details should be mentioned.

1. Name (includes last name and family name), a photograph should be affixed and scanned with the memorandum.
2. Father's Name and Mother's Name
3. Nationality
4. Date of Birth
5. Place of Birth
6. Qualifications
7. Occupation
8. Permanent Account Number
9. Permanent and Current Address
10. Contact Number
11. Fax Number (Optional)
12. 2 Identity Proofs in which Permanent Account Number is mandatory.
13. Residential Proof (not older than 2 months)
14. Proof of nationality, if subscriber is a foreign national
15. If the subscriber is a current director or promoter, then his designation along with Name and Company Identity Number

If a body corporate is subscribing to the memorandum, then the following particulars should be mentioned.

1. Corporate identity number of the company or registration number of the body corporate.
2. Global location number, which is used to identify the location of the legal entity. (Optional)
3. The name of the body corporate.
4. The registered address of the business.
5. Email address.

In case the body corporate is a company, then a certified copy of Board resolution which authorizes the subscription to the memorandum. The particulars required in this case are,

1. Number of shares to be subscribed by a body corporate.
2. Name, designation and address of the authorized person.

In case the body corporate is a limited liability partnership. The particulars required are,

1. A certified copy of the resolution.
2. The number of shares that the firm is subscribing to.
3. The name of the authorized partner.

In case the body corporate is registered outside the country. The particulars required are,

1. The copy of certificate of incorporation.
2. The address of the registered office.

Printing and Signing of Memorandum of Association

Section 7(1)(a) states that the memorandum should be duly signed by all the subscribers and should be in a manner prescribed by the Act.

Rule 13 of the Company (Incorporation) Rules, 2014 describes the manner in which the memorandum should be signed.

1. The Memorandum of Association should be signed by each subscriber to the memorandum. The subscriber shall mention his name, address, occupation and the number of shares he is subscribing to. The documents should be signed in the presence of at least one witness. The witness would also mention his name, address, and occupation. By signing the memorandum, the witness states that, "I witness to subscriber/subscriber(s)who has/have subscribed and signed in my presence (date and place to be given); further I have verified his or their Identity Details (ID) for their identification and satisfied myself of his/her/their identification particulars as filled in."
2. If the person subscribing to the document is illiterate, he can either authorize an agent to sign the document through Power of Attorney or he can put his thumb impression on the column for signatures. The person's name, address, occupation and the number of shares he is subscribing to should be written by a person who has been allowed to write for him. The person who is writing for the illiterate person should read and explain the contents of the document to an illiterate person.
3. Where the person subscribing to the memorandum is an artificial person i. e. a body corporate the memorandum shall be signed by the employee, officer or any person authorized by the Board of Resolution.
4. Where the person subscribing to the memorandum is a foreign national who does not reside in India but in a country,

- in any part of the Commonwealth, his signatures and address on the memorandum and proof of identity shall be notarized by a Notary (Public) in that part of the Commonwealth.
- in a country which is a signatory to The Hague Apostille Convention, 1961, his signature and proof of identity and address on the memorandum shall be notarized before the Notary (Public) of the country of his origin and be duly approved in accordance with the said Hague Convention.
- in a country outside the Commonwealth and which is not a party to the Hague Apostille Convention, 1961, his signatures and address on the memorandum and proof of identity, shall be notarized before the Notary (Public) of such country and the certificate of the Notary (Public) shall be authenticated by a Diplomatic or Consular Officer empowered in this behalf under section 3 of the Diplomatic and Consular Officers (Oaths and Fees) Act, 1948 (40 of 1948).

Section 3 of the Diplomatic and Consular Officers states that, every Diplomat or any officer in a foreign country can perform the functions of a notary public.

- Where there is no Diplomatic or Consular officer by any of the officials mentioned in section 6 of the Commissioners of Oaths Act, 1889.
- If the foreign national visited India and intended to incorporate a company, in such a case the incorporation shall be allowed if, he is having a valid Business Visa.

Section 15 of the Companies Act, 2013 states that the memorandum should be in printed form.

The Ministry of Corporate Affairs has clarified that a document printed in form laser printers will be considered valid provided it is legible and fulfills other requirements as well.

The submission of xerox copies is not allowed. The xerox copies can be submitted to the members of the company.

Alteration, Amendment & Change in Memorandum of Association under Companies Act, 2013

The term “alter” or “alteration” is defined in Section 2(3) of the Act, as any additions, omissions or substitutions. A company can alter the memorandum only to the extent as permitted by the Act.

According to Section 13, the company can alter the clauses in the memorandum by passing a special resolution.

A resolution is a formal decision taken in a meeting. There are two kinds of resolutions, ordinary and special. A special resolution is one which requires

at least 2/3rd majority to be effective. The alteration to the clauses also requires the approval of the Central Government in writing.

The alteration of memorandum can happen for a variety of reasons. The alteration can be made if,

1. Enables the company to carry its business more effectively.
2. Helps to achieve the objectives.
3. Helps the company to amalgamate with another company.
4. Helps the company dispose off any undertaking.

Alteration of Memorandum

The alteration of various clauses of the memorandum have different procedures:

1. Alteration to the Name Clause: To alter the name of the company, a special resolution is required. After the resolution is passed, the copy is sent to the registrar. For changing the name, the application needs to be filed in Form INC- 24 with the prescribed fees. After the name is changed, a new certificate of incorporation is issued.

2. Alteration to the Registered Office Clause: The application for changing the place for Registered Office of the company shall be filed with the Central Government in Form INC- 23 with the prescribed fees.

If the company is changing its Registered Office from one to another, then the approval of the Central Government is required. The Central Government is required to dispose off the matter within 60 days and should ensure that the change of place has the consent of all the stakeholders of the company.

- Alteration to the Object Clause: To alter the object clause, a special resolution is required to be passed. The changes must be confirmed by the authority. The document which confirms the changes by authority with a printed copy of the altered memorandum should be filed with the Registrar.

If the company is a public company, then the alteration should be published in the newspaper where the Registered Office of the company is located. The changes to the object clause must also mentioned on the company's website.

- Alteration to the Liability Clause: The Liability clause of the memorandum cannot be altered except with the written consent of all the members of the company. By altering the liability clause, the liability of the directors of the company can be made unlimited. In any case, the liability of the shareholders cannot be made unlimited. Changes in the liability clause can be made by passing a special a special resolution and sending a copy of the resolution to the Registrar of Companies.

Alteration to the Capital Clause: The capital clause of a company can be altered by an ordinary resolution.

The company can,

1. Increase its authorised share capital.
2. Convert the shares into stock.
3. Consolidate and divide all of its shares.
4. Cancel the shares which have not been subscribed to.
5. Diminish the share capital of the shares cancelled.

The altered Memorandum of Association should be submitted to the Registrar within 30 days of passing the resolution.

Articles of Association

The Companies Act, 2013 defines 'articles' as the "articles of association of a company originally framed, or as altered from time to time in pursuance of any previous company laws or of the present." The Articles of Association of a company are that which prescribe the rules, regulations and the bye-laws for the internal management of the company, the conduct of its business, and is a document of paramount significance in the life of a company. The Articles of a company have often been compared to a rule book of the company's working, that regulates the management and powers of the company and its officers. It prescribes several details of the company's inner workings such as the manner of making calls, director's/employees' qualifications, powers and duties of auditors, forfeiture of shares etc.

In fact, the articles of association also establish a contract between the members and between the members and the company. This contract is established, governs the ordinary rights and obligations that are incidental to having membership in the company.

It must be noted, however, that the articles of association, are subordinate to the memorandum of association of a company, which is the dominant, fundamental constitutional document of the company. Further, as laid down in Shyam Chand v. Calcutta Stock Exchange, any and all articles that go beyond the memorandum of association will be deemed ultra vires. Therefore, there should not be any provisions in the articles that go beyond the memorandum. In the event of a conflict between the memorandum and the articles, the provisions in the memorandum will prevail. In case of any ambiguity or uncertainty regarding details in the memorandum, it should be read along with the articles.

Nature and Content of Articles of Association

As per the Companies Act, 2013, the articles of association of different companies are supposed to be framed in the prescribed form, since the model form of articles is different for companies limited by shares, companies limited by guarantee having share capital, companies limited by

guarantee not having share capital, an unlimited company having share capital and an unlimited company not having share capital.

The signing of the Articles of Association

The Companies (Incorporation) Rules, 2014 prescribes that both the Memorandum and the Articles of a company are to be signed in a specific manner.

- Memorandum and Articles of a company, are both required to be signed by all subscribers, who are further required to add their names, addresses and occupation, in the presence of at least one witness, who must attest the signatures with his own signature and details.

- Where a subscriber is illiterate, he must affix a thumb impression in place of his signature and appoint a person to authenticate the impression with his signature and details. This appointed person should also read out the content of the documents to the illiterate subscriber for his understanding.

- Where a subscriber is a body corporate, the memorandum and articles must be signed by any director of the body corporate who is duly authorised to sign on behalf of the body corporate, by a passing a resolution of the board of directors of the body corporate.

- Where the subscriber is a Limited Liability Partnership, the partner of the LLP who is duly authorised to sign on the behalf of the LLP by a resolution of all the partners shall sign.

Provisions for Entrenchment

The concept of Entrenchment was introduced in the Companies Act, 2013 in Section 5(3) which implies that certain provisions within the Articles of Association will not be alterable by merely passing a special resolution and will require a much more lengthy and elaborate process. The literal definition of the word "entrench" means to establish an attitude, habit, or belief so firmly that bringing about a change is unlikely. Thus, an entrenchment clause included in the Articles is one which makes certain changes or amendments either impossible or difficult.

Provisions for entrenchment can only be introduced in the articles of a company during its incorporation, or an amendment to the articles brought about by a special resolution in case of a public company, and an agreement between all the members in case of a private company.

Alteration of Articles of Association

Section 14 of the Companies Act, 2013, permits a company to alter its articles, subject to the conditions contained in the memorandum of association, by passing a special resolution. This power is extremely important for the functioning of the company. The company may alter its articles to the effect that would turn:

A public company into a private company

For a company wanting to convert itself from public to a private company simply passing a special resolution is not enough. The company will have to acquire the consent and approval of the Tribunal. Further, a copy of the special resolution must be filed with the Registrar of Companies within 30 days of passing it. Further, a company must then file a copy of the altered, new articles of association, as well as the approval order of the Tribunal with the Registrar of Companies within 15 days of the order being received.

A private company into a public company

For a company wanting to convert from its private status to public, it may do so by removing/omitting the three clauses as per section 2(68) which defines the requisites of a private company. Similar to the conversion of the public to a private company, a copy of the resolution and the altered articles are to be filed with the Registrar within the stipulated period of time.

Limitations on power to alter articles

- The alteration must not contravene provisions of the memorandum, since the memorandum supersedes the articles, and the memorandum will prevail in the event of a conflict.
- The alteration cannot contravene the provisions of the Companies Act, or any other company law since it supersedes both the memorandum and the articles of the company.
- Cannot contravene the rules, alterations or suggestions of the Tribunal.
- The alteration cannot be illegal or in contravention with public policy. Further, it must be for the bona fide benefit and interest of the company. The alterations cannot be an effort to constitute a fraud on the minority and must be for the benefit of the company as a whole.
- Any alteration made to convert a public company into a private company, cannot be made until the requisite approval is obtained from the Tribunal.
- A company may not use the alteration to cover up or rectify a breach of contract with third parties or use it to escape contractual liability.
- A company cannot alter its articles for the purpose of expelling a member of the board of directors is against company jurisprudence and hence cannot occur.

Binding effect of Memorandum and Articles of Association

After the Articles and the Memorandum of a company are registered, they bind the company and its members to the same extent as if they had been signed by each of the members of the company.

However, while the company's articles have a binding effect, it does not have as much force as a statute does. The effect of binding may work as follows:

Binding the company to its members

The company is naturally completely bound to its members to adhere to the articles. Where the company commits or is in a place to commit a breach of the articles, such as making ultra vires or otherwise illegal transaction, members can restrain the company from doing so, by way of an injunction. Members are also empowered to sue the company for the purpose of enforcement of their own personal rights provided under the Articles, for instance, the right to receive their share of declared divided.

It should be noted, however, that only a shareholder/member, and only in his capacity as a member, can enforce the provisions contained in the Articles. For instance, in the case of Wood v. Odessa Waterworks Co., the articles of Waterworks Co. provided that the directors can declare a dividend to be paid to the members, with the sanction of the company at a general meeting. However, instead of paying the dividend to the shareholders in cash a resolution was passed to give them debenture bonds. It was finally held by the court, that the word "payment" referred to payment in cash, and the directors were thus restrained from acting on the resolution so passed.

Members bound to the company

Each member of the company is bound to the company and must observe and adhere to the provisions of the memorandum and the articles. All the money that may be payable by any member to the company shall be considered as a debt due. Members are bound by the articles just as though each and every one of them has signed and contracted to conform to their provisions. In Borland's Trustees v. Steel Bros. & Co. Ltd., the articles the company provided that in the event of bankruptcy of any member, his shares would be sold at a price affixed by the directors. Thus, when Borland went bankrupt, his trustee expressed his wish to sell these shares at their original value and contended that he could do so since he was not bound by the articles. It was held, however, that he was bound to abide by the company's articles since the shares were bought as per the provisions of the articles.

Binding between members

The articles create a contract between and amongst each member of the company. However, such rights can only be enforced by or even against a member of the company. Courts have been known to make exceptions and extend the articles to constitute a contract even between individual members. In the case of Rayfield v Hands Rayfield was a shareholder in a particular company., who was required to inform directors if he intended to transfer his shares, and subsequently, the directors were required to buy those shares at a fair value. Thus, Rayfield remained in adherence to the articles and informed the directors. The directors, however, contended that they were not bound to pay for his shares and the articles could not impose

this obligation on them. The courts, however, dismissed the directors' argument and compelled them to buy Rayfield's shares at a fair value. The court further held that it was not mandatory for Rayfield to join the company to be allowed to bring a suit against the company's directors.

No binding in relation to outsiders

Contrary to the above conditions, neither the memorandum nor the articles constitute a contract between the company and any third party. The company and its members are not bound to the outsiders with respect to the provisions of the memorandum and the articles. For instance, in the case of Browne v La Trinidad, the articles of the company included a clause that implied that Browne should be a director that should not be removed or removable. He was, however, removed regardless and thus brought an action to restrain the company from removing him. Held that since there was no contract between Browne and the company, being an outsider, he cannot enforce articles against the company even if they talk about him or give him any rights. Therefore, an outsider may not take undue advantage of the articles to make any claims against the company.

The doctrine of Constructive Notice

When the Memorandum and Articles of Association of any company, are registered with the Registrar of Companies they become "public documents" as per section 399 of the Act. This implies that any member of the general public may view and inspect these documents at a prescribed fee. A member of the public may make a request to a specific company, and the company, in turn, must, within seven days send that person a copy of the memorandum, the articles and all agreements and resolutions that are mentioned in section 117(1) of the Act.

If the company or its officers or both, fail to provide the copies of the requisite documents, every defaulting officer will be liable to a fine of Rs. 1000, for every day, until the default continues, or Rs. 1,00,000 whichever is less.

Therefore, it is the duty of every person that deals with the company to inspect these public documents and ensure in his own capacity that the workings of the company are in conformity with the documents. Irrespective of whether a person has actually read the documents or not, it is assumed that he familiar with the contents of these documents, and that he has understood them in their proper meaning. The memorandum and articles of association are thus deemed as notices to the public, hence a 'constructive notice'.

Illustration: If the articles of Company A, provided that any bill of exchange must be signed by a minimum of two directors, and the payee receives a bill of exchange signed only by one, he will not have the right to claim the amount.

Distinction Between Memorandum and Articles of Association

Sl.No.	Memorandum of Association	Articles of Association
1	Contains fundamental conditions upon which the company is incorporated.	Contain the provisions for internal regulations of the company.
2	Meant for the benefit and clarity of the public and the creditors, and the shareholders.	Regulate the relationship between the company and its members, as well amongst the members themselves.
3	Lays down the area beyond which the company's conduct cannot go.	Articles establish the regulations for working within that area.
4	Memorandum lays down the parameters for the articles to function.	Articles prescribe details within those parameters.
5	Can only be altered under specific circumstances and only as per the provisions of the Companies Act, 2013. Permission of the Central Government is also required in certain cases.	Articles can be altered a lot more easily, by passing a special resolution.
6	Memorandum cannot include provisions contrary to the Companies Act. Memorandum is only subsidiary to the Companies Act.	Articles cannot include provisions contrary to the memorandum. Articles are subsidiary to both the Companies Act and the Memorandum.
7	Acts done beyond the memorandum are ultra vires and cannot be ratified even by the shareholders.	Acts done beyond the Articles can be ratified by the shareholders as long as the act is not beyond the memorandum.

The doctrine of Indoor Management

The concept of the Doctrine of Indoor Management can be most elaborately explained by examining the facts of the case of Royal British Bank v. Turquand, which in fact, first laid down the doctrine. It is due to this that the doctrine of indoor management is also known as the "Turquand Rule".

The directors of a particular company were authorised in its articles to engage in the borrowing of bonds from time to time, by way of a resolution

passed by the company in a general meeting. However, the directors gave a bond to someone without such a resolution being passed, and therefore the question that arose was whether the company was still liable with respect to the bond. The company was Forgery— Any transaction which involves forgery or is illegal or void ab initio, implies the lack of free will while entering into the transaction, and hence does not invoke the doctrine of indoor management. For example, in the case of Ruben v. Great Fingal Consolidated, the secretary of a company illegally forged the signatures of two directors on a share certificate so as to issue shares without the appropriate authority. Since the directors had no knowledge of this forgery, they could not be held liable. The share certificate was held to be in nullity and hence, the doctrine of indoor management could not be applied. The wrongful an unauthorized use of the company's seal is also included within this exception.

Further, this doctrine cannot include situations where there was third agency involved or existent. For example, in the case of Varkey Souriar v. Keraleeya Banking Co. Ltd. this doctrine could not be applied where there was any scope of power exercised by an agent of the company. The doctrine cannot be implied even in cases of Oppression

11.5 PROSPECTUS

The Companies Act, 2013 defines a prospectus under section 2(70). Prospectus can be defined as "any document which is described or issued as a prospectus". This also includes any notice, circular, advertisement or any other document acting as an invitation to offers from the public. Such an invitation to offer should be for the purchase of any securities of a corporate body. Shelf prospectus and red herring prospectus are also considered as a prospectus.

Essentials for a document to be called as a prospectus

For any document to considered as a prospectus, it should satisfy following conditions.

- The document should invite the subscription to public share or debentures, or it should invite deposits.
- Such an invitation should be made to the public.
- The invitation should be made by the company or on the behalf company.
- The invitation should relate to shares, debentures or such other instruments.

Statement in lieu of prospectus

Every public company either issue a prospectus or file a statement in lieu of prospectus. This is not mandatory for a private company. But when a private company converts from private to public company, it must have to either

file a prospectus if earlier issued or it has to file a statement in lieu of prospectus.

The provisions regarding the statement in lieu of prospectus have been stated under section 70 of the Companies Act 2013.

Advertisement of prospectus

Section 30 of the Companies Act 2013 contains the provisions regarding the advertisement of the prospectus. This section states that when in any manner the advertisement of a prospectus is published, it is mandatory to specify the contents of the memorandum of the company regarding the object, member's liabilities, amount of the company's share capital, signatories and the number of shares subscribed by them and the capital structure of the company. Types of the prospectus as follows.

- Shelf Prospectus
- Red Herring Prospectus
- Abridged prospectus
- Deemed Prospectus

Shelf Prospectus

Shelf prospectus can be defined as a prospectus that has been issued by any public financial institution, company or bank for one or more issues of securities or class of securities as mentioned in the prospectus. When a shelf prospectus is issued then the issuer does not need to issue a separate prospectus for each offering, he can offer or sell securities without issuing any further prospectus.

The provisions related to shelf prospectus has been discussed under section 31 of the Companies Act, 2013.

The regulations are to be provided by the Securities and Exchange Board of India for any class or classes of companies that may file a shelf prospectus at the stage of the first offer of securities to the registrar.

The prospectus shall prescribe the validity period of the prospectus and it should be not be exceeding one year. This period commences from the opening date of the first offer of the securities. For any second or further offer, no separate prospectus is required.

While filing for a shelf prospectus, a company is required to file an information memorandum along with it.

Information Memorandum [Section 31(2)]

The company which is filing a shelf prospectus is required to file the information memorandum. It should contain all the facts regarding the new charges created, what changes have undergone in the financial position of the company since the first offer of the security or between the two offers.

It should be filed with the registrar within three months before the issue of the second or subsequent offer made under the shelf prospectus as given under Rule 4CCA of section 60A(3) under the Companies (Central Government's) General Rules and Forms, 1956.

When any company or a person has received an application for the allotment of securities with advance payment of subscription before any changes have been made, then he must be informed about the changes. If he desires to withdraw the application within 15 days, then the money must be refunded to them.

After the information memorandum has been filed, if any offer or securities is made, the memorandum along with the shelf prospectus is considered as a prospectus.

Red herring prospectus

Red herring prospectus is the prospectus which lacks the complete particulars about the quantum of the price of the securities. A company may issue a red herring prospectus prior to the issue of prospectus when it is proposing to make an offer of securities.

This type of prospectus needs to be filed with the registrar at least three days prior to the opening of the subscription list or the offer. The obligations carried by a red herring prospectus are same as a prospectus. If there is any variation between a red herring prospectus and a prospectus, then it should be highlighted in the prospectus as variations.

When the offer of securities closes then the prospectus has to state the total capital raised either raised by the way of debt or share capital. It also has to state the closing price of the securities. Any other details which have not been included in the prospectus need to be registered with the registrar and SEBI.

The applicant or subscriber has right under Section60B (7) to withdraw the application on any intimation of variation within 7 days of such intimation and the withdrawal should be communicated in writing.

Abridged Prospectus

The abridged prospectus is a summary of a prospectus filed before the registrar. It contains all the features of a prospectus. An abridged prospectus contains all the information of the prospectus in brief so that it should be convenient and quick for an investor to know all the useful information in short.

Section33(1) of the Companies Act, 2013 also states that when any form for the purchase of securities of a company is issued, it must be accompanied by an abridged prospectus.

It contains all the useful and materialistic information so that the investor can take a rational decision and it also reduces the cost of public issue of the capital as it is a short form of a prospectus.

Deemed Prospectus

A deemed prospectus has been stated under section 25(1) of the Companies Act, 2013.

When any company to offer securities for sale to the public, allots or agrees to allot securities, the document will be considered as a deemed prospectus through which the offer is made to the public for sale. The document is deemed to be a prospectus of a company for all purposes and all the provision of content and liabilities of a prospectus will be applied upon it.

In the case of SEBI v. Kunnamkulam Paper Mills Ltd., it was held by the court that where a rights issue is made to the existing members with a right to renounce in the favour of others, it becomes a deemed prospectus if the number of such others exceeds fifty.

Process for filing and issuing a prospectus

Application forms

As stated under section 33, the application form for the securities is issued only when they are accompanied by a memorandum with all the features of prospectus referred to as an abridged prospectus.

The exceptions to this rule are:

- When an application form is issued as an invitation to a person to enter into underwriting agreement regarding securities.
- Application issued for the securities not offered to the public.

Contents

For filing and issuing the prospectus of a public company, it must be signed and dated and contain all the necessary information as stated under section 26 of the Companies Act,2013:

1. Name and registered address of the office, its secretary, auditor, legal advisor, bankers, trustees, etc.
2. Date of the opening and closing of the issue.
3. Statements of the Board of Directors about separate bank accounts where receipts of issues are to be kept.
4. Statement of the Board of Directors about the details of utilization and non-utilisation of receipts of previous issues.
5. Consent of the directors, auditors, bankers to the issue, expert opinions.
6. Authority for the issue and details of the resolution passed for it.
7. Procedure and time scheduled for the allotment and issue of securities.

8. The capital structure of the in the manner which may be prescribed.
9. The objective of a public offer.
10. The objective of the business and its location.
11. Particulars related to risk factors of the specific project, gestation period of the project, any pending legal action and other important details related to the project.
12. Minimum subscription and what amount is payable on the premium.
13. Details of directors, their remuneration and extent of their interest in the company.
14. Reports for the purpose of financial information such as auditor's report, report of profit and loss of the five financial years, business and transaction reports, statement of compliance with the provisions of the Act and any other report.

Filing of copy with the registrar

As stated under sub-section 4 of section26 of the Companies Act, 2013, the prospectus is not to be issued by a company or on its behalf unless on or before the date of publication, a copy of the prospectus is delivered to the registrar for registration.

The copy should be signed by every person whose name has been mentioned in the prospectus as a director or proposed director or the assigned attorney on his behalf.

Delivery of copy of the prospectus to the registrar

As per section26(6) of the Companies Act 2013, the prospectus should mention that its copy has been delivered to the registrar on its face. The statement should also mention the document submitted to the registrar along with the copy of the prospectus.

Registration of prospectus

Section26(7) states about the registration of a prospectus by the registrar. According to this section, when the registrar can register a prospectus when:

- It fulfils the requirements of this section, i.e., section 26 of the Companies Act, 2013; and
- It contains the consent of all the persons named in the prospectus in writing.

Issue of prospectus after registration

If a prospectus is not issued before 90 days from the date from which a copy was delivered before the registrar, then it is considered to be invalid.

Contravention of section

If a prospectus is issued in contravention of the provision under section 26 of the Companies Act 2013, then the company can be punished under section 26(9). The punishment for the contravention is:

- Fine of not less than Rs. 50,000 extending up to 3,00,000.

If any person becomes aware of such prospectus after knowing the fact that such prospectus is being issued in contravention of section 26 then he is punishable with the following penal provisions.

- Imprisonment up to a term of 3 years, or
- Fine of more than Rs. 50,000 not exceeding Rs. 3,00,000.

11.6 INTRODUCTION TO COMPANY MEETINGS

A number of meetings are convened in a company and are generally classified as members' meetings, directors' meetings and other meetings. Members' meetings include the annual general meeting, which is the mandatory meeting of the members that every company is required to convene each year. However, there exists no embargo on holding more than one general meeting of the members, which are called the extra-ordinary general meetings. The meetings of the directors are called the Board meetings and the meetings of the committees of the directors are the Committee meetings. Other meetings include creditors meetings and class meetings.

The focus of the Companies Act, 2013 has been on enhancing transparency, shareholders' democracy and protection of the interest of the investors. It has made few changes for regulating meetings for example, the requirement of holding a statutory meeting of members at the time of commencement of business of a company for any public company (required under the Companies Act, 1956) has been done away with, the concepts of video-conferencing and e-voting have been introduced.

Board of Directors

The Board of directors of a company is a nucleus, selected according to the procedure prescribed in the Act and the Articles of Association. Members of the Board of directors are known as directors, who unless especially authorised by the Board of directors of the Company, do not possess any power of management of the affairs of the company. The Board of Directors oversees how the management serves and protects the long-term interests of all the stakeholders of the company. The institution of Board of Directors is based on the premise that a group of trustworthy people look after the interests of the large number of shareholders who are not directly involved in the management of the company. The position of board of directors is that of trust as the board is entrusted with the responsibility to act in the best interests of the company. Acting collectively as a Board of directors, they can exercise all the powers of the company except those, which are

prescribed by the Act to be specifically exercised by the company in general meeting.

The Board formulate policies and establish organisational set up for implementing those policies and to achieve the objectives contained in the Memorandum, muster resources for achieving the company objectives and control, guide, direct and manage the affairs of the company. Section

2(10) of the Companies Act, 2013 defines that "Board of Directors" or "Board", in relation to a company, means the collective body of the directors of the company. The term 'Board of Directors' means a body duly constituted to direct, control and supervise the affairs of a company. As per Section 149 of the Companies Act, 2013, the Board of Directors of every company shall consist of individual only. Thus, no body corporate, association or firm shall be appointed as director.

Directors' Meetings

Board Meetings [Section 173 read with Rules 3 and 4 of the Companies (Meetings of Board and its Powers), 2014]

The Board of directors of a company are responsible for overseeing the management of the company and thereby exercise their power of day-to-day decision making by convening and holding Board meetings.

Within 30 days of their incorporation, the companies must hold their first board meeting. Thereafter, the companies must hold at least four board meetings in a year, where there must not be more than 120 days' gap between two consecutive meetings.

One of the striking features of the present legislation is that it allows the directors to take part in the board meeting through videoconferencing or any other audio-visual means. However, there is an embargo from dealing certain matters through the video-conferencing or audio-visual mode.

A notice of at least seven days must be given to each of the director for a board meeting. In case of urgency a shorter notice may be given where at least one independent director is present at such meeting.

The notice of a board meeting must be sent to all the directors, otherwise the proceedings of the meeting and the resolution passed thereat may be declared as invalid by the Court of law.

Also, it has been held in the case of Dankha Devi Agarwal v. Tara Properties Private Limited that a decision taken in a meeting without due notice of such meeting for removal or induction would be instance of oppression and mismanagement.

At least two directors or one-third of the total strength (higher of the two) constitutes quorum for a board meeting. Here the directors, both personally attending or through the audio-video means would be counted for the purposes of the quorum (section 174).

Board Composition

Minimum/Maximum Number of Directors in a Company [Section 149(1)] Section 149(1) of the Companies Act, 2013 requires that every company shall have a minimum number of 3 directors in the case of a public company, two directors in the case of a private company, and one director in the case of a One Person Company. A company can appoint maximum 15 fifteen directors without any specific compliance. A company may appoint more than fifteen directors after passing a special resolution in general meeting.

The restriction of maximum number of directors shall not apply to section 8 companies. Minimum number of directors;

- Public Company - 3 Directors
- Private Company - 2 directors
- One Person Company (OPC) - 1 Director

Maximum Number of Director is 15, which can be increased by passing a special resolution.

Section 8 companies can have more than 15 directors.

Section 149(3) provides that every company shall have at least one director who has stayed in India for a total period of not less than one hundred and eighty-two days in the previous calendar year. Further, Second proviso to Section 149(1) read Rule 3 of Companies (Appointment and Qualification of Directors) Rules, 2014 following class of companies must have at least one Women Director. Alternate directorship shall also be included while calculating the directorship of 20 companies. Section 8 company will not be counted for the purpose of maximum number of Directorship

Maximum limit on total number of directorship has been fixed at 20 companies and the maximum number of public companies in which a person can be appointed as a director shall not exceed ten. The members of a company may, by special resolution, specify any lesser number of companies in which a director of the company may act as director.

Quorum for Board meeting Requirement

- Quorum for Board Meeting = 1/3rd of its Total strength or two directors, whichever is higher
- A Director participating through video conferencing/audio visual modes will also be counted for quorum
- Any fraction of a member will be rounded off as one
- Total strength shall not include directors whose places are vacant.

Power of Board [Section 179] Section 179 of the Act deals with the powers of the board; all powers to do such acts and things for which the company is authorised is vested with board of directors. But the board can act or do

the things for which powers are vested with them and not with general meeting.

The following [Section 179(3) read with Rule 8 of Companies (Management & Administration) Rules, 2014] powers of the Board of directors shall be exercised only by means of resolutions passed at meetings of the Board, namely :-

3. to make calls on shareholders in respect of money unpaid on their shares;

4. to authorise buy-back of securities under section 68;

5. to issue securities, including debentures, whether in or outside India;

6. to borrow monies;

7. to invest the funds of the company;

8. to grant loans or give guarantee or provide security in respect of loans;

9. to approve financial statement and the Board's report;

10. to diversify the business of the company;

11. to approve amalgamation, merger or reconstruction;

12. to take over a company or acquire a controlling or substantial stake in another company;

13. to make political contributions; Lesson 15 Board Constitution and its Powers 533

14. to appoint or remove key managerial personnel (KMP);

15. to appoint internal auditors and secretarial auditor; The Board may, by a resolution passed at a meeting, delegate to any committee of directors, the managing director, the manager or any other principal officer of the company or in the case of a branch office of the company, the principal officer of the branch office, the powers specified in (4) to (6) above on such conditions as it may specify. The banking company is not covered under the purview of this section.

Restriction on Powers of Board

[Section 180] The board can exercise the following powers only with the consent of the company by special resolution, namely – (a) to sell, lease or otherwise dispose of the whole or substantially the whole of the undertaking of the company or where the company owns more than one undertaking, of the whole or substantially the whole of any of such undertakings. (b) to invest otherwise in trust securities the amount of compensation received by it as a result of any merger or amalgamation; (c) to borrow money, where the money to be borrowed, together with the money already borrowed by the company will exceed aggregate of its paid-up share capital, free reserves

and securities premium apart from temporary loans obtained from the company's bankers in the ordinary course of business; (d) to remit, or give time for the repayment of, any debt due from a director

Contributions to Charitable Funds and Political Parties [Section 181] The power of making contribution to 'bona fide' charitable and other funds is available to the board subject to certain limits

Prohibitions and Restrictions Regarding Political Contributions [Section 182] According to Section 182 of the Act, a company, other than a government company which has been in existence for less than three financial years, may contribute any amount directly to any political party. Further, the limit of contribution to political parties is 7.5% of the average net profits during the three immediately preceding financial years.

Power of Board and other Persons to make Contributions to National Defence Fund, etc.

[Section 183] The Board is authorised to contribute such amount as it thinks fit to the National Defence Fund or any other fund approved by the Government for the purpose of national defence. The company is required to disclose in its profit and loss account the total amount or amounts contributed by it during the financial year.

In P.S Offshore Interland Services P Ltd v. Bombay Offshore Suppliers Ltd, it was held that a closed or out of function unit of a company may be an undertaking. Also in Pramod Kumar Mittal v. Andhra Steel Corpn Ltd, 11 it was held that an undertaking in a complete and complex weft and the various types of business and assets are threads which cannot be taken a part from the weft. (b) To remit or give time for payment of any debt to the company by a director,12 except in the case of renewal or continuance of an advance made by a banking company to its directors in the ordinary course of business. (c) To invest (excluding trust securities) the amount of compensation received in respect of the compulsory acquisition of any undertaking or property of the company. (d) To borrow moneys and where the moneys to be borrowed (together with the moneys already borrowed by the company) are more than paid up capital of the company and its free reserves. That is to say reserves in the share premium account, general reserve, profit and a loss account, and capital redemption account).The amount of temporary loans raised from banks in the ordinary course of business is excluded. This, however, does not include loans raised for the purpose of financing expenditure of a capital-' nature. (e) To contribute to charitable and other funds not directly relating to the business of the company or the welfare of its employees, amounts exceeding in any financial year, fifty thousand or 5 percent of the average net profits of the three preceding financial years, whichever is greater.

Power of directors to allot the shares

Directors of a company have powers to allot shares but this power must be exercised bonafide for the benefit of the company as a whole because this power is t / a fiduciary one. In Grant v. John Grant& Sons Ltd, it was held

that when the company not in need of further capital and the directors issued shares only to maintain their control or for defeating the wishes of the existing majority of the shareholders, the allotment was improper. In another case of Punt v. Symons &Co Ltd, the directors used the shares with the object of creating a sufficient majority to enable them to pass a special resolution depriving other shareholders special rights conferred on them by the company's articles. It was held that when issue of shares to persons who are, obviously meant and intended to secure the necessary statutory majority in a particular interest, it could not be fair and bonafide exercise of the power.

Similarly, in the case of Pierey v. S Mills &Co Ltd, the directors had issued shares to enable them to resist the election of three additional directors which would have put the existing directors in a minority on the board. The issue was held to be improper.

Power of Directors to Make Calls on Shares

The Articles of Association of companies generally provide that the power to make calls in advance from the shareholders in respect of unpaid amount on shares vest in the directors. The power to make calls is a fiduciary one and shall not be used by the directors for their own benefit. This power cannot be delegated by the directors to any committee of directors, the managing agent, secretaries, treasurers or the manager, **In Poiner Alkali Works Ltd v. Amiruddins.** Tayyabji, it was held that where the articles provide that every shareholder shall be liable to pay the amount of every call to the persons and at the time and place appointed by the directors, the resolution should specify the time, place and amount of the payment of the call. **In East and West Insurance Co Ltd v. Mrs. Kamla Jayanti Lsl Mehta**, it was held that when the time for the payment of the call is not fixed by the board of directors, the call is valid although there was an omission in specifying the place and person whom the call is to be paid. A valid resolution making a call must state; (a) The amount of the call, (b) The time when the call should be paid, (c) The person to whom the payment is to be made and (d) The place where the payment is to be made.

Committee Meetings

The Companies Act, 2013 provides for four mandatory committees of the board of directors under the Act which are namely, Audit Committee, Nomination & Remuneration Committee, Stakeholders Relationship Committee and Corporate Social Responsibility Committee. The committees so formulated are not to be appointed by every company but they get triggered or are required to be formulated based on certain thresholds.

i. **Audit Committee meeting is** required to be convened by every listed company and only those public companies which have a paid up share capital of Rs. 10 crore or more or have a turnover of Rs. 50 crore or more or have aggregate outstanding loan, debenture and deposit exceeding INR 50 Crore or more. The terms of reference of such a committee include monitoring auditor's appointment, remuneration

and his performance etc. Every minutes of the meeting of the Audit Committee shall be noted in the ensuing meeting of the Board of Directors and also, a distinct minutes' book shall be maintained for the meeting of the Committee. The Chairman of the Audit Committee is required to address the concerns of the shareholders at the Annual General Meeting.

ii. **Nomination and Remuneration Committee meeting** are also a mandate for every listed company and only those public company which have a paid-up share capital of Rs. 10 crore or more or have a turnover of R. 100 crore or more having aggregate outstanding loan, debenture and deposit exceeding INR 50 Crore or more. The committee is required to ensure that the level and composition of remuneration is reasonable and sufficient to attract, retain and motivate directors of the quality required to run the company successfully.

iii. **Stakeholders Relationship Committee meetings** are required to address the grievances of the stakeholders of the company. This committee is to be constituted by every company which has the strength of more than 1000 shareholders, debenture-holders, deposit-holders and any other security holders at any time during the financial year.

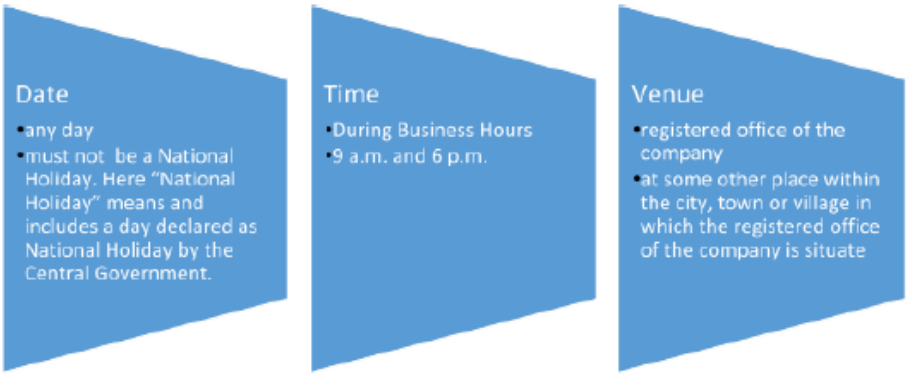
iv. **Corporate Social Responsibility Committee meeting** shall take all decisions as regards the CSR policy of the company in its meetings. Such committee shall consist of at least three directors, of which at least one director shall be an independent director.

Members' meetings

Annual General Meeting (Section 96): One of the opportunities annually given to the members of a company is to take part in the business of the company by exercising their power to take decisions. For this purpose, each year every company is required to hold at least one meeting of its members' which is known as an annual general meeting (AGM). An exemption from holding an annual general meeting is only given to a one-person company.

The first general meeting of a company must be held within nine months from the date of closing the financial year of the company, and then the company need not hold any annual general meeting in its year of incorporation. The subsequent annual general meetings shall take place within six months of the date of closing of the financial year. The time prescribed for the first annual general meeting cannot be extended, however, the time period for subsequent annual general meetings may be extended to a maximum of three months with the leave of the Registrar of companies.

Following chart depicts the date, time and venue for holding an annual general meeting. Here the Central Government is empowered to exempt, subject to conditions, any company from the holding such meeting in accordance with the date, time and venue as prescribed.

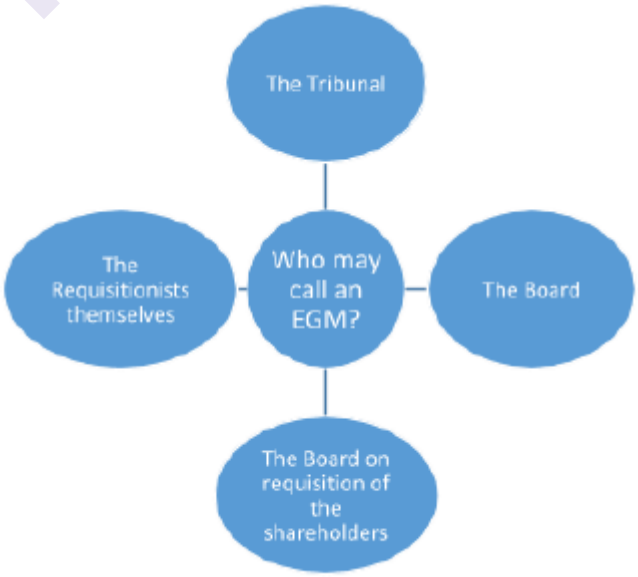


When a company defaults in holding an annual general meeting as required, the Tribunal has the power to call such meeting upon receipt of an application from any member of the company. The Tribunal may even direct to hold a one-member meeting. Such meetings shall be deemed as an annual general meeting as per provisions of this Act. Upon such default, the company and every officer in default would be liable for punishment as prescribed.

Business to be transacted at an annual general meeting (section 102)

The business transacted at the annual general meeting is called the ordinary business (this is the reason a general meeting is also referred to as an ordinary meeting). Items of ordinary business constitutes consideration of financial statements, Board reports and auditor's report, declaring dividends, appointment of directors and appointment and salary fixation of the auditors of the company.

Extra-Ordinary general meeting (Section 100): All other general meetings convened and held in a company besides the annual general meeting are regarded as extraordinary general meetings. All the business transacted at an extra-ordinary general meeting is called special business (all other businesses except ordinary business). The following diagram illustrates, who all can call an extraordinary general meeting:



The shareholders making a requisition must possess at least one-tenth of the paid up share capital of the company and where the company is without the share capital, the shareholders must possess at least one-tenth of the voting powers of the company. Such share-holders, requisitioning a general meeting, must sign upon the matters required to be addressed at the meeting. The Board upon receipt of such valid requisition must call a general meeting within 21 days. The date of the meeting in any case must not be later than 45 days from such requisition.

In case these dead-lines are not met by the Board, the shareholders making requisition may go ahead to call and hold a general meeting themselves. They can do so within 3 months from the requisition date. All the reasonable expenses incurred by the shareholders on holding such meeting, are to be reimbursed to them by the company by deducting such amounts from the fees of the defaulting directors.

In LIC of India v. Escorts Ltd, the Supreme Court observed that every shareholder of a company possesses a right to call/requisition an extra-ordinary general meeting, subject to the provisions of the Act. Once the requisition is made in compliance of the prescribed law, the shareholder cannot be restrained from calling such meeting.

In another case, Rathnavelu Chettiar v. M.Chettiar, the shareholders gave a requisition in compliance of the provision of the Act for removing the MD of the company. Where the directors failed to call a meeting within the prescribed time, the shareholders themselves requisitioned the meeting. The venue of the meeting was decided as the registered office of the company. However, on the day of the meeting, the registered office was locked, thus the meeting was held at some other place. The court held such meeting to be a validly convened meeting.

The Tribunal may also, under certain circumstances order to hold and convene a meeting (other than an annual general meeting). Here the Tribunal may on its own motion or upon the application made by any director or members having voting rights may call such a meeting. The Tribunal may give necessary directions for conduct of the meeting including the permission for holding one member meeting in person or through proxy (section 98).

Notice of the meeting (Section101)

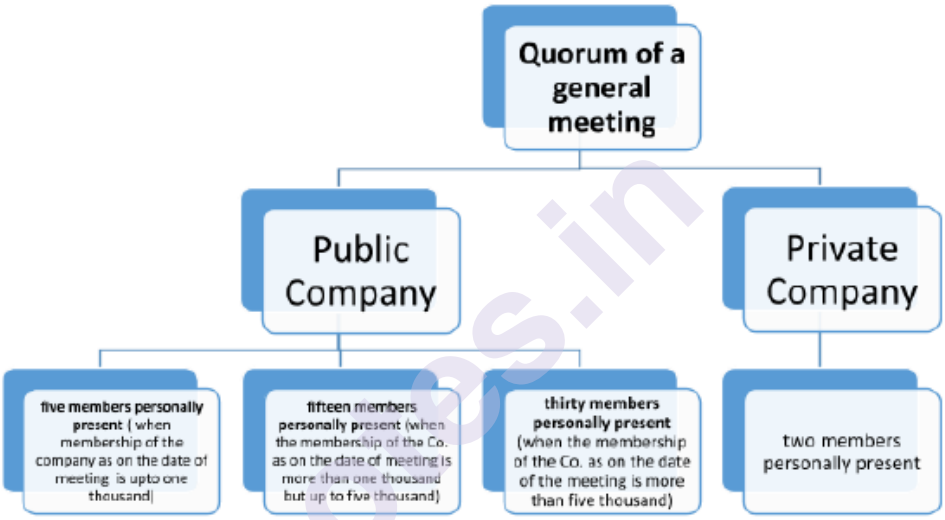
For calling a general meeting a notice is required to be given to every member of the company or to his legal representative (in case of a deceased member), every director and auditor of the company. Such notice must be given to the aforesaid parties at least 21 clear days before the meeting. The notice can be sent either in writing or through electronic means. The requirement of

21 days' notice can be done away with, if at least 95 percent of the members voting at the meeting agree to a shorter notice for such meeting.

The notice of a meeting must provide for the date, time and venue of the meeting along with the statement of the business to be dealt at the meeting. It is necessary to send such notice of the meeting as prescribed, however inadvertent failure to send notices or in case any member or other persons do not receive the notice shall not per se affect the validity of the meeting.

Quorum (Section 103)

For holding a valid meeting, a minimum requisite number of members must attend the meeting to transact the business, which constitutes quorum of the meeting. Following charts, provides at a glance, the quorum required to be present at general meetings:



Adjournment of a meeting

Where the requisite number of members are not present within half an hour of the allotted time of the meeting, such meeting is adjourned to be held on the same day next week at same time and venue or as scheduled by the Board. The only exception to the rule is, when the meeting is called by the requisitionists, in such a case the meeting is not adjourned for the want of quorum and is cancelled. In other cases, members present within half an hour of the adjourned meeting shall constitute the quorum.

Chairman of a meeting (section 104)

A chairman is elected by the members personally present at a meeting by the show of hands. Such chairman is required for orderly conduct of the meeting. In case a poll is demanded for electing a Chairman, the provisions of the Act shall apply and the earlier chairman shall continue unless a new one is appointed.

Proxies (section 105)

Members entitled to attend and vote at the meeting, may participate in the decision making process by voting in the meeting, either personally or through a duly appointed proxy. The proxy is another person, whom a

member appoints to attend and vote at the meeting on his behalf. However, such a proxy does not possess the right to speak at such meeting on behalf of the member, nor is he entitled to vote except in case of a voting by poll. Section 105 of the Act, further deliberates upon the provisions for appointing a proxy. A member can revoke his proxy by a notice in writing.

A member can appoint more than one proxies for the same meeting, in case he possesses different shares of that company. But in case, the said member appoints more than one proxies for the same bunch of shares, then all the proxies shall be jointly and severally liable.

Voting at a meeting (section106)

A member can participate in the decision-making process of the company by voting at the meetings. Such a right to vote can only be restricted by the articles of a company, where it stipulates that the shares in respect of which any call money or sums remains due or shares upon which the company has exercised any lien, such shareholders do not have right to vote.

Voting by show of hands (Section 107)

When a resolution is to be passed at a general meeting, voting takes place by show of hands unless the members ask for a poll or voting happens electronically. Such voting is evidenced though the Chairman's declaration and an entry to this effect in the minutes of the meeting.

Voting through electronic means [Section 108 read with Rule 20 Companies (Management and Administration) Rules, 2014]

The Central Government may prescribe in accordance with the Rule 20, certain class or classes of companies and also the manner in which a member may vote by the electronic means.

Demand for a Poll (Section 109 read with Rule 21 Companies (Management and Administration) Rules, 2014): A poll may be either ordered by the chairman suo moto or may be demanded by such number of members prescribed under this section.

Where a resolution is to be passed through poll, the Chairman shall require the assistance of certain persons for scrutinising the poll and the votes and to prepare a report in accordance with the Rule 21 of Companies (Management and Administration) Rules, 2014). The Chairman has the power to regulate the poll in accordance with the said rules.

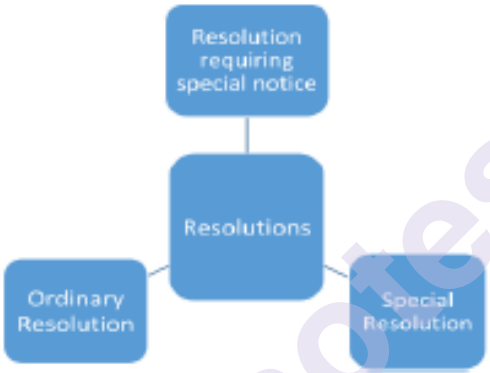
Postal Ballot (Section 110 read with Rule 22 Companies (Management and Administration) Rules, 2014): A Central Government notification may declare certain business items (excluding the items of ordinary business) to be dealt vide the postal ballot. A resolution passed by the required majority by a postal ballot shall be deemed to be passed at a duly convened general meeting.

Ordinary and Special resolution (Section 114)

Decisions in a company are taken by passing resolutions to that regard. The resolutions can be ordinary, special and resolutions requiring special notice, depending upon the nature of the decision to be taken.

Ordinary resolution is said to be passed when the votes cast by the eligible members in favour exceed the votes casted against any resolution. Here the members can either vote in person or through proxy. The Chairman of the meeting possesses a casting vote in case of a tie.

Whereas a special resolution is said to be passed for a resolution when a notice duly given for the purpose clearly specifies that the resolution to be passed is a special one. Such resolutions require that the votes by the eligible members must be three times in favour in comparison to the votes cast against the resolution. Here the person can either vote in person or through a proxy.



Resolutions requiring special notice (Section 115 read with Rule 23 Companies (Management and Administration) Rules, 2014)

There are certain resolutions which require special notice. According to section 115, any such notice required to be given shall be brought at the instance of member(s) holding not less than one percent of total voting power (in case of company not having share capital) or member(s) holding shares on which an aggregate sum of not exceeding five lakh rupees, paid up on the date of notice. Rule 23 further provides the time and means of sending such special notice.

Minutes of the meeting (section 118 read with Rule 25 Companies (Management and Administration) Rules, 2014)

Companies are required to maintain and keep the records of the proceedings of every meeting called the minutes of the meeting, which are to be prepared according to the provisions of this Act and the Secretarial Standards. The minutes of each of the meeting are to be recorded succinctly including all the details like the new appointments made. The minutes prepared in the loose sheets must be signed by the Chairman within 30 days of the meeting in the form of a book with pages consecutively numbered. The minute book of each kind of company viz. the general meetings, creditors' meetings are to be kept separately.

The minutes of the meetings shall have an evidentiary value for the proceedings mentioned therein.

Distribution of powers between Board of Directors and Shareholders

Company's powers can be exercised by the board of directors and at meetings of members of a company. Except for the powers which are expressly required to be exercised by the company in general meeting, in all other cases the directors can exercise all the company's powers. This division of company's powers has been dealt with Greer L J, in John Shaw and Sons {Salford Ltd), v. Shaw, in the following words: "A company is an entity distinct from its shareholders and its directors. Some of its powers may according to its articles, be exercised by directors, certain other powers may be reserved for the shareholders in general meeting. If powers of management are vested in the directors, they and they alone can exercise these powers. The only way in which the general body of the shareholders can control the exercise of the powers vested by the articles, in the directors is by altering the articles, or if the opportunity arises under the articles by refusing to re -elect the directors whose actions they disapprove."

The shareholders cannot usurp the powers which by the articles are vested in the directors any more than the directors can usurp the powers vested by the articles in general body of shareholders. The powers of directors include to issue preference shares, borrow money by mortgaging the company's property and to do acts necessary for the management of the company. The power to sell the assets of the company is vested in the board and if the board thinks that it is not

11.8 SUMMARY

Corporate law (also known as **business law**, **company law** or **enterprise law**) is the body of law governing the rights the rights, relations, and conduct of persons, companies, organizations and businesses. The term refers to the legal practice of law relating to corporations, or to the theory of corporations. Corporate law often describes the law relating to matters which derive directly from the life-cycle of a corporation.[1] It thus encompasses the formation, funding, governance, and death of a corporation. The Companies Act, 2013 received the assent of the President on August 29, 2013 and was notified in the Gazette of India on 30.08.2013.

The Companies Act, 2013 introduced new concepts supporting enhanced disclosure, accountability, better board governance, better facilitation of business and so on. It includes associate company, one-person company, small company, dormant company, independent director, women director, resident director, special court, secretarial standards, secretarial audit, class action, registered valuers, rotation of auditors, vigil mechanism, corporate social responsibility, E-voting etc.

11.9 QUESTIONS

A. What is a company? Enumerate different types of companies and characteristics.

B. What are the advantages and disadvantages of incorporation?

C. State different types of Companies?

D. What are Articles of Association?

E. Compare the Articles of Association with memorandum of Association?

F. What are the different Categories of meetings of a company?

G. What is meant by Transfer of shares?

H. Explain the various points of distinction between transfer of shares and transmission of shares?

I. Write Short notes on: -

A) Transfer of Shares.

B) Transmission of shares.

C) Statutory Meeting

D) Notice of a meeting

E) Annual General meeting.

F) Prospectus

G) Clause of Memorandum.

H) Articles of Association

I) Certificate of Incorporation.

J) Promoter.

Objective Questions

1. Fill in the blanks with correct words from the statements against each of the following questions:

I. A company means a company formed and registered under _____.

a) **The companies Act, 1956**.

b) The Contract Act, 1872.

c) The Indian Partnership Act, 1932.

II. A company is a distinct _____ person.

a) Artificial legal

b) Natural, born

c) Natural legal.

III. A company has _____ liability.

a) A limited

b) Unlimited

c) No

IV. Shares in a company are _____.

a) **easily transferable**.

b) Difficult to be transferred.

c) Non-transferable.

V. A company being a body corporate_____.

a) **Can sue and be sued**.

b) Cannot sue and cannot be sued.

c) Is above suit.

VI. Memorandum of Association embodies _____.

a) List of members of the company.

b) List of managing director and other directors of the company.

c) **Fundamentals rules regarding constitution and permitted scope of activities of the company**.

VII. The principle of constructive notice seeks to protect _____.

a) the company against outsider.

b) the directors against the company.

c) outsiders against the company.

VIII. Articles are subordinate to _____.

a) Memorandum

b) members.

c) directors.

IX. Articles can be altered simply by _____.

a) an ordinary resolution.

b) director's resolution

c) a special resolution.

X. The registered address of a company may be altered from one state to another state by _____.

a) a resolution at its annual meeting.

b) a resolution at its board of directors meeting.

c) alternation of the memorandum of Association.

XI. **The** doctrine of indoor management seeks to protect. _____.

a) the company against outsiders.

b) the directors against the company.

c) Outsiders against the company.

2. Match correctly the word of the following group "A" with those in Group "B"

Group "A"	Group "B"
i) Memorandum of association embodies.	a) fundamental rules regarding constitution and permitted scope of activities of the company.
ii) If the company is with limited liability, the last word of its name should be	b) limited
iii) When a company exercise its power to promote any of its declared objects, it is called.	c) Unlimited.
iv) An ultra vires contract of a company is known as	d) the ultra vires of the company.
v) The principle of constructive notice seeks to protect.	e) the intra vires of the company.
	f) void ab initio
	g) the company against outsiders
	h) voidable

3. Match correctly the word of the following group "A" with those in Group "B"

Group "A"	Group "B"
a) A company is	i) corporate personality
b) A company has a	ii) artificial legal person
c) A company owns	iv) any of the former companies act.

Group "A"	Group "B"
d) Shares in a company are	v) an artificial intelligence
e) A company has an independent	vi) Limited liability
f) A company is a distinct.	vii) never dies
g) An existing company means a company, formed and registered	viii) its own capital and assests.
	ix) easily transferable
	x) unlimited liability
	xi) not easily transferable

11.10 REFERENCES

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12

INTELLECTUAL PROPERTY RIGHTS

Unit Structure :

11.1 Meaning and Definition
11.2 Objectives
11.3 Patent definition
11.4 Trademarks
11.5 Infringement and Passing Off.
11.6 Infringement of Trademark
11.7 Copy right definition
11.8 Summary
11.9 Questions

11.1 MEANING AND DEFINITION

Meaning of intellectual property rights

The intellectual property right is a kind of legal right that protects a person's artistic works, literary works, inventions or discoveries or a symbol or design for a specific period of time. Intellectual property owners are given certain rights by which they can enjoy their Property without any disturbances and prevent others from using them, although these rights are also called monopoly rights of exploitation, they are limited in geographical range, time and scope.

As a result, intellectual property rights can have a direct and substantial impact on industry and business, as the owners of IPRs one can enforce such rights and can stop the manufacture, use, or sale of a product to the public. IP protection encourages publication, distribution, and disclosure of the creation to the public, rather than keeping it a secret and to encourage commercial enterprises to select creative works for exploitation.

Definition

The definition of intellectual property rights is any and all rights associated with intangible assets owned by a person or company and protected against use without consent. Intangible assets refer to non-physical property, including right of ownership in intellectual property. Examples of intellectual property rights include:

- Patents
- Domain names
- Industrial design

- Confidential information
- Inventions
- Moral rights
- Database rights
- Works of authorship
- Service marks
- Logos
- Trademarks
- Design rights
- Business or trade names
- Commercial secrets
- Computer software

11.2 OBJECTIVES

- IPR Awareness: Outreach and Promotion - To create public awareness about the economic, social and cultural benefits of IPRs among all sections of society.
- Generation of IPRs - To stimulate the generation of IPRs.
- Legal and Legislative Framework - To have strong and effective IPR laws, which balance the interests of rights owners with larger public interest.
- Administration and Management - To modernize and strengthen service-oriented IPR administration.
- Commercialization of IPRs - Get value for IPRs through commercialization.
- Enforcement and Adjudication - To strengthen the enforcement and adjudicatory mechanisms for combating IPR infringements.
- Human Capital Development - To strengthen and expand human resources, institutions and capacities for teaching, training, research and skill building in IPRs

11.3 PATENT DEFINITION

A patent is **an exclusive right granted for an invention, which is a product or a process that provides, in general, a new way of doing something, or offers a new technical solution to a problem**. To get a patent, technical information about the invention must be disclosed to the public in a patent application.

What is Patentable?

1. Utility Patents

Under federal statute, any person who "invents or discovers any new and useful process, machine, manufacture, or composition of matter, or any new and useful improvement thereof, may obtain a patent."

- A "process" is defined as a process, act, or method, of doing or making something, and primarily includes industrial or technical processes.
- A "machine" would be anything that would commonly be considered such, from a clockwork to a tractor to a computer.
- The term "manufacture" refers to articles which are made, and includes all manufactured articles.
- A "composition of matter" is a chemical composition, and may include mixtures of ingredients as well as new chemical compounds.

These classes of subject matter, taken together, include practically everything that is made and their processes for production.

2. Design Patents

A "design patent" protects the way an article looks. Since most manufactured items possess both functional and ornamental characteristics, both utility and design patents may be required to protect the invention.

For example, Apple Computers introduced a unique, decorative computer called an iMac, which featured a curved case incorporating the CPU, drives, and monitor, and which was made of white translucent plastic and colored transparent plastic. While various aspects of the computer itself may have already been patented, the design characteristics, which are wholly separate from the iMac's function, were themselves patentable.

3. Plant Patents

A plant patent may be granted when a new variety of plant is discovered and asexually reproduced. This does not include a tuber-propagated plant or a plant simply found in an uncultivated state. The patent protects the inventor's right to exclude others from asexually reproducing, selling, or using the plant so reproduced.

How the Government Decides Which Inventions are Patentable

1. Useful

The term "useful" means that the subject matter has a useful purpose. It also requires that the item is operable, since a machine that can not

perform its intended purpose cannot be considered useful in the ordinary sense of the word.

2. Novel

"Novelty" is strictly defined by patent law. An invention cannot be patented if:

- The invention was known or used by others in the United States before the patent applicant invented it.
- The invention was patented or described in any printed publication, before the patent applicant invented it.
- The invention was patented or described in a printed publication in any country more than one year prior to the inventor's U.S. patent application.
- The invention was in public use or on sale in the United States more than one year prior to the inventor's U.S. patent application.

These rules do not prevent a person from patenting an improvement to another invention, however. For example, tire makers have long known the formulas for making tire rubber. But what if an inventor found a way to make tire rubber twice as long-lasting by slightly changing the chemical composition? This could well be a patentable improvement as long as the difference was not obvious.

3. Nonobvious

Even if a new invention differs in one or more ways from another patented invention, a patent may still be refused if the differences would be obvious. Nonobviousness is defined as a sufficient difference from what has been used or described before that a person having ordinary skill in the area of technology related to the invention would not find it obvious to make the change.

For example, sodium chloride (table salt) and potassium chloride (a chemically similar salt) can often be used interchangeably. A chemist working to improve road salt would consider it obvious to substitute potassium chloride for sodium chloride, so a formula that simply made this substitution in an already patented road salt formula would not be patentable.

What is not Patentable?

1. An invention, that is frivolous or that claims anything obviously contrary to well established natural laws;
2. An invention, the primary or intended use of which would be contrary to law or morality or injurious to public health;

3. The mere discovery of a scientific principle or the formulation of an abstract theory;

4. The mere discovery of any new property or new use for a known substance or of the mere use of a known process, machine or apparatus unless such known process results in a new product or employs at least one new reactant;

5. A substance obtained by a mere admixture resulting only in the aggregation of the properties of the components thereof or a process for producing such substance;

6. The mere arrangement or rearrangement or duplication of known devices, each functioning independently of one another in a known way;

7. A method of agriculture or horticulture;

8. Inventions relating to atomic energy.

9. Any process for the medicinal, surgical, curative, prophylactic or other treatment of human beings or animals.

10. Plants and animals in whole or any part thereof other than microorganisms.

11. Mathematical or business method or a computer program per se or algorithms.

12. literary, dramatic, musical or artistic works, cinematographic works, television productions and any other aesthetic creations.

13. Mere scheme or rule or method of performing mental act or playing game.

14. Presentation of information.

15. Topography of integrated circuits.

16. An invention which in effect, is traditional knowledge or is based on the properties of traditional knowledge.

11.4 TRADEMARKS

A trademark can be any word, phrase, symbol, design, or a combination of these things that identifies your goods or services. It's how customers recognize you in the marketplace and distinguish you from your competitors.

The word "trademark" can refer to both trademarks and service marks. A trademark is used for goods, while a service mark is used for services.

A trademark:

- Identifies the source of your goods or services.
- Provides legal protection for your brand.
- Helps you guard against counterfeiting and fraud.

Definition

The term trademark refers to a recognizable insignia, phrase, word, or symbol that denotes a specific product and legally differentiates it from all other products of its kind. A trademark exclusively identifies a product as belonging to a specific company and recognizes the company's ownership of the brand. Trademarks are generally considered a form of intellectual property and may or may not be registered.

Types Of Trademarks

Product Mark

Product mark is a mark that is used on a good or on a product rather than on a service. This this type of trademark is used to recognize the origin of the product and helps in maintaining the reputation of a business. Trademark applications filed under trademark class 1-34 could be termed as a product mark, as they represent goods.

Service Mark

Service mark is similar to the product mark but a service mark is used to represent a service rather than a product. The main purpose of the service mark is that it distinguishes its proprietors from the owners of other services. Trademark applications filed under trademark class 35-45 could be termed as a service mark, as they represent services.

Collective Mark

Collective mark is used to inform the public about certain distinguished features of a product or service used to represent a collective. A group of individuals can use this mark so that they are collectively protecting a goods or service. The mark holder can be an association or can be a public institution or can also be a Section 8 Company.

In a collective mark, normally the standards of the products are fixed by the regulator owing the mark. Others associated with the collective are held responsible to adhere to certain standards while using the mark in the course of business. A commonly known collective mark in India is the Chartered Accountant designation.

Certification Mark

Certification mark is a sign that denotes a products origin, material, quality or other specific details which are issued by the proprietor. The main purpose of certification mark is to bring out the standard of the product and guarantee the product to the customers. A certification mark can also be

used to uplift the product's standard amongst the customers by showing that the product had undergone standard tests to ensure quality. Certification marks are usually seen on packed foods, toys and electronics.

Shape Mark

Shape Mark is exclusively used to protect the shape of the product so that the customers find it relatable to a certain manufacturer and prefer to buy the product. The shape of a particular product can be registered once it is recognized to have a noteworthy shape. An example of a shape is the Coca-Cola bottle or Fanta bottle, which have a distinctive shape identifiable with the brand.

Pattern Mark

Pattern marks are those products that have specific designed patterns that come out as the distinguishing factor of the product. Patterns which fail to stand out as a remarkable mark is generally rejected since it does not serve any purpose. For a pattern to be registered, it has to show evidence of its uniqueness.

Sound Mark

Sound mark is a sound that can be associated with a product or service originating from a certain supplier. To be able to register a sound mark, when people hear the sound, they easily identify that service or product or a shows that the sound represents. Sound logos are called as audio mnemonic and is most likely to appear at the beginning or end of a commercial. The most popular sound mark in India is the tune for IPL.

11.5 INFRINGEMENT AND PASSING OFF.

It is creating some false representation that is likely to lead someone to believe that the goods or services are those of someone else. In layman terms, passing off occurs when a trader/businessperson/or another person makes a false representation to their customer or consumer to lead them in believing that the goods or services they are delivering are the property of another person. The Law of Passing-Off, which covers Intellectual Property Rights in India, was created to prevent this conduct.

Section 134 1 (c) of the Trademark Act 1999 establishes the law of passing off. A common law remedy is provided by Section 27 of the Trademark Act 1999. Unregistered trademark rights are subject to this common-law tort (a trademark that has not been registered under a trademark or patent office is known as an unregistered trademark).

The law of passing off prohibits one person from impersonating another's goods or services. The concept of passing off was not very broad at first, and it has evolved significantly over time. The rule of passing off was originally solely applicable to products. That no single person may misrepresent the goods of others.

At a later time, this was extended to include goods, businesses, and services. Passing off was then expanded to include professions and non-trading activities. In today's world, it also refers to unfair commerce and unfair competition in which one person's actions harm another person's or group of people's goodwill. The basic question in passing off law is whether a person's actions are intended to deceive the public or to cause confusion between two business activities.

When does Passing Off arise?

Passing off arises when there are false claims and harm to the existing reputation or goodwill of the owner.

What is necessary for a Passing Off action?

In a Passing off action, the user must prove that the trademark they are using has a distinct identity for the product. However, if someone uses the same thing, it will create confusion in the minds of people and will cause harm to their business reputation.

Features of Passing-Off

There are three main features of passing off the trademark:

- Reputation
- Misrepresentation
- Deterioration

Accordingly, a complainant must prove:

1. Their products or service have goodwill.
2. They should prove that the other party is making a false representation.
3. Also, they should demonstrate that they have incurred a loss due to the party's false claims.

Other Features of Passing-Off the trademark

- If someone creates misrepresentation in the business to future clients of their ultimate customers of products or services in trade by them.
- To damage the reputation of another individual's enterprise.
- Provokes actual impairment to the complainant's business reputation.

11.6 INFRINGEMENT OF TRADEMARK

When a person uses a trademark or service mark without permission, it is trademark infringement. As previously indicated, passing off applies to unregistered trademarks, while trademark infringement applies to registered trademarks.

Trademark infringement mentions in Section 29 of the Trademark Act of 1999. It states that if a person uses a trademark that is registered by another corporation or individual and causes confusion in the eyes of the public, that person will be held accountable for trademark infringement.

Feature of Trademark Infringement

- **Unauthorized individual**

  It denotes a person who is not the owner of the registered trademark.

- **Identical or Deceptively Identical**

  The examination for deciding whether marks are similar or not is by finding whether there is a possibility for a probability of chaos among the public. If the consumers are probable to confuse among the two marks, there is an infringement case.

- **Registered Trademark**

  You can only violate a registered trademark. For an unrecorded Trademark, the standard law idea of passing off will involve.

- **Goods/ Services**

  To prove infringement, even the goods/ services of the person must match or be similar to the goods that the trademark denotes. Any unauthorized use of the complete statutory ownership of a registered trademark includes a breach. The infringement explained above is direct infringement. There is another aspect to trademark infringement in India, i.e. indirect infringement.

11.7 COPY RIGHT DEFINITION

Copyright refers to the legal right of the owner of intellectual property. In simpler terms, copyright is the right to copy. This means that the original creators of products and anyone they give authorization to are the only ones with the exclusive right to reproduce the work.

Copyright law gives creators of original material the exclusive right to further use and duplicate that material for a given amount of time, at which point the copyrighted item becomes public domain.

Subject In Which Copy Right Exists

All subject matters protected by copyright are called protected works. Thus, according to Section 13 of the Copyright Act 1957, it may be subjected for the following works: Original Musical work, Original Literary Work, Original Dramatic work, Cinematography films, Original Artistic work and Sound recordings.

Original Musical work –

Musical work was defined as "a work consisting of music and includes any graphical notation of such work but does not include any work or any action intended to be sung, spoken or performed with the music". In 2012 Amendment, there was a grant of statutory license for cover versions. A song typically contains both literary and musical work. Therefore, the tune and lyrics together forms the song. Lyric of a song is the literary part and it is protected as a literary work and the writer of the lyrics is the author of the work. Music accompanying the song is treated as a musical work and the author of the musical work is the composer of the musical work. So, in the song there can be two rights that are set of rights in the literary work and rights in the musical work and they are owned by different people. The author of this right is different people.

Original literary work –

Literary work refers to works that are in writing. The Act does not classify literary work, but we understand that as work that are captured in writing. The act says that literary work includes computer programmes, tables, and compilations including computer databases. The literary work need not have any literary merit and it is not the job of the courts to look into the literary merit of copyright work.

So, courts have found that football fixture lists, mathematical tables, tombola tickets, etc. are capable of copyright protection. The number of words in a copyrighted material is not an indicator of quality and the author of copyrighted work is the author who makes the work or who creates the work. There are certain things that cannot be protected under a copyright. For instance, phrases, names, invented words and slogans cannot form a part of copyright protections. The names especially used in commerce or in trade are protected by trademarks and invented work and slogans, for example the slogan which Pepsi used a while ago "Yeh Dill Mange more", which is an advertising slogan was held something that can not protected under the copyright Act.

Secondary or derivative works can also be protected. They can be prospected only if, it involves the right kind of labor, it should be of such a nature that the effort brings a material change in the work. Therefore, the work should get changed based on the effort that change should be of the right kind and the prior work should be different from the secondary work. When the author assigns the copyright to another person, the new work will be entitled to a copyright as well. Adaptations and abridgment of existing works can have a copyright; translations can also be entitled to a copyright. Compilations and collective works can have copyrights. A copyright can subsist in the individual item as well as in the collection as a whole. For computer programs the source code can be protected as a literary work.

Original dramatic work –

It defined as "including any piece of recitation, choreographic work or entertainment in dumb show, the scenic arrangement or acting, form of

which is fixed in writing or otherwise but does not include a cinematograph film". The terms literary and dramatic are used together and the principle applicable to literary work will be applicable to dramatic work as well. The author of a dramatic work is the person who authors the work.

Cinematography films –

It means any work of visual recording and includes a sound recording accompanying such visual recording and sound recording accompanying such visual recording and "cinematograph" shall be construed as including any work produced by any process analogous to cinematography including video films. The author of cinematography films is the producer of the films.

Original artistic work –

An artistic work as mentioned in the Act, a painting, a sculpture, a drawing includes a diagram, map, chart or plan, an engraving or a photograph, and whether or not any such work possesses artistic quality. A work of architecture is included as an artistic work and any work of artistic craftsmanship can also come under the ambit of an artistic work. The author of an artistic work is the artist of the artistic work other than photograph. The photograph is a person who takes the photograph, who is regarded as the author. Recently there was an issue with regard to a selfie taken by a monkey. The Court has held that, the person has to be a human being and so far intellectual property rights have only covered Intellectual work of humans.

Sound recordings –

It means a recording of sound from which such sounds may be produced regardless of the medium on which such recording is made or the method by which the sounds are produced. The author of sound recording is the producer of the sound recording. The sound recording may involve musicians, it may involve singers, but the author is the producer.

The term of copyright varies depending on the kind of work that is protected. Literary, musical, dramatic and artistic works are protected for the life of the author and after the death for a period of 60 years. For posthumous work published after the death of the author. It is 60 years from the time the work is first published. Therefore, cinematograph films sound recording, government works, works of international organizations all are prospected for 60 years from the work first published.

Here the ownership in copyright may vest in different persons under different circumstances. Like of a work is created by an employee in the course of his or her employment, the employer owns the copyright. If the work is created by an independent contractor and the independent contractor signs a written agreement stating that the work shall be "made for hire," the commission person or organization owns the copyright only if the work is a part of the larger literary work, such as an article in a magazine or a poem or story in anthology; part of a motion picture or other audiovisual work,

such as screenplay, a translation, a supplementary work, such as an afterword, an introduction, chart, editorial note, bibliography, appendix or index; a compilation; an instructional text; a test or answer material for a test; or an atlas. Works that do not fall within one of these eight classifications constitute works made for hire only if created by an employee within the scope of his or her employment. If the creator has sold the entire copyright, the purchasing business or person becomes the copyright owner.

Eastern Book company v/s Navin J. desai

The question involved was whether there is any copyright in the reporting of the judgment of a court. The Delhi High court held that it is not denied that under section 2(k) of the Copyright Act, a work which is made or published under the direction or control of any Court, tribunal or other judicial authority in India is a Government work. Under section 52(q), the reproduction or publication of any judgment or order of a court, tribunal or other judicial authority shall not constitute infringement of copyright of the government in these works. It is thus clear that it is open to everybody to reproduce and publish the government work including the judgment/ order of a court. However, in case, a person by extensive reading, careful study and comparison and with the exercise of taste and judgment has made certain comments about judgment or has written a commentary thereon, may be such a comment and commentary is entitled to protection under the Copyright Act. The court further observed: In terms of section 52(1)(q) of the Act, reproduction of a judgment of the court is an exception to the infringement of the Copyright. The orders and judgments of the court are in the public domain and anyone can publish them. Not only that being a Government work, no-copyright exists in these orders and judgments. No one can claim copyright in these judgments and orders of the court merely on the ground that he had first published them in his book. Changes consisting of elimination, changes of spelling, elimination or addition of quotations and corrections of typographical mistakes are trivial and hence no copyright exists therein.

Godrej Soaps (P) Ltd v/s Dora Cosmetics Co.

The Delhi High Court held that where the carton was designed for valuable consideration by a person in the course of his employment for and on behalf of the plaintiff and the defendant had led no evidence in his favor; the plaintiff is the assignee and the legal owner of copyright in the carton including the logo.

Originality of copyright

Originality is an important legal concept with respect to copyright. Originality is the aspect of a created or invented work that makes it new or novel, and thereby distinguishes it from reproductions, clones, forgeries, or derivative works. In this regard, an original work stands out because it was not copied from the work of others.

There is no objective minimum amount of content required for a work to be included within the scope of copyright. The Copyright Act defines only two requirements for copyrightability: original authorship ("originality") and fixation. "Original" means a work created through the "fruits of intellectual labor." "Originality" therefore requires not only that the author has not copied the work from another, but also that there is "at least some minimal degree of creativity."

"Originality" is a constitutional requirement for copyright applicability even though it was first stated explicitly by statute only with the introduction of the 1976 Copyright Act. In the case of Feist Publications, Inc. v. Rural Telephone Service, the U.S. Supreme Court explained that the requirement of originality is not particularly stringent and is comprised of two elements: that the work be independently created by the author (as opposed to copied from other works) and that it possesses at least some minimal degree of creativity. A work satisfies the "independent creation" element so long as it was not literally copied from another, even if it is fortuitously identical to an existing work. The "creativity" element sets an extremely low bar that is cleared quite easily. It requires only that a work possess some creative spark, no matter how crude, humble, or obvious it might be.

Authors and Owners

Ownership of Copyright

Ownership in Copyright is different from other ownership in physical material in which work is fixed. A person owning a book may not be the owner of the Copyright of the book. As per the general rule, the author is the first owner of Copyright of a work. The Copyright Laws provide certain exceptions to the general rule mentioned above, which are necessary to clearly examine the two different concepts of Ownership and Authorship of Copyright in India. To clear the above point, if a painting, photograph, or a portrait is made at the instance of any other person for a valuable consideration, such other person is the first owner of the Copyright in such a case.

The creator/inventor of an idea of creation/invention is also not the true owner of Copyright in work, unless he/she is the creator/inventor of the work. Therefore, any person is having any brilliant idea, and he/she communicates the idea to a dramatist who later on goes on to make a play on the same idea, the originator/creator of idea has no right in the product of the dramatist, as a Copyright subsists in a tangible form and not in a mere idea.

Section 17 of the Copyright Act, 1957, provides for provisions of acquiring Ownership of Copyright. The Ownership right is available only if the person qualifies the provision of the ***Copyright Act, 1957***. In other laws prevailing in India, no other remedy is available to counter the violation of Ownership of Copyright.

Section 17 of the Copyright Act, 1957, provides for the provision that the first owner of Copyright is defined to be the author of the work. The definition of the author is defined separately under the ***Copyright Act, 1957,*** to clearly explain the distinction between the Ownership and Authorship of Copyright in India***.*** The definition of author related to various works is provided under the ***Copyright Act, 1957.***

Authorship of Copyright

An author is an individual who writes, collects, composes, and draws the work in issue, although the whole idea of the work was suggested by some other person. The rationale behind the concept of an author is that the originator of a brilliant idea is not the Copyright owner in the work, unless he/she is also the creator of the work. The nationality of an author is not the prime factor to determine the right of an author to a Copyright under the Copyright Act, 1957. Though, the existence of Copyright has certain essential requirements under ***Section 13 (2) of the Copyright Act, 1957.***

The essential requirements under Section 13(2) of the Copyright Act, 1957 are as follows:

- **Published work**

  The work should be published in India, or when publication is done outside India, the author of the work, at the date of publication, must be a citizen of India, if alive at that date, or if dead, at the time of the death of the author.

- **Unpublished work**

  As per Section 7 of the Copyright Act, 1957, where the making of the work was extended for a considerable time period, the author of a work, should be deemed to be a citizen of, or domiciled in, the country of which he/she was a citizen or wherein he/she was domiciled for any substantial part of that time period. The unpublished work does not include the architectural works.

- **Architectural work**

  The architectural work of the author should be located in India only then the work will be considered as a subject of copyright protection under the Copyright Act, 1957, in India.

On the other hand, as a rule, the author is the first owner of the Copyright in the work. The Copyright Act, 1957, under Section 2(d) defines the author of various works as follows:

- In the case of literary or dramatic works, the author of the work is the author,

- In the case of musical works, the composer of the work is the author,

- In the case of an artistic work other than the photographs, the artist of the work is the author,
- In the case of a photograph, the person who takes a photograph is the author,
- In the case of cinematographic films, the producer of the work is the author,
- In the case of sound recordings, the producer of the work is the author, and
- In the case of literary, dramatic, musical, or artistic works, which is computer-generated, the person who causes the works to be created is the author.

As per ***Section 2 (ffa) of the Copyright Act, 1957***, a "Composer" in relation to a musical work means any person who composes the music irrespective of the fact that whether he/she records the musical works in any form of graphical notation. Though, the definition of the composer may not enable him/her to prove his/her authorship except the composition of musical work is recorded in any form of musical notation or otherwise. As per ***Section 2 (p) of the Copyright Act, 1957***, a "Musical work" means a work comprising of music and contains any graphical notation of such work but does not include any words or actions intended to be spoken, sung or performed with the music

Geographical indications

It is a name or sign used on certain products which corresponds to a geographic location or origin of the product, the use of geographical location may act as a certification that the product possesses certain qualities as per the traditional method. Darjeeling tea and basmati rice are a common example of geographical indication. The relationship between objects and place becomes so well known that any reference to that place is reminiscent of goods originating there and vice versa.

It performs three functions. First, they identify the goods as origin of a particular region or that region or locality; Secondly, they suggest to consumers that goods come from a region where a given quality, reputation, or other characteristics of the goods are essentially attributed to their geographic origin, and third, they promote the goods of producers of a particular region. They suggest the consumer that the goods come from this area where a given quality, reputation or other characteristics of goods are essentially attributable to the geographic region.

It is necessary that the product obtains its qualities and reputation from that place. Since those properties depend on the geographic location of production, a specific link exists between the products and the place of origin. Geographical Indications are protected under the **Geographical Indication of Goods (Registration and Protection) Act, 1999.**

11.8 SUMMARY

The concept of a trademark is as old as the ancient Harapan civilization, in which marks of trade with foreign countries such as Mesopotamia, and Babylon were found embosses on articles, 2006 (33) PTC 281,299). The law of trademark was enacted to register trademarks, which guarantee (1) an exclusive right to its owner and trader to deal in his goods and services using a symbol, a sign or a mark to distinguishes goods and services from similar goods and services, sold by other traders and service traders and service providers in the market and (2) to provide relief in case of its infringement by any other person.

A patent is **an exclusive right granted for an invention, which is a product or a process that provides, in general, a new way of doing something, or offers a new technical solution to a problem**. To get a patent, technical information about the invention must be disclosed to the public in a patent application.

11.9 QUESTIONS

1) Define Copyright.

2) What are the rights of the owner of Copyright?

3) Define the concept of intellectual property rights and state their objectives?

4) What is a patent? Explain the difference between patentable and non-patentable?

5) **Write short notes on:**

- **a)** Invention.
- **b)** Patentable
- **c)** Not patentable.
- **d)** Concept of copyright.
- **e)** Registration of geographical indication of goods.

Objective Questions:

1) State whether the following statements are True or False and correct them, if these are false:

   i) Copyright subsists in the process or method of construction of a work of architecture.

   ii) Copyright shall not subsist cinematograph films.

   iii) The term of copyright in anonymous and pseudonymous works shall be sixty years.

iv) The term of copyright in photographs shall be sixty years.

v) Intellectual property rights are in the nature of monopoly rights.

vi) A patent is a grant by the Government of a state for discovery.

vii) The patents Act, 1970 is based on the USA Patent Act,1950.

viii) Every invention, without an exception, can be patented.

ix) Every scientific theory can be patented for a fixed prescribed period.

x) No, invention related to atomic energy, can be patented.

2) Match correctly the words of **"Group A"** with those of "**Group B"**

"Group A"	**"Group B"**
a) Term of copyright in posthumous works	Shall subsist 50 years
b) Term of copyright in Government work.	Shall subsist 40 years
c) Term of copyright in Government works	Shall subsist 60 years
d) Term of copyright in any literary, dramatic, musical and artistic work.	Shall subsist 60years
e) Term of copyright in sound recording.	Shall subsist 60 years
	Shall subsist 60 years

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