



**THE TAMIL NADU
Dr. AMBEDKAR LAW UNIVERSITY**

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CONTRACTS – II
FIRST YEAR – SECOND SEMESTER
STUDY MATERIAL

By

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MESSAGE

Knowledge is power. Legal Knowledge is a potential power. It can be exercised effectively everywhere. Of all the domains of reality, it is Legal Knowledge, which deals with rights and liabilities, commissions and omissions, etc., empower the holder of such knowledge to have prominence over the rest. Law Schools and Law Colleges that offer Legal Education vary in their stature on the basis of their ability in imparting the quality Legal Education to the students. Of all the Law Schools and Colleges, only those that educate their students to understand the nuances of law effectively and to facilitate them to think originally, excel. School of Excellence in Law aims to be in top of such institutions.

The revolution in Information and Communication Technology dump lot of information in the virtual world. Some of the information are mischievous and dangerous. Some others are spoiling the young minds and eating away their time. Students are in puzzle and in dilemma to find out the right information and data. They do not know how to select the right from the wrong, so as to understand, internalise and assimilate into knowledge. Hence in the present scenario, the role of teachers gains much more importance in guiding the students to select the reliable, valid, relevant and suitable information from the most complicated, perplexed and unreliable data.

The teachers of the School of Excellence in Law have made a maiden attempt select, compile and present a comprehensive course material to guide the students in various subjects of law. The students can use such materials as guidance and travel further in their pursuit of legal knowledge. Guidance cannot be a complete source of information. It is a source that facilitates the students to search further source of information and enrich their knowledge. Read the materials, refer relevant text books and case laws and widen the knowledge.

Dr. P. Vanangamudi
Vice-Chancellor

SUBJECT : CONTRACTS – II

SUBJECT CODE : HVJ

(Indian Contract Act, Indian Partnership Act, Sale of Goods Act and Other Specific Contracts).

UNIT - I : Indemnity and Guarantee

Definition - English and Indian

Distinction between indemnity and guarantee.

Rights of the indemnity holder.

Rights of the indemnifier.

Implied indemnity dealt with Section 59,145,164 and 222 of the Contract Act.

Codification not exhaustive-principles of equity applicable.

Definition - English and Indian definitions.

Essentials and nature of guarantee.

Distinction between guarantee and indemnity - guarantee and insurance.

Elements of consideration in a contract of guarantee.

Nature and quantum of surety's liability.

Kinds of guarantee and their incidents.

Suretyship arises on contract and not on notice-position in English Law.

Duty of disclosure in guarantee.

Rights of surety against principal debtor-credit-co-sureties-difference in

English Law-Circumstances which a surety discharges.

UNIT - II : Bailment

Definition - Indian and English definitions.

Essentials of bailment and classification of bailment.

Distinction between bailment and pledge-deposit-sale-agency.

Rights and duties of the bailor and bailee-difference in English Law.

Pledge-definition-Rights of the Pawner and Pawnee.

Pledge by non-pawners.

Lien-kinds of lien-their nature and incidents - how lost

UNIT - III : Sale of Goods

Definition of sale and agreement to sell - distinction between sale and agreement to sell - Contract of work and layout. Hire purchase agreement - Bailment - Exchange - Gift.

Definition-goods – specific goods-future goods-Mercantile agent-Documents of title of goods.

How is sale made-rules for fixing price and effect of goods getting damages or perished in a contract of sale.

Stipulation as to time and other stipulation.

Conditions and warranties – Effect of breach – Ex-post facto warranty – when condition is treated as warranty.

Implied conditions and warranties – in a contract of sale – Exemption clauses effect of fundamental breach.

Rule as to passing off property.

Sale by non-owners, exception to Nemo dat quod non habet.

Rules as to delivery.

Unpaid vendor – His Rights or lien and stoppage in transit.

Remedies available to seller and buyer.

Auction sale.

UNIT – IV : Agency

Definition of contract of agency – Creation of agency-kinds of agency.

Distinction between Agent and servant and independent contractor.

Who may be an agent-kinds of Agent – Authority of the different kinds of Agent – Authority of Agents – Ostensible and emergency authority – delegation of authority – delegates non protest delegare – sub agent – substituted agent.

Essential of ratification and its effect.

Effect of notice to agent – necessary conditions to bind Principal.

Principal and third parties – The doctrine of undisclosed principal and concealed Principal.

Termination of agency and when it becomes irrevocable.

UNIT – V : Partnership

Definition of Partnership–Essential of partnership–Joint Hindu– partnership.

Distinction between partnership and co-ownership – Joint Hindu family –

Incorporation companies – contract of service – legal notion and mercantile notion.

Kinds of partners and duration of partnership.

Mutual rights and duties of partners.

Minor as a partner – difference in English Law.

Rights of Legal Representative and surviving partners.

Authority of partners – implied and emergency.

Liability of the partners of the acts of the firm and for the wrongful acts of other partner – nature of liability.

Principle of agency in partnership.

Partnership property – Tests.

Settlement of accounts – goodwill and its disposal – distribution of assets.

Retirement of partners.

Dissolution of firm and modes and circumstances.

Effect of non – registration of firm.

Books Recommended:

The Law of Contracts – Dr. Avtar Singh

Sale of Goods Act – Mulla

Law of Contracts – Krishna Nair

Law of Contracts – Anson

CONTRACTS - II

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UNIT - I

INDEMNITY AND GUARANTEE

Indemnity

The provisions in the Indian Contract Act pertaining to law of indemnity are given as follows

124. "Contract of indemnity" defined

A contract by which one party promises to save the other from loss caused to him by the contract of the promisor himself, or by the conduct of any other person, is called a "contract of indemnity".

125. Right of indemnity-holder when sued -

The promisee in a contract of indemnity, acting within the scope of his authority, is entitled to recover from the promisor-

- (1) all damages which he may be compelled to pay in any suit in respect of any matter to which the promise to indemnify applies;
- (2) all costs which he may be compelled to pay in any such suit, if in bringing of defending it, he did not contravene the orders of the promisor, and acted as it would have been prudent for him to act in the absence of any contract of indemnity, or if the promisor authorised him to bring or defend the suit;
- (3) all sums which he may have paid under the terms of any compromise of any such suit, if the compromise was not contract to the orders of the promisor, and was one which it would have been prudent for the promise to make in the absence of any contract of indemnity. or if the promisor authorised him to compromise the suit.

Meaning of Indemnity

A guarantees to B the payment of a bill of exchange by C, the acceptor. The bill is dishonoured by C. A is liable, not only for the amount of the bill, but also for any interest and charges which may have become due on it. A guarantees to B the payment of a bill of exchange by C, the acceptor. The bill is dishonoured by C. A is liable, not only for the amount of the bill, but also for any interest and charges which may have become due on it."

Definition - English and Indian

Section 124 of the Indian Contract Act- . "Contract of indemnity" defined.—A contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person, is called a "contract of indemnity." —A contract by which one party promises to save the other from loss caused to him by the conduct of the promisor himself, or by the conduct of any other person, is called a "contract of indemnity."” Illustration A contracts to indemnify B against the consequences of any proceedings which C may take against B in respect of a certain sum of 200 rupees. This is a contract of indemnity. A contracts to indemnify B against the consequences of any proceedings which C may take against B in respect of a certain sum of 200 rupees. This is a contract of indemnity.”

In England a contract of indemnity has been defined as: "A promise to save another harmless from loss caused as a result of a transaction entered into at the instance of the promisor." Indemnity covers not only loss arising from the conduct of promisor or third party, but also accidental loss. However, definition in Section 124 of the Indian Contract Act is narrower and seems to exclude Indemnity as a cover for accidental loss. The Case Law of Gajanan v. Moreshwar can be taken as an example for Contracts of Indemnity. Chagla, J. observed "If the indemnified has incurred a liability and that liability is absolute, he is entitled to call upon the indemnifier to save him from the liability and pay him off. English law thus includes the loss by accidents and events also.

Further the promise to save may be implied or expressed. Implied indemnity dealt with Section 59,145,164 and 222 of the Contract.

Distinction between Indian and English Law on Indemnity

1. English law covers both expressed and implied whereas the Indian law covers only express contract of indemnity.
2. In English law the loss may be because of the conduct of some person or due to the accident which is quiet independent of anybody's conduct whereas in Indian law the loss should be because of the conduct of some person and not by accident.
3. In English law the contract of Insurance can be assigned whereas in Indian law it is an actionable claim.

Distinction between indemnity and guarantee.

In a contract of indemnity there are two parties called the the indemnifier and the indemnified. In a contract of guarantee there are three parties namely the debtor,credito and guarantor.In a contract of indemnity, the indemnifier promises without the request of debtor.Contract of Guarantee is for security of a debt or performance of promise.Liability of surety in a contract of guarantee is Secondary.

Rights of the Indemnity holder.

Section 125 of the Indian Contract Act states the rights of the indemnity holder as follows.

Rights of indemnity-holder when sued.—The promisee in a contract of indemnity, acting within the scope of his authority, is entitled to recover from the promisor— —The promisee in a contract of indemnity, acting within the scope of his authority, is entitled to recover from the promisor—”

- (1) all damages which he may be compelled to pay in any suit in respect of any matter to which the promise to indemnify applies;
- (2) all costs which he may be compelled to pay in any such suit if, in bringing or defending it, he did not contravene the orders of the promisor, and acted as it would have been prudent for him to act in the absence of any contract of indemnity, or if the promisor authorized him to bring or defend the suit;
- (3) all sums which he may have paid under the terms of any compromise of any such suit, if the compromise was not contrary to the orders of the promisor, and was one which it would have been prudent for the promisee to make in the absence of any contract of indemnity, or if the promisor authorized him to compromise the suit.

Rights of the indemnifier.

The Indian contract act is silent on the rights of the indemnifier. Many jurist have compared the rights of the surety and the rights of the indemnifier and they have concluded that there are many similarities.

Judicial decisions –

GajananMoreshwarParelkar vs Moreshwar Madan Mantri

Justice Chagla - The Indian Contract Act is both an amending and a consolidating Act, and it is not exhaustive of the law of contract to be applied by the Courts in India. Section 124 deals only with one particular kind of indemnity which arises from a promise made by the indemnifier to save the indemnified from the loss caused to him by the conduct of the indemnifier himself or by the conduct of any other person, but does not deal with those classes of cases where the indemnity arises from. loss caused by events or accidents which do not or may not depend upon the conduct of the indemnifier or any other person, or by reason of liability incurred by something done by the indemnified at the request of the indemnifier.

Guarantee.

The provisions relating to Guarantee in the Indian Contract Act are given as follows

126. "Contract of guarantee", "surety", "principal debtor" and "creditor" –

A "contract of guarantee" is a contract to perform the promise, or

discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the "surety", the person in respect of whose default the guarantee is given is called the "principal debtor", and the person to whom the guarantee is given is called the "creditor". A guarantee may be either oral or written.

127. Consideration for guarantee

Anything done, or any promise made, for the benefit of the principal debtor, may be a sufficient consideration to the surety for giving the guarantee.

128. Surety's liability

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

129. Continuing guarantee

A guarantee which extends to a series of transaction, is called, a "continuing guarantee".

130. Revocation of continuing guarantee

A continuing guarantee may at any time be revoked by the surety, as to future transactions, by notice to the creditor.

131. Revocation of continuing guarantee by surety' death –

The death of the surety operates, in the absence of any contract to the contrary, as a revocation of ma continuing guarantee, so far as regards future transactions.

132. Liability of two persons, primarily liable, not affected by arrangement between them that one shall be surety on other's default –

Where two persons contract with third person to undertake a certain liability, and also contract with each other that one of them shall be liable only on the default of the other, the third person not being a party to such contract the liability of each of such two persons to the third person under the first contract is not affected by the existence of the second contract, although such third person may have been aware of its existence.

133. Discharge of surety by variance in terms of contract

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

134. Discharge of surety by release or discharge of principal debtor –

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

135. Discharge of surety when creditor compounds with, gives time to, or agrees not to sue, principal debtor

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

136. Surety not discharged when agreement made with third person to give time to principal debtor

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

137. Creditor's forbearance to sue does not discharge surety

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

138. Release of one co-surety does not discharge other –

Where there are co-sureties, a release by the creditor of one of them does not discharge the others neither does set free the surety so released from his responsibility to the other sureties.

139. Discharge of surety by creditor's act or omission impairing surety's eventual remedy –

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

140. Rights of surety on payment or performance –

Where a guaranteed debt has become due, or default of the principal debtor to perform a guaranteed duty has taken place, the surety upon payment or performance of all that he is liable for, is invested with all the rights which the creditor had against the principal debtor.

141. Surety's right to benefit of creditor's securities –

A surety is entitled to the benefit of every security which the creditor has against the principal debtor at the time when the contract of suretyship entered into, whether the surety knows of the existence of such security or not; and if the creditor loses, or without the consent of the existence of such security or not; and if the creditor loses,

or without the consent of the surety, parts with such security, the surety, the surety is discharged to the extent of the value of the security.

142. Guarantee obtained by misrepresentation, invalid

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

143. Guarantee obtained by concealment, invalid -

Any guarantee which the creditor has obtained by means of keeping silence as to material circumstances, is invalid.

144. Guarantee on contract that creditor shall not act on it until co-surety joins –

Where a person gives a guarantee upon a contract that the creditor shall not act upon it until another person has jointed in it as co-surety, the guarantee is not valid that other person does not join.

145. Implied promise to indemnify surety –

In every contract of guarantee there is an implied promise by the principal debtor to indemnify the surety, and the surety is entitled to recover from the principal debtor whatever sum he has rightfully paid under the guarantee, but no sums which he has paid wrongfully.

146. Co-sureties liable to contribute equally –

Where two or more persons are co-sureties for the same debt or duty, either jointly or severally, and whether under the same or different contract, and whether with or without the knowledge of each other the co-sureties, in the absence of any contract to the contrary, are liable, as between themselves, to pay each an equal share of the whole debt, or of that part of it which remains unpaid by the principal debtor.

147. Liability of co-sureties bound in different sums -

Co-sureties who are bound in different sums are liable to pay equally as far as the limits of their respective obligations permit.

Definition - English and Indian definitions.

Guarantee is a mercantile contract, the equivalent of the common law of the contract of “suretyship”, by which a person undertakes to answer the debt of another.

Section 126 of the Indian Contract Act is as follows.

‘Contract of guarantee’, ‘surety’, ‘principal debtor’ and ‘creditor’—A ‘contract of guarantee’ is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the ‘surety’; the person in respect of whose default the guarantee is given is called the ‘principal debtor’, and the person to whom the guarantee is given is called the ‘creditor’. A guarantee may be either oral or written. —A ‘contract of guarantee’ is a contract to perform the promise, or discharge the liability, of a third person in case of his default. The person who gives the guarantee is called the ‘surety’; the person in respect of whose default the guarantee is given is called the ‘principal debtor’, and the person to whom the guarantee is given is called the ‘creditor’. A guarantee may be either oral or written.”

Essentials and nature of guarantee.

In a contract of guarantee it is essential that there are three parties, viz. the Surety, the principal debtor and the creditor. It is also necessary that there is a liability, existing or future, enforceable by law. The moment there is a default on the part of the principal debtor, the Surety immediately becomes liable as if he were the principal debtor. He has no right to ask the creditor to first proceed against the principal debtor nor can he demand a notice from the creditor that the principal debtor has defaulted, because it is the Surety’s duty to ensure that the principal debtor pays or performs his obligation. The existence of debt is a primary requirement in a contract of guarantee.

A contract of guarantee may be written or oral. A contract of guarantee may be expressed or implied. Consent of the surety should not have been obtained by misrepresentation or fraud. According to section 142 and 143 of the Indian contract Act the guarantee obtained by misrepresentation or concealment is invalid.

Section 142 - Guarantee obtained by misrepresentation, invalid.—Any guarantee which has been obtained by means of misrepresentation made by the creditor, or with his knowledge and assent, concerning a material part of the transaction, is invalid. —Any guarantee which has been obtained by means of misrepresentation made by the creditor, or with his knowledge and assent, concerning a material part of the transaction, is invalid.”

Section 143 - Guarantee obtained by concealment, invalid.—Any guarantee which the creditor has obtained by means of keeping silence as to a material circumstance, is invalid. —Any guarantee which the creditor has obtained by means of keeping silence as to a material circumstance, is invalid.

Illustrations

A engages B as clerk to collect money for him. B fails to account for some of his receipts, and A in consequence calls upon him to furnish security for his duly accounting. C gives his guarantee for B's duly accounting. A does not acquaint C with B's previous conduct. B afterwards makes default. The guarantee is invalid. (a) A engages B as clerk to collect money for him. B fails to account for some of his receipts, and A in consequence calls upon him to furnish security for his duly accounting. C gives his guarantee for B's duly accounting. A does not acquaint C with B's previous conduct. B afterwards makes default. The guarantee is invalid.”

A guarantees to C payment for iron to be supplied by him to B to the amount of 2,000 tons. B and C have privately agreed that B should pay five rupees per ton beyond the market price, such excess to be applied in liquidation of an old debt. This agreement is concealed from A. A is not liable as a surety. (b) A guarantees to C payment for iron to be supplied by him to B to the amount of 2,000 tons. B and C have privately agreed that B should pay five rupees per ton beyond the market price, such excess to be applied in liquidation of an old debt. This agreement is concealed from A. A is not liable as a surety.”

Concept of Coextensive liability –

The concept of coextensive liability is embedded in the contract of guarantee in India According to section 128 of the Indian contract Act “the liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract.”. To illustrate this, following could be considered as an apt example.

A agrees to be a surety for the debt contract entered by B and C where B is the debtor and C is the creditor. In case if there is agreement later on without the consent of A, for the purpose of relieving B from the contract then by the application of coextensive liability principle, A is discharged from liability. Thus if A the surety has to be liable in a surety contract then the debtor has to contractually liable at the time of surety's liability. According to Supreme Court of India, The guarantor of a loan is liable to pay it if the debtor fails to clear it, the Supreme Court has ruled while maintaining that financial institutions too cannot act like property dealers in recovering the debts. A bench of Justices B S Chauhan and Dipak Misra also said the guarantor cannot insist that the creditor must first exhaust all remedies against the principal debtor before recovering the debts from the surety holders. “There can be no dispute to the settled legal proposition that in view of the provisions of Section 128 of the Indian Contract Act, 1872, the liability of the guarantor/surety is co-extensive with that of the debtor.

Elements of consideration in a contract of guarantee.

Section 127 of the Indian Contract Act - Anything done, or any promise made, for the benefit of the principal debtor, may be a sufficient consideration to the surety for giving the guarantee.

Illustrations

- B requests A to sell and deliver to him goods on credit. A agrees to do so, provided C will guarantee the payment of the price of the goods. C promises to guarantee the payment in consideration of A's promise to deliver the goods. This is a sufficient consideration for C's promise.
- A sells and delivers goods to B. C afterwards requests A to forbear to sue B for the debt for a year, and promises that, if he does so, C will pay for them in default of payment by B. A agrees to forbear as requested. This is a sufficient consideration for C's promise.
- A sells and delivers goods to B. A afterwards, without consideration, agrees to pay for them in default of B. The agreement is void.

Doctrine of Subrogation in a contract of guarantee –

Subrogation is a legal doctrine whereby one person is entitled to enforce the subsisting or revived rights of another for one's own benefit. A right of subrogation typically arises by operation of law, but can also arise by statute or by agreement. A surety may be entitled to be subrogated to the rights of the creditor as against the principal debtor.

A surety who pays off the debts of another party may be entitled to be subrogated to the creditor's former claims and remedies against the debtor to recover the sum paid. This would include the endorser on a bill of exchange. The surety will then have the benefit of any security interest in favour of the creditor for the original debt. Conceptually this is an important point, as the subrogee will take the subrogor's security rights by operation of law, even if the subrogee had been unaware of them.

Right of subrogation –

The surety on payment of the debt acquires a right of subrogation. According to sec 140 of the Indian Contract Act - The surety cannot claim the right of subrogation to the creditor's securities if he has signed up as a security for a part of the agreement and security has been held by the creditor.

Section 140 states as follows

Rights of surety on payment or performance.

Where a guaranteed debt has become due, or default of the principal debtor to perform a guaranteed duty has taken place, the surety, upon payment or performance of all that he is liable for, is invested with all the rights which the creditor had against the principal debtor. —Where a guaranteed debt has become due, or default of the principal debtor to perform a guaranteed duty has taken place, the surety, upon payment or performance of all that he is liable for, is invested with all the rights which the creditor had against the principal debtor.”

Doctrine of Contribution in a contract of guarantee –

The right of a person who has discharged a common liability to recover proportionate share from the other(s) that were so liable.

According to section 146 of the Indian contract Act -

Co-sureties liable to contribute equally.—Where two or more persons are co-sureties for the same debt or duty, either jointly or severally, and whether under the same or different contracts, and whether with or without the knowledge of each other, the co-sureties, in the absence of any contract to the contrary, are liable, as between themselves, to pay each an equal share of the whole debt, or of that part of it which remains unpaid by the principal debtor. Illustrations –

- A, B and C are sureties to D for the sum of 3,000 rupees lent to E. E makes default in payment. A, B and C are liable, as between themselves, to pay 1,000 rupees each. (a) A, B and C are sureties to D for the sum of 3,000 rupees lent to E. E makes default in payment. A, B and C are liable, as between themselves, to pay 1,000 rupees each.”
- A, B and C are sureties to D for the sum of 1,000 rupees lent to E, and there is a contract between A, B and C that A is to be responsible to the extent of one-quarter, B to the extent of one-quarter, and C to the extent of one-half. E makes default in payment. As between the sureties, A is liable to pay 250 rupees, B 250 rupees, and C 500 rupees. (b) A, B and C are sureties to D for the sum of 1,000 rupees lent to E, and there is a contract between A, B and C that A is to be responsible to the extent of one-quarter, B to the extent of one-quarter, and C to the extent of one-half. E makes default in payment. As between the sureties, A is liable to pay 250 rupees, B 250 rupees, and C 500 rupees.

English law

A surety is entitled to contribution from a co-surety in respect of their common liability. This particular right is not the result of any contract, but is derived from a equity, on the ground of equality of burden and benefit, and exists whether the sureties be bound jointly, or jointly and severally, and by the same, or different, instruments. There is, however, no right of contribution where each surety is severally bound for a given portion only of the guaranteed debt; nor in the case of a surety for a surety; nor where a person becomes a surety jointly with another and at the latter's request. Contribution may be enforced, either before payment, or as soon as the surety has paid more than his share of the common debt; and the amount recoverable is now always regulated by the number of solvent sureties, though formerly this rule only prevailed in equity. In the event of the bankruptcy of a surety, proof can be made against his estate by a co-surety for any excess over the latter's contribute share. The right of contribution is not the only right possessed by co-sureties against each other, but they are also entitled to the benefit of all securities which have been taken by any one of them as an indemnity against the liability incurred for the principal debtor. The Roman law did not recognize the right of contribution among sureties. It is, however, sanctioned by many existing codes.

Continuing Guarantee -

Definition of “Continuing Guarantee “A continuing guarantee is a guarantee where the guarantor assumes liability for any past, present and future obligations owed by a debtor to a lender or creditor. Even where the amount owing has been completely paid, the guarantor can still be liable under that line of credit if there is a subsequent indebtedness. It is also known as a continuing guaranty. A common example is a guarantee for a revolving line of credit. In *Syndicate Bank vs Channaveerappa Beleri & Ors* on 10 April, 2006, the guarantee is seen to be a continuing guarantee and the undertaking by the defendant is to pay any amount that may be due by the company at the foot of the general balance of its account or any other account whatever. In the case of such a continuing guarantee, so long as the account is a live account in the sense that it is not settled and there is no refusal on the part of the guarantor to carry out the obligation, we do not see how the period of limitation could be said to have commenced running. Limitation would only run from the date of breach under Art. 115 of the schedule to the Limitation act 1908. According to section 130 of the Indian Contract Act -A continuing guarantee may at any time be revoked by the surety, as to future transactions, by notice to the creditor.

Illustration

- guarantees to B, to the extent of 10,000 rupees, that C shall pay all the bills that B shall draw upon him. B draws upon C, C accepts the bill. A gives notice of revocation. C dishonours the bill at maturity. A is liable upon his guarantee. (b) A guarantees to B, to the extent of 10,000 rupees, that C shall pay all the bills that B shall draw upon him. B draws upon C, C accepts the bill. A gives notice of revocation. C dishonours the bill at maturity. A is liable upon his guarantee.”

Specific guarantee –When the guarantee specified in the guarantee contract is only for a particular transaction and not for the series of transaction then the contract will be termed as a specific guarantee contract. The concept of revocation will not be acceptable in a specific contract or else the creditor will have to discharge the guarantor from the liability which is a rare phenomenon in contract of guarantee. The discharge of surety can also take place on repayment of the particular debt for which guarantee or surety was secured.

Limited guarantee -

Limited guarantee are those in which the guarantor specifies the time during which the guarantee shall operate or fixes a maximum amount of liability. The restraint clauses in limited guarantee may be on a particular account of the borrower or may be of a limited amount or may restrict to the period of guarantee.

Unlimited guarantee -

It may be unlimited in any conditions referred to as to time or amount etc.

Conditional guarantee -

When certain conditions are imposed on the creditor to be followed on default of the debtor then the guarantee may be described as conditional. For example asking the creditor to sue the debtor before asking the surety to pay the defaulted amount etc.

Discharge or termination of surety (section 130 – 147 of the Indian Contract Act)

1. Revocation by the surety

According to section 130 of the Indian Contract Act - A continuing guarantee may at any time be revoked by the surety, as to future transactions, by notice to the creditor.

2. By Death of Surety

According to section 131 of the Indian Contract Act - The death of the surety operates, in the absence of any contract to the contrary, as a revocation of a continuing guarantee, so far as regards future transactions. —The death of the surety operates, in the absence of any contract to the contrary, as a revocation of a continuing guarantee, so far as regards future transactions.”

Hence, if any transaction takes place after the death of the surety then the estate of the surety will not be liable even if such transactions have taken place without the knowledge of the death of the surety. This can be countered by putting appropriate clauses in the agreement.

3. Discharge by variance -

According to section 133 of the Indian Contract Act

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

M. S. Anirudhan vs The Thomco Bank Lt the Supreme Court of India has created a concept or doctrine of beneficial variance which states that when the variance in the surety contract is beneficial to the surety then such variance will not attract section 133 of the Indian Contract Act.

4. Discharge by loss of security by the creditor.

According to section 141 of the contract act A surety is entitled to the benefit of every security which the creditor has against the principal debtor at the time when the contract of suretyship is entered into, whether the surety knows of the existence of such security or not; and if the creditor loses, or without the consent of the surety, parts with such security, the surety is discharged to the extent of the value of the security.

Illustrations –

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

State of Madhya Pradesh v. Kaluram

In an auction for sale of felled trees, Jagatram (J) was awarded the sale, on payment of a security and subsequent payment of installments. He executed a contract in favour of the Governor of M.P. which specified, (among other terms), that the contractor had to furnish a coupe boundary certificate which concerned the area from which contractor was allowed to take away the trees. Nathuram and Kaluram (K), the defendants, stood sureties for J. J removed the entire quantity of the trees, paid the first installment but failed to pay the rest. State of M.P(S) claimed for recovery. K filed an action against the S claiming that he was not liable to pay the arrears of forest dues recoverable. The expression “security” in s.141 is not used in any technical sense : it includes all rights which the creditor had against the property at the date of the contract. The surety is entitled on payment of the debt or performance of all that he is liable for, to the benefit of the rights of the creditor against the principal debtor which arise out of the transaction which gives rise to the right or liability.

UNIT - II

BAILMENT

The provisions in the Indian Contract relating to Bailment are given as follows

148. "Bailment", "bailor" and "bailee" defined –

A "bailment" is the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the direction of the person delivering them. The person delivering the goods is called the "bailor". The person to whom they are delivered is called the "bailee". Explanation: If a person already in possession of the goods of other contracts hold them as a bailee, he thereby becomes the bailee, and the owner becomes the bailor of such goods, although they may not have been delivered by way of bailment.

149. Delivery to bailee how made –

The delivery to be bailee may be made by doing anything which has the effect of putting the goods in the possession of the intended bailee or of any person authorised to hold them on his behalf.

150. Bailor's duty to disclose faults in goods bailed –

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

151. Care to be taken by bailee –

In all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quantity and value as the goods bailed.

152. Bailee when not liable for loss, etc, of thing bailed –

The bailee, in the absence of any special contract, is not responsible for the loss, destruction or deterioration of the thing bailed, if he has taken the amount of care of it described in section 151.

153. Termination of bailment by bailee's act inconsistent with conditions –

A contract of bailment is voidable at the option of the bailor, if the bailee does any act with regard to the goods bailed, inconsistent with the conditions of the bailment.

154. Liability of bailee making unauthorised use of goods bailed –

If the bailee makes any use of the goods bailed which is not according to the conditions of the bailment, he is liable to make compensation to the bailor for any damage arising to the goods from or during such use of them.

155. Effect of mixture with bailor's consent, of his goods with bailee's -

If the bailee, with the consent of the bailor, mixes the goods of the bailor with his own goods, the bailor and the bailee shall have an interest, in proportion to their respective shares, in the mixture thus produced.

156. Effect of mixture, without bailor's consent, when the goods can be separated –

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

157. Effect of mixture, without bailor's consent, when the goods cannot be separated –

If the bailee, without the consent of the bailor, mixes the goods of the bailor with his own goods in such a manner that it is impossible to separate the goods bailed from the other goods, and deliver them back, the bailor is entitled to be compensated by the bailee for the loss of the goods.

158. Repayment, by bailor, of necessary expenses –

Where, by the conditions of the bailment, the goods are to be kept or to be carried, or to have work done upon them by the bailee for the bailor, and the bailee is to receive no remuneration, the bailors shall repay to the bailee the necessary expenses incurred by him for the purpose of the bailment.

159. Restoration of goods lent gratuitously –

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

160. Return of goods bailed, on expiration of time or a accomplishment of purpose –

It is the duty of the bailee to return, or deliver according to the bailor's directions, the goods bailed, without demand, as soon as the time for which they were bailed has expired, or the purpose for which they were bailed has been accomplished.

161. Bailee's responsibility when goods are not duly returned –

If by the fault of the bailee, the goods are not returned, delivered or tendered at the proper time, he is responsible to the bailor for any loss, destruction or deterioration of the goods from that time.

162. Termination of gratuitous bailment by death –

A gratuitous bailment is terminated by the death either of the bailor or of the bailee.

163. Bailor entitled to increase or profit from goods bailed –

In the absence of any contract to the contrary, the bailee is bound to deliver to the bailor, or according to his directions, any increase or profit which may have accrued from the goods bailed.

164. Bailor's responsibility to bailee –

The bailor is responsible to the bailee for any loss which the bailee may sustain the reason that the bailor was not entitled to make the bailment, or to receive back the goods, or to give directions, respecting them.

165. Bailment by several joint owners –

If several joint owners of goods bail them, the bailee may deliver them back to, or according to the directions of, one joint owner without the consent of all in the absence of any agreement to the contrary.

166. Bailee not responsible on redelivery to bailor without title –

If the bailor has no title to the goods, and the bailee, in good faith, delivers them back to, or according to the directions of the bailor, the bailee is not responsible to the owner in respect of such delivery.

167. Right of third person claiming goods bailed –

If a person, other than the bailor, claims goods bailed he may apply to the court to stop delivery of the goods to the bailor, and to decide the title to the goods.

168. Right to finder of goods may sue for specified reward offered –

The finder of goods has no right to sue the owner for compensation for trouble and expense, voluntarily incurred by him to preserve the goods and to find out the owner; but he may retain the goods against the owner until he receives such compensation; and where the owner has offered a specific reward for the return of goods lost, the finder may sue for such reward, and may retain the goods until he receives it.

169. When finder of thing commonly on sale may sell it –

When a thing which is commonly the subject of sale is lost, if the owner cannot with reasonable diligence be found, or if he refuses upon demand, to pay the lawful charges of the finder, the finder may sell it –

- (1) when the thing is in danger of perishing or of losing the greater part of its value, or
- (2) when the lawful charges of the finder, in respect of the thing found, amount to two-thirds of its value.

170. Bailee's particular lien –

Where the bailee has, in accordance with the purpose of the bailment, rendered any service involving the exercise of labour or skill in respect of the goods bailed he has in the absence of a contract to the contrary, a right to retain such goods until he receives due remuneration for the services he has rendered in respect of them.

171. General lien of bankers, factors, wharfingers, attorneys and policy brokers –

Bankers, factors, wharfingers, attorneys of a High Court and policy brokers may, in the absence of a contract to the contrary, retain as a security for a general balance of account, any goods bailed to them; but no other person has a right to retain, as a security for such balance, goods bailed to him, unless there is an express contract to that effect. Bailment describes a legal relationship in common law where physical possession of personal property, or a chattel, is transferred from one person (the 'bailor') to another person (the 'bailee') who subsequently has possession of the property.

Contracts of Bailment are a special class of contract. These are dealt with in Chap. IX from S. 148 to 181 of the Indian Contract Act, 1872. Bailment implies a sort of one person temporarily goes into the possession of another. The circumstances in which this happens are numerous. Delivering a cycle, watch or any other article for repair, delivering gold to a goldsmith for making ornaments, delivering garments to a drycleaner, delivering goods for carriage, etc. are all familiar situations which create the relationship of 'Bailment'.

Section 148 Indian Contract Act, 1872 defines 'Bailment' as "the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished be returned or otherwise disposed of according to the directions of the person delivering them".

Bailor:- The person delivering the goods is called 'Bailor'.

Bailee:- The person to whom they (goods) are delivered is 'Bailee'.

The word 'bailment' is derived from the French word '*bailleur*' which means 'to deliver'. Etymologically, it means any kind of 'handing over'. In legal sense, it involves change of possession of goods from one person to another for some specific purpose.

Section 148 of Indian Contract Act 1872 defines '*Bailment*' as the delivery of goods by one person to another for some purpose, upon a contract that they shall, when the purpose is accomplished, be returned or otherwise disposed of according to the direction of the person delivering them.

The person who owns and delivers the goods is called the '*bailor*'. The person to whom the goods are delivered is called the '*bailee*'.

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

Subject matter of bailment

Section 148 of the Indian Contract Act, 1872 makes it very clear that there are three essential features of Bailment, namely:

- 1) Delivery of Possession
- 2) Delivery upon Contract
- 3) Delivery for a purpose and Return of Goods

Delivery of Possession: The delivery of possession of goods is essential for bailment. There must be transfer of possession of the bailed goods from bailor to bailee and the goods must be handed over to the bailee for whatever is the purpose of bailment. Here, possession means control over goods and an intention to exclude others from exercising similar control over the same goods. Thus, the bailee must have actual physical control of the property with the intent to possess it for a valid bailment.

As per *Section 149*, the delivery can also be made to the bailee by doing anything which has the effect of putting the bailed goods in the possession of the intended bailee or any person authorized by him for this purpose. Thus, the delivery of possession can be actual or constructive. The delivery may either put the bailee in the actual physical possession of the goods or put the bailee in a position of power over such goods that may be possessed later. The essential of a bailment is the delivery of goods for a temporary purpose.

Mere custody of goods is not the same as delivery of possession. A guest who uses the goods of the host during a party is not a bailee. Similarly, it was held in *Reaves vs. Capper* [1838 5 Bing NC 136] that a servant in custody of certain goods by the nature of his job is not a bailee. Similarly, a servant holding his master's umbrella is not a bailee but is a custodian

Similarly, hiring and storing goods in a *bank locker* by itself is not bailment though there is delivery of goods to the bank premises. The goods are in no way entrusted to the bank. A bank cannot be presumed to know what goods are stored in any given locker at all the times. If a bank is given actual and exclusive possession of the property inside a locker by the person who hired the locker, only then can bailment under *Section 148* can be presumed.

In *Atul Mehra vs. Bank of Maharashtra* [AIR 2003 P&H 11], it was held that mere hiring of a bank's locker and storing things in it would not constitute a bailment. But the position changes completely if the locker in the safe deposit vault of the bank can be operated even without the key of the customer.

Delivery of possession, as required for bailment, can be made in two ways – Actual or Constructive.

a) *Actual Delivery*: Here, the bailor hands over the physical possession of the goods to the bailee.

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

b) *Constructive Delivery*: Constructive delivery is an action that the law treats as the equivalent of actual delivery. It can be difficult to deliver intangible

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

Example: A has rare coins in a locked safe-deposit box. Delivery of a safe deposit box is not possible. When he hands over the keys to the box to B, it is taken as constructive delivery for purpose of bailment.

Section 149 specifically deals with constructive delivery of goods. It states that anything done which has the effect of putting the goods in the possession of the intended bailee or any other person authorized to hold them on his behalf is to be treated as constructive delivery of the goods.

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

Delivery upon Contract: It is necessary that the goods are delivered to the bailee and returned to the bailor when the purpose is accomplished upon a contract. This means there should be a contract between the two parties for such transaction of delivery and subsequent return. If there is no contract, there is no bailment. The contract giving rise to bailment can be *express or implied*.

Property deposited in a court under orders is not property delivered under a contract. Such delivery or transfer does not constitute bailment.

Under English Law: There can be bailment without a contract. If a person deposits or delivers the goods under stressful circumstance like fire flood, riots or if the person who is depositing the goods is incapable of appreciating the value of the action, it is still regarded as bailment despite the absence of a contract. Delivery of goods to another under a mistake of identity of the person is also treated as bailment without a contract as long as the bailor took reasonable care to ascertain the identity.

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

The case of *Lasalgoan Merchants Bank vs. PrabhudasHathibhai* is one the first where the Courts started imposing the obligations of a bailee even without a contract. In *State of Gujarat vs. Memom Mahomed*, the Supreme Court of India accepted this view and stated that "...Bailment is dealt with by the Contract Act only in cases where it arises from a contract, but it is not correct to say that there cannot be bailment without an enforceable contract."

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

The third essential of bailment is twofold –

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

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

Example: A tailor who receives a cloth for stitching is the bailee in this case. The tailor is supposed to return the finished garment to the customer, the bailor, once the garment has been stitched.

1. c) *Return of goods in specie* is also essential. The same goods that were bailed must be returned to the bailor in the same condition after the accomplishment of purpose as they were handed over to the bailee in the beginning. Any accruals to the goods must also be handed over. If an animal gives birth during the period of bailment, the bailee must return the animal with the offspring at the conclusion of the bailment.

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

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

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

Classification of bailment

The main types of bailment are given below:

1. Gratuitous Bailment:

Where the bailee does not charge nay thing for the bailment it is called gratuitous bailment.

2. Bailment for Reward:

When the bailor charges any thing for his services it is called bailment for rewards.

3. Bailment for Use:

When the bailor delivers an article to the bailee for use by the later in any general or specific way, this is called a bailment for use.

Illustration

X delivers his watch to Y for the latter to use it for one month. Here bailment is bailment for used.

4. Bailment of safe custody:

If valuable goods or even coins or notes in box are deposited for protection, it is called bailment for safe custody.

Illustration

X gives his watch to Y for the latter to keep it in safe custody for two months.

5. Bailment for Mutual Benefit:

When the bailor delivers his articles to another for repair or gives his goods to carrier for carriage, it is known as bailment for mutual benefit.

6. Bailment for Pledge:

It is a contract whereby an article is deposited with a lender as security for the payment of a loan or performance of a promise.

7. Bailment for Finding of lost Goods:

If a person already in possession of the lost goods of another, he thereby becomes the bailee and the owner becomes the bailor.

Rights and duties of the bailor and Bailee

Liabilities and Duties of Bailer -

Disclosing of defects of goods bailed (section 150)

Bailor's duty to disclose faults in goods bailed.—The bailor is bound to disclose to the bailee faults in the goods bailed, of which the bailor is aware, and which materially interfere with the use of them, or expose the bailee to extraordinary risks; and if he does not make such disclosure, he is responsible for damage arising to the bailee directly from such faults. If such goods are bailed for hire, the bailor is responsible for such damage, whether he was or was not aware of the existence of such faults in the goods bailed.

It is duty of bailor to disclose any defects, which are present in goods, which are being bailed. Illustrations - A lends a horse, which he knows to be vicious, to B. He does not disclose the fact that the horse is vicious. The horse runs away. B is thrown and injured. A is responsible to B for damage sustained. (a) A lends a horse, which he knows to be vicious, to B. He does not disclose the fact that the horse is vicious. The horse runs away. B is thrown and injured. A is responsible to B for damage sustained.

ii. Repayment of expenses (section 158 and 164)

Repayment, by bailor, of necessary expenses.—Where, by the conditions of the bailment, the goods are to be kept or to be carried, or to have work done upon them by the bailee for the bailor, and the bailee is to receive no remuneration, the bailor shall repay to the bailee the necessary expenses incurred by him for the purpose of the bailment. —Where, by the conditions of the bailment, the goods are to be kept or to be carried, or to have work done upon them by the bailee for the bailor, and the bailee is to receive no remuneration, the bailor shall repay to the bailee the necessary expenses incurred by him for the purpose of the bailment.

Bailor's responsibility to bailee.—The bailor is responsible to the bailee for any loss which the bailee may sustain by reason that the bailor was not entitled to make the bailment, or to receive back the goods, or to give directions respecting them. —The bailor is responsible to the bailee for any loss which the bailee may sustain by reason that the bailor was not entitled to make the bailment, or to receive back the goods, or to give directions respecting them.”

It is liability of bailor to repay all those expenses, which bailee spends for purpose of bailment.

iii. Bailor's Responsibility to Bailee

Bailor is liable to bailee for any loss, which the bailee bears in the following situations;

a. No right to make bailment

Bailor is responsible to bailee for any loss, which bailee bears because bailor was not entitled to make bailment.

b. No Right to get back bailed goods

Bailor is responsible to bailee for any loss, which bailee bears because bailor was not entitled to get back bailed goods.

c. No right to give Directions

Bailor is responsible to bailee for any loss, which bailee bears because bailor was not entitled to give directions.

Liabilities and Duties of Bailee -

Care (section 151 and section 152)

Care to be taken by bailee.—In all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quantity and value as the goods bailed. Bailee when not liable for loss, etc., of thing bailed.—The bailee, in the absence of any special contract, is not responsible for the loss, destruction or deterioration of the thing bailed, if he has taken the amount of care of it described in section 151.

In all cases of bailment, Bailee is bound to take care of bailed goods in the same manner in which a man of ordinary prudence takes care of his own goods of the same quality and value.

Unauthorized use of Bailed Goods (section 153)

Termination of bailment by bailee's act inconsistent with conditions.—A contract of bailment is voidable at the option of the bailor, if the bailee does any act with regard to the goods bailed, inconsistent with the conditions of the bailment. Illustration A lets to B, for hire, a horse for his own riding. B drives the horse in his carriage. This is, at the option of A, a termination of the bailment. A lets to B, for hire, a horse for his own riding. B drives the horse in his carriage. This is, at the option of A, a termination of the bailment.” If bailee makes any use of goods bailed and such use is not according to conditions of bailment, he is liable to make compensation to bailor for any damage, which is caused to the goods during such use.

iii. Mixing of Bailed goods with Bailee's goods

If bailee mixes bailed goods with his own goods without consent of bailor, his liability arises in the following two cases;

When goods can be Separated (section 156)

Effect of mixture, without bailor's consent, when the goods can be separated.—If the bailee, without the consent of the bailor, mixes the goods of the bailor with his own goods, and the goods can be separated or divided, the property in the goods remains in the parties respectively; but the bailee is bound to bear the expense of separation or division, and any damage arising from the mixture. —If the bailee, without the consent of the bailor, mixes the goods of the bailor with his own goods, and the goods can be separated or divided, the property in the goods remains in the parties respectively; but the bailee is bound to bear the expense of separation or division, and any damage arising from the mixture.” Out of mixed goods, if bailed goods can be separated or divided, bailee will be under obligation to bear all expense of separation or division, and any damage, which is caused from such mixture. Illustrations A bails 100 bales of cotton marked with a particular mark to B. B, without A's consent, mixes the 100 bales with other bales of his own, bearing a different mark; A is entitled to have his 100 bales returned, and B is bound to bear all the expense incurred in the separation of the bales, and any other incidental damage. A bails 100 bales of cotton marked with a particular mark to B. B, without A's consent, mixes the 100 bales with other bales of his own, bearing a different mark; A is entitled to have his 100 bales returned, and B is bound to bear all the expense incurred in the separation of the bales, and any other incidental damage.

When goods cannot be Separated (Section 157)

Effect of mixture, without bailor's consent, when the goods cannot be separated.—If the bailee, without the consent of the bailor, mixes the goods of the bailor with his own goods in such a manner that it is impossible to separate the goods bailed from the other goods and deliver them back, the bailor is entitled to be compensated by the bailee for the loss of the goods. —If the bailee, without the consent of the bailor, mixes the goods of the bailor with his own goods in such a manner that it is impossible to separate the goods bailed from the other goods and deliver them back, the bailor is entitled to be compensated by the bailee for the loss of the goods.”

Out of mixed goods, if bailed goods cannot be separated or divided, bailee will be under obligation to compensate the bailor for such loss of bailed goods. Illustration - A bails a barrel of Cape flour worth Rs. 45 to B. B, without A's consent, mixes the flour with country flour of his own, worth only Rs. 25 a barrel. B must compensate A for the loss of his flour. A bails a barrel of Cape flour worth Rs. 45 to B. B, without A's consent, mixes the flour with country flour of his own, worth only Rs. 25 a barrel. B must compensate A for the loss of his flour.”

Return of Bailed goods (section 160)

Return of goods bailed, on expiration of time or accomplishment of purpose.—It is the duty of the bailee to return, or deliver according to the bailor's directions, the goods bailed, without demand, as soon as the time for which they were bailed has expired, or the purpose for which they were bailed has been accomplished. —It is the duty of the bailee to return, or deliver according to the bailor's directions, the goods bailed, without demand, as soon as the time for which they were bailed has expired, or the purpose for which they were bailed has been accomplished.”

It is duty of bailee to return bailed goods to bailor without any demand an according to directions of bailor on expiration of time or accomplishment of purpose.

Non-return of Bailed Goods (Section 161)

Bailee's responsibility when goods are not duly returned.—

If by the fault of the Bailee, the goods are not returned, delivered or tendered at the proper time, he is responsible to the bailor for any loss, destruction or deterioration of the goods from that time. If Bailee fails to return bailed goods at proper time, it is his liability to compensate bailor for any destruction or loss from this time.

Increase or Profit from bailed goods -

In absence of any contrary contract or according to directions of bailor, bailee is also under obligation to deliver to bailor any increase or profit, which may have accrued from bailed goods.

Duty not to set up jus tertii

Section 166 of the Act

If the bailor has no title to the goods, and the bailee, in good faith, delivers them back to, or according to the directions of, the bailor, the bailee is not responsible to the owner in respect of such delivery.

This right of lien can be divided into two categories

(1) Particular lien and (2) General lien

(1) **Particular lien** is basically, the right of the bailee to retain the goods when the payment has not been furnished for some service or labour involved with regard to the goods. Moreover, this right of particular lien can be exercised not only by the bailee, but also in other cases of lien of finder of goods, pawnee's or pledgee's lien, agent's lien, unpaid sellers lien and partner's lien which would be discussed in the subsequent chapters in detail.

(2) **General lien**, as in comparison to particular lien grants the right to retain the goods for the general balance of payment, in other words, in this case, either a particular part of the goods may be retained or the whole of it till the payment would be received. General lien has been conferred on five kinds of people:

- (i) **General lien of bankers:** bankers can exercise general lien unless there is a contract to the contrary. While exercising this right, the banker can retain the goods for the satisfaction of the debt other than one for which the goods are being pledged. Moreover, if a customer has different accounts with a the bank, the bank can combine those accounts for the purpose of general lien.
- (ii) **General lien of factors:** a factor is a mercantile agent entrusted with the possession of goods of his principal for selling them. He has also the right of general lien for the recovery of the general balance of the amount.
- (iii) **Wharfingers:** Wharf basically means a loading stage along a sea or a river for loading and unloading vessels. Therefore, wharfinger is a person who owns this and can exercise his right of lien for the recovery of the wharfage charges.

- (iv) **Attorneys:** Attorneys have this right granted in respect of the documents which are being held with them which actually belongs to their clients. But, it is to note that the Supreme court has held that these documents are not goods.
- (v) **Policy brokers:** The insurance agent has this right to recover the amount of brokerage from this clients on the application of this right of lien.
- (d) **Right of suit against a wrong doer:** When the goods are being bailed and if a third party wrongfully deprives the bailee of its use or possession, the bailor or the bailee can sue the third party.

Position of the finder of goods

Finder of goods is the one who finds the goods and occupies the place of a bailee. He has also got the same rights as that of the bailee, but cannot generally claim compensation for voluntary expenses undertaken, but can claim compensation for the amount which has been spent on the good for its preservation, from the owner. Moreover, he has also got the right to sell the goods in case of the impossibility of finding the owner of the goods. This is granted under the provisions of section 168 and 169 of the act.

Pledge

The provisions relating to Pledge in the Indian Contract are as follows

172. "Pledge", "Pawnor", and "Pawnee" defined -

The bailment of goods as security for payment of a debt or performance of a promise is called "pledge". The bailor is in this case called "pawnor". The bailee is called "pawnee".

173. Pawnee's right of retainer -

The pawnee may retain the goods pledged, not only for payment of the debt or the performance of the promise, but for the interests of the debt, and all necessary expenses incurred by him in respect to the possession or for the preservation of the goods pledged.

174. Pawnee not to retain for debt or promise other than for which goods pledged - presumption in case of subsequent advances -

The pawnee shall not, in the absence of a contract to that effect, retain the goods pledged for any debt or promise of other than the debtor promise for which they are pledged; but such contract, in the absence of anything to the contrary, shall be presumed in regard to subsequent advances made by the pawnee.

175. Pawnee's right as to extraordinary expenses incurred -

The pawnee is entitled to receive from the pawnor extraordinary expenses incurred by him for the preservation of the goods pledged.

176. Pawnee's right where pawnor makes default -

If the pawnor makes default in payment of the debt, or performance, at the stipulated time, or the promise, in respect of which the goods were pledged, the pawnee may bring a suit against the pawnor upon the debt or promise, and retain the goods pledged as a collateral security; or he may sell the thing pledged, on giving the pawnor reasonable notice of the sale.

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

177. Defaulting pawnor's right to redeem -

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

178. Pledge by mercantile agent -

Where a mercantile agent is, with the consent of the owner, in possession of goods or the documents of title to goods, any pledge made by him, when acting in the ordinary course of business of a mercantile agent, shall be as valid as if he were expressly authorised by the owner of the goods to make the same; provided that the pawnee acts in good faith and has not at the time of the pledge notice that the pawnor has not authority to pledge.

Explanation : In this section, the expression "mercantile agent" and "documents of title" shall have the meanings assigned to them in the Indian Sale of Goods Act, 1930 (3 of 1930).

178A. Pledge by person in possession under voidable contract -

When the pawnor has obtained possession of the other goods pledged by him under a contract voidable under section 19 of section 19A, but the contract has not been rescinded at the time of the pledge, the pawnee acquired a goods title to the goods, provided he acts in good faith and without notice of the pawnor's defect of title.

179. Pledge where pawnor has only a limited interest -

Where person pledges goods in which he has only a limited interest, the pledge is valid to the extent of that interest.

PLEDGE

Pledge or pawn is similar to the act of bailment of goods but with the sole purpose that the goods serve as a security for the payment of a debt or the performance of the promise where the bailor is the pawnor and the bailee is the pawnee or the pledge. This is different from hypothecation where in case of hypothecation, the possession of the goods remain with the owner of the goods.

The contract of pledge requires the following essentials:

(1) **Delivery of goods:** Since pledging is also like bailment, the delivery of goods is essential. Mere agreement to transfer the possession in the future is not enough. Moreover, the delivery of goods may be actual or constructive.

(2) **The purpose of pledge:** The basic purpose of pledge is that the goods so bailed should serve as security for the payment of a debt, or performance of a promise. Ordinarily, the owner or the agent can pledge the goods. A person fraudulently getting the possession of the goods has no right to pledge. But, in exceptional cases, a non owner may pledge i.e., in case of pledge by a mercantile agent, person in possession under a voidable contract, person with limited interest ,etc.

Rights of pawnee:

The rights of the pawnee may be the right to retain the goods so pledged for the amount of the principal debt and the interest which is granted under section 173; the right to recover extraordinary expenses incurred by the pawnee; and the right of suit to procure the debt and the sale of pledged goods, granted by sec. 175 and 176 respectively.

In fine, a pawnee's right to redeem the goods pledged is also granted under section 177. Right of redemption also grants the right of accretion of the goods so pledged, which is observed in the case of *M.R.Dhawan vs. Madan Lal*.

UNIT - III

SALE OF GOODS

SALE OF GOODS ACT

The provisions in the Sale of Goods Act are as follows

Chapter 1 - Preliminary

1. Short title, extent and commencement.-

- (1) This Act may be called the Sale of Goods Act, 1930.
- (2) It extends to the whole of India (except the State of Jammu and Kashmir).
- (3) It shall come into force on the 1st day of July, 1930

Chapter 2 - Formation of the Contract

4. Sale and agreement to sell.-

- (1) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price. There may be a contract of sale between one part-owner and another.
- (2) A contract of sale may be absolute or conditional
- (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, but where the transfer of the 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.
- (4) An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred.

5. Contract of Sale how made -.

- (1) A contract of sale is made by an offer to buy or sell goods for a price and the acceptance of such offer. The contract may provide for the immediate delivery of the goods or immediate payment of the price or both, or for the delivery or payment by instalments, or that the delivery or payment or both shall be postponed.
- (2) Subject to the provisions of any law for the time being in force, a contract of sale may be made in writing or by word of mouth, or partly in writing and partly by word of mouth or may be implied from the conduct of the parties.

6. Existing or future goods.-

- (1) The goods which form the subject of a contract of sale may be either existing goods, owned or possessed by the seller, or future goods.
- (2) There may be a contract for the sale of goods the acquisition of which by the seller depends upon a contingency which may or may not happen.
- (3) Where by a contract of sale the seller purports to effect a present sale of future goods, the contract operates as an agreement to sell the goods.

7. Goods perishing before making of contract.- Where there is a contract for the sale of specific goods, the contract is void if the goods without the knowledge of the seller have, at the time when the contract was made, perished or become so damaged as no longer to answer to their description in the contract.

8. Goods perishing before sale but after agreement to sell.- Where there is an agreement to sell specific goods, and subsequently the goods without any fault on the part of the seller or buyer perish or become so damaged as no longer to answer to their description in the agreement before the risk passes to the buyer, the agreement is thereby avoided.

9. Ascertainment of price.- (1) The price in a contract of sale may be fixed by the contract or may be left to be fixed in manner thereby agreed or may be determined by the course of dealing between the parties.

10. Agreement to sell at valuation.-

(1) Where there is an agreement to sell goods on the terms that the price is to be fixed by the valuation of a third party and such third party cannot or does not make such valuation, the agreement is thereby avoided. Provided that, if the goods or any part thereof have been delivered to, and appropriated by, the buyer, he shall pay a reasonable price therefor.

(2) Where such third party is prevented from making the valuation by the fault of the seller or buyer, the party not in fault may maintain a suit for damages against the party in fault.

11. Stipulations as to time.- Unless a different intention appears from the terms of the contract, stipulations as to time of payment are not deemed to be of the essence of a contract of sale. Whether any other stipulations as to time is of the essence of the contract or not depends on the terms of the contract.

12. Condition and warranty.-

(1) A stipulation in a contract of sale with reference to goods which are the subject thereof may be a condition or a warranty

(2) A condition is a stipulation essential to the main purpose of the contract, the breach of which gives rise to right to treat the contract as repudiated.

(3) A warranty is a stipulation collateral to the main purpose of the contract, the breach of which claim for damages but not to a right to reject the goods and treat the contract as repudiated.

(4) Whether a stipulation in a contract of sale is condition or a warranty depends in each case on the construction of the contract. A stipulation may be a condition, though called a warranty in the

13. When condition to be treated as warranty.-

(1) Where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may waive the condition or elect to treat the breach of the condition as a breach of warranty and not as a ground for relating the contract as repudiated.

(2) Where a contract of sale is not severable and the buyer has accepted the goods or part thereof, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty and not as a ground for rejecting the goods and treating the contract as repudiated, unless there is a term of the contract, express or implied, to that effect.

(3) Nothing in this section shall affect the case of any condition or warranty fulfilment of which is excused by law by reason of impossibility of otherwise.

14. Implied undertaking as to title, etc.- In a contract of sale, unless the circumstances of the contract are such as to show a different intention there is-

- (a) an implied condition on the part of the seller that, in the case of a sale, he has a right to sell the goods and that, in the case of an agreement to sell, he will have a right to sell the goods at the time when the property is to pass.
- (b) an implied warranty that the buyer shall have and enjoy quiet possession of the goods.
- (c) an implied warranty that the goods shall be free from any charge or encumbrance in favour of any third party not declared or known to the buyer before or at the time when the contract is made.

15. Sale by description.- Where there is a contract for the sale of goods by description, there is an implied condition that the goods shall correspond with the description, and, if the sale is by sample as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample if the goods do not also correspond with the description.

16. Implied condition as to quality or fitness.- Subject to the provisions of this Act and of any other law for the time being in force, there is no implied warranty or condition as to the quality or fitness for any particular purpose of goods supplied under a contract of sale, excepts as follows:-

- (1) Where the buyer, expressly or by implication, makes known to the seller the particular purpose for which the goods are required, so as to show that the buyer relies on the seller's skill or judgement, and the goods are of a description which it is in the course of the seller's business to supply (whether he is the manufacturer or producer or not), there is an implied condition that the goods shall be reasonably fit for such purpose.

Provided that, in the case of a contract for the sale of a specified article under its patent or other trade name, there is no implied conditions to its fitness for any particular purpose.

- (2) Where goods are bought by description from a seller who deals in goods of that description (whether he is the manufacturer or producer or not), there is an implied condition that the goods shall be of merchantable quality.

Provided that, if the buyer has examined the goods, there shall be no implied conditions as regards defects which such examination ought to have revealed.

- (3) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade.
- (4) An express warranty or conditions does not negative a warranty or condition implied by this Act unless inconsistent therewith.

17. Sale by sample.-

- (1) A contract of sale is a contract for sale by sample where there is a term in the contract, express or implied, to that effect.
- (2) In the case of a contract for sale by sample there is an implied condition -
 - (a) that the bulk shall corresponded with the sample in quality.
 - (b) that the shall have a reasonable opportunity of comparing the bulk with the sample.
 - (c) that the goods shall be free from any defect, rendering them un-merchantable, which would not be apparent on reasonable examination

18. Goods must be ascertained.- Where there is a contract for the sale of unascertained goods, no property in the goods is transferred to the buyer unless and until the goods are ascertained.

19. Property passes when intended to pass.-

- (1) Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred.
- (2) For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case.
- (3) Unless a different intention appears, the rules contained in Section 20 to 24 are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer.

20. Specific goods in a deliverable state.- Where there is an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment of the price or the time of delivery of the goods, or both, is postponed.

21. Specific goods to be put into a deliverable state.- Where there is a contract for the sale of specific goods and the seller is bound to do something to the goods for the purpose of putting them into a deliverable state, the property does not pass until such thing is done and the buyer has notice thereof.

22. Specific goods in a deliverable state, when the seller has to do anything thereto in order to ascertain price.- Where there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act or thing is done and the buyer has notice thereof.

23. Sale of unascertained goods and appropriation.-

(1) Where there is a contract for the sale of unascertained or future goods by description and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be expressed or implied, and may be given either before or after the appropriation is made.

(2) **Delivery to carrier.-** Where, in pursuance of the contract, the seller delivers the goods

24. Goods sold on approval or 'on sale or return'- when goods are delivered to the buyer on approval or on sale or return or other similar terms, the property therein passes to the buyer-

- (a) when he signifies his approval or acceptance to the seller or does some other act adopting the transaction.
- (b) if he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of such time, and, if not time has been fixed, on the expiration of a reasonable time.

25. Reservation of right of disposal.-

(1) Where there is a contract for the sale of specific goods or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled. In such case, notwithstanding the delivery of the goods to a buyer, or to a carrier or other bailee for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled.

- (2) Where goods are shipped or delivered to a railway administration for carriage by railway and by the bill of lading or railway receipt, as the case may be, the goods are deliverable to the order of the seller or his agent, the seller is prima facie deemed to reserve the right of disposal.
- (2) Where the seller of goods draws on the buyer for the price and transmits to the buyer the bill of exchange together with the bill of lading or, as the case may be, the railway receipt, to secure acceptance to payment of the bill of exchange, the buyer is bound to return the bill of lading or the railway receipt if he does not honour the bill of exchange, and, if he wrongfully retains the bill of lading or the railway receipt, the property in the goods does not pass to him.

Explanation.- In this section, the expression “Railway” and “Railway administration” shall have the meanings respectively assigned to them under the Indian Railways Act, 1890.

26. Risk Prima facie passes with property.- Unless otherwise agreed, the goods remain at the seller’s risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer, the goods are at the buyer’s risk whether delivery has been made or not.

Provided that, where delivery has been delayed through the fault of either buyer or seller, the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault..

Provides also that nothing in this section shall affect the duties or liabilities of either seller or buyer as a bailee of the goods of the other party.

27. Sale by person not the owner.- Subject to the provisions of this Act and of any other law for the time being in force, where goods are sold by a person who is not the owner thereof and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by conduct precluded

from denying the seller’s authority to sell. Provided that, where a mercantile agent is, with the consent of the owner, in possession of the goods or of a document of title to the goods, any sale made by him, when acting in the ordinary course of business of a mercantile agent, shall be as valid as if he were expressly authorised by the owner of the goods to make the same, provided that the buyer acts in good faith and has not at the time of the contract of sale notice that the seller has not authority to sell.

28. Sale by one of joint owners.- If one of several joint owners of goods has the sole possession of them by permission of the co-owners, the property in the goods is transferred to any person who buys them of such joint owner in good faith and has not at the time of the contract of sale notice that the seller has not authority to sell.

29. Sale by person in possession under voidable contract.- When the seller of goods has obtained possession thereof under a contract voidable under Section 19 or Section 19A of the Indian Contract Act, 1872, but the contract has not been rescinded at the time of the sale, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of the seller’s defect of title.

30. Seller or buyer in possession after sale.-

- (1) Where a person, having sold goods, continues or is in possession of the goods or of the documents of title to the goods, the delivery or transfer by that person or by a mercantile agent acting for him of the goods or documents of title under any sale, pledge or other disposition thereof to any person receiving the same in good faith and without notice of the previous sale shall have the same effect as if the person making the delivery or transfer were expressly authorised by the owner of the goods to make the same.

(2) Where a person, having bought or agreed to buy goods, obtains with the consent of the seller, possession of the goods or the documents of title to the goods, the delivery or transfer by that person or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge or other disposition thereof to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods shall have effect as if such lien or right did not exist.

31. Duties of seller and buyer.- It is the duty of the seller to deliver the goods and of the buyer to accept and pay for them, in accordance with the terms of the contract of sale.

32. Payment and delivery are concurrent conditions.- Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, that is to say, the seller shall be ready and willing to give possession of the goods to the buyer in exchange for the price, and the buyer shall be ready and willing to pay the price in exchange for possession of the goods.

33. Delivery.- Delivery of goods sold may be made by doing anything which the parties agree shall be treated as delivery or which has the effect of putting the goods in the possession of the buyer or of any person authorised to hold them on his behalf.

34. Effect of part delivery.- A delivery of part of goods, in progress of the delivery of the whole has the same effect, for the purpose of passing the property in such goods, as a delivery of the whole, but a delivery of part of the goods, with an intention of severing it from the whole, does not operate as a delivery of the remainder.

35. Buyer to apply for delivery.- Apart from any express contract, the seller of goods is not bound to deliver them until the buyer applies for delivery.

36. Rules as to delivery.-

(1) Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question depending in each case on the contract, express or implied, between the parties. Apart from any such contract, goods sold are to be delivered at the place at which they are at the time of the sale, and goods agreed to be sold are to be delivered at the place at which they are at the time of the agreement to sell, if not then in existence, at the place at which they are manufactured or produced.

(1) Where under the contract of sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time.

(3) Where the goods at the time of sale are in the possession of a third person, there is no delivery by seller to buyer unless and until such third person acknowledges to the buyer that he holds the goods on his behalf.

Provided that nothing in this section shall affect the operation of the issue or transfer of any document of title to goods.

(4) Demand or tender of delivery may be treated as ineffectual unless made at a reasonable hour.

What is a reasonable hour is a question of fact.

(5) Unless otherwise agreed, the expense of and incidental to putting the goods into a deliverable state shall be borne by the seller.

37. Delivery of wrong quantity.-

- (1) Where the seller delivers to the buyer a quantity of good less than he contracted to sell, the buyer may reject them, but if the buyer accepts the goods so delivered he shall pay for them at the contract rate.
- (2) Where the seller delivers to the buyer a quantity of goods larger than he contracted to sell the buyer may accept the goods included in the contract and reject the rest, or he may reject the whole. If the buyer accepts the whole of the goods so delivered, he shall pay for them at the contract rate.
- (3) Where the seller delivers to the buyer the goods he contract to sell mixed with goods of a different description not included in the contract., the buyer may accept the goods which are in accordance with the contract and reject the rest, or may reject the whole.
- (4) The provisions of this section are subject to any usage of trade, special agreement or course of dealing between the parties.

38. Installment deliveries.-

- (1) Unless otherwise agreed, the buyer of goods is not bound to accept delivery thereof by instalments.
- (2) Where there is a contract for the sale of goods to be delivered by stated instalments which are to be separately paid for, and the seller makes no delivery or defective delivery in respect of one or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it is a question in each case depending on the terms of the contract and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract, or whether it is a severable breach giving rise to a claim for compensation, but not a right to treat.

39. Delivery to carrier or wharfinger.-

- (1) Where, in pursuance of a contract of sale, the seller is authorised or required to send the goods to the buyer, delivery of the goods to a carrier, whether named by the buyer or not, for the purpose of transmission to the buyer, or delivery of the goods to a wharfinger for safe custody, is prima facie deemed to be a delivery of the goods to the buyer.
- (2) Unless otherwise authorised by the buyer, the seller shall make such contract with the carrier or wharfinger on behalf of the buyer as may be reasonable having regard to the nature of the goods and the other circumstances of the case. If the seller omits so to do, and the goods are lost or damaged in course of transit or whilst in the custody of the wharfinger, the buyer may decline to treat the delivery to the carrier or wharfinger as a delivery to himself, or may hold the seller responsible for damages.
- (3) Unless otherwise agreed, where goods are sent by the seller to the buyer by a route involving sea transit, in circumstances in which it is usual to insure, the seller shall give such notice to the buyer as may enable him to insure them during their sea transit and if the seller fails so to do, the goods shall be deemed to be at his risk during such sea transit. the whole contract as repudiated.

40. Risk where goods are delivered at distant place.- Where the seller of goods agrees to deliver them at his own risk at place other than that where they are when sold, the buyer shall, nevertheless, unless otherwise agreed, take any risk of deterioration in the goods necessarily incident to the course of transit.

41. Buyer's right of examining the goods.-

- (1) Where goods are delivered to the buyer which he has not previously examined, he is not deemed to have accepted them unless and until he has a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract.

(2) Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request, to afford the buyer a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract,

42. Buyer not bound to return rejected goods.- Unless otherwise agreed, where goods are delivered to the buyer and he refuses to accept them, having the right so to do, he is not bound to return them to the seller, but it is sufficient if he intimates to the seller that he refuses to accept them.

43. Buyer not bound to return rejected goods.- Unless otherwise agreed, where goods are delivered to the buyer and he refuses to accept them, having the right so to do, he is not bound to return them to the seller, but it is sufficient if he intimates to the seller that he refuses to accept them.

44. Liability of buyer for neglecting or refusing delivery of goods.- When the seller is ready and willing to deliver the goods and requests the buyer to take delivery, and the buyer does not within a reasonable time after such request take delivery of the goods, he is liable to the seller for any loss occasioned by his neglect or refusal to take delivery and also for a reasonable charge for the care and custody of the goods. Provided that nothing in this section shall affect the rights of the seller where the neglect or refusal of the buyer to take delivery amounts to a repudiation of the contract.

Rights of unpaid seller against the goods

45. "Unpaid seller" defined.- (1) The seller of goods is deemed to be an "unpaid seller" within the meaning of this Act-

- (a) When the whole of the price has not been paid or tendered.
 - (b) When a bill of exchange or other negotiable instrument has been received as conditional payment, and the conditions on which it was received has not been fulfilled by reason of the dishonour of the instrument or otherwise.
- (2) In this Chapter, the term "seller" includes any person who is in the position of a seller, as, for instance, an agent of the seller to whom the bill of lading has been endorsed, or a consignor or agent who has himself paid, or is directly responsible for, the price.

46. Unpaid seller's rights.- (1) Subject to the provisions of this Act and of any law for the time being in force, notwithstanding that the property in the goods may have passed to the buyer, the unpaid seller of goods, as such, has by implication of law.

- (a) a lien on the goods for the period while he is in possession of them,
 - (b) in case of the insolvency of the buyer a right of stopping the goods in transit after he has parted with the possession of them.
 - (c) a right of re-sale as limited by this Act
- (3) Where the property in goods has not passed to the buyer, the unpaid seller has, in addition to his other remedies, a right of withholding delivery similar to and co-extensive with his rights of lien and stoppage in transit where the property has passed to the buyer.

47. Seller's lien.-

- (1) Subject to the provisions of this Act, the unpaid seller of goods who is in possession of them is entitled to retain possession of them until payment or tender of the price in the following cases, namely :-
 - (a) where the goods have been sold without any stipulations as to credit.
 - (b) where the goods have been sold on credit, but the term of credit has expired.
 - (c) where the buyer becomes insolvent.
- (2) The seller may exercise his right of lien notwithstanding that he is in possession of the goods as agent or bailee for the buyer.

48. Part delivery.- Where an unpaid seller has made part delivery of the goods, he may exercise his right of lien on the remainder, unless such part delivery has been made under such circumstances as to show an agreement to waive the lien.

49. Termination of lien.-

- (1) The unpaid seller of goods loses his lien thereon -
 - (a) when he delivers the goods to a carrier or other bailee for the purpose of transmission to the buyer without reserving the right of disposal of the goods.
 - (b) when the buyer or his agent lawfully obtains possession of the goods,
 - (c) by waiver thereof.
- (2) The unpaid seller of goods, having a lien thereon, does not lose his lien by reason only that he has obtained a decree for the price of the goods.

50. Right of stoppage in transit.- Subject to the provisions of this Act, when the buyer of goods becomes insolvent, the unpaid seller who has parted with the possession of the goods has the right of stopping them in transit, that is to say, he may resume possession of the goods as long as they are in the course of transit, and may retain them until payment or tender of the price.

51. Duration of transit.-

- (1) Goods are deemed to be in course of transit from the time when they are delivered to a carrier or other bailee for the purpose of transmission to the buyer, until the buyer or his agent in that behalf takes delivery of them from such carrier or other bailee.
- (2) If the buyer or his agent in that behalf obtains delivery of the goods before their arrival at the appointed destination, the transit is at an end.
- (3) If, after the arrival of the goods at the appointed destination, the carrier or other bailee acknowledges to the buyer or his agent that he holds the goods on his behalf and continues in possession of them as bailee for the buyer or his agent, the transit is at an end and it is immaterial that a further destination for the goods may have been indicated by the buyer.
- (4) If the goods are rejected by the buyer and the carrier or other bailee continues in possession of them, the transit is not deemed to be at an end, even if the seller has refused to receive them back.

- (5) When goods are delivered to a ship chartered by the buyer, it is a question depending on the circumstances of the particular case, whether they are in the possession of the master as a carrier or as agent of the buyer.
- (6) Where the carrier or other bailee wrongfully refuses to deliver the goods to the buyer or his agent in that behalf, the transit is deemed to be at an end.
- (7) Where part delivery of the goods has been made to the buyer or his agent in that behalf, the remainder of the goods may be stopped in transit, unless such part delivery has been given in such circumstances as to show an agreement to give up possession of the whole of the goods.

52. How stoppage in transit is effected.-

- (1) The unpaid seller may exercise his right to stoppage in transit either by taking actual possession of the goods, or by giving notice of his claim to the carrier or other bailee in whose possession the goods are. Such notice may be given either to the person in actual possession of the goods or to his principal. In the later case the notice, to be effectual, shall be given at such time and in such circumstances, that the principal, by the exercise of reasonable diligence, may communicate it to his servant or agent in time to prevent a delivery to the buyer.
- (4) Whether notice of stoppage in transit is given by the seller to the carrier or other bailee in possession of the goods, he shall re-deliver the goods to, or according to the directions of, the seller. The expenses of such re-delivery shall be borne by the seller.

53. Effect to sub-sale or pledge by buyer.-

- (1) Subject to the provisions of this Act, the unpaid seller's right of lien or stoppage in transit is not affected by any sale or other disposition of the goods which the buyer may have made, unless the seller has assented thereto. Provided that where a document of title to goods has been issued or lawfully transferred to any person as buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for consideration, then, if such last mentioned transfer was by way of sale, the unpaid seller's right of lien or stoppage in transit is defeated, and, if such last mentioned transfer was by way of pledge or other disposition for value, the unpaid seller's right of lien or stoppage in transit can only be exercised subject to the rights of the transferee.
- (2) Where the transfer is by way of pledge, the unpaid seller may require the pledgee to have the amount secured by the pledge satisfied in the first instance, as far as possible, out of any other goods or securities of the buyer in the hands of the pledgee and available against the buyer.

54. Sale not generally rescinded by lien or stoppage in transit.-

- (1) Subject to the provisions of this section, a contract of sale is not rescinded by the mere exercise by an unpaid seller of his right of lien or stoppage in transit.
- (2) Where the goods are of a perishable nature, or where the unpaid seller who has exercised his right of lien or stoppage in transit gives notices to the buyer of his intentions to re-sell, the unpaid seller may, if the buyer does not within a reasonable time pay or tender the price, re-sell the goods within a reasonable time and recover from the original buyer damages for any loss occasioned by his breach of contract, but the buyer shall not be entitled to any profit which may occur on the re-sale. If such notices are not given, the unpaid seller shall not be entitled to recover such damages and the buyer shall be entitled to the profit, if any, on the re-sale.

- (3) Where an unpaid seller who has exercised his right of lien or stoppage in transit re-sells the goods, the buyer acquires a good title thereto as against the original buyer, notwithstanding that no notice of the re-sale has been given to the original buyer.
- (4) Where the seller expressly reserves a right of re-sale in case the buyer should make default, and on, the buyer making default, re-sells the goods, the original contract of sale is thereby rescinded, but without prejudice to any claim which the seller may have for damages.

55. Suit for price.- (1) Where under a contract of sale the property in the goods has passed to the buyer and the buyer wrongfully neglects or refuses to pay for the goods according to the terms of the contract, the seller may sue him for the price of the goods.

56. Damages for non-acceptance.- Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may sue him for damages for non-acceptance.

57. Damages for non-delivery.- Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may sue the seller for damages for non-delivery.

58. Specific performance.- Subject to the provisions of Chapter II of the Specific Relief Act, 1877, in any suit for breach of contract to deliver specific or ascertained goods, the Court may, if it thinks fit, on the application of the plaintiff, by its decree direct that the contract shall be performed specifically, without giving the defendant the option of retaining the goods on payment of damages. The decree may be unconditional, or upon such terms and conditions as to damages, payment of the price or otherwise, as the Court may deem just, and the application of the plaintiff may be made at any time before the decree.

59. Remedy for breach of warranty -

- (1) Where there is a breach of warranty by the seller, or where the buyer elects or is compelled to treat any breach of a condition on the part of the seller as a breach of warranty, the buyer is not by reason only of such breach of warranty entitled to reject the goods; but he may-
 - (a) Set up against the seller the breach of warranty in diminution or extinction of the price; or
 - (b) Sue the seller for damages for breach of warranty.
- (2) The fact that a buyer has set up a breach of warranty in diminution or extinction of the price does not prevent him from suing for the same breach of warranty if he has suffered further damage.

60. Repudiation of contract before due date.- Where either party to a contract of sale repudiates the contract before the date of delivery, the other may either treat the contract as subsisting and wait till the date of delivery, or he may treat the contract as rescinded and sue for damages for the breach.

61. Interest by way of damages and special damages.-

- (1) Nothing in this Act shall affect the right of the seller or the buyer to recover interest or special damages in any case whereby law interest or special damages may be recoverable, or to recover the money paid where the consideration for the payment of it has failed.
- (2) In the absence of a contract to the contrary, the Court may award interest at such rate as it thinks fit on the amount of the price-
 - (a) to the seller in a suit by him for the amount of the price.- from the date of the tender of the goods or from the date on which the price was payable.
 - (b) to the buyer in a suit by him for the refund of the price in a case of a breach of the contract on the part of the seller- from the date on which the payment was made.

62. Exclusion of implied terms and conditions.- Where any right, duty or liability would arise under a contract of sale by implication of law, it may be negated or varied by express agreement or by the course of dealing between the parties, or by usage, if the usage is such as to bind parties to the contract.

63. Reasonable time a question of fact.- Where in this Act any reference is made to a reasonable time, the question what is a reasonable time is a question of fact.

- (1) where goods are put up for sale in lots, each lot is prima facie deemed to be the subject of a separate contract of sale.
- (2) the sale is complete when the auctioneer announces its completion by the fall of the hammer or in other customary manner, and, until such announcement is made, any bidder may retract his bid.
- (3) a right to bid may be reserved expressly by or on behalf of the seller and, where such right is expressly so reserved, but not otherwise, the seller or any one person on his behalf may, subject to the provisions hereinafter contained, bid at the auction,
- (4) where the sale is not notified to be subject to a right to bid on behalf of the seller, it shall not be lawful for the seller to bid himself or to employ any person to bid at such sale, or for the auctioneer knowingly to take any bid from the seller or any such person, and any such person, and any sale contravening this rule may be treated as fraudulent by the buyer.
- (5) the sale may be notified to be subject to a reserved or upset price.
- (6) if the seller makes use of pretended bidding to raise the price, the sale is voidable at the option of the buyer.

64A. In contracts of sale, amount of increased or decreased tax to be added or deducted.-

- (1) Unless a different intention appears from the terms of the contract, in the event of any tax of the nature described in sub-section (2) being imposed, increased, decreased or remitted in respect of any goods after the making of any contract for the sale or purchase of such goods without stipulations as to the payment of tax where tax was not chargeable at the time of the making of the contract, or for the sale or purchase of such good tax- paid where tax was chargeable at that time.-
 - (a) if such imposition or increase so takes effect that the tax or increased tax, as the case may be, or any part of such tax is paid or is payable, the seller may add so much to the contract price as will be equivalent to the amount paid or payable in respect of such tax or increase of tax, and he shall be entitled to be paid and to sue for and recover such addition, and
 - (b) if such decrease or remission so takes effect that the decreased tax only, or no tax, as the case may be, is paid or is payable, the buyer made deduct so much from the contract price as will be equivalent to the decrease of tax or remitted tax, and he shall not be liable to pay, or be sued for, or in respect of, such deduction.
- (2) The provisions of sub-section (1) apply to the following taxes, namely:-
 - (a) any duty of customs or excise on goods.
 - (b) any tax on the sale or purchase of goods.

This Act deals with only one kind of transfer, namely, "sale". This Act is not concerned with "Exchange" or hire purchase or a contract of labour. Again, the act deals with the movable goods. Eg., stock and shares,

movable items, agri-goods, etc. Moreover, an actionable claim i.e., claim for debt or money are not considered to be goods. As per section 4 of the sale of goods Act, "sale" means transfer of goods for a price and the price received is the consideration. But in some cases the payment may not be an immediate consideration as in case of credit sale. Therefore, promise to be paid or partly paid or partly promised brings in consideration. Therefore, in an agreement for sale, the transfer of goods takes place at a particular time or is subject to the fulfilment of a particular condition. Eg., In case of a contract of labour, there is no sale of goods, instead the services of a labourer is being utilised. Section 5 of the act deals with how the contract of sale is made

Section 5 - Contract of sale how made.—

- (1) A contract of sale is made by an offer to buy or sell goods for a price and the acceptance of such offer. The contract may provide for the immediate delivery of the goods or immediate payment of the price or both, or for the delivery or payment by instalments, or that the delivery or payment or both shall be postponed.
- (2) Subject to the provisions of any law for the time being in force, a contract of sale may be made in writing or by word of mouth, or partly in writing and partly by word of mouth or may be implied from the conduct of the parties.

It is also a contract made by an offer and acceptance. Moreover, the payment or the delivery of the goods may be immediate in nature or may be in instalments.

POSSIBILITY OF SALE

The possibility of the sale of goods gets depends on the nature of the goods. In case the goods are perishable, and they perish before the making of the contract Sec 7 (Where there is a contract for the sale of specific goods, the contract is void if the goods without the knowledge of the seller have, at the time when the contract was made, perished or become so damaged as no longer to answer to their description contract.) of the act which remains in consonance with sec 20 of the Indian Contract Act may be applied. In case the goods perish after the agreement before the sale, Section 8 (Where there is an agreement to sell specific goods, and subsequently the goods without any fault on the part of the seller or buyer perish or become so damaged as no longer to answer to their description in the agreement before the risk passes to the buyer, the agreement is thereby avoided.) of the Act applies which remains in consonance with sec. 56 (Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may sue him for damages for non-acceptance.) of the Contract Act.

Section 9 (Ascertainment of price.—

- (1) The price in a contract of sale may be fixed by the contract or may be left to be fixed in manner thereby agreed or may be determined by the course of dealing between the parties.
- (2) Where the price is not determined in accordance with the foregoing provisions, the buyer shall pay the seller a reasonable price. What is a reasonable price is a question of fact dependent on the circumstances of each particular case.)

and 10 of the sale of goods Act (Agreement to sell at valuation.—

- (1) Where there is an agreement to sell goods on the terms that the price is to be fixed by the valuation of a third party and such third party cannot or does not make such valuation, the agreement is thereby avoided: Provided that, if the goods or any part thereof have been delivered to, and appropriated by, the buyer, he shall pay a reasonable price therefor.

- (2) Where such third party is prevented from making the valuation by the fault of the seller or buyer, the party not in fault may maintain a suit for damages against the party in fault.)

deals with the price fixation of the goods deemed for the sale. Therefore, the price may be fixed by the contract, or may be fixed according to an agreement or may be determined in the course of dealings between the parties, or else as a last resort the buyer shall pay a reasonable price.

CONDITIONS AND WARRANTIES (Secs. 11 to 17)

In every transaction, there would be some stipulations and some of these stipulations go the root of the transactions and these are called as conditions which is defined in Section 12 of the Act. Breach of the conditions lead to the repudiation of the contract. Warranties are also a kind of stipulations but are not fundamental to the contract, but are collateral to the contract. Moreover as per section 13 of the act in certain cases, a condition may become a warranty. In some cases even though the parties may not have stated in written the conditions and warranties, there may be the existence of certain “implied” conditions and warranties which are particularly covered under sec 14 .

SALE BY SAMPLE (Sec 17)

A contract of sale is a contract of sale by sample where there is a term in the contract express or implied to that effect. In case of a contract of sale, there is an implied condition by which the parties are bound by it in the contract. This is well illustrated in the case of *Lorymer vs. Smith*. The main idea is that the bulk of goods shall correspond to the sample.

SALE BY DESCRIPTION (Sec 15)

This kind of sale deals with two parts, wherein the first part deals with the sale by description and the other part deals with the sale by sample and description. Basically, sale by description is addressed to the ears i.e., when the goods are sold by description, there is an implied condition that the goods shall correspond to the given description.

RISK *PRIMA FACIE* FOLLOWS OWNERSHIP

Basically, there is a general rule that the owner of the goods shall bear the loss of damage to goods before the contract becomes active. In other words, the seller remains the owner till the goods are sold. This is so even if the goods are in the possession of the buyer. However, there are two exceptions to this rule:

- (1) The party who causes a delay in delivery may accept to bear the risk.
- (2) The buyer and seller may agree to separate risk from ownership.

TRANSFER OF TITLE

When does the property in goods pass to the buyer (Section 18 to 24)

There are seven rules in this regard. They are granted the sections from 18 t 24. In brief it means to convey the following points,

- (1) The sale is effected only when the subject matter is ascertained and not otherwise
- (2) The property in goods is transferred to the buyer at the time when the parties intend the transfer of the goods.
- (3) The property pass to the buyer when the contract is made irrespective of whether it is conditional or unconditional

- (4) The buyer gets a good title when the seller fulfils certain conditions which he is bound to and by giving a notice to the buyer.
- (5) For a contract to be effected, the goods should be in deliverable state i.e., it must be ascertained, weighed and the price must be determined. Only in such a case, the property gets transferred to the buyer.
- (6) The property in goods pass to the buyer when the goods of such condition is unconditionally appropriated to the contract.
- (7) When the buyer signifies his approval to the transaction or does any act adopting the transaction, the title passes on to him.

SALE BY NON-OWNER

The sale of goods can be made only by the one who has a good title to it i.e., only the owner of the goods has got the authority to sell them. A person who is not a owner cannot exercise such a right. This is granted under section 27 of the act. But, there are some exceptions to it which ranges from section 27 to sec 30 and also under sec 54(3).

In fine the act also grants certain rights and duties to the seller and the buyer which is granted from section 32.

ANTICIPATORY BREACH

In conclusion, it is necessary to make a reference the anticipatory breach of the contract which is granted under Section 60 of the act. If either party repudiates the contract before the due date of performance, the other party may either-

- (a) Treat the contract as subsisting and wait till the date of delivery, or
- (b) Rescind the contract and sue for damages.

Therefore, by way of concluding remarks, it is put forth that the Sale of goods Act primarily specialises in a specific type of contract. It is generally known that the Contract Act stands out as the foundation stone for all the types of contract. Therefore, this act is a specie of the generic banner of contracts . Therefore this act deems to provide the rules that are involved in the contract of sale of movable goods.

UNIT – IV

AGENCY

The provisions in the Indian Contract Act relating to law of agency are given below

182. “Agent” and “principal” defined -

An “agent” is a person employed to do any act for another, or to represent another in dealing with third persons. The person for whom such act is done, or who is so represented, is called the “principal”.

183. Who may employ agent -

Any person who is of the age of majority according to the law to which he is subject, and who is of sound mind, may employ an agent.

184. Who may be an agent -

As between the principal and third persons, any person may become an agent, but no person who is not of the age of majority and sound mind can become an agent, so as to be responsible to the principal according to the provisions in that behalf herein contained.

185. Consideration not necessary -

No consideration is necessary to create an agency;

186. Agent’s authority may be expressed or implied -

The authority of an agent may be expressed or implied.

187. Definitions of express and implied -

An authority is said to be express when it is given by words spoken or written. An authority is said to be implied when it is to be inferred from the circumstances of the case; and things spoken or written, or the ordinary course of dealing, may be accounted circumstances of the case.

188. Extent of agent’s authority -

An agent, having an authority to do an act, has authority do every lawful thing which is necessary in order to do so such act. An agent having an authority to carry on a business, has authority to do every lawful thing necessary for the purpose, or usually done in the course, of conducting such business.

189. Agent’s authority in an emergency -

An agent has authority, in an emergency, to do all such acts for the purpose of protecting his principal from loss and would be done by a person of ordinary prudence, in his own case, under similar circumstances.

190. When agent cannot delegate -

An agent cannot lawfully employ another to perform acts which he has expressly or impliedly undertaken to perform personally, unless by the ordinary custom of trade and from the nature of the agency, a sub-agent must be employed

191. "Sub-agent" defined -

A "sub-agent" is a person employed by, and acting under the control of, the original agent of the agency.

192. Representation of principal by sub-agent properly appointed -

Where a sub-agent is properly appointed, the principal is, so far as regards third persons, represented by the sub-agent, and is bound by and responsible for his acts, as if originally appointed by the principal. Agent's responsibility for sub-agent: The agent is principal for the acts of the sub-agent.

Sub-agent's responsibility: The sub-agent is responsible for his acts to the agent, but not to the principal, except in cases of fraud, or wilful wrong..

193. Agent's responsibility for sub-agent appointed without -

authority Where an agent, without having authority to do so, has appointed a person to act, he stands towards such person in the relation of a principal to an agent, and is responsible to the principal and to third person; the principal is not represented, by or responsible for the person so employed, nor is that person responsible to the principal.

194. Relation between principal and person duly appointed by agent to act for the agency -

When an agent, holding an express or implied authority to name another person to act for the business of the agency, has named another person accordingly, such person is not a sub-agent, but an agent of the principal for such part of the business of the agency as is entrusted to him.

195. Agent's duty in naming such person -

In selecting such agent for his principal, an agent is bound to exercise the same amount of discretion as a man of ordinary prudence would exercise in his own case; and is not responsible to the principal for the acts of negligence of the agent so selected.

196. Right of person as to acts done for him without his authority, effect of

Where acts are done by one person on behalf of another, but without his knowledge or consent to ratify or to disown such acts. If he ratifies them, the same effects will follow as if performed by his authority.

197. Ratification may be expressed or implied -

Ratification may be expressed or may be implied in the conduct of the person on whose behalf

198. Knowledge requisite for valid ratification -

No valid ratification can be made by a person whose knowledge of the facts of the case is materially defective.

199. Effect of ratifying unauthorized act forming part of a transaction -

A person ratifying any unauthorized act done on his behalf ratifies the whole of the transaction of which such act formed a part.

200. Ratification of unauthorized act cannot injure third person -

An act done by one person on behalf of another, without such other person's authority, which, if done with authority, would have the effect of subjecting a third person to damages, or of terminating any right or interest of a third person, cannot, by ratification, be made to have such effect.

201. Termination of Agency -

An agency is terminated by the principal revoking his authority, or by the agent renouncing the business of the agency; or by the business of the agency being completed; or by either the principal or agent dying or becoming of unsound mind; or by the principal being adjudicated an insolvent under the provisions of any Act for the time being in force for the relief of insolvent debtors.

202. Termination of Agency, where agent has an interest in subject-matter -

Where the agent has himself an interest in the property which forms the subject-matter of the agency, the agency cannot, in the absence of an express contract, be terminated to the prejudice of such interest.

203. When principal may revoke agent's authority -

The principal may, save as is otherwise provided by the last preceding section, revoke the authority given to his agent at any time before the authority has been exercised so as to bind the principal.

204. Revocation where authority has been partly exercised -

The principal cannot revoke the authority given to his agent after the authority has been partly exercised, so far as regards such acts and obligations as arise from acts already done in the agency.

205. Compensation for revocation by principal, or renunciation by agent -

Where there is an express or implied contract that the agency should be continued for any period of time, the principal must make compensation to the agent, or the agent to the principal, as the case may be, for any previous revocation or renunciation of the agency without sufficient cause.

206. Notice of revocation or renunciation -

Reasonable notice must be given of such revocation or renunciation; otherwise the damage thereby resulting to the principal or the agent, as the case may be, must be made good to the one by the other.

207. Revocation and Renunciation may be expressed or implied -

Revocation and renunciation may be expressed or may be implied in the conduct of the principal or agent respectively.

208. When termination of agent's authority takes effect as to agent, and as to third persons -

The termination of the authority of an agent does not, so far as regards the agent, take effect before it becomes known to him, or, so far as regards third persons, before it becomes known to them.

209. Agent's duty on termination of agency by principal's death or insanity -

When an agency is terminated by the principal dying or becoming of unsound mind, the agent is bound to take, on behalf of the representatives of his late principal, all reasonable steps for the protection and preservation of the interests entrusted to him.

210. Termination of Sub-agent's authority -

The termination of the authority of an agent causes the termination (subject to the rules herein contained regarding the termination of an agent's authority) of the authority of all sub-agents appointed by him.

211. Agent's duty in conducting principal's business -

An agent is bound to conduct the business of his principal according to the directions given by the principal, or, in the absence of any such directions, according to the custom which prevails in doing business of the same kind at the place where the agent conducts such business. When the agent acts otherwise, if any loss be sustained, he must make it good to his principal, and, if any profit accrues, he must account for it.

212. Skill and Diligence required from agent -

An agent is bound to conduct the business of the agency with as much skill as is generally possessed by persons engaged in similar business, unless the principal has notice of his want of skill. The agent is always bound to act with reasonable diligence, and to use such skill as he possesses; and to make compensation to his principal in respect of the direct consequences of his own neglect, want of skill or misconduct, but not in respect of loss or damage which are indirectly or remotely caused by such neglect, want of skill or misconduct.

213. Agent's accounts -

An agent is bound to render proper accounts to his principal on demand.

214. Agent's duty of communicate with principal -

It is the duty of an agent, in cases of difficulty, to use all reasonable diligence in communicating with his principal, and in seeking to obtain his instructions.

215. Right to principal when agent deals, on his own account, in business of agency without principal's consent –

If an agent deals on his own account in the business of the agency, without first

obtaining the consent of his principal and acquainting him with all material

circumstances which have come to his own knowledge on the subject, the principal may repudiate the transaction, if the case shows either that any material fact has been dishonestly concealed from him by the agent, or that the dealings of the agent have been disadvantageous to him.

216. Principal's right to benefit gained by agent dealing on his own account in business of agency -

If an agent, without the knowledge of his principal, deals in the business of the

agency on his own account instead of on account of his principal, the principal is

entitled to claim from the agent any benefit which may have resulted to him from

the transaction.

217. Agent's right of retainer out of sums received on principal's account -

An agent may retain, out of any sums received on account of the principal in the

business of the agency, all moneys due to himself in respect of advances made or

expenses properly incurred by him in conducting such business, and also such

remuneration as may be payable to him for acting as agent.

218 . Agent's duty to pay sums received for principal -

Subject to such deductions, the agent is bound to pay to his principal all sums

received on his account.

219. When agent's remuneration becomes due -

In the absence of any special contract, payment for the performance of any act is not due to the agent until the completion of such act; but an agent may detain moneys received by him on account of goods sold, although the whole of the goods consigned to him for sale may not have been sold, or although the sale may not be actually complete.

220. Agent not entitled to remuneration for business misconducted -

An agent who is guilty of misconduct in the business of the agency is not entitled to any remuneration in respect of that part of the business which he has misconducted.

221. Agent's lien on principal property -

In the absence of any contract to the contrary, an agent is entitled to retain goods, papers, and other property, whether movable or immovable, of the principal received by him, until the amount due to himself for commission, disbursements and services in respect of the same has been paid or accounted for to him.

222. Agent to be indemnified against consequences of lawful acts -

The employer of an agent is bound to indemnify him against the consequences of all such agent in exercise of the authority conferred upon him.

223. Agent to be indemnified against consequences of acts done in good faith -

Where one person employs another to do an act, and the agent does the act in good faith, he is not liable to indemnify the agent against the consequences of that act, though it causes an injury to third persons

224. Non-Liability of employer of agent to do a Criminal Act -

Where one person employs another to do an act which is criminal, the employer is not liable to the agent, either upon an express or an implied promise, to indemnify him against the consequences of that act.

225. Compensation to agent for injury caused by principal's neglect -

The principal must make compensation to his agent in respect of injury caused to such agent by the principal's neglect or want of skill.

226. Enforcement and Consequences of agent's contracts -

Contracts entered into through an agent, and obligations arising from acts done by an agent, are enforceable in the same manner, and will have the same legal

consequences, as if the contracts had been entered into and the acts done by the principal in person.

227. Principal how far bound, when agent exceeds authority -

When an agent does more than he is authorised to do, and when the part of what he does which is within his authority, can be separated from the part which is beyond his authority, so much of what he does as is within his authority is binding as between him and his principal.

228. Principal not bound when excess of agent's authority is not separable -

Where an agent does more than he is authorised to do, and what he does beyond the scope of his authority cannot be separated from what is within it, the principal is not bound by the transaction.

229. Consequences of notice given to agent -

Any notice given to or information obtained by the agent, provided it be given or obtained in the course of the business transacted by him for the principal, shall, as between the principal and third parties, have the same legal consequence as if it had been given to or obtained by the principal.

230. Agent cannot personally enforce, nor be bound by, contracts on behalf of principal -

In the absence of any contract to that effect, an agent cannot personally enforce contracts entered into by him on behalf of his principal, nor is he personally bound by

PRESUMPTION OF CONTRACT TO THE CONTRARY. -

Such a contract shall be presumed to exist in the following cases :-

- (1) where the contract is made by an agent for the sale or purchase of goods for a merchant resident abroad;
- (2) where the agent does not disclose the name of his principal; and
- (3) where the principal, though disclosed, cannot be sued.

231. Rights of Parties to a contract made by agent not disclosed –

If an agent makes a contract with a person who neither knows, nor has reason to suspect, that he is an agent, his principal may require the performance of the contract; but the other contracting party has, as against the principal, the same

rights as he would have had as against the agent if the agent had been the principal. If the principal discloses himself before the contract is completed, the other contracting party may refuse to fulfil the contract, if he can show that, if he had known who was the principal in the contract, or if he had known that the agent

232. Performance of contract with agent supposed to be principal -

Where one man makes a contract with another, neither knowing nor having

reasonable ground to suspect that the other is an agent, the principal, if he requires the performance of the contract, can only obtain such performance subject to the rights and obligations subsisting between the agent and the other party to the contract.

233. Right of person dealing with agent personally liable -

In cases where the agent is personally liable, a person dealing with him may hold either him or his principal, or both of them, liable.

234. Consequence of Inducing agent or principal to act on belief that principal or agent will be held exclusively liable -

When a person who has made a contract with an agent induces the agent to act

upon the belief that the Principal only will be held liable, or induces the principal to act upon the belief that the agent only will be held liable, he cannot afterwards hold liable the agent or principal respectively.

235. Liability of pretended agent –

A person untruly representing himself to be the authorised agent of another, and thereby inducing a third person to deal with him as such agent, is liable, if his alleged employer does not ratify his acts, to make compensation to the other in respect of any loss or damage which he has incurred by so dealing.

236. Person falsely contracting as agent not entitled to performance –

A person with whom a contract has been entered into in the character of agent, is not entitled to require the performance of it if he was in reality acting, not as agent, but on his own account.

237. Liability of principal inducing belief that agent's unauthorized acts were authorized –

When an agent has, without authority, done acts or incurred obligations to third persons on behalf of his principal, the principal is bound by such acts or obligations, if he has by his words or conduct induced such third persons to believe that such act and obligations were within the scope of the agent's authority.

238. Effect, on agreement, of misrepresentation or fraud by agent -

Misrepresentations made, or frauds committed, by agents acting in the course of their business for their principals, have the same effect on agreements made by such agents as if such misrepresentations or frauds had been made or committed, by the principals; but misrepresentations made, or frauds, committed, by agents, in matters which do not fall within their authority, do not affect their principals.

An "agent" is a person employed to do any act for the "principal" or to act as his representative while dealing with third parties. This is brought about in section 182 (An 'agent' is a person employed to do any act for another, or to represent another in dealings with third person. The person for whom such act is done, or who is so represented, is called the 'principal'.) of the Indian Contract Act. If the principle has duly authorised the agent to do a particular act, he will be solely responsible for the acts of the agent which fall under the boundaries of the authorisation. There are different kinds of Agents who enter into such contracts, each of whose types are being discussed below in brief:

- (1) **Auctioneers:** Auctioneer is an agent whose primary duty is to sell goods of the principal by public auction. He is the mercantile agent on analysing from the point of view of the sale of goods act. He has got the authority only for selling the goods and not to provide warranties on behalf of the seller and moreover, even when he sells the goods in the absence of an authorisation, the buyer gets a good title which marks the justice provided by law for innocent buyers.
- (2) **Factors:** As already discussed in the previous chapter, factor, who acts as a mercantile agent has also got the right to sell the goods on credit and also to receive the price from the buyer. Moreover, he has also got the right of general lien.
- (3) **Brokers:** A broker is a kind of an agent whose main role is to bring about the sale or the purchase of the goods for his principle and he gets remuneration in terms of the commission from the principle.
- (4) ***Del credere Agents:*** It is a general rule that the agents are not liable in case of errors committed by third parties, but this category of agency is an exception to the same. He is also termed as a mercantile agent. On the failure of the third party to pay, this agent can be made liable to pay. His liability is similar to that of a surety.

Features of Agency:

The contract of agency provides the following features:

- (1) **The principal should be competent to contract:** Since a contract is created through an agent between the principal and the third party, the principal should be competent to contract and must comply with the procedures of soundness of mind and the age of majority in compliance with section 183 which provides the same. Section 183 - Any person who is of the age of majority according to the law to which he is subject, and who is of sound mind, may employ an agent."
- (2) **Capacity of the agent:** The capacity of the agent as granted under section 184 is to be analysed from two dimensions, one is that he serves as a link between the principle and the third party and the other wherein any one can become an agent of that kind and the other of the kind of principal-agent contract which requires the compliance of the capacity requirements. section 184-As between the principal and third person any person may become an agent, but no person who is not of the age of majority and of sound mind can become an agent, so as to be responsible to his principle according to the provisions in that behalf herein contained.
- (3) **Consideration:** No consideration is required in order to create agency which is derived from the fact of liability of the principal for the agents act and the duty to indemnify him presumes sufficient consideration.

Now a question of greater consideration that arises is that how is agency created? It is said that a contract of agency may be created by:

- (a) **Actual authority:** he principal is bound by the acts of the agent within his authority which may be expressed or implied. An expressed authority is one which is expressed by means of words, spoken or written as given in sec. 187- An authority is said to be express when it is given by words spoken or written. An authority is said to be implied when it is to be inferred from the circumstances of the case; and things spoken or written, or the ordinary course of dealing, may be accounted circumstances of the case. For Example - A owns a shop in Serampor, living himself in Calcutta, and visiting the shop occasionally. The shop is managed by B, and he is in the habit of ordering goods from C in the name of A for the purposes of the shop, and of paying for them out of A's funds with A's knowledge. B has an implied authority from A to order goods from C in the name of A for the purposes of the shop. A owns a shop in Serampor, living himself in Calcutta, and visiting the shop occasionally. The shop is managed by B, and he is in the habit of ordering goods from C in the name of A for the purposes of the shop, and of paying for them out of A's funds with A's knowledge. B has an implied authority from A to order goods from C in the name of A for the purposes of the shop."

And an implied authority is one in which the agent has got every authority to do an act which is lawful so as to fulfil his duties.(Sec.188) - An agent having an authority to do an act has authority to do every lawful thing which is necessary in order to do such act." An agent having an authority to carry on a business, has authority to do every lawful thing necessary for the purpose, or usually done in the course, of conducting such business.For example - A constitutes B his agent to carry on his business of a ship-builder. B may purchase timber and other materials, and hire workmen, for the purpose of carrying on the business. (b) A constitutes B his agent to carry on his business of a ship-builder. B may purchase timber and other materials, and hire workmen, for the purpose of carrying on the business."

- (b) **In situations of emergency:** An agent has got the complete authority to do the acts of necessity in case of emergency by using his own prudence, so as to protect his principle from the danger or loss to be incurred. (Sec.189) - "An agent has authority, in an emergency, to do all such acts for the purpose of protecting his principal from loss as would be done by a person of ordinary prudence, in his own case under similar circumstances."

- (c) **By Estoppel** : This is a situation similar to an apparent or ostensible authority implied. Under this, although the agent has got no authority to do an act, the principle by his conduct recognises the right of the agent to do a particular act within the authority so implied.
- (d) **By ratification**: This is an exceptional category of agency wherein an act which has not been authorised by the principle, but nevertheless, being undertaken by the agent gains a subsequent ratification of authorisation from the principal to be deemed under authority.

Let us look into the following essentials of ratification:

1. It is necessary that the act of ratification must be done on behalf of another i.e., the person who seeks to ratify the same.
2. It is necessary that the principal should be in existence and must be in a competent position to contract.
3. No ratification can be made by a person whose knowledge of the facts of the case is materially defective.
4. A principal cannot ratify only those parts of the contract which are favourable to him and disown others. Ratification should essentially made to the whole act.
5. The ratification, if it is injurious to the third party subsequent to it, it becomes invalid i.e., any ratification so made must not be injurious to the third party.
6. For a valid ratification to come into existence, it is required that it should be made within a reasonable time and;
7. The ratification so made may be expressed or implied.

Effect of Ratification: The doctrine of Relation Back

The main effect of ratification is the subsequent authorisation of the act of the agent which was unauthorised previously. Moreover, the contract is deemed to be in existence only on the date of the act done and not on the date of ratification.

(e) **Agency in husband and wife relationship**: The contractual relation of agency in husband and wife can either occur in case of agency by co-habitation or by an agency of necessity. In case of former, a married woman co habiting with her husband is presumed to have the power to pledge the credit of her husband in case of necessities, but in case of the latter even if the husband has deserted the wife, she can use his credit. But, this rule of agency of necessity does not hold good in India as a wife who is deserted can claim maintenance under the personal laws.

Duties of the Agent:

1. **Duty not to delegate his duties**: As per section 190, when a principal has reposed confidence upon the particular agent to accomplish a particular task, he cannot delegate it to others which symbolises the saying, "A delegate cannot further delegate", but there are certain exceptions to it. When it is the custom of trade to that effect, an agent may employ a sub-agent; when the nature of agency requires so; when the so assigned / authorised work is not skill based; or when the principal himself authorises the act. From the above lines, it is easier to understand the boundary and scope of sub-agency where the sub agent is appointed by the agent, wherein the sub agent is responsible to the agent and the agent is responsible to the principal. The principal is not liable for the act of the sub agent unless and until it is fraudulent in nature or a wilful wrong. On the other hand, a substituted agent is one who is appointed in place of the agent to perform the particular act. A substituted agent replaces the sub agent and when he comes in the agent goes out of the picture.

2. **Duty to follow the principle's directions:** An agent is bound to conduct the business of the principal according to the directions given by the principal. If he does not act as stated, if any loss is sustained by the principal, he must make good the loss, and any profit so made must be accounted for.

3. **Duty to show proper skill and care:** An agent is bound to conduct his business with as much skill as it is required to conduct a business of such a kind unless it is so specified by the principle. He is bound to make compensation in respect of the direct consequences on account of his own neglect or want of skill, etc

The other specific duties of an agent are the duties to render proper accounts, communicate with the principal, not to deal on his own account and the duty to pay the sums received for the principle. Section 190 to 217 of the contract act speaks about these defined duties.

Rights of agent and duties of the principal:

(1) **Right to remuneration:** An agent is entitled to receive the remuneration for the work of agency done by him which does not become due to him unless the work is completed. On the other hand, an agent who is guilty of misconduct in agency is not entitled to receive the payment. (Sec. 220)

According to section 220 of the Indian Contract Act. Agent not entitled to remuneration for business misconducted.—An agent who is guilty of misconduct in the business of the agency, is not entitled to any remuneration in respect of that part of the business which he has misconducted. For example - A employs B to recover 1,000 rupees from C. Through B's misconduct the money is not recovered. B is entitled to no remuneration for his services, and must make good the loss. (b) A employs B to recover 1,000 rupees from C. Through B's misconduct the money is not recovered. B is entitled to no remuneration for his services, and must make good the loss."

(2) **Right to retain sums:** The agent has also got the right to retain the sums to be received by the principal in certain cases where the amount of remuneration to be paid to the agent stands in due. (Sec 217)

According to section 217 of the Indian Contract Act An agent may retain, out of any sums received on account of the principal in the business of the agency, all moneys due to himself in respect of advances made or expenses properly incurred by him in conducting such business, and also such remuneration as may be payable to him for acting as agent."

(3) **Right of lien on the principal's property:** When the principal has failed to pay the dues of the agent, the agent has the right to lien on the principal's property until the commission due to him has been paid. (Sec.221)

According to section 221 of the Indian Contract Act

In the absence of any contract to the contrary, an agent is entitled to retain goods, papers, and other property, whether movable or immovable of the principal received by him, until the amount due to himself for commission, disbursements and services in respect of the same has been paid or accounted for to him

(4) **Right to be indemnified:** The principal is bound to indemnify the agent against the consequences of all such lawful acts done by the agent in the exercise of the authority conferred upon him. (Secs. 222, 223) In case of any commission of a crime by the agent, the principal need not indemnify. According to section 222 of the Indian Contract Act - Agent to be indemnified against consequences of lawful acts.—The employer of an agent is bound to indemnify him against the consequences of all lawful acts done by such agent in exercise of the authority conferred upon him. Illustrations - , B a broker at Calcutta, by the orders of A, a merchant there, contracts with C for the purchase of 10 casks of oil for A. Afterwards A refuses to receive the oil, and C sues B. B informs A, who repudiates the contract altogether. B defends, but unsuccessfully, and has to pay damages and costs and incurs expenses. A is liable to B for such damages, costs and expenses.

(b) B, a broker at Calcutta, by the orders of A, a merchant there, contracts with C for the purchase of 10 casks of oil for A. Afterwards A refuses to receive the oil, and C sues B. B informs A, who repudiates the contract altogether. B defends, but unsuccessfully, and has to pay damages and costs and incurs expenses. A is liable to B for such damages, costs and expenses.”

According to section 223 of the Indian Contract Act Where one person employs another to do an act, and the agent does the act in good faith, the employer is liable to indemnify the agent against the consequences of that act, though it may cause an injury to the rights of third persons.

Illustrations –

A, a decree-holder and entitled to execution of B's goods requires the officer of the Court to seize certain goods, representing them to be the goods of B. The officer seizes the goods, and is sued by C, the true owner of the goods. A is liable to indemnify the officer for the sum which he is compelled to pay to C, in consequence of obeying A's directions. (a) A, a decree-holder and entitled to execution of B's goods requires the officer of the Court to seize certain goods, representing them to be the goods of B. The officer seizes the goods, and is sued by C, the true owner of the goods. A is liable to indemnify the officer for the sum which he is compelled to pay to C, in consequence of obeying A's directions.”

(5) Right to compensation for damage due to the principal's neglect: If any injury is suffered by the agent on account of the principal's neglect, then the agent has got the inherent right to claim compensation by way of damages. (Sec. 225)

According to section 225 of the Indian Contract Act The principal must make compensation to his agent in respect of injury¹ caused to such agent by the principal's neglect or want of skill. -- The principal must make compensation to his agent in respect of injury¹ caused to such agent by the principal's neglect or want of skill.” Illustration A employs B as a bricklayer in building a house, and puts up the scaffolding himself. The scaffolding is unskilfully put up, and B is in consequence hurt. A must make compensation to B. A employs B as a bricklayer in building a house, and puts up the scaffolding himself. The scaffolding is unskilfully put up, and B is in consequence hurt. A must make compensation to B.”

It is important to note that as the agent acts on behalf of the principal, the principal is not only liable for his acts which were discussed previously, but is also liable in certain other circumstances.

The question of the principal's liability when the agent exceeds his authority is a question of considerable importance. Even in such cases, the principal may be made liable when the agent's act is within his authority. In cases where the *ultravires* and *intravires* acts can be separable, the principal may not be liable for the *ultravires* acts of the agent. Moreover, a notice to the agent in the course of the business is considered as the notice to the principal. Moreover, when the agent commits fraud or misrepresentation, it will not only terminate the contract, but will also make the principal liable as it is observed in the case of *Lloyd vs. Grace Smith & Co.* The principal is also liable for the torts committed by the agent, but an important point of question is whether such an act was committed in the course of employment. If yes, the principal would be liable and can escape liability otherwise. (*State Bank of India vs. Shyama Devi*).

Moreover an agent may be made liable personally in cases where the principal is in a foreign nation, or when he fails to disclose the identity of his principal. when the principal is not competent to be sued, when agreement itself is in existence to hold personal liability of the agent, or when he commits a breach of legal obligation, etc.

Moreover, as per sec. 233 f the Indian Contract Act, Right of person dealing with agent personally liable.— In cases where the agent is personally liable, a person dealing with him may hold either him or his principal, or both of them liable. —In cases where the agent is personally liable, a person dealing with him may hold

either him or his principal, or both of them liable. Illustration, A enters into a contract with B to sell him 100 bales of cotton, and afterwards discovers that B was acting as agent for C. A may sue either B or C, or both, for the price of the cotton. A enters into a contract with B to sell him 100 bales of cotton, and afterwards discovers that B was acting as agent for C. A may sue either B or C, or both, for the price of the cotton.”

the third party has an option, either to sue the principal or the agent, and in case he has induced the belief that he would sue only one party, he is bound by such a promise i.e., he is estopped from leaping out of such a promise. Moreover, an agreement of agency may be terminated by the revocation of authority; by renunciation of the business of agency by the agent; by the completion of the business of agency; by death or insanity of either of the principal or agent; or by the insolvency of the principal which is discussed in Section 201 of the Indian Contract Act.

UNIT – V

PARTNERSHIP

INDIAN PARTNERSHIP ACT

A partnership is an arrangement in which two or more individuals share the profits and liabilities of a business venture. Various arrangements are possible: all partners might share liabilities and profits equally, or some partners may have limited liability. Partnership is a relationship created by an agreement. It entails the following essentials:

- (1) it is an association of two or more persons
- (2) the persons enter into an agreement to carry on a business
- (3) The persons agree to share the profits or the losses in an agreed ratio
- (4) the business would be carried on by all the partners or any one acting on behalf of all.

These essentials and the definitions thereon find a place in Secs 4, 5 and 6 of the Act.

According to Section 4 in The Indian Partnership Act, 1932

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

According to Section 5 in The Indian Partnership Act, 1932

The relation of partnership arises from contract and not from status; and, in particular, the members of a Hindu undivided family carrying on a family business as such, or a Burmese Buddhist husband and wife carrying business as such, are not partners in such business. State Amendment Goa, Daman and Diu.—In section 5, for the words “Burmese Buddhist husband and wife carrying on business as such”, substitute the words “a husband and wife under the regime of communion of property carrying on business as such”

According to Section 6 in The Indian Partnership Act, 1932

Mode of determining existence of partnership.—In determining whether a group of persons is or is not a firm, or whether a person is or is not a partner in a firm, regard shall be had to the real relation between the parties, as shown by all relevant facts taken together. Explanation 1.—The sharing of profits or of gross returns arising from property by persons holding a joint or common interest in that property does not of itself make such persons partners. Explanation 2.—The receipt by a person of a share of the profits of a business, or of a payment contingent upon the earning of profits or varying with the profits earned by a business, does not of itself make him a partner with the persons carrying on the business; and in particular, the receipt of such share or payment—

- (a) by a lender of money to persons engaged or about to engage in any business,
- (b) by a servant or agent as remuneration,
- (c) by the widow or child of a deceased partner, as annuity, or
- (d) by a previous owner or part owner of the business, as consideration for the sale of the goodwill or share thereof, does not of itself make the receiver a partner with the persons carrying on the business.

These persons are individually called as partners and collectively, the firm. Moreover, partnership is not created by registration, but is created by status. But, the relation of partnership arises from the agreement and not by the virtue of status Eg., If a Hindu undivided family is carrying on a business, is as such not a partnership firm. Therefore each partner is liable for the acts of the firm as well as for the acts of other partner(s). Thus each partner is the agent of the firm as well as the other partners. So, their relationship is also that of a principal – agent *interse*.

REGISTRATION OF FIRMS

Unlike a company, which is created by registration, i.e., by the due process of law, a partnership is not created by registration. It is created by an agreement. Hence registration is not compulsory. But however, the consequences of non registration are grave for the unregistered firm and its partners. Stating briefly, an unregistered firm cannot take the assistance of a civil court to enforce the rights arising out of a contract or conferred by the partnership act. This is granted under sec 58 and 59 of the act.

According to Section 58 in The Indian Partnership Act, 1932

Application for registration.—

- (1) The registration of a firm may be effected at any time by sending by post or delivering to the Registrar of the area in which any place of business of the firm is situated or proposed to be situated, a statement in the prescribed form and accompanied by the prescribed fee, stating,—
 - (a) the firm name,
 - (b) the place or principal place of business of the firm,
 - (c) the names of any other places where the firm carries on business,
 - (d) the date when each partner joined the firm,
 - (e) the names in full and permanent addresses of the partners, and
 - (f) the duration of the firm. The statement shall be signed by all the partners, or by their agents specially authorised in this behalf.
- (2) Each person signing the statement shall also verify it in the manner prescribed.
- (3) A firm name shall not contain any of the following words, namely:— “Crown”, “Emperor”, “Empress”, “Empire”, “Imperial”, “King”, “Queen”, “Royal”, or words expressing or implying the sanction, approval or patronage of 1[Government], except 2[when the State Government] signifies 3[its] consent to the use of such words as part of the firm name by order in writing 4[***]. STATE AMENDMENTS Goa, Daman and Diu.—In section 58,—
 - (i) for sub-section (3), substitute the following sub-section, namely:— “(3) No firm shall be registered by a name which in the opinion of the Registrar is undesirable”.
 - (ii) after sub-section (3), insert the following sub-sections:— “(4) Any person aggrieved by an order of the Registrar under sub-section (3) may, within 30 days from the date of communication of such order, appeal to the State Government whose decision shall be final.
- (5) A firm’s name shall not contain any of the following words, namely, Union, State, President, Republic, Governor or words expressing or implying sanction, approval or patronage of Government unless the Government of Goa, Daman and Diu signifies, by order in writing, its consent to the use of such words as part of the firm’s name: Provided that nothing in this sub-section shall apply to any firm carrying on business under any such name, before the date of the commencement of the Indian Partnership (Goa, Daman and Diu Amendment) Act, 1966.

(6) Any person who contravenes the provisions of sub-section (5) shall be punishable with fine which may extend to five hundred rupees". [Vide Goa, Daman and Diu Act 6 of 1966, sec. 3 (w.e.f. 22-8-1966)].

(Maharashtra)—In section 58,—

(a) in sub-section (1),

(i) for the words "The registration of a firm", substitute the words, brackets, figure and letter "Subject to the provisions of sub-section (1A), the registration of a firm";

(ii) Omit the words "at any time";

(iii) after the words "prescribed fee", insert the words "and a true copy of the deed of partnership";

(iv) after clause (a), insert the following clause, namely:— "(aa) the nature of business of the firm;";

(b) after sub-section (1), insert the following sub-section, namely:— "(1A) The statement under sub-section (1) shall be sent or delivered to the Registrar within a period of one year from the date of constitution of the firm: Provided that in the case of any firm carrying on business on or before the date of commencement of the Indian Partnership (Maharashtra Amendment) Act, 1984 (Maharashtra Act 29 of 1984), such statement shall be sent or delivered to the Registrar within a period of one year from such date.";

(c) for sub-section (3), substitute the following sub-sections, namely:— "(3) A firm shall not have any of the names or emblems specified in the Schedule to the Emblems and Names (Prevention of Improper Use) Act, 1950 (12 of 1950), or any colourable imitation thereof, unless permitted so to do under that Act, or any name which is likely to be associated by the public with the name of any other firm on account of similarity, or any name which, in the opinion of the Registrar for reasons to be recorded in writing, is undesirable: Provided that nothing in this sub-section shall apply to any firm registered under any such name before the date of the commencement of the Indian Partnership (Maharashtra Amendment) Act, 1984 (Maharashtra Act 29 of 1984).

(4) Any person aggrieved by an order of the Registrar under sub-section (3) may, within 30 days from the date of communication of such order, appeal to the officer not below the rank of Deputy Secretary to Government authorised by the State Government in this behalf, in such manner, and on payment of such fee, as may be prescribed. On receipt of any such appeal, the authorised officer shall, after giving an opportunity of being heard to the appellant decide the appeal, and his decision shall be final". - [Vide Maharashtra Act 29 of 1984, sec. 6 (w.e.f. 1-1-1985)].

(Pondicherry)—In section 58, for sub-section (3), substitute the following sub-sections, namely:— "(3) The Registrar shall refuse to register—

(a) a firm under sub-section (1) or

(b) an alteration of the firm name, if the proposed name or alteration of the firm name is identical with the name of which any other existing firm has been registered or in the opinion of the Registrar so nearly resembles such other name as to be likely to deceive or mislead the public or the members of either firm.

(4) Any person who is aggrieved by an order of Registrar under sub-section (3) may file an appeal before such person or authority, in such manner, within such time and on payment of such fees as may be prescribed. The appeal shall be heard and decided in such manner as may be prescribed." [Vide Pondicherry Act 8 of 1969, sec. 2 (w.e.f. 1-1-1970)].

(Rajasthan)—In section 58, for sub-section (3), substitute the following sub-sections namely:— "(3) No firm shall be registered by a name which, in the opinion of the State Government, is undesirable.

- (4) Except with the previous sanction, in writing, of the State Government, no firm shall be registered by a name which contains any of the following words, namely:—
- (a) ‘Union’, ‘State’, ‘President’, ‘Republic’ or any word expressing or implying the sanction, approval or patronage of the Central or any State Government; and
- (b) ‘Municipal’, ‘Chartered’ or any word which suggests or is calculated to suggest connection with any municipality or local authority: Provided that nothing in this sub-section shall apply to any firm registered before the date of commencement of the Indian Partnership (Rajasthan Amendment) Act, 1971.” [Vide Rajasthan Act 10 of 1971, sec. 2 (w.e.f. 15-9-1971)]. Tamil Nadu.—Same as in Rajasthan, except that in the proviso to sub-section (4), for the words “Indian Partnership (Rajasthan Amendment) Act, 1971” substitute the words “Indian Partnership (Madras Amendment) Act, 1965”. [Vide Tamil Nadu Act 35 of 1965, sec. 2 (w.e.f. 1-4-1966)].

According to Section 59 in The Indian Partnership Act, 1932

Section 59 in The Indian Partnership Act, 1932

59. Registration.—When the Registrar is satisfied that the provisions of section 58 have been duly complied with, he shall record an entry of the statement in a register called the Register of Firms, and shall file the statement.

1. STATE AMENDMENTS

(Maharashtra) —Renumber section 59 as sub-section (1) of that section, and,—

- (a) in sub-section (1) as so renumbered, after the words “file the statement”, insert the words “on the date such entry is recorded and such statement is filed, the firm shall be deemed to be registered,”;
- (b) after sub-section (1) as so renumbered, insert the following sub-section, namely:— “(2) The firm, which is registered, shall use the brackets and word “(Registered)” immediately after its name”. [Vide Maharashtra Act 29 of 1984, sec. 7 (w.e.f. 1-1-1985)].
- Section 59A Andhra Pradesh.—After section 59, insert the following section, namely:— “59A. Amendment of the Register of Firms.—(1) Notwithstanding anything in this Chapter, the Registrar of Firms, Andhra Pradesh, may, by order in writing, amend the register by deleting therefrom the entries relating to any firm, whose place of business has, by virtue of the provisions contained in the States Reorganisation Act, 1956 and the Andhra Pradesh and Madras (Alteration of Boundaries) Act, 1959, ceased to be in the Andhra Pradesh; the Registrar may likewise amend the register by adding thereto the entries relating to any firm included in the register of another State but, whose place of business has, by reason of the said provisions, become included in the State of Andhra Pradesh: Provided that the Registrar shall, before passing an order under this sub-section, give to the firm concerned an opportunity of making its representation, if any.
- (2) The Registrar shall cease to perform the functions of a Registrar under the Act in respect of any firm the entries relating to which are deleted as aforesaid and shall perform the functions of a Registrar under the Act in respect of any firm the entries relating to which are added as aforesaid.
- (3) Any person aggrieved by an order under sub-section (1) may appeal to such authority and within such time as may be specified in this behalf by an order made by the Government of the Andhra Pradesh, and such Authority shall pass such order on the appeal as it thinks fit.
- (4) An order of the Registrar under sub-section (1), or where an appeal has been preferred against it under sub-section (3), the order of the appellate authority, shall be final.” [Vide Andhra Pradesh Act 7 of 1965, sec. 2 (w.e.f. 10-3-1965)].

(Kerala) —After section 59, insert the following section, namely:— “59A. Amendment of Register.—(1) Notwithstanding anything contained in this Chapter, the Registrar of Firms appointed by the State of Kerala may, by order in writing, amend the register by deleting therefrom the entries relating to any firm whose place of business has, by reason of the reorganisation of States, ceased to be situated in the State of

Kerala. The Registrar may likewise amend the register by adding thereto the entries relating to any firm included in the register of the State of Madras but whose place of business has, by reason of the said reorganisation of States, become part of the State of Kerala: Provided that the Registrar shall, before passing an order, make such inquiry as he deems necessary.

(2) After such amendment the Registrar shall cease to perform the functions of a Registrar in respect of any firm the entries relating to which have been deleted as aforesaid and shall perform all the functions of a Registrar in respect of all firms the entries relating to which are added as aforesaid.

(3) Any person aggrieved by an order under sub-section (1) may appeal to such authority and within such time as may be specified in this behalf by the State Government of Kerala and such authority shall pass such order on the appeal as it thinks fit.

(4) An order of the Registrar under sub-section (1), or where an appeal has been preferred against it under sub-section (3), the order of the appellate authority, shall be final.

(5) The provisions of this section shall cease to be in force from such date as the State Government of Kerala may, by notification in the Gazette, appoint." [Vide Kerala Adaptation of Laws (No. 2) Order, 1957 (w.e.f. 30-10-1957)]. Madhya Pradesh.—After section 59, insert the following section, namely:—
"59A. (1) Notwithstanding anything contained in this Chapter, the Registrar of Firms appointed by the State of Madhya Pradesh may, by order in writing, amend the register by deleting therefrom the entries relating to any firm, whose place of business has, by reason of the reorganisation of States, ceased to be situated in the State of Madhya Pradesh. The Registrar may likewise amend the register by adding thereto the entries relating to any firm included in the register of another State but whose place of business has, by reason of the said reorganisation of States, become part of the State of Madhya Pradesh: Provided that the Registrar shall, before passing an order, make such inquiry as he deems necessary.

(2) After such amendment the Registrar shall cease to perform the functions of a Registrar in respect of any firm the entries relating to which have been deleted as aforesaid and shall perform all the functions of a Registrar in respect of all firms the entries relating to which are added as aforesaid.

(3) Any person aggrieved by an order under sub-section (1) may appeal to such authority and within such time as may be specified in this behalf by the State Government of Madhya Pradesh, and such authority shall pass such order on the appeal as it thinks fit.

(4) An order of the Registrar under sub-section (1), or where an appeal has been preferred against it under sub-section (3), the order of the appellate authority shall be final.

(5) The provisions of this section shall cease to be in force from such date as the State Government of Madhya Pradesh may, by notification in the State Gazette, appoint." [Vide Madhya Pradesh Adaptation of Laws (State and Concurrent Subjects) (Third Amendment) Order, 1957 (w.r.e.f. 1-11-1956)].

(Maharashtra)—(i) After section 59, insert the following section, namely:— "59A. Deletion and addition of entries relating to certain firms, by reason of reorganisation of States.—

(1) Notwithstanding anything contained in this Chapter, a Registrar of Firms appointed for any area by the Government of Bombay may, by order in writing, amend the Register of Firms maintained by him by deleting therefrom the entries relating to any firm, whose place of business has, by reason of the reorganisation of States under the States Reorganisation Act, 1956, ceased to be situated in the State of Bombay. The Registrar may likewise and without any charge or fee therefor amend the Register by adding thereto the entries relating to any firm included in the Register of another State but whose place of business has, by reason for such reorganisation, become part of the area within his jurisdiction in the State of Bombay: Provided that the Registrar shall, before passing any order under

this sub-section, make such inquiry as he deems necessary and give notice to the firm and the Registrar of the State concerned.

- (2) After such amendment, the Registrar shall cease to perform the functions of a Registrar in respect of any firm the entries relating to which have been deleted as aforesaid and shall perform the functions of a Registrar in respect of any firm the entries relating to which are added as aforesaid.
 - (3) Any person aggrieved by an order under sub-section (1) may appeal to such authority, and within such time, as may be specified in this behalf by the Government of Bombay by notification in the Official Gazette; and such authority shall pass such order on the appeal as it thinks fit.
 - (4) An order of a Registrar under sub-section (1), or when an appeal has been preferred against it under sub-section (3), the order of the appellate authority shall be final.
 - (5) The provisions of this section shall cease to be in force from such date as the Government of Bombay may, by notification in the Official Gazette, appoint." [Vide Central Acts on State and Concurrent Subjects (Bombay Adaptation) (Amendment) Order, 1957 (w.e.f. 17-10-1957)]. Section 59A1.
- (ii) After section 59, insert the following section, namely:— "59A1. Late registration on payment of penalty.—If the statement in respect of any firm is not sent or delivered to the Registrar within the time specified in sub-section (1A) of section 58, then the firm may be registered on payment, to the Registrar, of a penalty of one hundred rupees per year of delay or a part thereof." [Vide Maharashtra Act 29 of 1984, sec. 8 (w.e.f. 1-1-1985)]. Mysore (Karnataka).—In section 59A, in sub-section (1), for the words "by reason of the reorganisation of States", the words, brackets, etc., "by reason of the addition of the Bellary district to the State of Mysore under the Andhra Pradesh State Act, 1953 (Central Act 30 of 1953), or of the reorganisation of States under the States Reorganisation Act, 1956 (Central Act 37 of 1956)" shall be substituted. [Vide Mysore Act 19 of 1961, sec. 2 (w.e.f. 14-9-1961)]. Note.—This amendment relates to section 59A as introduced by Madras Adaptation of Laws (Central Acts) Order, 1957. Tamil Nadu.—After section 59, insert the following section, namely:— "59A. Special provision for amending the register.—(1) Notwithstanding anything contained in this Chapter, the Registrar of Firms appointed by the State Government of Madras may, by order in writing, amend the register by deleting therefrom the entries relating to any firm, the place of business of which has, by reason of the formation of the State of Andhra or of the addition of the Bellary district to the State of Mysore under the Andhra State Act, 1953 or of the reorganisation of States under the States Reorganisation Act, 1956, or of the alteration of boundaries under the Andhra Pradesh and Madras (Alteration of Boundaries) Act, 1959, ceased to be located in the State of Madras. The Registrar may likewise amend the register by adding thereto the entries relating to any firm included in the register of another State but the place of business of which has, by reason of the said reorganisation of States or of the said alteration of boundaries, become part of the State of Madras: Provided that the Registrar may, before passing an order, make such inquiry as he deems necessary.
- (2) After such amendment the Registrar shall cease to perform the functions of the Registrar in respect of any firm the entries relating to which have been deleted as aforesaid and shall perform all the functions of a Registrar in respect of all firms the entries relating to which are added as aforesaid.
 - (3) Any person aggrieved by an order under sub-section (1) may appeal to such authority and within such time as may be specified in this behalf by the State Government of Madras, and such authority shall pass such order on the appeal as it thinks fit.
 - (4) An order of the Registrar under sub-section (1), or where an appeal has been preferred against it under sub-section (3), the order of the appellate authority shall be final.

(5) The provisions of this section shall cease to be in force from such date as the State Government of Madras may, by notification in the Official Gazette, appoint." [Vide Tamil Nadu (Added Territories) Adaptation of Laws Order, 1961 (w.r.e.f. 1-4-1960)]. Section 59B

(Gujarat) —After section 59A, insert the following section, namely:— "59B. Deletion of entries relating to certain firms by reason of reorganisation of Bombay State.—

- (1) Notwithstanding anything contained in this Chapter, a Registrar of Firms appointed for any area by the Government of Gujarat may, by order in writing, amend the Register of Firms maintained by him by deleting therefrom the entries relating to any firm whose place of business has, by reason of the reorganisation of the State of Bombay, by the Bombay Reorganisation Act, 1960, ceased to be situated in the State of Gujarat: Provided that the Registrar shall, before passing any order under this sub-section, make such inquiry as he deems necessary and give notice to the firm and the Registrar of the State of Maharashtra.
- (2) After such amendment the Registrar shall cease to perform the functions of a Registrar in respect of any firm the entries relating to which have been deleted as aforesaid.
- (3) Any person aggrieved by an order under sub-section (1) may appeal to such authority and within such time as may be specified in this behalf by the Government of Gujarat, by notification in the Official Gazette; and such authority shall pass such order on the appeal as it thinks fit.
- (4) An order of a Registrar under sub-section (1), or where an appeal has been preferred against it under sub-section (3), the order of the appellate authority shall be final." [Vide Gujarat Adaptation of Laws (State and Concurrent Subjects) (Eighth Amendment) Order, 1961 (w.r.e.f. 1-5-1960)].

(Maharashtra) —After section 59A, insert the following section, namely:— "59B.—Same as in Gujarat, except that—

- (i) in the marginal note, for the words "re-organisation of Bombay State", substitute the words 'formation of State of Gujarat';
- (ii) in sub-sections (1) and (3), for the word "Gujarat", substitute the word "Maharashtra", and in the proviso, for the word "Maharashtra", substitute the word "Gujarat";
- (iii) in sub-section (1), for the words "by reason of re-organisation of the State of Bombay", substitute the words "by reason of the formation of the State of Gujarat". [Vide Central Acts on State and Concurrent Subjects (Maharashtra Adaptation) (Amendment) Order, 1961 (w.r.e.f. 1-5-1960)].

GENERAL DUTIES OF THE PARTNERS

The partners are bound –

1. To carry on the business of the firm to the greatest common advantage ;
2. To be just and faithful to each other
3. To render true accounts and full information of all things affecting the firm to any party or his legal representatives.
4. Every partner shall indemnify the firm for any loss caused to it by his fraud in the conduct of the business of firm.

The mutual rights and duties of the partners are determined by contract between the partners. Such a contract may be express or implied.

RIGHTS OF THE PARTNERS

The partnership agreement may entail the following rights upon the partners:

1. Every partner has a right to take part in the conduct of the business

2. every partner is bound to act diligently to his duties in the conduct of the business
3. any difference arising out of the ordinary matters connected with the business may be decided by a majority of partners.

Having seen the expressly available rights, it becomes necessary to have a look at the implied authorities available :

1. Sell the goods of the firm
2. Purchase on account of the firm any goods necessary for the firm
3. Receive payment or debts due to the firm and give receipts or releases for them
4. Accept, make , issue bills and other negotiable instruments in the name of the firm
5. Borrow money on credit of the firm

Although the implied authority is granted to the partners, such an authority is not extensive. There are some acts which a partner has got the right to do in his express authority i.e., provided he is expressly authorised to do it.

As per Sec 20, the partners may enter into a contract between themselves to extend or restrict the implied authority of any partner. Moreover, as per Sec 21, A partner has an authority in an emergency to do such acts which are necessary.

According to Section 20 in The Indian Partnership Act, 1932

Extension and restriction of partner's implied authority.—The partners in a firm may, by contract between the partners, extend or restrict the implied authority of any partner. Notwithstanding any such restriction, any act done by a partner on behalf of the firm which falls within his implied authority binds the firm, unless the person with whom he is dealing knows of the restriction or does not know or believe that partner to be a partner.

According to Section 21 in The Indian Partnership Act, 1932

Partner's authority in an emergency.—A partner has authority, in an emergency, to do all such acts for the purpose of protecting the firm from loss as would be done by a person of ordinary prudence, in his own case, acting under similar circumstances, and such acts bind the firm

Section 24 grants that a notice to the partner is a notice to the firm except in cases of a fraud committed by the partner or the firm.

According to Section 24 in The Indian Partnership Act, 1932

Effect of notice to acting partner.—Notice to a partner, who habitually acts in the business of the firm of any matter relating to the affairs of the firm operates as notice to the firm, except in the case of a fraud on the firm committed by or with the consent of that partner.

NCOMING AND OUT GOING PARTNER

Section 31 provides that the consent of all the existing partners is required to introduce a new person as a partner in the firm.

A partner may retire —

1. with the consent of all the other partners
2. according to an expressed agreement
3. if the partnership is at will, by giving notice in writing to all the other parties of his intention to retire.

According to Section 31 in The Indian Partnership Act, 1932

Introduction of a partner.—

- (1) Subject to contract between the partners and to the provisions of section 30, no person shall be introduced as a partner into a firm without the consent of all the existing partners.
- (2) Subject to the provisions of section 30, a person who is introduced as a partner into a firm does not thereby become liable for any act of the firm done before he became a partner.

OUTGOING PARTNER'S RIGHTS (SECTION 36 and 37)

An outgoing partner may have the following rights

1. He is entitled to share such profits made since he ceased to be a partner as may be attributable to the use of his share of the property of the firm,
2. He is entitled to interest at the rate of six percent per annum on the amount of his share in the property of the firm.

According to Section 36 in The Indian Partnership Act, 1932

Right of outgoing partner to carry on competing business.—

- (1) An outgoing partner may carry on a business competing with that of the firm and he may advertise such business, but, subject to contract to the contrary, he may not,—
 - (a) use the firm name,
 - (b) represent himself as carrying on the business of the firm, or
 - (c) solicit the custom of persons who were dealing with the firm before he ceased to be a partner.
- Agreements in restraint of trade.—(2) A partner may make an agreement with his partners that on ceasing to be a partner he will not carry on any business similar to that of the firm within a specified period or within a specified local limits; and, notwithstanding anything contained in section 27 of the Indian Contract Act, 1872 (9 of 1872), such agreement shall be valid if the restrictions imposed are reasonable.

According to Section 37 in The Indian Partnership Act, 1932

Right of outgoing partner in certain cases to share subsequent profits.—Where any member of a firm has died or otherwise ceased to be a partner, and the surviving or continuing partners carry on the business of the firm with the property of the firm without any final settlement of accounts as between them and the outgoing partner or his estate, then, in the absence of a contract to the contrary, the outgoing partner or his estate is entitled at the option of himself or his representatives to such share of the profits made since he ceased to be a partner as may be attributable to the use of his share of the property of the firm or to interest at the rate of six per cent. per annum on the amount of his share in the property of the firm: Provided that where by contract between the partners an option is given to surviving or continuing partners to purchase the interest of a deceased or outgoing partner, and that option is duly exercised, the estate of the deceased partner, or the outgoing partner or his estate, as the case may be, is not entitled to any further or other share of profits; but if any partner assuming to act in exercise of the option does not in all material respects comply with the terms thereof, he is liable to account under the foregoing provisions of this section.

DISSOLUTION OF THE FIRM

Dissolution of the partnership (owing to retirement, death or insolvency of a partner) merely involves change in the relation of the partners but it does not end the firm; the partnership would certainly come to an end but the firm, the reconstituted one might continue under the same name. So the dissolution of the partnership may or may not include the dissolution of the firm but the dissolution of the firm necessarily

means the dissolution of the partnership. On dissolution of the firm, the business of the firm ceases to exist since its affairs are wound up by selling the assets and by paying the liabilities and discharging the claims of the partners. The dissolution of partnership among all partners of a firm is called dissolution of the firm.

(i) **Dissolution by Agreement:** A firm is dissolved in case

- all the partners give consent or
- as per the terms partnership agreement .

(ii) **Compulsory dissolution :** A firm is dissolved compulsorily in the following cases

- When all the partners or all excepting one partner becomes insolvent or of unsound mind.
- When the business becomes unlawful.
- When all the partners excepting one decide to retire from the firm.
- When all the partners or all excepting one partner die.
- A firm is also dissolved compulsorily if the partnership deed includes any provision regarding the happening of the following events

- (a) expiry of the period for which the firm was formed,
- (b) completion of the specific venture or project for which the firm was formed.

(iii) **Dissolution by notice :** In case of a partnership at will, the firm may be dissolved if any one of the partner gives a notice in writing to the other partners.

(iv) **Dissolution by Court:** A court may order a partnership firm to be dissolved in the following cases:

- (a) When a partner becomes of unsound mind
- (b) When a partner becomes permanently incapable of performing his/her duties as a partner,
- (c) When partner deliberately and consistently commits breach of agreements relating to the management of the firm;
- (d) when a partner's conduct is likely to adversely affect the business of the firm;
- (e) when a partner transfers his/her interest in the firm to a third party;
- (g) When the court regards dissolution to be just and equitable.

CONCLUSION

Partnership is the simplest form of combination to carry on a business. It arises when two or more people carry on business together with the object of making a profit. It requires no formalities and no registration. It is very flexible.

Partnerships have existed for many centuries. The rules of partnership law fall into two parts: external rules, which govern relations between the partnership and those dealing with it (customers, etc); and internal rules which govern relations between the partners themselves.

Model Question Paper
B.A.B.L.(Hons) Degree (Semester) Examinations
Contracts II

Time – 2 ½ hours

Maximum Marks: 70 marks

Part A – (2X12=24 marks)

Answer TWO of the following in about 500 words each

- 1) Explain the rights and duties of an Indemnity holder in an indemnity contract.
- 2) Discuss the concept of coextensive liability in a contract of guarantee
- 3) Discuss the doctrine of elections in a partnership contract.

Part B – (2X7=14 marks)

Answer TWO of the following in about 300 words each

- 4) What are the various ways in which a agency contract can be terminated?
- 5) Explain the importance of conditions and warranties in a contract of sale.
- 6) Discuss the rights of a partner in a partnership contract

Part C – (5X4=20 marks)

7) Writes notes on FIVE of the following

- (a) Continuing guarantee
- (b) Foreign Agents
- (c) Undisclosed Principal
- (d) Sub Agents
- (e) Rights and Duties of a surety
- (f) Retirement of partners
- (g) General Lien and Particular Lien

Part D – (2X6=12 marks)

Answer TWO of the following by referring to the provision of law and decided cases. Give Cogent reasons

- 8) A is an agent who never wishes to disclose the fact that he is working as a agent of some principal. During the agency, A was made liable to pay compensation to a third party injury. The undisclosed principal refuses to indemnify A. Decide whether A has any remedy.
- 9) Raj takes an insurance policy for his car from three insurance companies for the same risk and for the same cover. Raj claims insurance from only one insurance company when his car was lost. The other insurance companies failed to share the loss. Decide the rights of the insurance company that indemnified Raj.
- 10) A, is a partner in a firm where he was disgruntled and so he wrote against the interest of the firm to many people outside the firm. The other partners decided to keep A outside the firm and so A decides to sue the firm. Decide

KEY

Part A – (2X12=24 marks)

Answer TWO of the following in about 500 words each

- 1) Write about sec 125 of the Indian contract Act
- 2) The liability of the surety is coextensive with that of the debtor. Sec 128 of the Indian contract act
- 3) Write about minor's right to be a partner. Minor is having the right to be a partner for profits and not for losses. Analyse the modus operandi in Partnership Act which gives the minor the right to elect to continue or discontinue in the firm after becoming major.

Part B – (2X7=14 marks)

Answer TWO of the following in about 300 words each

- 4) By notice, death of the parties, renunciation by agent, by operation of law etc.
- 5) Differentiate and mention the relevant provisions in the Sale of Goods Act
- 6) Mention all the rights as given in the Partnership Act

Part C – (5X4=20 marks)

7) Write notes on FIVE of the following

- a) Continuing guarantee as given in Indian contract Act. It can be revoked only prospectively
- b) Foreign Agents - Agents who are working for foreign nationals.
- c) Undisclosed Principal - Agent does not disclose the principal (refer to sec 219 & 220)
- d) Sub Agents - Exception to Delegatus non Potest Delegare
- e) Rights and Duties of a surety - Subrogation, Contribution, Lien etc as given in Contract Act
- f) Retirement of partners - Mention the rights, duties and liabilities of partners
- g) General Lien and Particular Lien - Differentiate and refer to sec 171 of the Indian Contract Act

Part D – (2X6=12 marks)

Answer TWO of the following by referring to the provision of law and decided cases. Give Cogent reasons

- 7) A is an agent who never wishes to disclose the fact that he is working as an agent of some principal. During the agency, A was made liable to pay compensation to a third party injured. The undisclosed principal refuses to indemnify A. Decide whether A has any remedy.

Key - A has the right to disclose the undisclosed Principal. Refer to sec 219 & 220 of the Indian Contract Act

- 8) Raj takes an insurance policy for his car from three insurance companies for the same risk and for the same cover. Raj claims insurance from only one insurance company when his car was lost. The other insurance companies failed to share the loss. Decide the rights of the insurance company that indemnified Raj.

Key - The insurance company has the rights of contribution as per the principles of indemnity

- 9) A, is a partner in a firm where he was disgruntled and so he wrote against the interest of the firm to many people outside the firm. The other partners decided to keep A outside the firm and so A decides to sue the firm. Decide

Key - As per the provisions of the partnership act every partner has a right to participate in the working of the firm but Delhi high court recently held that the partners cannot express against the interest of the firm.