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Department of Master of Business Administration

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I MBA I Semester

Subject

BUSINESS AND LEGAL ENVIRONMENT

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BUSINESS AND LEGAL ENVIRONMENT

Unit Wise Subject Notes

Page Numbers

UNIT 1

Part 1

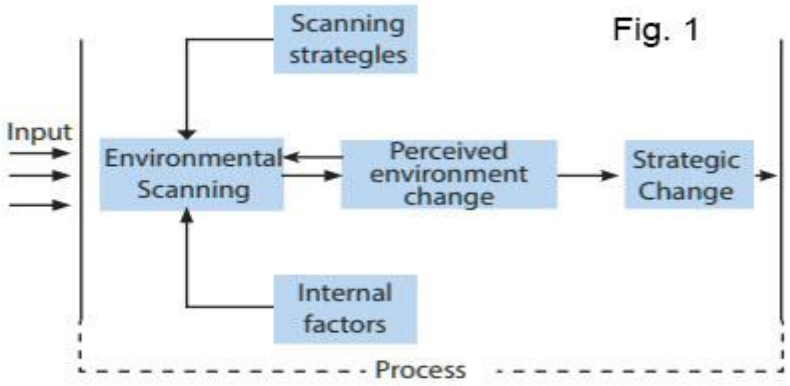
Business Environment

<u>environmental scanning</u>

Every organization has an internal and external environment. In order for the organization to be successful, it is important that it scans its environment regularly to assess its developments and understand factors that can contribute to its success. Environmental scanning is a process used by organizations to monitor their external and internal environments.

The purpose of the scan is the identification of opportunities and threats affecting the business for making strategic business decisions. As a part of the environmental scanning process, the organization collects information regarding its environment and analyzes it to forecast the impact of changes in the environment. This eventually helps the management team to make informed decisions.

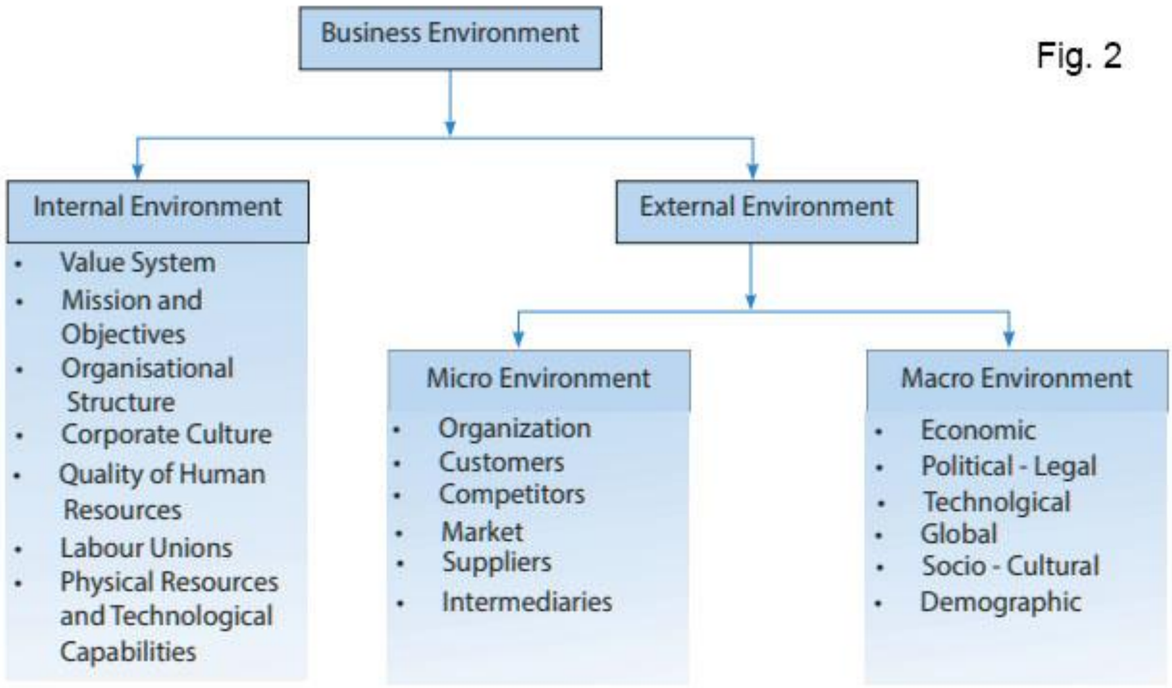
Fig. 1



As seen from the figure above, environmental scanning should primarily identify opportunities and threats in the organization's environment. Once these are identified, the organization can create a strategy which helps in maximizing the opportunities and minimizing the threats. Before looking at the important factors for environmental scanning, let's take a quick peek at the components of an organization's environment.

Components of a Business Environment

Fig. 2



As you can see above, the internal environment of an organization consists of various elements like the value system, mission/objectives of the organization, structure, culture, quality of employees, labor unions, technological capabilities, etc. These elements lie within the organization and any changes to them can affect the overall success of the business.

On the other hand, an organization cannot operate in a vacuum. Also, there are many factors outside the walls of an organization which affects the functions of the business. These factors constitute the external environment of an organization.

IMPORTANCE OF ENVIRONMENTAL SCANNING:

Environmental scanning plays an important role in the business process of an organization. There are many advantages of performing environmental analysis that helps the organization to stay safe from the business loss and to stay ahead in the competition.

1. By performing environmental analysis, you can learn about the strengths, opportunities, opportunities available, and threats lurking around the industry. Having knowledge about all

these things you can take a decision regarding your business and can reform your business strategies.

2. The environmental analysis helps us to determine whether the resources such as human resource, capital resource, etc. are being used properly or not. It helps us to curb down the wastage of these important resources.

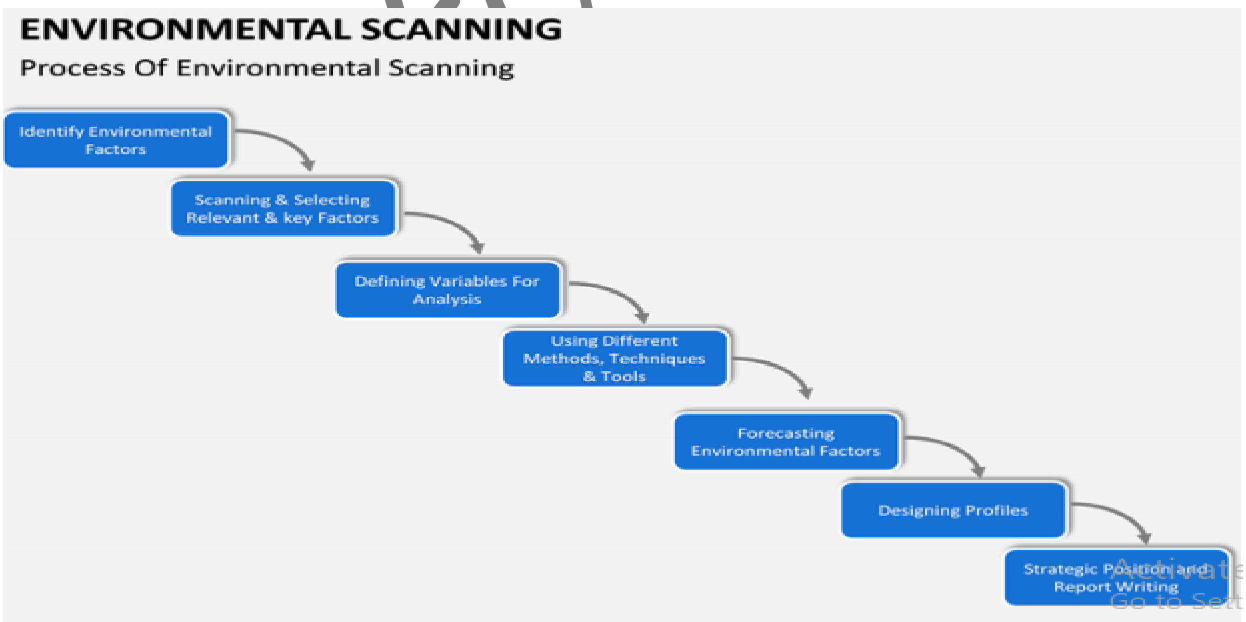
3. Constant environment scanning helps the organization to learn about the opportunities and threats occurring in the industry and on the basis of that information future strategies can be planned and implemented. Hence, it helps the organizations to stay strong in the game.

4. Environmental scanning helps you to learn about the business strategies of your competitors. You can take ideas from the strategies and can also form your strategies accordingly so that you can give constant competition to them.

5. The data collected from environmental scanning plays an important role in long-term business planning.

6. Environmental scanning helps you to stay connected with your consumers. You can learn about the changing expectations of your consumers and provide them services accordingly.

PROCESS OF ENVIRONMENTAL SCANNING: PURPOSE OF ENVIRONMENTAL SCANNING:



Industrial Policy

After Independence, the Government of India adopted an approach to develop Industrial sector of India. India adopted several Industrial Policy resolution to develop the Industrial sector.

Industrial Policy Resolution, 1948.

Industrial Policy Resolution, 1956.

Monopolies and Restrictive Trade Practices Act, 1969.

Liberalisation of Industrial Policy Regime, 1980s.

New Industrial Policy, 1991.

Industrial Policy Resolution, 1948.

The resolution was issued on April 6, 1948. The resolution accepted the importance of both private and public sectors for the development of the industrial sector.

The 1948 Resolution also accepted the importance of the small and cottage industries as they are suited for the utilization of local resources and are highly labour intensive.

The 1948 Resolution divided the Industries into following four categories.

Industries with State Monopoly	Mixed Sector	Government Control Sectors	Private Enterprises
• Arms and Ammunition. • Atomic Energy. • Rail Transport.	• Coal • Iron & Steel. • Aircraft Manufacturing. • Shipbuliding. • Telephone & Telegraph Manufacturing. • Wireless Apparatus. • Mineral Oils.	• 18 Industries of National importance were included in this category. • The government did not directly undertook production in these sectors nut decided to regulate them.	• All the industries not included in the mentioned three categories were left open to the Private Sector.

Industrial Policy Resolution, 1956.

The Policy Resolution of 1956, laid the following objectives for the growth of the Industrial sector:

1. To accelerate the rate of growth and to speed up the pace of Industrialization.
2. To develop heavy industries and machine making industries.
3. Expansion of Public Sector.
4. To reduce disparities in Income and Wealth.
5. Development of a competitive Cooperative Sector.
6. To Prevent concentration of Business in few hands and Restriction in Creation of Monopolies.

The objectives were chosen carefully with the aim of creating employment and reducing poverty.

The 1956 Resolution further divided the Industries into three Categories.

Monopoly of the State.

- 17 industries were chosen which were exclusively reserved for Public Sector.
- Arms & Ammunition, Atomic energy, Railway and Air transport were to be monopolies of the state.
- Remaining 13 industries will have only state as new entrants, with already existing private firms.

Mixed Sector.

- 12 Industries were included which were all mineral industries, road transport, sea transport, machine tool, ferroalloys, chemical industries like manufacturing of drugs, antibiotics, fertilizers, rubber etc.
- Chemical pulp, carbonization of coal, aluminium and other non-ferrous metals.

Private Sector.

- All industries not included in the other two categories.
- These Industries were left open to the private sector.

To sum up, the 1956 Resolution, emphasized on the mutual dependence and existence of the public and private sectors. The only 4 industries in which private sector are not allowed were Arms & Ammunition, Railways, Air Transport and Atomic Energy. In all other sector, either private sector was allowed to operate freely or will provide help to the government sector as and when needed.

Industries (Development & Regulation) Act, 1951.

The Industries Act was passed by the Parliament on October 1951 to control and regulate the process of Industrial development in the country. The Acts main task was to regulate the Industrial sector.

The specific objectives of the Act were:

1. Regulation of Industrial Investment and Production according to Five Year Plans.
2. Protection of small-scale enterprises from giant enterprises.
3. Prevention of Monopolies and concentration of ownership of industries in few hands.
4. Balanced Growth and Equitable development of all the regions.
5. It was also believed that the State is best suited to promote balanced growth by; channelizing investment in the most important sectors; Correlate supply and demand; eliminate competition; ensure optimum utilization of social capital.

Problems of the Excessive Restrictions imposed by the Government.

Liberalization measures adopted in the 1980s

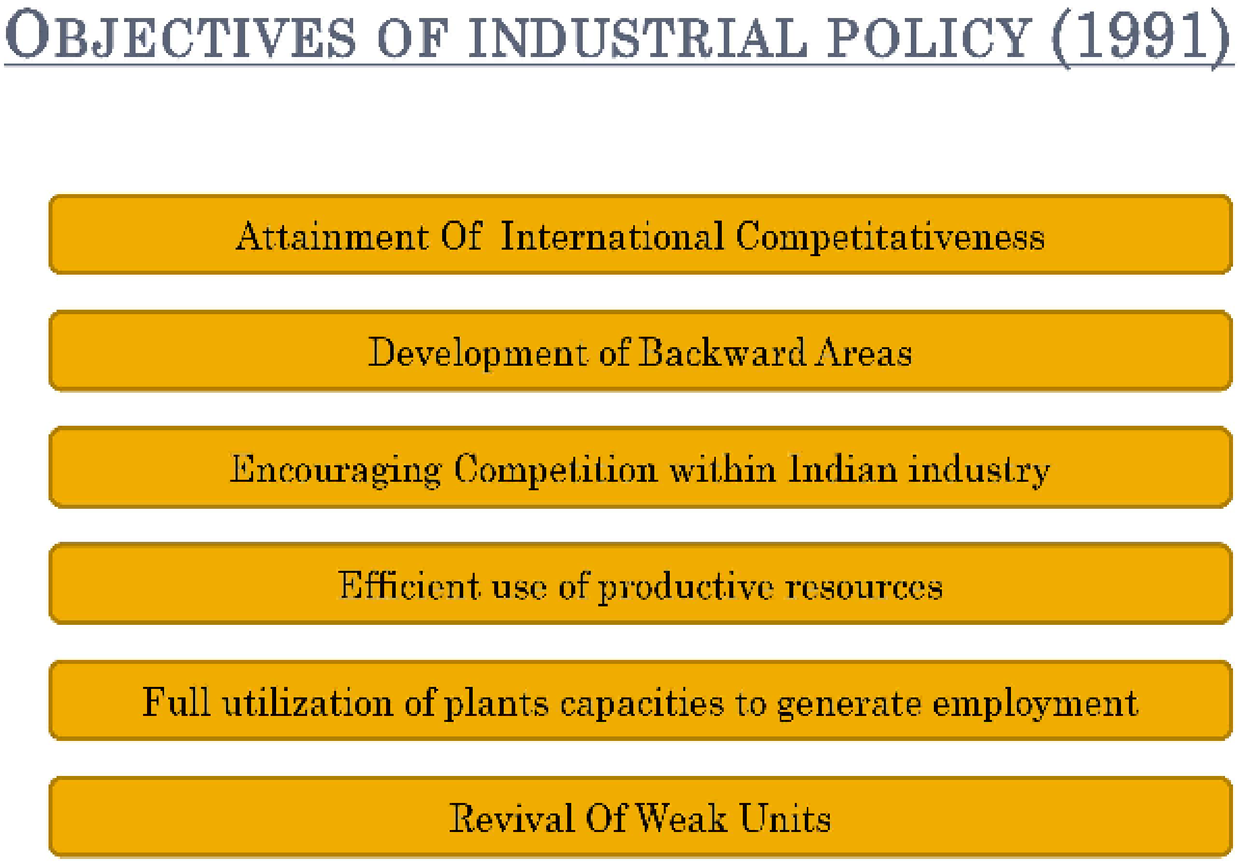
1. Exemption from Licensing.
2. Relaxation to MRTP Act and FERA guidelines.
3. Delicensing of large range of industries.
4. Re-endorsed of capacity: Benefits were granted under this scheme to industries who successfully achieve capacity utilization of 90 percent.
5. Broad Banding of Industries: Under this, the government branded the industries into broad categories. For example; cars, jeeps, tractors, light and heavy commercial vehicles are branded as Four-Wheelers.

6. Promotion of Economies of scale in production processes to reduce cost by allowing firms to expand.
7. Development of Backward Areas.
8. Incentives were provided to the Exporters.
9. Promotion of Small Scale Industries by increasing their Investment limits.

New Industrial Policy, 1991

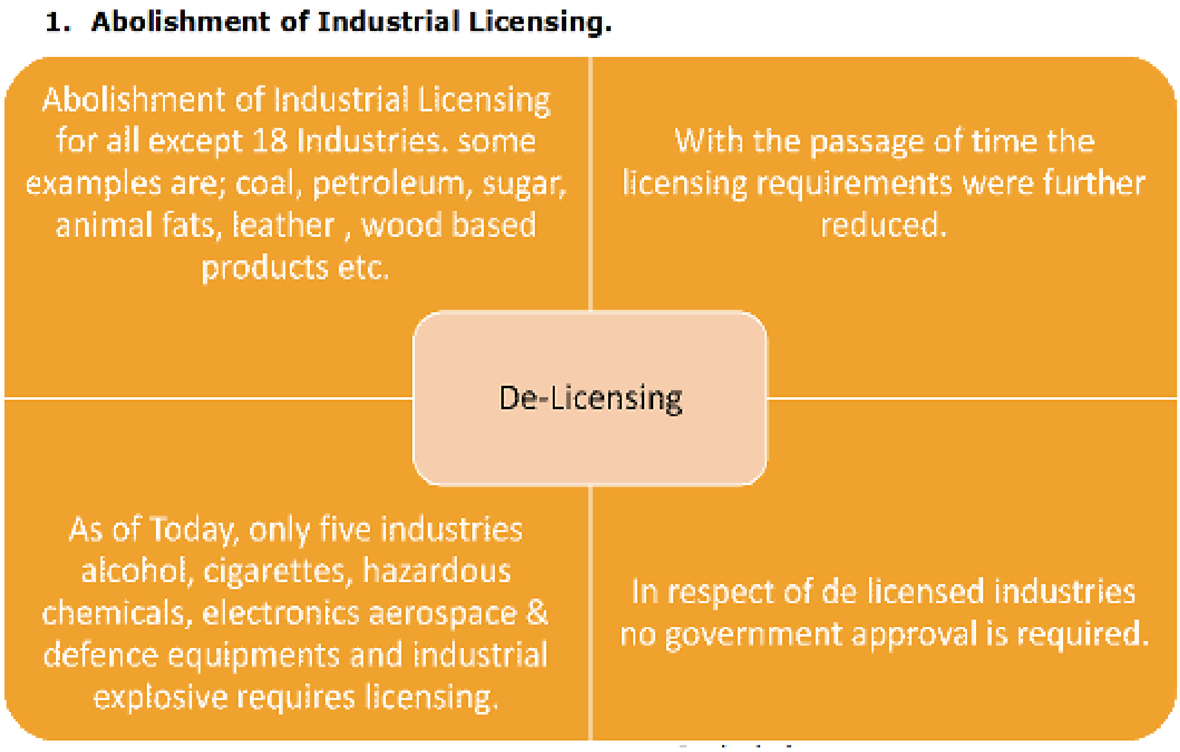
In the backdrop of severe Balance of Payment Crisis of 1991, the Government in continuation of the measured announced during the 1980s announced a New Industrial Policy on July 24, 1991.

The new industrial policy was a major structural break for the Indian economy. The policy has deregulated the Industrial sector in a substantial manner. The major aims of the new policy were; to carry forward the gains already made in the industrial sector; Correct the existing market distortion from the industrial sector; to provide gainful and productive employment; to attain global competitiveness.

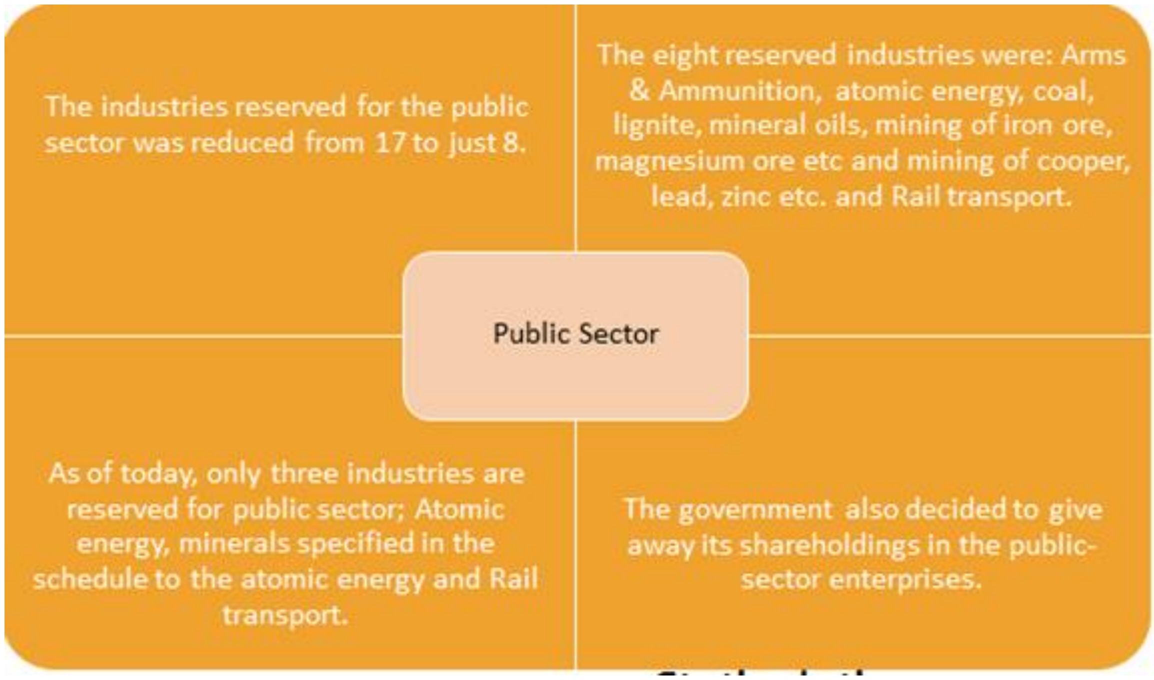


The Government announced series of Initiative in respect of the following areas:

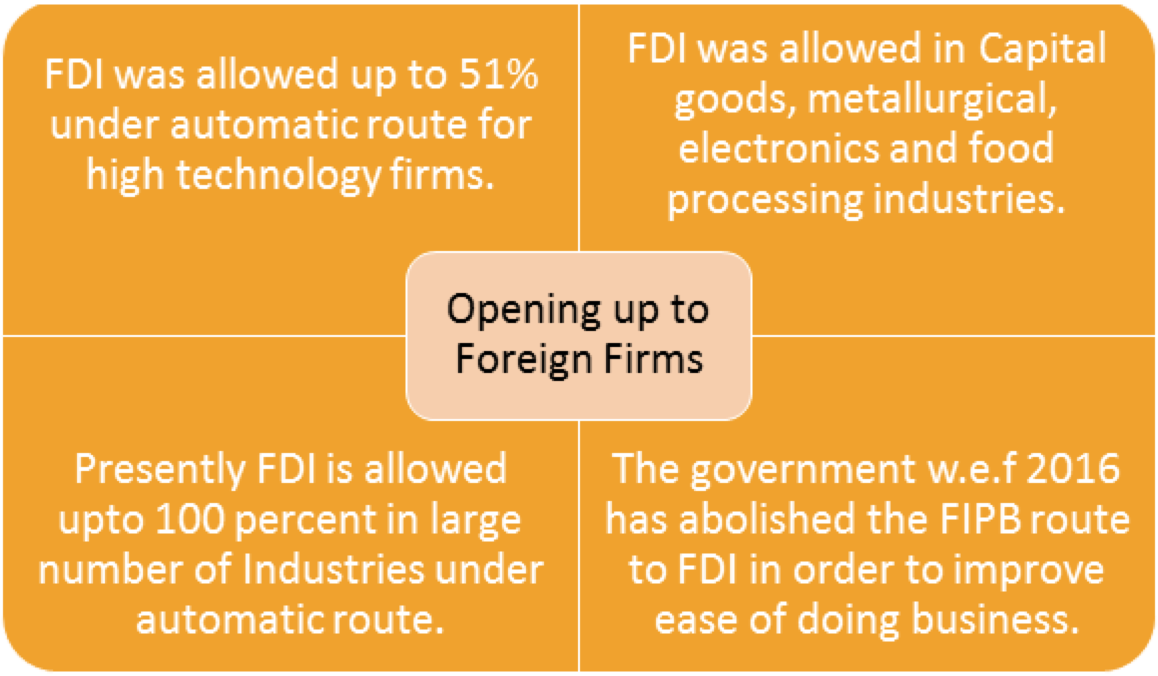
Abolishment of Industrial Licensing



Role of Public Sector Reduced Substantially



Entry of Foreign Firms and Investments



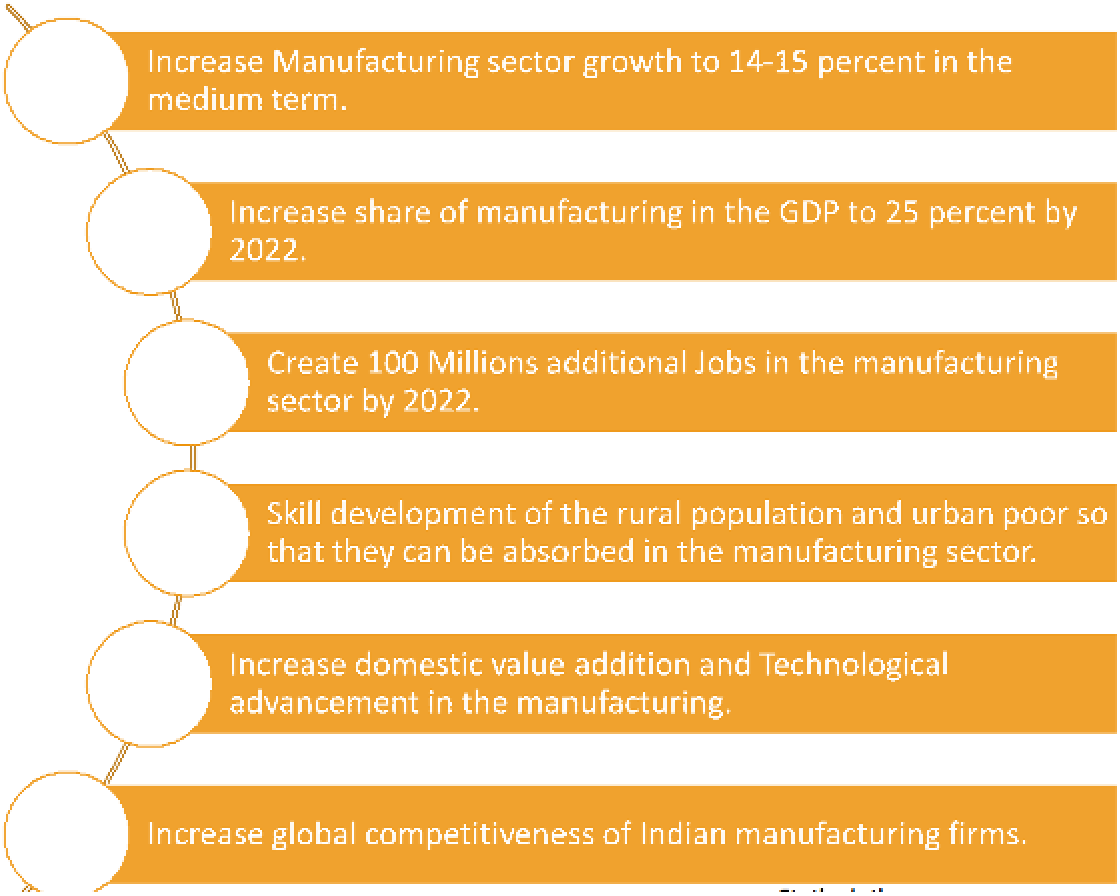
<u>National Manufacturing Policy, 2011</u>

The success of India's economic story has mainly been due to service's sector growth. Despite strong policy measures, the industrial sector (especially manufacturing) has stagnated. The maximum contribution of the sector in the overall GDP is close to 15%, which is far less than that of other emerging economies like China (whose share is close to 45%). As a result of which, India has failed to provide gainful employment to its massive labour force.

Lack of employment in the manufacturing sector has put excessive pressure on the agriculture sector to provide employment, which is not possible under any economic model. The result of this is the phenomenon called "Jobless Growth", which is specific to India.

The Government recognising this fact and in order to promote manufacturing sector launched National Manufacturing Policy on November 2011.

Objectives of the National Manufacturing Policy



Government Policy support under NMP

1. The manufacturing policy proposes to create an enabling environment for the growth of manufacturing in India.
2. The NMP envisages simplification of business regulations significantly.
3. The NMP proposes the development of the MSMEs sector. The proposal includes technological upgradations of the MSMEs; adoption of business-friendly policies; equity investments.
4. Skill Development of the youth is the most important part of the NMP.
5. Setting up of National Investment and Manufacturing Zones(NIMZ) with significant incentives like easy land acquisitions, integrated industrial township development, world-class physical infrastructure.
6. A total of 12 NMIZ have been announced so far by the government. Out of the total 12, 8 NIMZ are located in the Delhi-Mumbai Industrial Corridor. Other 4 NMIZ is planned to build in; Nagpur; Tumkur (Karnataka); Chittoor (Andhra Pradesh); Medak (Andhra Pradesh).

Make in India Program

Make in India is a campaign launched by the government of India on 25 September 2015. The aim of the Make in India program is to project India as an efficient and competitive powerhouse of global manufacturing. The program aims to convert India into "World's

Factory" by promoting and developing India as a leading manufacturing destination and a Hub for the production of manufacturing goods.

Make in India is essentially an invitation to the foreign companies to come and invest in India on the back of the Government promise to create an environment easy for doing business. But contrary to public perception, no specific concessions have been offered to foreign investors under this scheme till date.

The government since the launch of the program is trying to make India an attractive destination for global Multinationals by focussing on ease of doing business, liberal FDI regime, improving the quality of Infrastructure and Business-friendly policies.

The need for the program

1. The share of Industrial Manufacturing in India's GDP is 14-15%, which is way below its actual potential. The program aims to increase this share to 25%.
2. India's economic performance is a story of "Jobless Growth". India has failed to generate jobs for his youth entering the labour force. The main reason for low job creation is that the manufacturing sector has failed to take off and still remains dismal.
3. If India failed to develop a competitive manufacturing sector now than it will be trapped in a "Middle Income Trap", where India will not be able to grow at a higher growth rate (India will remain a middle-income country with a deficient and uncompetitive economic system).
4. No country in the World has become rich and developed without developing its Manufacturing sector. The story is true for Britain (Industrial Revolution), USA (In the 1900s), Japan (Since 1950s), East Asian Tigers (In 1970s), China (Since 1990s).
5. The employment elasticity of the manufacturing sector is highest. Manufacturing is the only sector that has the potential to create jobs at a faster rate and absorb excess labour from agriculture. A weak manufacturing sector, therefore, is a curse for the economy.
6. The service led growth as witnessed by India since 1991 reforms is not sustainable in the long run as the employment elasticity of the services sector is one of the lowest.
7. People start consuming services on a large scale once they cross a certain minimum threshold of Income. In the absence of minimum threshold income, the demand for services will stagnate in the future and the phenomenon of the service led growth will be reversed.
8. The key for India to sustain its service-led growth is to make sure that its manufacturing sector is well developed. A well-developed manufacturing sector will absorb low skilled labours from agriculture sector and employ the productively in factories. Similarly, the high skilled workers will be employed in the High-Tech End of Manufacturing like Electrical Engineering, Aerospace, Automobiles, Defence Manufacturing etc.
9. Moreover, the benefits from the programme are likely to be multiple and can address issues on economic growth and employment generation as well as fuel consumer demand.
10. Having said that, the success of the Make in India programme lies in India building capabilities to manufacture world-class products at competitive prices. In today's dynamic world, achieving the same is far more complex as the variables which impact business are extremely fluid and require businesses to be extremely flexible and adaptive to changes in the environment and technology.

How Government is supporting the Program

• Improving Ease of Doing Business and promoting use of technology;

• Opening up of new sectors for FDI, undertaking de-licensing and deregulation of the economy on a vast scale;

• Introduction of new and improved infrastructure through industrial corridors, industrial clusters and smart cities;

• Strengthening IPR infrastructure to nurture innovation; and

• Building a new mindset in government to partner industry instead of working as a regulator in Economic Growth of the country.

What is Fiscal Policy?

Fiscal policy is the means by which a government adjusts its spending levels and tax rates to monitor and influence a nation's economy. It is the sister strategy to monetary policy through which a central bank influences a nation's money supply. These two policies are used in various combinations to direct a country's economic goals. Here we look at how fiscal policy works, how it must be monitored and how its implementation may affect different people in an economy.

Before the Great Depression, which lasted from Sept. 4, 1929, to the late 1930s or early 1940s, the government's approach to the economy was laissez-faire. Following World War II, it was determined that the government had to take a proactive role in the economy to regulate unemployment, business cycles, inflation and the cost of money. By using a mix of monetary and fiscal policies (depending on the political orientations and the philosophies of those in power at a particular time, one policy may dominate over another), governments can control economic phenomena.

Fiscal policy is based on the theories of British economist John Maynard Keynes. Also known as Keynesian economics, this theory basically states that governments can influence macroeconomic productivity levels by increasing or decreasing tax levels and public spending. This influence, in turn, curbs inflation (generally considered to be healthy when between 2-3%), increases employment and maintains a healthy value of money. Fiscal policy is very important to the economy. For example, in 2012 many worried that the fiscal cliff, a simultaneous increase in tax rates and cuts in government spending set to occur in January

2013, would send the U.S. economy back to recession. The U.S. Congress avoided this problem by passing the American Taxpayer Relief Act of 2012 on Jan. 1, 2013.

Balancing Act

The idea, however, is to find a balance between changing tax rates and public spending. For example, stimulating a stagnant economy by increasing spending or lowering taxes runs the risk of causing inflation to rise. This is because an increase in the amount of money in the economy, followed by an increase in consumer demand, can result in a decrease in the value of money - meaning that it would take more money to buy something that has not changed in value.

Let's say that an economy has slowed down. Unemployment levels are up, consumer spending is down, and businesses are not making substantial profits. A government thus decides to fuel the economy's engine by decreasing taxation, which gives consumers more spending money, while increasing government spending in the form of buying services from the market (such as building roads or schools). By paying for such services, the government creates jobs and wages that are in turn pumped into the economy. Pumping money into the economy by decreasing taxation and increasing government spending is also known as "pump priming." In the meantime, overall unemployment levels will fall.

With more money in the economy and fewer taxes to pay, consumer demand for goods and services increases. This, in turn, rekindles businesses and turns the cycle around from stagnant to active.

If, however, there are no reins on this process, the increase in economic productivity can cross over a very fine line and lead to too much money in the market. This excess in supply decreases the value of money while pushing up prices (because of the increase in demand for consumer products). Hence, inflation exceeds the reasonable level.

For this reason, fine tuning the economy through fiscal policy alone can be a difficult, if not improbable, means to reach economic goals. If not closely monitored, the line between a productive economy and one that is infected by inflation can be easily blurred.

And When the Economy Needs to Be Curbed …

When inflation is too strong, the economy may need a slowdown. In such a situation, a government can use fiscal policy to increase taxes to suck money out of the economy. Fiscal policy could also dictate a decrease in government spending and thereby decrease the money in circulation. Of course, the possible negative effects of such a policy, in the long run, could be a sluggish economy and high unemployment levels. Nonetheless, the process continues as the government uses its fiscal policy to fine-tune spending and taxation levels, with the goal of evening out the business cycles.

Who Does Fiscal Policy Affect?

Unfortunately, the effects of any fiscal policy are not the same for everyone. Depending on the political orientations and goals of the policymakers, a tax cut could affect only the middle class, which is typically the largest economic group. In times of economic decline and rising taxation, it is this same group that may have to pay more taxes than the wealthier upper class.

Similarly, when a government decides to adjust its spending, its policy may affect only a specific group of people. A decision to build a new bridge, for example, will give work and more income to hundreds of construction workers. A decision to spend money on building a new space shuttle, on the other hand, benefits only a small, specialized pool of experts, which would not do much to increase aggregate employment levels.

That said, the markets also react to fiscal policy. For example, in response to President Trump's proposed corporate tax deduction plans, the S&P has been trading higher according to Barclays.

The Bottom Line

One of the biggest obstacles facing policymakers is deciding how much involvement the government should have in the economy. Indeed, there have been various degrees of interference by the government over the years. But for the most part, it is accepted that a degree of government involvement is necessary to sustain a vibrant economy, on which the economic well-being of the population depends.

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Definition: Monetary policy is the macroeconomic policy laid down by the central bank. It involves management of money supply and interest rate and is the demand side economic policy used by the government of a country to achieve macroeconomic objectives like inflation, consumption, growth and liquidity.
Description: In India, monetary policy of the Reserve Bank of India is aimed at managing the quantity of money in order to meet the requirements of different sectors of the economy and to increase the pace of economic growth. The RBI implements the monetary policy through open market operations, bank rate policy, reserve system, credit control policy, moral persuasion and through many other instruments. Using any of these instruments will lead to changes in the interest rate, or the money supply in the economy. Monetary policy can be expansionary and contractionary in nature. Increasing money supply and reducing interest rates indicate an expansionary policy. The reverse of this is a contractionary monetary policy.

For instance, liquidity is important for an economy to spur growth. To maintain liquidity, the RBI is dependent on the monetary policy. By purchasing bonds through open market operations, the RBI introduces money in the system and reduces the interest rate.

Monetary Policy of India: Main Elements and Objectives!

Monetary Policy of India is formulated and executed by Reserve Bank of India to achieve specific objectives. It refers to that policy by which central bank of the country controls(i) the supply of money, and (ii) cost of money or the rate of interest, with a view to achieve particular objectives.

In the words of D.C. Rowan, "The monetary policy is defined as discretionary act undertaken by the authorities designed to influence (a) the supply of money, (b) cost of money or rate of interest, and (c) the availability of money for achieving specific objective."

Thus, monetary policy of India refers to that policy which is concerned with the measures taken to regulate the volume of credit created by the banks. The main objectives of monetary policy are to achieve price stability, financial stability and adequate availability of credit for growth.

Following are the main elements of the monetary policy of India:

i. It regulates the stocks and the growth rate of money supply.

ii. It regulates the entire banking system of the economy.

iii. It determines the allocation of loans among different sectors.

iv. It provides incentives to promote savings and to raise the savings-income ratio.

v. It ensures adequate availability of credit for growth and tries to achieve price stability.

Objectives of Monetary Policy:

According to RBI Governor Dr. D. Subba Rao, "The objectives of monetary policy in India are price stability and growth. These are pursued through ensuring credit availability with stability in the external value of rupee and overall financial stability."

Following are the main objectives of monetary policy:

i. To Regulate Money Supply in the Economy:

Money supply includes both money in circulation and credit creation by banks. Monetary policy is farmed to regulate the money supply in the economy by credit expansion or credit contraction. By credit expansion (giving more loans), the money supply can be expanded. By credit contraction (giving less loans) money supply can be decreased.

The main aim of the monetary policy of the Reserve Bank was to control the money supply in such a manner as to expand it to meet the needs of economic growth and at the same time contract it to curb inflation. In other words monetary policy aimed at expanding and contracting money supply according to the needs of the economy.

ii. To Attain Price Stability:

Another major objective of monetary policy in India is to maintain price stability in the country. It implies Control over inflation. Price level, is affected by money supply. Monetary policy regulates money supply to maintain price stability.

iii. To promote Economic Growth:

An important objective of monetary policy is to make available necessary supply of money and credit for the economic growth of the country. Those sectors which are quite significant for the economic growth are provided with adequate availability of credit.

iv. To Promote saving and Investment:

By regulating the rate of interest and checking inflation, monetary policy promotes saving and investment. Higher rates of interest promote saving and investment.

v. To Control Business Cycles:

Boom and depression are the main phases of business cycle. Monetary policy puts a check on boom and depression. In period of boom, credit is contracted, so as to reduce money supply and thus check inflation. In period of depression, credit is expanded, so as to increase money supply and thus promote aggregate demand in the economy.

vi. To Promote Exports and Substitute Imports:

By providing concessional loans to export oriented and import substitution units, monetary policy encourages such industries and thus help to improve the position of balance of payments.

vii. To Manage Aggregate Demand:

Monetary authority tries to keep the aggregate demand in balance with aggregate supply of goods and services. If aggregate demand is to be increased than credit is expanded and the interest rate is lowered down. Because of low interest rate, more people take loan to buy goods and services and hence aggregate demand increases and vice-verse.

viii. To Ensure more Credit for Priority Sector:

Monetary policy aims at providing more funds to priority sector by lowering interest rates for these sectors. Priority sector includes agriculture, small- scale industry, weaker sections of society, etc.

ix. To Promote Employment:

By providing concessional loans to productive sectors, small and medium entrepreneurs, special loan schemes for unemployed youth, monetary policy promotes employment.

x. To Develop Infrastructure:

Monetary policy aims at developing infrastructure. It provides concessional funds for developing infrastructure.

xi. To Regulate and Expand Banking:

RBI regulates the banking system of the economy. RBI has expanded banking to all parts of the country. Through monetary policy, RBI issues directives to different banks for setting up rural branches for promoting agricultural credit. Besides it, government has also set up cooperative banks and regional rural banks. All this has expanded banking in all parts of the country.

RBI monetary policy today: Four things to watch out for

The Reserve Bank of India (RBI) will announce its monetary policy decision at 2:30pm in Mumbai followed by a press conference 15 minutes later

Mumbai: The Reserve Bank of India's (RBI) monetary policy committee (MPC) is scheduled to announce its policy decision at 2:30pm on Wednesday. Given the rising risk of inflation overshooting the central bank's target, the market is expecting status quo on policy rates.

All 15 economists **surveyed** by *Mint* expect the MPC to keep the key repo rate—the rate at which the central bank infuses liquidity in the banking system (or lends to banks)—unchanged at 6%.

Beyond the rate action, here are four things to watch out for in the monetary policy:

Inflation forecasts: Since the last policy rate cut in August, inflation, as measured by consumer price index (CPI)-based inflation has risen by 190 basis points to reach a five-month high. One basis point is a hundredth of a percentage point. The latest data showed CPI inflation quickened to 3.36% in August on higher food prices. Even core inflation, which excludes the volatile component of food and fuel, shot up sharply. Given the base effect during the second half of the fiscal year, economists expect inflation to jump further, breaching the 4% target in early 2018. Other risks, including the impact of monsoon on food price inflation, rising global crude prices and impact of goods and services tax (GST), could also push inflation higher.

Growth forecasts: Economic growth slowing to 5.7% year-on-year for the April-June quarter has sparked debate over the need to cut policy rates. The drop in GDP growth has shown that the impact of one-off events like demonetisation and GST implementation could play out much longer than expected. The six-member MPC is, therefore, expected to give a dovish outlook, acknowledging a slowdown in growth. Economists also expect the central bank to cut its current projection of real gross value added (GVA), a measure of growth, of 7.3% for the current fiscal year.

Commentary on government finances: As economic growth has been slowing for five quarters, the pressure is building on the government to announce a stimulus package to spur growth. Though the government has stuck to its budgeted borrowing target for this fiscal and also committed to meet the fiscal deficit target of 3.2%, it has not ruled out additional borrowing after a review in December. Total expenditure of the central government has grown at 7.5%, despite a muted growth in revenues at 2.1% during April-July 2017. The central government's fiscal deficit has already touched 92% of the budget estimates. Economists expect the policy document to flag the issue of stretched government finances as it could be inflationary in nature. RBI governor Urjit Patel warned against farm loan waivers stating that they increase fiscal risks and pose an upside risk to inflation outlook.

Voting pattern: In the previous policy, four out of six members voted for a rate cut. This time too economists expect that the decision to keep rates on hold may not be unanimous. Ravindra Dholakia, one of the three external members of the MPC, who is perceived to be an eternal dove, is expected to press for further easing, while Michael Patra is expected to stick to his hawkish stance.

First Published: Wed, Oct 04 2017. 09 33 AM IST

	Monetary Policy	Fiscal Policy
Tool	Interest rates	Tax and government spending
Effect	Cost of borrowing/mortgages	Budget deficit
Distribution	Higher interest rates hit homeowners but benefit savers	Depends which taxes you raise.
Exchange rate	Higher interest rates cause appreciation	No effect on exchange rate
Supply-side	Limited impact	Higher taxes may affect incentives to work
Politics	Monetary policy set by independent Central Bank	Changing tax and government spending highly political.
Liquidity trap	Cuts in interest rates may not work in liquidity trap	Fiscal policy advised in very deep recessions

Unit II

LAW OF CONTRACT-1872

- Came in to force on 1^{st}sep 1872
- Amended in 1886 ,1891,1930,1932 -1997
- Not applicable to all types of contracts
- Meaning:-sec-2(h) defines law of contract as “an agreement enforceable at law”.
- Requirements

1. Two parties (offeror & offeree)
2. Agreement (offer & acceptance)
3. Legal obligation

- All agreements are not contracts
- All obligations also do not constitute contracts
- Contract results from a combination of agreement and obligation.
- An agreement may exist without any legal obligation but a contract cannot.
- Law of contract is confined only to legal but not to domestic obligations.
- Law of contract is not the whole law of agreement nor is it the whole law of obligation.
- It is the law of those agreements which create obligations and those obligations which have their sources in agreements.

Essential elements of a valid contract

1. Agreement: - communication by the parties to one another their intention to create relationship – proposal (offer)-acceptance.
2. Competent parties: - (i) age of majority (ii) possess sound mind (iii) not subject to any other legal disqualifications.
3. Free consent: - understanding the same thing in the same sense, consent without any fear or favor.
4. Consideration: - something in return.

5. Legal object:- object of the agreement should be legal, should not violate the provisions of some law or not relate to matters which are forbidden by law
6. Not expressly declared void:- by any law in the court.
7. Compliance with legal formalities (a) writing (b) registration

(a) Writing:

- Time barred debt
- Lease agreements for a period of more than three years
- Contracts of insurance
- N.I Act
- Articles of association
- Transfer of immovable properties

(b) Registration:

- A promise made without consideration out of natural love &affection.
- Documents of which registration is compulsory u/sec-17 of the Registration Act.
- Contracts relating to immovable properties under T.P Act 1882.
- M.o. Articles of Association, Debentures, Mortgages and changes under the companies Act of 1956.Offer
- u/sec-2 (e) – "every promise and every set of promises forming consideration for each other is called an agreement"

Offer (or) Proposal:

2(a)- "when one person signifies to another his willingness to do or to abstain from doing anything with a view to obtaining the assent of that other to such an act or abstinence ,he is said to make an offer or proposal" – it consists of two parts.

i. A promise by the offerer to do or abstain from doing something.
ii. And a request to the offeree for giving his acceptance (i.e.) offerer is not bound by his promise until the offeree accepts unconditionally.

Essentials of a valid offer

1. Intention to create legal relations

- Offer to perform legal or moral act

2. Offer must be clear and specific not loose or vague

- May lay down any terms and conditions in his offer
- But they should be certain and legal

Ex:-Horse to be purchased only if it proves to be lucky.

3. Different from an answer to a question

- Mere answer to a question cannot be taken as an offer

Ex:-Will you sell your white car? Mail the lowest cash price.

- Mere invitation to an offer is also not a valid offer

Ex: - Catalogue, advtments, tenders, job prospectus, auctions

- Mere statement of intention

Ex:-Father-in-law to son-in –law.

4. Offer must be made with a view to act or abstinence by the offeree

- Should not dictate terms

5. Offer must be communicated

Ex: - Missing son and offering money

6. Special conditions attached to an offer must also be communicated,

Ex: - Specification on the ticket

TYPES OF OFFER

1. General &Special offers

general- world at large

special- specific individual

2. Express & Implied offers

express - expressed by words spoken or written

implied - conduct (bus route)

3. Positive and Negative offers

positive - to do something in favour

negative - to not to do which effects either of the party.

4. Cross offers

Two offers similar in all respects, made by one party to another in ignorance of each others' offer.

ACCEPTANCE

Sec- 2(b) –when the person to whom the offer is made signifies his assent there to, the proposal is said to be accepted.

- Thus acceptance is the consent of the party to whom the offer has been made to the establishment of legal relations between himself and the offerer.
- It is an assent to the terms of the offer.

Who can give acceptance?

- It can be given only by the person to whom the offer is made , if the offer is made to public at large then anybody can come forward and accept the offer

Essentials of valid acceptance

1. Acceptance may be Express or Implied

Express – written or spoken

Implied - conduct

2. Absolute & unqualified

- It must correspond with all the terms of the offer
- Must be accepted in Toto
- No conditions in acceptance (if done will be a counter offer)

3. Must be in the mode prescribed

- should be given in the prescribed mode
- If the proposer doesn't reject it is deemed to have accepted
- If the proposer has not prescribed any mode, it must be in some usual and reasonable manner.

Ex: - Offer is accepted in terms of an ordinary letter rather than a telegram.

4. Silence cannot be prescribed as a mode of acceptance

- Offerer cannot impose the burden on the person to whom the offer is made to reply under all circumstances

5. Acceptance can be given only for that offer which has been communicated

- There can be no acceptance of an uncommunicated offer.
- Acts done in ignorance of proposal will not amount to acceptance of the offer.

Ex: - Resignation accepted before he changed his mind

6. Acceptance must be communicated

- Mere mental acceptance not evidence by words or conduct in the eyes of law is no acceptance.

7. Acceptance of the proposal will mean acceptance of all the terms of the offer.

8. Acceptance must be given within the time stipulated (or) within reasonable time

9. If the proposal is made through an agent, it is enough if the acceptance is communicated to him.

10. Acceptance in order to be valid, must be made under circumstances which would show that the acceptor is able and willing then &there to fulfill the promise.

11. If acceptance has been given by a person "subject to a formal contract" or "subject to approval by certain person such as solicitors etc is not a valid contract".

Communication of offer & acceptance (sec-4)

- In the absence of physical presence when the contracting parties are living at a distance and services of the proposal should reach and should come to the knowledge of the person to whom the offer has been made.
- Mere delivery does not make the communication of offer by post complete.
- When the letter of acceptance reaches the proposer or not, the offer is deemed to be accepted only when the letter of acceptance is posted.

Revocation of offer & acceptance

Offer – sec-5: states that a proposal may be revoked any time before its acceptance is complete as against the proposer but not afterwards. Revocation of a proposal after its acceptance is ineffective.

Acceptance – sec-5: acceptance may be revoked at any time before communication of acceptance is complete as against the acceptor, but not after wards.

Revocation of offer by following ways (sec-6)

(i) By communication of the notice of revocation

- Notice to the offeree before the offer is accepted
- Either expressly or by conduct
- It will take in to effect only when it comes to the knowledge of the offeree.
- It should come from the offerer (or) his agent but not from any other source.

(ii) By lapse of the specified time

- Offer stands revoked after the lapse of the specified time

(iii) By the failure of the acceptor to fulfill a condition precedent to the acceptance

(iv) By the death or insanity of the proposer

- If it comes to the knowledge of the acceptor before acceptance.
- If the proposer dies after the acceptance of the offer, the legal representative of the proposer shall be bound by the contract.

(v) By a counter offer

- Will also amount to a revocation of the original offer .

Contracts by post

- Offer is completed when it reaches only to the offeree.
- Acceptance is deemed to be complete when it is posted, properly addressed.
- If revocation and acceptance reaches simultaneously who ever has opened first decides the issue.
- Telegram – simultaneously – it is deemed to be revoked by phone.
- It should be audible, clearly heard.
- If the call is abruptly disturbed or cut, it cannot be taken into account, another call has to be made.
- When parties negotiate a contract face to face, the question of dispute over revocation does not arise because everything is definite.

Ex:- Anson:- Train of gunpowder with a lighted match.

CONSIDERATION

- Consideration is the essential element of a valid contract.
- Consideration, broadly speaking is the price said by the promisee for the obligation of the promisor – " *quid pro quo*" (i.e.) "something in return"
- An agreement without consideration is a bare promise and is not binding on the parties – "*ex nudopacto non aritioactio*"
- Consideration need not be a benefit to the promisor. If the promisee has suffered some loss or detriment, it will be taken as a sufficient consideration for the promisor to fulfill the promise.

Sec- 2(d) :- "when at the desire of the promisor , the promisee or any other person has done or abstained from doing or promises to do or to abstain from doing something, such act or abstinence, or promise is called a consideration for the promise"

- Consideration therefore may be described as something accepted or agreed upon as a return, or equivalent for the promise made.
- It implies some benefit to the promisor.

Essential elements of consideration.

1. Consideration should be furnished at the desire of the promisor.

- Distinction must be made between purely voluntary acts and acts done at the instance of the other party.
- It is not necessary that the promisor himself should be benefited by the consideration.

2. Consideration may move from the promisee or any other person.

- Consideration furnished by a third party will also valid if it has been done at the desire of the promisor. "doctrine of constructive consideration"

3. Consideration may be a promise to do something or abstain to do something.

- Negative or positive

4. Consideration must be past, present or future.

5. Must be an independent consideration to support each independent promise.

6. Consideration must be real and not illusory , illegal, impossible, uncertain,ambiguous , fraudulent ,immoral or opposed to public policy .

- Sec-23 of the act says "it should not cause injury to any person or property if allowed to be exchanged.

7. Consideration must be valuable in the eyes of law.

8. Adequacy of consideration

- It need not be adequate
- Inadequacy of consideration will not invalidate a contract.

Exceptions

1. Completed gifts :- promise without consideration is a gift

- Absence of consideration shall not effect the validity as between the donor and the donee if any gift actually made – sec-25(2).
- Gifts once made cannot be recovered on the ground of absence of consideration.

2. Promise made on account of natural love and affection –sec- 21(1)

3. Promise to compensate for voluntary services – sec- 25 (2)

4. Promise to pay a time barred debt- sec-23-(3) there should be a distinct, definite or express promise to pay the debt.

5. Contacts of agency – sec- 185 of I.C Act, consideration is not required to create an agency.

Legality of the object & consideration:-

- Consideration is the act, abstinence or promise made at the desire of the promise where as the object is the purpose for which the agreement is entered in to.

Ex: - purchase of arms to wage a war

Consideration object.

Unlawful consideration and object

Sec- 23 – shall be unlawful in the following cases

1. If it is forbidden by law : it has expressly been declared to be unlawful by any of the laws of the country which is being in force.

Ex; - selling of smuggled goods

2. If it is of such a nature that , if permitted , it would defeat the provisions of law

Ex: - defaulter is prohibited from purchasing the estate.

3. If it is fraudulent (i.e.) the object is to cheat the other party by concealment of any material fact or otherwise.

4. If it involves or implies injury to the person or property of another

5. If the court regards it as immoral or opposed to public policy.

Public policy and Public interest

P.P:- it is that principle of law which provides that no person can lawfully do that which has tendency to be injurious to the public or to the public good.

P.I:- it implies common good or general social welfare.

Agreements against public policy

1. Trading with the enemy.
2. Agreements for shifting prosecution.

3. Agreements for improper promotion of litigation.

4. Marriage brokerage contracts.

- An agreement to procure marriage for reward is void.

5. Traffic in public offices.

- Agreements for the sale of public offices etc or void.

6. Agreements creating interest opposed to duty

- Person entering into an agreement on account of which he will have to follow a course against his public or professional duty – it is void.

7. Agreements interfering with marital status – it is void

8. Agreements in restraint of parental rights

- Agreements, the consideration or object of which a part is unlawful.
- If there are several objects but a single consideration the agreement is void if any of the objects is unlawful.
- If there is single object but several considerations, the agreement is void if any one of the consideration is unlawful.

CAPACITY TO CONTRACT

- Capacity to contract implies competence of the parties to contract.
- (Sec-11) - "Every person is competent to contract, who is of the age of majority according to the law to which he is subject and who is of sound mind and is not disqualified from contracting by any law to which he is subject.

1. Minor: Indian Majority Act 1875 says a person who has not completed his/her 18thyr of age is considered to be a minor.

- In case of property transfer from the guardian or court of ward the majority age is 21yrs.
- Special privileged position to a minor.
- He is allowed t take advantage of his acts but does not incur any kind of obligations.
- He cannot be held liable for any of his wrongs.
- No legal action can be taken against him for his misbehavior or false promises.
- Parents of minors are not legally responsible for his contracts unless he acts as their Agent

(i) Absolutely Void: An agreement with a minor has been held to be void abinitio.

- It is not only void but absolutely void.
- It is considered nullity and non-existent from the very beginning.

(ii) No Ratification: He can not ratify contracts entered into by him during his minority, even after becoming major.

- A promise by a person on attaining majority to repay the money lent, and advanced to him during minority cannot be enforced, as consideration given during minority is held to be no consideration at all.

(iii) No Restitution: (compensation or benefit)- A minor is not liable to repay any money or compensate for any benefit that he might have received under a void contract.

- Court will not grant restitution if ;

a) Where the other party was aware of infancy(minority).

b) Where the other party was unscrupulous in his dealings with the minor.

c) Other party entered into a contract with the minor on account of reasons other than misrepresentation of his age.

d) Where the other party fails to satisfy the court that justice requires the application of the principle of restitution in his favour.

(iv) No Estoppel: A minor is not bound by his misrepresentations.

- A minor is not Estopped from pleading guilty even though he may be guilty of misrepresentation as to his age.

(v) Minor beneficiary: Any contracts in which the minor is to receive some benefit or which are beneficial to him are valid.

- But in no case, he is personally liable, only his property is liable for arising out of such contracts.
- Contracts include for teaching, instruction or employment of the minor, if reasonable and for the benefit of the minor.

(vi) Minor's liability for necessities: All contracts relating to the necessities of the life supplied to a minor are valid.

- A person can claim re-imbursement out of the property of the minor the amount of necessities supplied to him or to the members of his family.

(vii) Minor promise: A minor can be a promisee.

- Promissory note executed in favour of the minor can be enforced.
- He can negotiate or endorse negotiable instruments so as not to incur any liability.

(viii) Minor Agent: A minor can be appointed as an agent.

- Principal cannot recover any compensation from his minor agent for loss caused to him by any fault of the minor agent.

(ix) Surety for minor: A person who stands as a surety for a loan taken by the minor will be liable to the creditor for payment of the loan.

(x) Minor Partner: He cannot be a partner, however he can be admitted to the benefits of the partnership.

(xi) Minor as a member of a company: He cannot become a member of a company.

- If he inherits certain shares, the name of his lawful guardian will be entered as a member in the register of members

(xii) A minor cannot be declared as an insolvent because even for necessities of life he is not personally liable.

Position of Minor's Parents:

- They are not liable for the acts of their minor children.
- It is only a moral obligation, but there is no legal obligation.
- Minority is not a disqualification but a shield and a boon.
- Salmond- “The law protects their latches and assists them in their pleadings, the lawyers are their counselors, the jury are their servants and law is their guardian”.

2. Persons of Unsound Mind;

- (sec-12)- “A person is said to be of sound mind for the purpose of making a contract if at the time when he makes it, he is capable of understanding it and of forming a rational judgement as to its effect upon his interests”.

(i) Idiot: A person who is devoid of any faculties of thinking or rational judgement is called an idiot.

- All agreements made by him, except than those for necessities of life, are absolutely void.

(ii) Lunatic: A person, whose mental powers are deranged is called a lunatic.

- Agreements made with lunatics, except those made during lucid intervals (period in which he is in his senses)are void.
- Agreements for necessities of life are, however valid.

(iii) Drunkards: A person under the influence of alcohol or drugs stands on the same footing as a lunatic.

- An agreement made during drunkenness is void, otherwise it should be proved.

PERSONS DISQUALIFIED BY OTHER LAWS

i) Alien Enemy: A person who is not a citizen of India is called an Alien.

- A Alien friend living in India has full contractual capacity subject to certain restrictions.

In case of a War

- No contract can be made with alien enemy during the war except with the prior approval from the govt.
- Performance of the contracts made before the outbreak of war will be suspended during the course of the war.

ii) Foreign Sovereigns: They can enter into contracts and enforce them in our courts.

- They can be and their representatives can be sued in Indian courts only with the permission of the central govt.

iii) Convicts: While undergoing sentence, a convict is incapable of entering into a contract.

iv) Corporations: Corporation or a company is an artificial company created by law.

- It can only contract through its Board of Directors.
- It can hold property, can sell or purchase goods, can sue and can be sued in relation to any contracts entered into by it.

FREE CONSENT (Sec-13) - "Two or more persons are said to consent when they agree upon the same thing in the same sense",(i.e) that there should be perfect identity of mind (consensus ad idem) regarding the subject matter of the contract.

- To make the contract valid, not only consent is necessary but the consent should also be Free

(Sec-14) - Consent is said to be free, when it is not caused by any of the following.

1. Coercion: (Sec-15)- "Coercion is the committing or threatening to commit any act forbidden by IPC, or the unlawful detaining or threatening to detain any property, to the prejudice of any person, what so ever, with the intention of causing any person to enter into an agreement".

- Threat to commit suicide.
- Threat to file a suit(false charges)

2. Undue Influence:(Sec-16)-It is the improper use of any power possessed over the mind of the contracting party.

- Contract is said to be affected by undue influence when,

i) The relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other.

ii) That the dominant party obtains an unfair advantage over the other.

iii) That the dominant party uses his dominant position to obtain that unfair advantage.

Ex: Pardanashin women

3. Fraud (Intentional misrepresentation): (Sec-17)- means and includes any of the acts committed by a party to a contract, or by anyone with his convenience or by his agent with intent t deceive another party there to or his agent or to induce him to enter into the contract.

- An active concealment of a fact by one having knowledge or belief of the fact.
- A promise made without any intention of performing it.
- Any other act fitted to deceive.
- Any such act or omission as the law specially declares to be fraudulent.
- Plaintiff must have suffered.

4. Misrepresentation: It is a false representation made innocently without any intention of deceiving the other party. It may include two things.

a) Wrong statement of a material fact not known to be false.

b) Non-disclosure of facts where there is a legal duty to disclose with out any intention to deceive.

- (Sec-18)- Misrepresentation may be committed in any of the following ways.

i) By positive statement- makes an absolute and explicit statement of fact, which is not true though he believes it to be true.

ii) By breach of duty- if a person commits a breach of duty on account of which he gains something, while the other party looses, it will be termed as misrepresentation.

iii) Causing mistake by innocent misrepresentation- the other party commits a mistake about something which is essential to the contract.

5. Mistake: It means erroneous belief concerning something.

- Mistake of fact (Sec-20)may be of two types.

i) Bilateral Mistake: where the parties to an agreement misunderstood each other and are at cross purposes, there is bilateral mistake, thus for declaring an agreement void-abinitio, the following three conditions must be fulfilled.

a) Both the parties must be under a mistake.

b) Mistake must relate to some fact and not to judgment or opinion.

c) The fact must be essential to the agreement.

ii) Unilateral Mistake: Where only one of the contracting parties is mistaken as to a matter of fact, the mistake is a unilateral mistake

UNLAWFUL & ILLEGAL (OR)VOID AGREEMENTS

- Sec-2(g):- “An agreement not enforceable by law is said to be void”.

- Thus a void agreement does not give rise to any legal consequences and is *void ab initio.*
- In the eyes of law such an agreement is no agreement at all from its very inception .

1. **Agreements in Restraint of Marriage:**

- Sec-26 :- "Every agreement in restraint of the marriage of any person, other than a minor is void".
- The restraint may be general or partial.
- Agreement agreeing not to marry at all, or a certain person, or a class of persons, or for a fixed period, is void.

2. Agreements in Restraint of Trade:

- Sec-27:- declares "every agreement by which any one is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void."
- Thus no person is at liberty to deprive himself of the fruit of his labour, skill or talent, by any contracts that he enters into.

Exceptions:

(i) Sale of good will:

- The seller of the "good will" of a business can be restrained from carrying on a similar business, with in specified local limits, so long as the buyer, or any person desiring title to the good will from him.

(ii) Partners' agreements:

- An agreement in restraint of trade among the partners or between any partner and the buyer of firm's good will is void if…..

a) Partner shall not carry on any business other than that of the firm while he is a partner (sec-11(2)) of Partnership Act.

b) Partner on retiring from the partnership he will not carry on any business similar to that of the firm within a specified period or within specified local limits (sec-36(2)) of P.Act.

c) On anticipation of the dissolution of the firm that some or all of them will not carry on a business similar to that of the firm within a specified period or within specified local limits(sec-54) of P.Act.

d) Partner and the buyer of the firm's good will that such partner will not carry on any business similar to that of the firm within a specified period or within specified local limits (sec-55(3)) of P.Act.

(iii) Trade combinations:

- Agreement in the nature of a business combination between traders or manufacturers.

  Ex: - Not to sell their goods below a certain price.

(iv) Negative stipulations in service agreements:

- Agreement of service by which a person binds himself during the term of the agreement, not to take service with anyone else, is not in restraint of lawful profession and is valid.

3. Agreements in Restraint of Legal Proceedings.

- (Sec-28), as amended by the Indian contract (Amend) Act, 1996, declares the following three kinds of agreements void.

i) An agreement by which a party is restricted absolutely from taking usual legal proceedings in respect of any rights arising from a contract.

ii) An agreement which limits the time with in which one may enforce his contract rights, without regard to the time allowed by the Limitation Act.

iii) An agreement which provides for forfeiture of any rights arising from a contract, if suit is not brought within a specified period.

4. Uncertain Agreements.

- (Sec-29) "Agreements, the meaning of which is not certain or capable of being made certain, are void".
- The law aims to ensure that the parties to a contract should be aware of the precise nature and scope of their mutual rights and obligations under the contract.

5. Wagering Agreements.

- (Sec-30) "Wager" means 'a bet', something stated to be lost or won on the result of a doubtful issue and therefore, wagering agreements are nothing but ordinary betting agreements.
- Agreements by way of wager are void, and no suit shall be brought for recovering anything alleged to be won on any wager.

Special cases:

- A bet on a horse race carrying a prize of Rs 500 or more to the winners has been made valid; less than Rs 500 remain a wager (void).
- Cross word puzzles, game shows- where prize depends upon skill&intelligence,it is a valid transaction

6. Agreements contingent on impossible events.

- (Sec-36) "Contingent agreements to do or not to do any thing if an impossible event happens, are void.
- Whether the impossibility of the event is known or not known to the parties to the agreement at the time when it is made.

Ex:- 'A' agrees to pay 'B' Rs 1,000(as a loan) if two straight lines should enclose a space-it is void.

7. Agreements to do impossible acts.(Sec-56) "An agreement to do an impossible act in itself is void"

CONTINGENT CONTRACTS

- "A Continent contract is a contract to do or not to do something, if some event collateral to such contract does or does not happen"-(Sec-31).
- Thus it is a contract, the performance of which is dependent upon, the happening or non-happening of an uncertain event, collateral to such contract.

Ex: - 'A' contracts to sell 'B' 10 bales of cotton for Rs 20,000, if the ship by which they are coming returns safely.

Essentials

1. The performance of such a contract depends upon the happening or non-happening of some future uncertain event.
2. The future uncertain event is collateral i.e. incidental to the contract.

Rules regarding the performance of contingent contracts:

1. Contingent contracts to do or not to do anything, if an uncertain future event happens, cannot be enforced by law unless and until that event has happened, if the event becomes impossible, such contracts become VOID-(sec-32).

Ex: - 'A' makes a contract with 'B' to buy B's horse if A survives 'C'. The contract cannot be enforced by law unless and until C dies in A's life time.

2. Contingent contracts to do or not to do anything, if an uncertain future event does not happen, can be enforced when the happening of that event becomes impossible, and not before (sec-33).

Ex: - 'A' agrees to pay 'B' a sum of money (as insurance claim) if a certain ship does not return (of course after charging premium).The contract can be enforced when the ship sinks or caught fire.

3. If a contract is contingent upon how a person will act at an unspecified time, the event shall be considered to become impossible when such person does anything which renders it impossible that he should so act within any definite time(sec-34).

Ex: - 'A' agrees to pay 'B' a sum of money (as loan) if B marries C, but C marries D. The marriage of B to C must now is considered impossible-but D dies and now B marries C (D's widow), it will not revive the old obligation.

4. Contingent contracts to do or not to do something, if a specified uncertain event happens with in a fixed time, becomes void, if at the expiration of the time fixed, such event has not happened or becomes impossible (sec-35(1)).

Ex: - 'A' Promises to pay 'B' a sum of money (as a loan) if a certain ship returns within a year. The contract may be enforced if the ship returns with in the year.

5. If a specified uncertain event does not happen within a fixed time.

Ex:-If the ship does not return within the year.

6. If an impossible event happens, are void, whether the impossibility of the event is known or not to the parties to the agreement at the time when it is made (sec-36).

Ex: - 'A' agrees to pay 'B' Rs 1,000 (as a loan), if B will marry A's daughter C. C was dead at the time of agreement. The agreement is void.

PERFORMANCE OF CONTRACTS

- It means fulfilling of their respective legal obligations created under the contract by both the promisor and the promise.

Who can demand performance?

- It is only the promisee who can demand performance of the promise under a contract.
- A third party cannot demand performance of the contract even if it was made for his benefit.
- In case of the death of the promisee, his legal representatives are entitled to enforce the performance of the contract against the promisor.

By whom contracts must be performed?

1. By the promisor himself(sec-40):- "If it appears from the nature of the case that it was the intention of the parties to any contract that any promise contained in it should be performed by the promisor himself, such promise must be performed by the promisor."

2. By the promisor or his Agent (sec-40(2)):-In the case of a contract of impersonal nature.

Ex: - A contract of sale of goods or a contract to lend sum of money, the promisor himself or his agent may perform the contract.

3. By the legal representatives (sec-37(2)):-In case of the death of the promisor before performance, the liability of performance falls on his legal representatives, unless a contrary intention appears from the contract.

- The rule of the law is "a personal cause of action comes to an end with the death of the person concerned."

3. Performance by a third person (sec-41):-It lays down that if a promisee accepts performance of the promise from a third person, he cannot afterwards enforce it against the promisor.

Performance of Joint promises:

Who can demand performance of Joint promises ?(sec-45)

- When a promise is made to several persons jointly, then unless a contrary intention appears from the contract, the right to claim performance rests with all the promisees jointly and a single promisee cannot demand performance.
- When any one of the promisees dies, the right to claim performance rest with the legal representatives of such deceased person jointly with the surviving promisees.
- When all the promisees are dead, the right to claim performance rests with all legal representatives jointly.
- In brief, so long as all the joint promisees are alive the right to claim performance rests with all them jointly and on the death of any promise his legal representatives step into his shoes.

By whom joint promises must be performed.

1. All promisors must jointly fulfil the promise (sec-42).
2. Any one or more of joint promisors may be compelled to perform (sec-43(1)).
3. Right of contribution inter-se between joint promisors (sec-43(2)).
4. Sharing of loss by default in contribution (sec-43(3)).

5. Effect of release of one joint promisor (sec-44).

Order of performance of Reciprocal promises:

- Promises which form the consideration for each other are called “reciprocal promises” or “mutual promises”.

1. Mutual and Independent(sec-52)
2. Mutual and Dependent(sec-54)
3. Mutual and Concurrent (sec-51).

Time and Place for Performance:

- Sec 46 to 50 and 55 of the contract Act lay down the rules regarding the time &place for performance of a contract.
- Where prescribed by the promisee, the performance of the contract must be at the specified time and place.
- Where not prescribed by the promisee, then the contract must be performed.

a) With in a reasonable time, on a working day and within the usual hrs of business (sec-47).

b) At a proper place (sec-49).

- Effects of failure to perform a contract with in the stipulated time(sec-55)

1. Where “time is of the essence of the contract” and there is failure to perform, one may rescind the contract and sue for the breach.
2. Where “time is not of the essence of the contract”, one has to accept the delayed performance.

DISCHARGE OF CONTRACT

- When the rights and obligations arising out of a contract are extinguished, the contract is said to be discharged or terminated.
- It can be terminated in any of the following ways

1. **Discharge by Performance:**

- Performance of a contract is the principal and most usual mode of discharge of a contract.

(i) Actual performance:

- When each party to a contract fulfills his obligation arising under the contract with in the time and in the manner prescribed, it amounts to actual performance of the contract and the contract comes to an end or stand discharged.
- Such a party gets a right of action against the other party who is guilty of breach.

(ii) Attempted performance or tender:

- When the promisor offers to perform his obligation under the contract, but is unable to do so because the promisee does not accept the performance, it is called "attempted performance" or "tender".
- Thus tender is not actual performance but is only an "offer to perform".

Essentials of a valid tender:

1. It must be unconditional-conditional tender is no tender.
2. It must be made at a proper time &place.
3. It must be of the whole obligation for and not only of the part.
4. If the tender relates to delivery of goods, it must give a reasonable opportunity to the promisee for inspection of goods, so that he may be sure that the goods tendered are of contract description.
5. It must be made by a person who is in a position and is willing to perform the promise.
6. It must be made to the proper person i.e the promisee or his duly authorised agent, tender made to a stranger is invalid.
7. If there are several joint promisees, an offer to any one of them is a valid tender.
8. In case of tender of money, exact amount should be tendered in the legal tender money.

2. Discharge by Mutual Consent or Agreement:

- Since a contract is created by means of an agreement, it may also be discharged by another agreement between the same parties.
- Sec-62 and sec-63 deal with this subject and provide for the following methods of discharging a contract by mutual agreement.
- (i) Novation: - "Novation occurs when a new contract is substituted for an existing contract, either between the same parties or between different parties, the consideration mutually being the discharge of the old contract."

(ii) Alteration:- "Alteration of a contract means change in one or more of the material terms of contract."

(iii) Rescission:- A contract may be discharged, before the date of performance, by agreement between the parties to the effect that it shall no longer bind them, Such an agreement amounts to "Rescission" or cancellation of the contract.

(iv) Remission:- "Remission may be defined as the acceptance of a lesser sum than what was contracted for or a lesser fulfillment of a promise made."

(v) Waiver:- "Waiver means the deliberate abandonment or giving up of a right which a party is entitled to under a contract, where upon the other party to the contract is released from his obligation."

3. Discharge by Subsequent or Supervening Impossibility or Illegality:

- Impossibility at the time of contract-there is no question of discharge of a contract which is entered into to perform something that is obviously impossible.

Ex:- "An agreement to do an act impossible init self is void."

- Sec-56(1)- "An agreement to do an act impossible in itself is void."

- Subsequent impossibility- In fact it is this case, where the impossibility supervenes after the contract has been made which is material to our study of discharge of contracts.

- Cases where the Doctrine of Supervening Impossibility applies:

1. Destruction of subject matter:

Ex:- A music hall was to be let out for series of concerts on certain days i.e hall was destroyed by fire before the date of the first concert.

2. Failure of ultimate purpose:

Ex:- Hiring a hotel room to view a festival procession, but the procession is cancelled.

3. Death or Personal incapacity of promisor:

4. Change of Law:

Ex:- There was a contract for the sale of the trees of a forest subsequently by an Act of legislature, the forest was acquired by the state govt.

5. Outbreak of war.

- Cases not covered by supervening Impossibility:

- “He that agrees to do an act must do it or pay damages for not doing it” is the general rule of law of contract.

- Difficulty of performance
- Commercial Impossibility
- Impossibility due to the default of a third person
- Strikes and lockouts
- Failure of one of the objects

4. Discharge by Lapse of Time:

- The Limitation Act lays that in case of breach of contract, legal action should be taken with in a specified period, called the period of limitation.
- Again, where “time is of essence in a contract”, if the contract is not performed at the fixed time, the contract comes to an end.

5. Discharge by operation of law:

(i) Death

(ii) Insolvency

(iii) Merger-where an inferior right contract merges into a superior right contract, the former stands discharged automatically.

Ex:- Tenancy into ownership rights.

(iv) Unauthorized material alteration

Ex:- Forged or altered promissory note.

Discharge by Breach of contract:

- Breach of contract by a party there to is also a method of discharge of a contract, because “breach” also brings to an end, the obligations created by a contract on the part of each of the parties.
- Of course the aggrieved party, i.e the party not at fault can sue for damages for breach of contract as per law.

REMEDIES OF BREACH OF CONTRACT

- Whenever there is a breach of a contract, the injured party becomes entitled to anyone or more of the following remedies against the guilty party.

1. **Rescission of the contract:**

- When there is a breach of contract by one party, the other party may rescind the contract and need not perform his part of obligations under the contract and keep quiet if he decides not to take any legal actions against the guilty party.
- But in case the aggrieved party intends to sue the guilty party for damages for breach of contract, he has to file a suit for rescission of the contract.
- When the court grants rescission, the aggrieved party is freed from all obligations and becomes entitled to compensation for any damages (sec-75).

2. Suit for Damages:

- The fundamental principle under lying damages is not punishment but compensation.
- As a general rule ,"compensation must commensurate with the injury or loss sustained, arising naturally from the breach."
- If actual loss is not proved, no damages will be answered.

Assessment of damages;

- Extent to which a plaintiff is entitled to demand damages for breach of contract. The rules have been laid down by (sec-73).

(a) Ordinary damages

- Such damages which normally arose in the usual course of things from such breach.

(b) Special damages

- Such damages which the parties knew when they enter into contract, as likely to result from the breach.

(c) Exemplary or Vindictive damages

- Breach of contract is to compensate the injured party for the loss suffered and not to punish the guilty party. Hence, obviously exemplary damages have no place in the law of contract and are not recoverable for a breach of contract.

However, there are two exceptions to this rule,

(i) Breach of a contract to marry-->depend upon the extent of injury to the party's feelings.

(ii) Dishonour of a cheque by a banker when there are sufficient funds-->the smaller the cheque, the greater the damage.

(d) Nominal damages

- These damages are awarded only for the name sake.
- These are awarded to establish the right to decree for breach of contract when the injured party has not actually suffered any real damage.

(e) Duty to mitigate damage suffered

- It is the duty of the injured party to mitigate damage suffered as a result of breach of contract by the other party.

Ex:-servant is dismissed, he has to be shown other employment.

3. Suit upon Quantum Meruit(sec-65-70):

- The phrase quantum meruit literally means “as much as is earned” or “in proportion to the work done”.
- A right to sue upon quantum meruit usually arises where after part performance of the contract by one party, there is breach of contract, or the contract is discovered void or becomes void.
- This remedy may be availed of either without claiming damages i.e.(claiming reasonable compensation only for the work done) or in addition to claiming damages for breach, i.e. (claiming reasonable compensation for part performance and damages for the remaining unperformed part).

4. Suit for Specific Performance:

- Specific performance means the actual carrying out of the contract as agreed.
- The court directing the defendant to actually perform the promise that he has made, such a suit may be filed either instead of or in addition to a suit for damages.
- It is granted, where the legal remedy is inadequate or defective.
- It is granted in contracts connected with land,buildings,rare articles and unique goods having some special value to the party who is suing because of family association.

5. Suit for Injunction:

- Injunction is an order of a court restraining a person from doing a particular act.
- Where a party is in breach of negative term of the contract i.e. where he is doing something which he promised not to do, the court may, by issuing an injunction restrain him from doing, what he promised not to do.
- Thus “Injunction” is a preventive relief.

Part II

INDEMNITY AND GUARANTEE

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 C.I" – (Sec -124).

- It is entered into with the object of protecting the promisee against anticipated loss.
- The contingency upon which the whole contract of indemnity depends is the happening of loss.
- The person who promises to make good the loss is called the "indemnifier" (promisor) and the person whose loss is to be made good is called the "indemnified" or indemnity –holder (promisee)

Rights of indemnity holder when sued (sec-125)

1. He is entitled to recover all damages which he may be compelled to pay in respect of suit to which the promise to indemnity applies.
2. He is entitled to recover all costs reasonably incurred, in bringing or defending such suit, provided he acted prudently or with the authority of the promisor (indemnifier).

3. He is also entitled to recover all sums which he may have paid under the terms of any compromise of any such suit.

Contract of guarantee: - "A contract of guarantee is a contract to perform the promise, or discharge the liability of a third person in case of his default –" (sec -126).

- A contract of guarantee is entered into with the object of enabling a person to get a loan or goods on credit or an employment.
- 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.

Distinction between a contract of indemnity and a contract of guarantee.

1. Number of parties: - In C.I, there are two parties – the indemnifier and indemnity holder. In C.G there are three parties- the creditor, the principal debtor and the surety.

2. Object or purpose: - A C.I is for the reimbursement of loss, where as – a C.G is for the security of a debt or good conduct of an employee.

3. Number of contracts: - In C.I there is only one contract between the indemnifier and the indemnified - while in guarantee, there are three contracts.

4. Nature of liability:- In C.I the liability of the indemnifier is primary in nature _ in C.G the liability of the surety is secondary.

5. Request by the debtor: - In C.I the indemnifier acts independently without any request of the debtor or the third party. - In C.G it is necessary that the surety should give the guarantee at the request of the debtor.

6. Existing debt or duty: - In C.I, in most cases there is no existing debt or duty, where as in C.G there is an existing debt.

7. Right to sue :- In C.G , the surety after he discharges the debt owing to the creditor , can proceed against the principal debtor in his own right.-In C.I the indemnifier cannot sue the third party for loss in his own name, because there is no privity of contract.

Nature and extent of surety's liability

- Regarding the extent of the surety's liability, (sec – 128) provides thus "the liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract."
- The liability of a surety is secondary or contingent (i.e.) the surety is liable only on default of the principal debtor unless there is an express provision in the contract that the creditor must in the first instance proceed against the surety, must give the notice of default to the surety.

Rights of surety

1. Surety's rights against the creditor

(ii) Right to benefit of creditor's securities (sec -141) The surety is entitled to demand from the creditor, at the time of payment, all the securities which the creditor has against the principal debtor at the time when the contract of surety ship is entered into.

(ii) Right to claim set –off, if any

- The surety is also entitled to the benefit of any set-off or counter claim, which the principal debtor might possess against the creditor in respect of the same transaction.

2. Surety's rights against the principal debtor

(i) Right of subrogation (sec -140)

- When the surety pays off the debt on the default of the principal debtor, he is invested with all the rights which the creditor had against the principal debtor (i.e.) the surety steps into the shoes of the creditor and is entitled to all the remedies which the creditor could have enforced against the principal debtor.
- The surety may claim the securities, if any held the creditor and sue the principal debtor.

(ii) <u>Right to claim indemnity (sec- 145)</u>

- In every C.G 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 "<u>right fully paid</u>" under the guarantee.

3. <u>Surety's rights against co-sureties (sec 146-147)</u>

- Where a debt is guaranteed by more than one sureties they are called co-sureties.

(i) <u>Where they are sureties for the same debt for similar amount</u>

- (i.e. , for one and the same amount) the co-sureties are liable to contribute equally , and are entitled to share the benefit of securities , if any held by any one of the co-sureties, equally-Equality of burden and benefit.

(ii) <u>Where they are sureties for the same debt for different sums</u>

- The rule is that "subject to the limit fixed by his guarantee, each surety is to contribute equally".

<u>Discharge of Surety from liability</u>

1. <u>Notice of Revocation (sec-130)</u>

- An "<u>ordinary guarantee</u>" for a single specific debt or transaction cannot be revoked once it is acted upon.
- But a "<u>continuing guarantee</u>" may at any time, be revoked by the surety as to future transactions, by giving notice to the creditor.

2. <u>Death of Surety (sec -131)</u>

- In case of a "<u>continuing guarantee</u>" the death of surety also discharges him from liability as regards transactions after his death, unless there is a contract to the contrary.

3. <u>Variance in terms of contract (sec- 133)</u>

- “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”.

4. Release or discharge of principal debtor (sec- 134)

- This section provides for the following two ways of discharge of surety from liability.

(a) The surety is discharged by any contract between the creditor and the principal debtor, by which the principal debtor is released;-any release of the principal debtor is a release of the surety also.

(b) The surety is also discharged by any act or omission of the creditor, the legal consequence of which is the discharge of the principal debtor.

5. Arrangement by creditor with principal debtor without surety’s consent (sec-135)

- Where the creditor, without the consent of the surety, makes an arrangement with the principal debtor for composition, or promises to give him time or not to sue him, the surety will be discharged.

6. Creditor’s act or omission impairing surety’s eventual remedy (sec-139)

- It is the duty of the creditor to do every act necessary for the protection of the nights of the surety and if he fails in this duty, the surety is discharged.

7. Loss of security (sec-141)

- If the creditor loses or, without the consent of the surety, parts with any security given to him at the time of the contract of guarantee, the surety is discharged from liability to the extent of the value of security.
- * If the security is lost due to an act of god or enemies of the state or unavoidable accident, the surety would not be discharged.

8. Invalidation of the contract of guarantee

- A surety is also discharged from liability when the contract of guarantee is invalid in the following cases.

(i) Where the guarantee has been obtained by means of misrepresentation or fraud or keeping silence as to material part of the transaction, by the creditor or with his knowledge and assent (sec-142-143)

(ii) Where a person gives a guarantee upon a contract that the creditor shall not act upon it untill another person has joined in it as co-surety, the guarantee is not valid if that other person does not join (sec-144)

(iii) Where it lacks one or more essential elements of a valid contract.

<u>CONTRACT OF SALE OF GOODS</u>

- Sale of Goods Act, 1930 came into force on 1st July 1930.
- It contains 66 sections and extend to the whole of India except to the state of J&K.
- Minor amendments in the act were made in 1963.
- The general provisions of the Indian Contract Act continue to be applicable to the contract of Sale of Goods Act relating to capacity of the parties, free consent, agreements in restraint of trade, wagering agreements and measure of damages.

Definition- (Sec-4(1)) of the sale of goods act defines as "a contract where by the seller transfers or agrees to transfer the property in goods to the buyer for a price".

Essentials of a contract of sale:

1. Two parties- The first essential is that there must be two distinct parties to a contract of sale, a buyer and a seller, as a person can not buy his own goods.

2. Transfer of property- 'Property' here means 'ownership of goods'.

- A mere transfer of possession of goods cannot be termed as sale, to constitute a contract of sale the seller must either transfer or agree to transfer the property in the goods to the buyer.

3. Goods- The subject matter of the contract of sale must be 'goods'.

- (Sec-2(7))- "Goods means every kind of movable property other than actionable claims and money, and includes stock and shares, growing crops, grass, and things attached to or form part of land, goodwill, trade marks, copy rights, patent rights, water, gas, electricity etc, decree of a court of law are regarded as goods.

4. Price- The consideration for a contract of sale must be money and is called 'Price'.

5. Sale and an Agreement to sell- The term contract of sale is a generic term

and includes both a 'Sale' and an 'Agreement to sell'.

- The property in the goods is immediately transferred at the time of making the contract from the seller to the buyer, the contract is called a 'Sale' (Sec-4(3)).
- The transfer of property in the goods is to take place at a future time or subject to some condition there after to be fulfilled, the contract is called 'an agreement to sell'(Sec-4(3)).

6. No formalities to be observed(Sec-5)- It does not prescribe any particular form to constitute a valid contract of sale.

- A contract of sale of goods can be made by mere offer and acceptance.
- The offer may be made either by the seller or the buyer and the same must be accepted by the other.
- Such contract may be made either orally or in writing or partly orally and partly in writing or may be even implied from the conduct of the parties.

Distinction between 'Sale' and an 'Agreement to sell';

1. Transfer of Property(ownership):

- In a sale the property in goods passes to the buyer immediately at the time of making the contract.
- In an Agreement to sell there is no transfer of property to the buyer at the time of the contract . The conveyance of property takes place later so that the seller continues to be the owner until the agreement to sell becomes a sale.

2. Risk of loss: The general rule is that unless other wise agreed, the risk of loss prima facie passes with property(Sec-26).

- In case of sale, if the goods are destroyed the loss falls on the buyer even though the goods may never come into his possession because the property in the goods has already passed to the buyer.
- In case of Agreement to sell where the ownership in the goods is yet to pass from the seller to the buyer, such loss has to be borne by the seller even though the goods are in the possession of the buyer.

3. Consequences of breach:

- In case of sale, if the buyer wrongfully neglects or refuses to pay the price of the goods, the seller can sue for the price, even though the goods are still in his possession.
- In case of an Agreement to Sell, if the buyer breaks his promise, the seller can only sue for damages and not for the price, even though the goods are in the possession of buyer.

4. Right of sale:

- In a sale, the property is with the buyer and as such the seller(in possession of goods after sale) cannot resell the goods. If he does so, the subsequent buyer having knowledge of the previous sale does not acquire a title to the goods.

- In an A. to Sell, the property in the goods remain with the seller and as such he can dispose of the goods as he likes and the original buyer can sue him for the breach of contract only.

5. Insolvency of buyer before he pays for the goods:

- In a sale, if the buyer is adjudged insolvent before he pays for the goods, the seller, in the absence of a 'right of lien' over the goods, must deliver the goods to the official receiver or assignee.
- But in an A. to Sell, in these circumstances, the seller may refuse to deliver the goods to the official receiver or assignee unless paid for, as ownership has not passed to the buyer.

6. Insolvency of seller if the buyer has already paid the price:

- In a Sale, if the seller is adjudged insolvent, the buyer is entitled to recover the goods from the official receiver or assignee, as the property in the goods rests with the buyer.
- In an A. to Sell, if the buyer has already paid the price and the seller is adjudged insolvent, the buyer can only claim a ratable dividend and not the goods because property in them still rests with the seller.

Kinds of Goods:

1. Existing goods-Goods which are physically in existence which are in seller's ownership or possession, at the time of entering the contract of sale are called 'existing goods', further classified into,

a) Specific goods- Goods identified and agreed upon at the time of the making of the contract of sale are called 'specific goods'(Sec-2(4)).

b) Unascertained goods- The goods which are not separately identified or ascertained at the time of the making of the contract are 'unascertained goods'.

2. Future Goods- Goods to be manufactured, produced or acquired by the seller after the making of the contract of sale are called 'Future goods'(Sec-2(6)).

3. Contingent Goods- Goods, the acquisition of which by the seller depends upon an uncertain contingency are called 'contingent goods'(Sec-6(2)).

Ex:- 'X' agrees to sell to 'Y' 25 bales of Egyptian cotton, provided the ship which is bringing them reaches the port safely.

Effect of Pershing of Goods- (Sec-7&8) deal with effect of perishing of goods on the rights and obligations of the parties to a contract of sale. The word 'perishing' means not only physical destruction of the goods but it also covers.

a) Damage to goods so that the goods have ceased to exist in the commercial sense(i.e), their merchantable character as such has been lost.

Ex:- cement is spoiled by water.

b) Loss of goods by theft.

c) Where the goods have been lawfully requisitioned by the govt.

- The effect of perishing of goods may be discussed under the following heads,

1. Perishing of specific goods at or before making of the contract(Sec-7):

i) In case of perishing of the 'whole' of the goods-where specific goods form the subject matter of a contract of sale, and they, with out the knowledge of the seller, perish, at or before the time of the contract, the agreement is void.

ii) In case of perishing of only 'a part' of the goods-where in a contract for the sale of specific goods, only part of the goods are destroyed or damaged, the effect of perishing will depend upon whether the contract is entire or divisible.

2. Perishing of specific goods before sale but after agreement to sell(Sec-8):

- Where there is an agreement to sell specific goods and subsequently the goods with out any fault on the part of the seller or buyer perish, before the risk passes to the buyer, the agreement is there by avoided(i.e), the contract of sale becomes void, and both parties are excused from performance of the contract.

The Price: The money consideration for a sale of goods is known as 'price'(Sec-2(10)).

- No valid sale can take place with out a price.
- The price should be paid or promised to be paid in legal tender money, unless other wise agreed.

Modes of fixing the Price:-(Sec-9) the price may be fixed by one or the other of the following modes.

1. It may be expressly fixed by the contract itself- It is a most usual mode of fixing the price. The parties are free to fix any price they like and the court will not question as to the adequacy of price.

2. It may be fixed in accordance with an agreed manner provided by the contract- It may be agreed that the buyer would pay the market price prevailing on a particular date, or that the price is to be fixed by the third party(valuer) appointed by the consent of the parties.

3. It may be determined by the course of dealings between the parties- the course of dealings suggest that in subsequent transactions also the price as on the date of order will be paid of the previous price.

4. If the price is not capable of being determined in accordance with any of the above modes, the buyer is bound to pay to the seller a ‘reasonable price’.

5. Agreement to sell at valuation(Sec-10)- Where there is an agreement to sell goods on the terms that the price is to be fixed by the valuation of the third party and such third party fails to fix the price, the contract becomes void, except as to part of goods delivered and accepted, if any, under the contract, as regards which the buyer is bound to pay a reasonable price.

6. Earnest or Deposit- Money deposited with the seller by the buyer as security for due fulfillment of the contract is called ‘earnest’ or ‘deposit'. It counts as part payment and only balance of the price is required to be paid.

7. Document of title to goods- Any document which is used in the ordinary course of business as proof of the possession or control of goods or authorizing or purporting to authorize, either by endorsement or by delivery, the possessor of the document to transfer or receive goods there by represented is a document o f title to goods(Sec-2(4)).

Ex:-Bill of lading, dock warrant, railway receipt, delivery order etc.

Conditions and Warranties

- A contract of sale of goods contains various terms or stipulations regarding the quality of the goods, the price and the mode o fits payment, the delivery of goods and its time and place. But all of them are not of equal importance.
- Some of the stipulations may be major terms which go to the very root of the contract and their breach may frustrate the very purpose of the contract.
- While others may be minor terms which are not so vital that their breach may seem to be a breach of the contract as such.
- In law of sales major terms are called ‘Conditions’ and minor terms are called ‘Warranties’.
- Mere praise or commendation or expression of opinion made by the seller in reference to his goods are neither conditions nor warranties- they do not form a part of the contract and as a result give no right of action.

Ex:- Praising the house to sell.

- Condition: A condition is a stipulation essential to the main purpose of the contract, the breach of which gives the aggrieved party a right to repudiate the contract itself(Sec-12(2)).
- In addition, he may maintain an action for damages for loss suffered, if any on the footing that the whole contract is broken and the seller is guilty of non-delivery.
- Warranty: A warranty is a stipulation collateral to the main purpose of the contract, the breach of which gives the aggrieved party a right to sue for damages only, and not to avoid the contract itself(Sec-12(3)).

Distinctions:

1. As to value- A condition is a stipulaton which is essential to the main

purpose of the contract, where as a warranty is a stipulation which is collateral to the main purpose of the contract(Sec-12(2)(3)).

2. As to breach: The breach of a condition is a stipulation which is essential

to the main purpose of the contract, where as a warranty is a

stipulation which is collateral to the main purpose of the contract.

3. As to treatment: A breach of condition may be treated as a a breach of warranty, but a breach of warranty cannot be treated as a breach of condition.

When breach of condition is to be treated as breach of warranty:-

1. Voluntary waiver by buyer- Instead of repudiate the contract and reject the goods, he may elect to waive the condition(i.e) to treat the breach of condition as a breach of warranty and accept the goods and sue the seller for damages for breach of warranty.
2. Acceptance of goods by buyer- Where the buyer has accepted the goods and subsequently he comes to know of the breach of condition, he can not reject them, but can only maintain an action for damages.

- This case does not depend upon the will of the buyer but the law compulsorily treats a breach of condition as a breach of warranty.

Meaning of Acceptance:

- Taking possession of delivery of the goods does not by it self amount to acceptance.
- According to (Sec-42), the buyer is deemed to have accepted the goods,

i) When he intimates to the seller that he has accepted them, or

ii) When he does any act in relation to goods which is inconsistent with the ownership of the seller,

Ex:- Consumes, uses, pledges or resells the goods or puts his mark on them, etc, or

iii) When, after the lapse of reasonable time, he retains the goods with out intimating the seller that he has rejected them. On rejection of goods, however mere informing the seller is enough and the buyer is not bound to return the rejected goods actually(Sec-43).

Expressed & Implied Conditions and Warranties:

- They are said to be express when at the will of the parties they are inserted in the contract, and
- They are said to be implied when the law presumes their existence in the contract automatically though they have not been put into it in express words(Sec-62).

Implied Conditions:

1. Condition as to title(Sec-14(a)):

- As a result of this condition, if the seller's title turns out to be defective the buyer is entitled to reject the goods and to recover his price.
- In this case he must return the goods to the true owner, he can of course recover the price from the seller because of a total failure of consideration.

2. Condition in a sale by description(Sec-15):

- Where there is a contract of sale of goods by description, there is an implied condition that the goods shall correspond with the description.
- If the description of the article tendered is different in any respect, it is not the article bargained for, and the other party is not bound to take it.
- "If you contract to sell peas, you can not oblige a party to take beans".

3. Condition in a sale by sample(Sec-17):

- When under a contract of sale, goods are to be supplied according to a sample agreed upon, the implied conditions are,

i) That the bulk shall correspond with the sample in quality,

ii) That the buyer shall have a reasonable opportunity of comparing the bulk with the sample,

iii) That the goods shall be free from any defect.

4. Condition in a sample as well as by description(Sec-15):

- When goods are sold by sample as well as by description, there is an implied condition that the bulk of the goods shall correspond both with the sample and with the description.
- If the goods supplied correspond only with the sample and not with the description or vice versa, the buyer is entitled to reject the goods, the bulk of the goods must correspond with both.

5. Condition as to fitness or quality(Sec-16(1)):

- The implied condition is deemed t exist on the part of the seller that the goods supplied shall be reasonably fit for the purpose for which the buyer wants them,

i) The buyer, expressly or impliedly, should make known to the seller the particular purpose for which the goods are required,

ii) the buyer should rely on the seller's skill or judgement, and

iii) The goods sold must be of a description which the seller deals in the ordinary course of his business, whether he be the manufacturer or not.

6. Condition as to merchantability(Sec-16(2)):

- This condition is implied only where the sale is by description.
- Thus sub section lays down another implied condition in such cases(i.e) that the goods should be of 'merchantable quality'.

7. Condition as to wholesomeness:

- This condition is implied only in a contract of sale of eatables and provisions, in such cases the goods supplied must not only answer to description and be merchantable but must also be whole some, i.e free from any defect which render them unfit for human consumption.

Implied Warranties:

1. Warranty of quiet possession(Sec-14(b)):

- In every contract of sale, the first implied warranty on the part of the seller is that "the buyer shall have and enjoy quiet possession of the goods".
- If the quiet possession of the buyer is in any way disturbed by a person having a superior right than that of the seller, the buyer can claim damages from the seller.

2. Warranty of freedom from encumbrances(Sec-14(c)):

- "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".
- If the goods are afterwards found to be subject to a charge and the buyer has to discharge the same, there is breach of warranty and the buyer is entitled to damages.

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

- The part of the seller is that in case the goods sold are dangerous nature he will warn the ignorant buyer of the probable danger.
- If there is a breach of this warranty the buyer is entitled to claim compensation for the injury caused to him.

Doctrine of Caveat Emptor- The maxim of caveat emptor means "let the buyer beware". It is the duty of the buyer to careful while purchasing goods of his requirement and, in the absence of any enquiry from the buyer, the seller is not bound to disclose every defect in goods of which he may be cognizant.

Performance of Contract of Sale

- 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(Sec-31).
- Thus the performance of a contract of sale implies "delivery of goods" by the seller and acceptance of the delivery of goods and payment for them by the buyer, in accordance with the contract.
- The parties are free to provide any terms they like in their contract about the time, place and manner of delivery of goods, acceptance there of and payment of the price.

Delivery:- Delivery of goods means voluntary transfer of possession of goods from one person to another(Sec-2(2)).

Modes of delivery:

1. Actual delivery- Where the goods are physically handed over by the seller or his authorised agent to the buyer or his authorised agent, the delivery is said to actual.

2. Symbolic delivery-Here the goods remain where they are(probably because they are bulky but the means of obtaining possession of goods is delivered.

Ex:- handing over the keys of the godown where the goods are stored.

3. Constructive delivery or delivery by attornment- Such delivery takes place when the person in possession of the goods of the seller acknowledges, in accordance with the

seller’s order, that he holds the goods on behalf of the buyer and the buyer has assented to it.

- In such a delivery all three parties, namely, the seller, the person holding the seller’s goods and the buyer, must concur.

Rules as to delivery of goods:

1. Delivery may be either actual or symbolic or constructive(Sec-33):

- ---Same as above---

2. Delivery and payment are concurrent conditions(Sec-32):

- Unless other wise agreed, delivery of the goods and payment of the price are concurrent conditions, i.e the seller should be ready and willing to deliver the goods to the buyer in exchange for the price and the buyer should be ready and willing to pay the price in exchange for possession of the goods simultaneously.

3. Effect of part delivery, when property in goods is to pass on delivery(Sec-34):

- A delivery of part of the 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.

4. Buyer to apply for delivery(Sec-35):

- Although it is the duty of the seller to deliver the goods according to the contract, yet he is not bound to deliver them until the buyer applies for delivery. It is the duty of the buyer to demand delivery, and if he fails to do so, he can not blame the seller for the non-delivery.
- The parties may, however, agree otherwise.

5. Time of delivery(Sec-36(2)(4):

- 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 with in a reasonable time.

6. Place of delivery(Sec-36(1)):

- The place of delivery may be stated in the contract of sale, and where it is so stated, the goods must be delivered at the named place during business hrs on a working day. But where no place is mentioned in the contract, the following rules must be followed;

i) In case of sale the goods are to be delivered at the place where they are at the time of the sale.

ii) In an A. to sell the goods are to be delivered at the place where they are at the time of the agreement to sell.

iii) In the case of future goods the goods are to be delivered at the place at which they are manufactured or produced.

7. Delivery of goods where they are in possession of third party(Sec-36(3)):

- Where the goods at the time of sale are in possession of a third person, there is no delivery by the seller to the buyer unless and until such third person acknowledges to the buyer that he holds the goods on his behalf, such a delivery is known as "constructive delivery" or "delivery by attornment" and requires the consent of all the three parties, the seller, the buyer and the person having possession of the goods.

8. Expenses of delivery(Sec-36(5)):

- Unless other wise agreed, the expenses of and incidental to putting the goods into a deliverable state must be borne by the seller.

9. Delivery of wrong quantity or different quality(Sec-37):

- A defective delivery, i.e delivery of quantity less or more than that contracted for or delivery of goods mixed with the goods of a different description not included in the contract, entitles the buyer,

i) To reject the whole , or

ii) To accept the whole, or

iii) To accept the quantity and quality he ordered and reject the rest of the goods so delivered.

10. Instalment deliveries(Sec-38):

- Unless otherwise agreed, the buyer of the goods is not bound to accept delivery there of by instalments.If the parties so agreed then on the delivery of the goods may be made by instalments.

11. Delivery to carrier or wharfinger(Sec-39):

- Where 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 delivery of the goods to the buyer.

- Seller's duty-It is the duty of the seller, when he delivers the goods to the carrier or wharfinger, to enter into a reasonable contract on behalf of the buyer for the safety of the goods, and if he fails to do so, and the goods are lost or damaged, the buyer may decline to treat the delivery, may hold the seller responsible in damages.

- <u>Sea Transit</u>: Unless otherwise agreed , where goods are sent by the seller to the buyer by a route involving sea transit, where it is usual to insure, the seller must inform the buyer in time to get the goods insured during their sea transit, and if the seller fails to do so, the goods shall be deemed to be at his risk during such sea transit.

Distinction between Contract & Agreement

Basis	**Contract**	**Agreement**
1. Section : 2. Definition : 3. Enforceability : 4. Interrelationship 5. Scope : 6. Validity : 7. Legal : Obligation	Sec. 2(h) A contract is an agreement enforceable by law. Every contract is enforceable A contract includes an agreement. The scope of a contract is limited, as it includes only commercial agreements. Only legal agreements are called contracts. Every contract contains a legal obligation.	Sec. 2(e) Every promise or every set of promises forming consideration for each other is an agreements. Every promise is not enforceable. An agreement does not include a contract. Its scope is relatively wider, as it includes both social agreement and commercial agreements. An agreement may be both legal and illegal. It is not necessary for every agreement to have legal obligation.

Unit III

The Negotiable Instruments (Amendment) Act, 2018 was notified on 02-08-2018.

<u>The following amendments have been made</u> —

- *Section 143* — now introduces a **new proviso 143A**, giving power to a Court to try an offence under S. 138 to order the drawer of cheque to pay interim compensation to the complainant in summary trials/summons case where he pleads not guilty to the accusations in the complaint. Furthermore, the interim compensation shall not exceed

20 % of amount of the cheque and shall be payable within 60 days from date of the order.

- *Recovery of fine* shall be same as under Section 421 of the Code of Criminal Procedure, 1973.
- In *cases of acquittal*, the Court is now empowered to direct the **complainant to repay** to the appellant the amount so released, at interest rates as prescribed by RBI.
- *Section 148* — now **empowers the appellate court**, for appeals against conviction under S. 138, to direct the appellant to deposit a minimum 20 % of the fine/compensation awarded, in addition to interim compensation paid under S. 143A.

August 6, 2018

The Central Government has notified amendment to one of the most essential legislation i.e. the **Negotiable Instrument (Amendment) Act, 2018**.

The Amendment incorporates **Section 143A in the** Negotiable Instrument Act, 1881 which provides for the **Power to provide for interim compensation to the complainant**.

The insertion of new provisions in the NI Act aims at addressing the issue of undue delay in finality of cheque dishonor cases. It is believed that the amendment will strengthen the credibility of cheques and help trade and commerce in general.

- The new **Section 143 A** empowers the Court trying an offence under Section 138 of the NI Act(cheque dishonor cases) order the drawer of the cheque to pay interim compensation to the complainant. The interim compensation so payable shall be twenty percent of the amount of the impugned cheque. Earlier, there was no such relief available to the complainant under the Act.
- The Amendment also inserts new **Section 148**, whereby in an appeal by the drawer against conviction under Section 138 of the NI Act, the Appellate Court may order the appellant to deposit such sum which shall be a minimum of twenty percent of the fine or compensation awarded by the trial Court. However, if the appellant is acquitted, then the Court shall direct the complainant to repay to the appellant the amount so released, with interest.

NEGOTIABLE INSTRUMENTS ACT, 1881

OBJECTIVES

After reading this lesson, you should be able to-

• Understand meaning, essential characteristics and types of negotiable instruments;

• Describe the meaning and marketing of cheques, crossing of cheques and cancellation of crossing of a cheque;

• Explain capacity and liability parties to a negotiable instruments; and

• Understand various provisions of negotiable instrument Act, 1881 regarding negotiation, assignment, endorsement, acceptance, etc. of negotiable instruments.

1.1 INTRODUCTION

The Negotiable Instruments Act was enacted, in India, in 1881. Prior to its enactment, the provision of the English Negotiable Instrument Act were applicable in India, and the present Act is also based on the English Act with certain modifications. It extends to the whole of India except the State of Jammu and Kashmir. The Act operates subject to the provisions of Sections 31 and 32 of the Reserve Bank of India Act, 1934. Section 31 of the Reserve Bank of India Act provides that no person in India other than the Bank or as expressly authorised by this Act, the Central Government shall draw, accept, make or issue any bill of exchange, hundi, promissory note or engagement for the payment of money payable to bearer on demand. This Section further provides that no one except the RBI or the Central Government can make or issue a promissory note expressed to be payable or demand or after a certain time. Section 32 of the Reserve Bank of India Act makes issue of such bills or notes punishable with fine which may extend to the amount of the instrument. The effect or the consequences of these provisions are:

1. A promissory note cannot be made payable to the bearer, no matter whether it is payable on demand or after a certain time.

2. A bill of exchange cannot be made payable to the bearer on demand though it can be made payable to the bearer after a certain time.

3. But a cheque {though a bill of exchange} payable to bearer or demand can be drawn on a person's account with a banker.

1.2 MEANING OF NEGOTIABLE INSTRUMENTS

According to Section 13 (a) of the Act, "Negotiable instrument means a promissory note, bill of exchange or cheque payable either to order or to bearer, whether the word "order" or " bearer" appear on the instrument or not." In the words of Justice, Willis, "A negotiable instrument is one, the property in which is acquired by anyone who takes it bonafide and for value notwithstanding any defects of the title in the person from whom he took it". Thus, the term, negotiable instrument means a written document which creates a right in favour of some person and which is freely transferable. Although the Act mentions only these three instruments (such as a promissory note, a bill of exchange and cheque), it does not money payable to bearer on demand. This Section further provides that no one except the RBI or the Central Government can make or issue a promissory note expressed to be payable or demand or after a certain time. Section 32 of the Reserve Bank of India Act makes issue of such bills or notes punishable with fine which may extend to the amount of the instrument. The effect or the consequences of these provisions are:

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CHARACTERISTICS OF A NEGOTIABLE INSTRUMENT

A negotiable instrument has the following characteristics:

1. Property: The prossessor of the negotiable instrument ispresumed to be the owner of the property contained therein. A negotiable instrument does not merely give possession of the instrument but right to property also. The property in a negotiable instrument can be transferred without any formality. In the case of bearer instrument, the property passes by mere delivery to the transferee. In the case of an order instrument, endorsement and delivery are required for the transfer of property.

2. Title: The transferee of a negotiable instrument is known as 'holder in due course.' A bona fide transferee for value is not affected by any defect of title on the part of the transferor or of any of the previous holders of the instrument.

3. Rights: The transferee of the negotiable instrument can sue in his own name, in case of dishonour. A negotiable instrument can be transferred any number of times till it is at maturity. The holder of the
instrument need not give notice of transfer to the party liable on the instrument to pay.

4. Presumptions: Certain presumptions apply to all negotiable instruments e.g., a presumption that consideration has been paid under it. It is not necessary to write in a promissory note the words 'for value received' or similar expressions because the payment of consideration is presumed. The words are usually included to create additional evidence of consideration.

5. Prompt payment: A negotiable instrument enables the holder to expect prompt payment because a dishonour means the ruin of the credit of all persons who are parties to the instrument.

PRESUMPTIONS AS TO NEGOTIABLE INSTRUMENT

Sections 118 and 119 of the Negotiable Instrument Act lay down certain presumptions which the court presumes in regard to negotiable instruments. In other words these presumptions need not be proved as they are presumed to exist in every negotiable instrument. Until the contrary is proved the following presumptions shall be made in case of all negotiable instruments:

1. Consideration: It shall be presumed that every negotiable instrument was made drawn, accepted or endorsed for consideration. It is presumed that, consideration is present in every negotiable instrument until the contrary is presumed. The presumption of consideration, however may be rebutted by proof that the instrument had been obtained from, its lawful owner by means of fraud or undue influence.

2. Date: Where a negotiable instrument is dated, the presumption is that it has been made or drawn on such date, unless the contrary is proved.

3. Time of acceptance: Unless the contrary is proved, every accepted bill of exchange is presumed to have been accepted within a reasonable time after its issue and before its maturity. This presumption only applies when the acceptance is not dated; if the acceptance bears a date, it will prima facie be taken as evidence of the date on which it was made.

4. Time of transfer: Unless the contrary is presumed it shall be presumed that every transfer of a negotiable instrument was made before its maturity.

5. Order of endorsement: Until the contrary is proved it shall be presumed that the endorsements appearing upon a negotiable instrument were made in the order in which they appear thereon.

6. Stamp: Unless the contrary is proved, it shall be presumed that a lost promissory note, bill of exchange or cheque was duly stamped.

7. Holder in due course: Until the contrary is proved, it shall be presumed that the holder of a negotiable instrument is the holder in due course. Every holder of a negotiable instrument is presumed to have paid consideration for it and to have taken it in good faith. But if the instrument was obtained from its lawful owner by means of an offence or fraud, the holder has to prove that he is a holder in due course.

8. Proof of protest: Section 119 lays down that in a suit upon an instrument which has been dishonoured, the court shall on proof of the protest, presume the fact of dishonour, unless and until such fact is disproved.

TYPES OF NEGOTIABLE INSTRUMENT

Section 13 of the Negotiable Instruments Act states that a negotiable instrument is a promissory note, bill of exchange or a cheque payable either to order or to bearer. Negotiable instruments recognised by statute are: (i) Promissory notes (ii) Bills of exchange (iii) Cheques. Negotiable instruments recognised by usage or custom are: (i) Hundis (ii) Share warrants (iii) Dividend warrants (iv) Bankers draft (v) Circular notes (vi) Bearer debentures (vii) Debentures of Bombay Port Trust (viii) Railway receipts (ix) Delivery orders.

This list of negotiable instrument is not a closed chapter. With the growth of commerce, new kinds of securities may claim recognition as negotiable instruments. The courts in India usually follow the practice of English courts in according the character of negotiability to other instruments.

Promissory notes

Section 4 of the Act defines, "A promissory note is an instrument in writing (note being a bank-note or a currency note) containing an unconditional undertaking, signed by the maker, to pay a certain sum of money to or to the order of a certain person, or to the bearer of the instruments."

Essential elements

An instrument to be a promissory note must possess the following elements:

1. **It must be in writing:** A mere verbal promise to pay is not a promissory note. The method of writing (either in ink or pencil or printing, etc.) is unimportant, but it must be in any form that cannot be altered easily.

2. **It must certainly an express promise or clear understanding to pay:** There must be an express undertaking to pay. A mere acknowledgment is not enough. The following are not promissory notes as there is no promise to pay.

If A writes:

(a) "Mr. B, I.O.U. (I owe you) Rs. 500"

(b) "I am liable to pay you Rs. 500".

(c) "I have taken from you Rs. 100, whenever you ask for it have to pay" .

The following will be taken as promissory notes because there is an express promise to pay:

If A writes:

(a) "I promise to pay B or order Rs. 500"

(b) "I acknowledge myself to be indebted to B in Rs. 1000 to be paid on demand, for the value received".

(3) Promise to pay must be unconditional: A conditional undertaking destroys the negotiable character of an otherwise negotiable instrument. Therefore, the promise to pay must not depend upon the happening of some outside contingency or event. It must be payable absolutely.

(4) **It should be signed by the maker:** The person who promise to pay must sign the instrument even though it might have been written by the promisor himself. There are no restrictions regarding the form or place of signatures in the instrument. It may be in any part of the instrument. It may be in pencil or ink, a thumb mark or initials. The pronote can be signed by the authorised agent of the maker, but the agent must expressly state as to on whose behalf he is signing, otherwise he himself may be held liable as a maker. The only legal requirement is that it should indicate with certainty the identity of the person and his intention to be bound by the terms of the agreement.

(5) **The maker must be certain:** The note self must show clearly who is the person agreeing to undertake the liability to pay the amount. In case a person signs in an assumed name, he is liable as a maker because a maker is taken as certain if from his description sufficient indication follows about his identity. In case two or more persons promise to pay, they may bind themselves jointly or jointly and severally, but their liability cannot be in the alternative.

(6) **The payee must be certain:** The instrument must point out with certainty the person to whom the promise has been made. The payee may be ascertained by name or by designation. A note payable to the maker himself is not pronate unless it is indorsed by him. In case, there is a mistake in the name of the payee or his designation; the note is valid, if the payee can be ascertained by evidence. Even where the name of a dead person is entered as payee in ignorance of his death, his legal representative can enforce payment.

(7) **The promise should be to pay money and money only:** Money means legal tender money and not old and rare coins promise to deliver paddy either in the alternative or in addition to money does not constitute a promissory note.

(8) **The amount should be certain:** One of the important characteristics of a promissory note is certainty—not only regarding the person to whom or by whom payment is to be made but also regarding the amount.

However, paragraph 3 of Section 5 provides that the sum does not become indefinite merely because

(a) there is a promise to pay amount with interest at a specified rate.

(b) the amount is to be paid at an indicated rate of exchange.

(c) the amount is payable by installments with a condition that the whole balance shall fall due for payment on a default being committed in the payment of anyone installment.

(9) Other formalities: The other formalities regarding number, place, date, consideration etc. though usually found given in the promissory notes but are not essential in law. The date of instrument is not material unless the amount is made payable at a certain time after date. Even in such a case, omission of date does not invalidate the instrument and the date of execution can be independently ascertained and proved.

On demand (or six month after date) I promise to pay Peter or order the sum of rupees one thousand with interest at 8 per cent per annum until payment.

Bill of exchange

Section 5 of the Act defines, "A bill of exchange is an instrument in writing containing an unconditional order, signed by the maker, directing a certain person to pay a certain sum of money only to, or to the order of a certain person or to the bearer of the instrument".

A bill of exchange, therefore, is a written acknowledgement of the debt, written by the creditor and accepted by the debtor. There are usually three parties to a bill of exchange drawer, acceptor or drawee and payee. Drawer himself may be the payee.

Essential conditions of a bill of exchange

(1) It must be in writing.

(2) It must be signed by the drawer.

(3) The drawer, drawee and payee must be certain.

(4) The sum payable must also be certain.

(5) It should be properly stamped.

(6) It must contain an express order to pay money and money alone.

For example, In the following cases, there is no order to pay, but only a request to pay. Therefore, none can be considered as a bill of exchange:

(a) "I shall be highly obliged if you make it convenient to pay Rs. 1000 to Suresh".

(b) "Mr. Ramesh, please let the bearer have one thousand rupees, and place it to my account and oblige"

However, there is an order to pay, though it is politely made, in the following examples:

(a) “Please pay Rs. 500 to the order of ‘A’.

(b) ‘Mr. A will oblige Mr. C, by paying to the order of’ P”.

(7) The order must be unconditional.

Distinction Between Bill of Exchange and Promissory Note

1. **Number of parties:** In a promissory note there are only two parties – the maker (debtor) and the payee (creditor). In a bill of exchange, there are three parties; drawer, drawee and payee; although any two out of the three may be filled by one and the same person,

2. **Payment to the maker:** A promissory note cannot be made payable the maker himself, while in a bill of exchange to the drawer and payee or drawee and payee may be same person.

3. **Unconditional promise:** A promissory note contains an unconditional promise by the maker to pay to the payee or his order, whereas in a bill of exchange, there is an unconditional order to the drawee to pay according to the direction of the drawer.

4. **Prior acceptance:** A note is presented for payment without any prior acceptance by the maker. A bill of exchange is payable after sight must be accepted by the drawee or someone else on his behalf, before it can be presented for payment.

5. **Primary or absolute liability:** The liability of the maker of a promissory note is primary and absolute, but the liability of the drawer of a bill of exchange is secondary and conditional.

6. **Relation:** The maker of the promissory note stands in immediate relation with the payee, while the maker or drawer of an accepted bill stands in immediate relations with the acceptor and not the payee.

7. **Protest for dishonour:** Foreign bill of exchange must be protested for dishonour when such protest is required to be made by the law of the country where they are drawn, but no such protest is needed in the case of a promissory note.

8. **Notice of dishonour:** When a bill is dishonoured, due notice of dishonour is to be given by the holder to the drawer and the intermediate indorsers, but no such notice need be given in the case of a note.

Classification of Bills

Bills can be classified as:

(1) Inland and foreign bills.

(2) Time and demand bills.

(3) Trade and accommodation bills.

(1) Inland and Foreign Bills

Inland bill: A bill is, named as an inland bill if:

(a) it is drawn in India on a person residing in India, whether payable in or outside India, or

(b) it is drawn in India on a person residing outside India but payable in India.

The following are the Inland bills

(i) A bill is drawn by a merchant in Delhi on a merchant in Madras. It is payable in Bombay. The bill is an inland bill.

(ii) A bill is drawn by a Delhi merchant on a person in London, but is made payable in India. This is an inland bill.

(iii) A bill is drawn by a merchant in Delhi on a merchant in Madras. It is accepted for payment in Japan. The bill is an inland bill.

Foreign Bill: A bill which is not an inland bill is a foreign bill. The following are the foreign bills:

1. A bill drawn outside India and made payable in India.
2. A bill drawn outside India on any person residing outside India.
3. A bill drawn in India on a person residing outside India and made payable outside India.
4. A bill drawn outside India on a person residing in India.
5. A bill drawn outside India and made payable outside India.

Bills in sets (Secs. 132 and 133): The foreign bills are generally drawn in sets of three, and each sets is termed as a 'via'. As soon as anyone of the set is paid, the others becomes inoperative. These bills are drawn in different parts. They are drawn in order to avoid their loss or miscarriage during transit. Each part is despatched separately. To avoid delay, all the parts are sent on the same day; by different mode of conveyance.

Rules: Sections 132 and 133 provide for the following rules:

(i) A bill of exchange may be drawn in parts, each part being numbered and containing a provision that it shall continue payable only so long as the others remain unpaid. All parts make one bill and the entire bill is extinguished, i.e. when payment is made on one part- the other parts will become inoperative (Section 132).

(ii) The drawer should sign and deliver all the parts but the acceptance is to be conveyed only on one of the parts. In case a person accepts or endorses different parts of the bill in favour of different persons, he and the subsequent endorsers of each part are liable on such part as if it were a separate bill (Sec. 132).

(iii) As between holders in due course of the different parts of the same bill, he who first acquired title to anyone part is entitled to the other parts and is also entitled to claim the money represented by bill (Sec. 133).

(2) Time and Demand Bill

Time bill: A bill payable after a fixed time is termed as a time bill.

In other words, bill payable “after date” is a time bill.

Demand bill: A bill payable at sight or on demand is termed as a demand bill.

(3) Trade and Accommodation Bill

Trade bill: A bill drawn and accepted for a genuine trade transaction is termed as a “trade bill”.

Accommodation bill: A bill drawn and accepted not for a genuine trade transaction but only to provide financial help to some party is termed as an “accommodation bill”.

Example: A, is need of money for three months. He induces his friend B to accept a bill of exchange drawn on him for Rs. 1,000 for three months. The bill is drawn and accepted. The bill is an “accommodation bill”. A may get the bill discounted from his bankers immediately, paying a small sum as discount. Thus, he can use the funds for three months and then just before maturity he may remit the money to B, who will meet the bill on maturity. In the above example A is the “accommodated party” while B is the “accommodating party”. It is to be noted that an recommendation bill may be for accommodation of both the drawer arid acceptor. In such a case, they share the proceeds of the discounted bill.

Rules regarding accommodation bills are:

(i) In case the patty accommodated continues to hold the bill till maturity, the accommodating party shall not be liable to him for payment of, the bill since the contract between them is not based on any consideration (Section 43).

(ii) But the accommodating party shall be liable to any subsequent holder for value who may be knowing the exact position that the bill is an accommodation bill and that the full consideration has not been received by the acceptor. The accommodating party can, in turn, claim compensation from the accommodated party for the amount it has been asked to pay the holder for value. An accommodation bill may be negotiated after maturity. The holder or such a bill after maturity is in the same position as a holder before maturity, provided he takes it in good faith and for value (Sec. 59) In form and all other respects an accommodation bill is quite similar to an ordinary bill of exchange. There is nothing on the face of the accommodation bill to distinguish it from an ordinary trade bill.

Cheques

Section 6 of the Act defines "A cheque is a bill of exchange drawn on a specified banker, and not expressed to be payable otherwise than on demand".

A cheque is bill of exchange with two more qualifications, namely,

(i) it is always drawn on a specified banker, and (ii) it is always payable on demand. Consequently, all cheque are bill of exchange, but all bills are not cheque. A cheque must satisfy all the requirements of a bill of exchange; that is, it must be signed by the drawer, and must contain an unconditional order on a specified banker to pay a certain sum of money to or to the order of a certain person or to the bearer of the cheque. It does not require acceptance.

Distinction Between Bills of Exchange and Cheque

1. A bill of exchange is usually drawn on some person or firm, while a cheque is always drawn on a bank.

2. It is essential that a bill of exchange must be accepted before its payment can be claimed A cheque does not require any such acceptance.

3. A cheque can only be drawn payable on demand, a bill may be also drawn payable on demand, or on the expiry of a certain period after date or sight.

4. A grace of three days is allowed in the case of time bills while no grace is given in the case of a cheque.

5. The drawer of the bill is discharged from his liability, if it is not presented for payment, but the drawer of a cheque is discharged only if he suffers any damage by delay in presenting the cheque for payment.

6. Notice of dishonour of a bill is necessary, but no such notice is necessary in the case of cheque.

7. A cheque may be crossed, but not needed in the case of bill.

8. A bill of exchange must be properly stamped, while a cheque does not require any stamp.

9. A cheque drawn to bearer payable on demand shall be valid but a bill payable on demand can never be drawn to bearer.

10. Unlike cheques, the payment of a bill cannot be countermanded by the drawer.

Hundis

A "Hundi" is a negotiable instrument written in an oriental language. The term hundi includes all indigenous negotiable instrument whether they be in the form of notes or bills. The word 'hundi' is said to be derived from the Sanskrit word 'hundi', which means "to collect". They are quite popular among the Indian merchants from very old days. They are used to finance trade and commerce and provide a fascile and sound medium of currency and credit. Hundis are governed by the custom and usage of the locality in which they are intended to be used and not by the provision of the Negotiable Instruments Act. In case there is no customary rule known as to a certain point, the court may apply the provisions of the Negotiable Instruments Act. It is also open to the parties to expressly exclude the applicability of any custom relating to hundis by agreement (lndur Chandra vs. Lachhmi Bibi, 7 B.I.R. 682).

PARTIES TO NEGOTIABLE INSTRUMENTS

Parties to Bill of Exchange

1. **Drawer:** The maker of a bill of exchange is called the 'drawer'.

2. **Drawee:** The person directed to pay the money by the drawer is called the 'drawee',

3. **Acceptor**: After a drawee of a bill has signed his assent upon the bill, or if there are more parts than one, upon one of such pares and delivered the same, or given notice of such signing to the holder or to some person on his behalf, he is called the ' acceptor'.

4. **Payee:** The person named in the instrument, to whom or to whose order the money is directed to be paid by the instrument is called the ‘payee’. He is the real beneficiary under the instrument. Where he signs his name and makes the instrument payable to some other person, that other person does not become the payee.

5. **Indorser:** When the holder transfers or indorses the instrument to anyone else, the holder becomes the ‘indorser’.

6. **Indorsee:** The person to whom the bill is indorsed is called an ‘indorsee’.

7. **Holder:** A person who is legally entitled to the possession of the negotiable instrument in his own name and to receive the amount thereof, is called a ‘holder’. He is either the original payee, or the indorsee. In case the bill is payable to the bearer, the person in possession of the negotiable instrument is called the ‘holder’.

8. **Drawee in case of need:** When in the bill or in any endorsement, the name of any person is given, in addition to the drawee, to be resorted to in case of need, such a person is called ‘drawee in case of need’.

In such a case it is obligatory on the part of the holder to present the bill to such a drawee in case the original drawee refuses to accept the bill. The bill is taken to be dishonoured by non-acceptance or for nonpayment, only when such a drawee refuses to accept or pay the bill.

9. **Acceptor for honour:** In case the original drawee refuses to accept the bill or to furnish better security when demanded by the notary, any person who is not liable on the bill, may accept it with the consent of the holder, for the honour of any party liable on the bill. Such an acceptor is called ‘acceptor for honour’.

Parties to a Promissory Note

1. **Maker.** He is the person who promises to pay the amount stated in the note. He is the debtor.

2. **Payee.** He is the person to whom the amount is payable i.e. the creditor.

3. **Holder.** He is the payee or the person to whom the note might have been indorsed.

4. The indorser and indorsee (the same as in the case of a bill).

Parties to a Cheque

1. **Drawer.** He is the person who draws the cheque, i.e., the depositor of money in the bank.

2. **Drawee**. It is the drawer's banker on whom the cheque has been drawn.

3. **Payee.** He is the person who is entitled to receive the payment of the cheque.

4. The holder, indorser and indorsee (the same as in the case of a bill or note).

NEGOTIATION

Negotiation may be defined as the process by which a third party is constituted the holder of the instrument so as to entitle him to the possession of the same and to receive the amount due thereon in his own name. According to section 14 of the Act, 'when a promissory note, bill of exchange or cheque is transferred to any person so as to constitute that person the holder thereof, the instrument is said to be negotiated.' The main purpose and essence of negotiation is to make the transferee of a promissory note, a bill of exchange or a cheque the holder there of. Negotiation thus requires two conditions to be fulfilled, namely:

1. There must be a transfer of the instrument to another person; and

2. The transfer must be made in such a manner as to constitute the transferee the holder of the instrument.

Handing over a negotiable instrument to a servant for safe custody is not negotiation; there must be a transfer with an intention to pass title.

Modes of negotiation

Negotiation may be effected in the following two ways:

1. **Negotiation by delivery (Sec. 47):** Where a promissory note or a bill of exchange or a cheque is payable to a bearer, it may be negotiated by delivery thereof.

Example: A, the holder of a negotiable instrument payable to bearer, delivers it to B's agent to keep it for B.The instrument has been negotiated.

2. **Negotiation by endorsement and delivery (Sec. 48):** A promissory note, a cheque or a bill of exchange payable to order can be negotiated only be endorsement and delivery. Unless the holder signs his endorsement on the instrument and delivers it, the transferee does not become a holder. If there are more payees than one, all must endorse it.

ASSIGNMENT

Bills, notes and cheques represent debts and as such have been held to be assignable without endorsement. Transfer by assignment takes place when the holder of a negotiable instrument sells his right to another person without endorsing it. The assignee is entitled to get possession and can recover the amount due on the instrument from the parties thereto. Of the two methods of transfer of negotiable instruments discussed, transfer by negotiation is recognized by the Negotiable Instrument Act.

Negotiation and Assignment Distinguished

The various points of distinction between negotiation and assignment are as below:

1. Negotiation requires delivery only to constitute a transfer, whereas assignment requires a written document signed by the transferor.

2. Consideration is always presumed in the case of transfer by negotiation. In the case of assignment consideration must be proved.

3. In case of negotiation, notice of transfer is not necessary, whereas in the case of assignment notice of the transfer must be given by the assignee to the debtor.

4. The assignee takes the instrument subject to all the defects in the title of the transferor. If the title of the assignor was defective the title of the assignee is also defective. However, in case of negotiation the transferee takes the instrument free from all the defects in the title of the transferor. A holder in due course is not affected by any defect in the title of the transferor. He may therefore have a better title than the transferor.

5. In case of negotiation a transferee can sue the third party in his own name. But an assignee cannot do so.

Importance of delivery in negotiation

Delivery is a voluntary transfer of possession from one person to another. Delivery is essential to complete any contract on a negotiable instrument whether it be contract of making endorsement or acceptance. The property in the instrument does not pass unless the delivery is fully completed. Section 46 of the Act provides that a negotiable instrument is not made or accepted or endorsed unless it is delivered to a proper person. For instance, if a person signs a promissory note and keeps it with himself, he cannot be said to have made a promissory note; only when it is delivered to the payee that the promissory note is made. Delivery may be actual or constructive. Delivery is actual when it is accompanied by actual change of possession of the instrument. Constructive delivery is effected without any change of actual possession.

ENDORSEMENT

The word ‘endorsement’ in its literal sense means, writing on the back of an instrument. But under the Negotiable Instruments Act it means, the writing of one’s name on the back of the instrument or any paper attached to it with the intention of transferring the rights therein. Thus, endorsement is signing a negotiable instrument for the purpose of negotiation. The person who effects an endorsement is called an ‘endorser’, and the person to whom negotiable instrument is transferred by endorsement is called the ‘endorsee’.

Essentials of a valid endorsement

The following are the essentials of a valid endorsement:

1. It must be on the instrument. The endorsement may be on the back or face of the instrument and if no space is left on the instrument, it may be made on a separate paper attached to it called allonage. It should usually be in ink.

2. It must be made by the maker or holder of the instrument. A stranger cannot endorse it.

3. It must be signed by the endorser. Full name is not essential. Initials may suffice. Thumb-impression should be attested. Signature may be made on any part of the instrument. A rubber stamp is not accepted but the designation of the holder can be done by a rubber stamp.

4. It may be made either by the endorser merely signing his name on the instrument (it is a blank endorsement) or by any words showing an intention to endorse or transfer the instrument to a specified person (it is an endorsement in full). No specific form of words is prescribed for an endorsement. But intention to transfer must be present. When in a bill or note payable to order the endorsee’s name is wrongly spelt, he should when he endorses it, sign the name as spelt in the instrument and write the correct spelling within brackets after his endorsement.

5. It must be completed by delivery of the instrument. The delivery must be made by the endorser himself or by somebody on his behalf with the intention of passing property therein. Thus, where a person endorses an instrument to another and keeps it in his papers where it is found after his death and then delivered to the endorsee, the latter gets no right on the instrument.

6. It must be an endorsement of the entire bill. A partial endorsement i.e. which purports to transfer to the endorse a part only of the amount payable does not operate as a valid endorsement.If delivery is conditional, endorsement is not complete until the condition is fulfilled.

Who may endorse?

The payee of an instrument is the rightful person to make the first endorsement. Thereafter the instrument may be endorsed by any person who has become the holder of the instrument. The maker or the drawer cannot endorse the instrument but if any of them has become the holder thereof he may endorse the instrument. (Sec. 51).The maker or drawer cannot endorse or negotiate an instrument unless he is in lawful possession of instrument or is the holder there of. A payee or indorsee cannot endorse or negotiate unless he is the holder there of.

Classes of endorsement

An endorsement may be:

(1) Blank or general.

(2) Speical or full.

(3) Partial.

(4) Restrictive.

(5) Conditional.

(a) Blank or general endorsement (Sections 16 and 54).

It is an endorsement when the endorser merely signs on the instrument without mentioning the name of the person in whose favour the endorsement is made. Endorsement in blank specifies no endorsee. It simply consists of the signature of the endorser on the endorsement. A negotiable instrument even though payable to order becomes a bearer instrument if endorsed in blank. Then it is transferable by mere delivery. An endorsement in blank may be followed by an endorsement in full.

Example: A bill is payable to X. X endorses the bill by simply affixing his signature. This is an endorsement in blank by X. In this case the bill becomes payable to bearer.There is no difference between a bill or note indorsed in blank and one payable to bearer. They can both be negotiated by delivery.

(b) Special or full endorsement (Section 16)

When the endorsement contains not only the signature of the endorser but also the name of the person in whose favour the endorsement is made, then it is an endorsement in full. Thus, when endorsement is made by writing the words “Pay to A or A’s order,” followed by the signature of the endorser, it is an endorsement in full. In such an endorsement, it is only the endorsee who can transfer the instrument.

Conversion of endorsement in blank into endorsement in full: When a person receives a negotiable instrument in blank, he may without signing his own name, convert the blank endorsement into an endorsement in full by writing above the endorser’s signature a direction to pay to or to the order of himself or some other person. In such a case the person is not liable as the endorser on the bill. In other words, the person transferring such an instrument does not incur all the liabilities of an endorser. (Section 49).

Example: A is the holder of a bill endorsed by B in blank. A writes over B’s signature the words “Pay to C or order.” A is not liable as endorser but the writing operates as an endorsement in full from B to C.Where a bill is endorsed in blank, or is payable to bearer and is afterwards endorsed by another in full, the bill remains transferable by delivery with regard to all parties prior to such endorser in full. But suchendorser in full cannot be sued by any one except the person in whose favour the endorsement in full is made. (Section 55).

Example: C the payee of a bill endorses it in blank and delivers it to D, who specially endorses it to E or order. E without endorsement transfers the bill to F. F as the bearer is entitled to receive payment or to sue the drawer, the acceptor, or C who endorsed the bill in blank but he cannot sue D or E

(c) Partial endorsement (Section 56)

A partial endorsement is one which purports to transfer to the endorsee a part only of the amount payable on the instrument. Such an endorsement does not operate as a negotiation of the instrument.

Example: A is the holder of a bill for Rs.1000. He endorses it “pay to B or order Rs.500.” This is a partial endorsement and invalid for the purpose of negotiation.

(d) Restrictive endorsement (Section 50)

The endorsement of an instrument may contain terms making it restrictive. Restrictive endorsement is one which either by express words restricts or prohibits the further negotiation of a bill or which expresses that it is not a complete and unconditional transfer of the instrument but is a mere authority to the endorsee to deal with bill as directed by such endorsement.

"Pay C," "Pay C for my use," "Pay C for the account of B" are instances of restrictive endorsement. The endorsee under a restrictive endorsement acquires all the rights of the endoser except the right of negotiation.

Conditional or qualified endorsement

It is open to the endorser to annex some condition to his owner liability on the endorsement. An endorsement where the endorsee limits or negatives his liability by putting some condition in the instrument is called a conditional endorsement. A condition imposed by the endorser may be a condition precedent or a condition subsequent. An endorsement which says that the amount will become payable if the endorsee attains majority embodies a condition precedent. A conditional endorsement unlike the restrictive endorsement does not affect the negotiability of the instrument. It is also some times called qualified endorsement. An endorsement may be made conditional or qualified in any of the following forms:

(i) **'Sans recourse' endorsement:** An endorser may be express word exclude his own liability thereon to the endorser or any subsequent holder in case of dishonour of the instrument. Such an endorsement is called an endorsement sans recourse (without recourse). Thus 'Pay to A or order sans recourse, 'pay to A or order without recourse to me,' are instances of this type of endorsement. Here if the instrument is dishonoured, the subsequent holder or theindorsee cannot look to the indorser for payment of the same.

An agent signing a negotiable instrument may exclude his personal liability by using words to indicate that he is signing as agent only. The same rule applies to directors of a company signing instruments on behalf of a company. The intention to exclude personal liability must be clear.

Where an endorser so excludes his liability and afterwards becomes the holder of the instrument, all intermediate endorsers are liable to him.

Example: A is the holder of a negotiable instrument. Excluding personal liability by an endorsement without recourse, he transfers the instrument to B, and B endorses it to C, who endorses it to A. A can recover the amount of the bill from B and C.

(ii) **Facultative endorsement:** An endorsement where the endorser extends his liability or abandons some right under a negotiable instrument, is called a facultative endorsement. "Pay A or order, Notice of dishonour waived" is an example of facultative endorsement.

(iii) **'Sans frais' endorsement:** Where the endorser does not want the endorsee or any subsequent holder, to incur any expense on his account on the instrument, the endorsement is 'sans frais'.

(iv) **Liability dependent upon a contingency:** Where an endorser makes his liability depend upon the happening of a contingent event, or makes the rights of the endorsee to receive the amount depend upon any contingent event, in such a case the liability of the endorser will arise only on the happening of that contingent event. Thus, an endorser may write 'Pay A or order on his marriage with B'. In such a case, the endorser will not be liable until the marriage takes place and if the marriage becomes impossible, the liability of the endorser comes to an end.

Effects of endorsement

The legal effect of negotiation by endorsement and delivery is:

(i) to transfer property in the instrument from the endorser to the endorsee.

(ii) to vest in the latter the right of further negotiation, and

(iii) a right to sue on the instrument in his own name against all the other parties (Section 50).

Cancellation of endorsement

When the holder of a negotiable instrument, without the consent of the endorser destroys or impairs the endorser's remedy against prior party, the endorser is discharged from liability to the holder to the same extent as if the instrument had been paid at maturity (Section 40).

Negotiation back

'Negotiation back' is a process under which an endorsee comes again into possession of the instrument in his own right. Where a bill is re-endorsed to a previous endorser, he has no remedy against the intermediate parties to whom he was previously liable though he may further negotiate the bill.

INSTRUMENTS WITHOUT CONSIDERATION

A person cannot pass a better title than he himself possesses. A person who is a mere finder of a lost goods or a thief or one who obtains any article by fraud or for an unlawful consideration does not get any title to the thing so acquired. The true owner can recover it not only from him but from any person to whom he may have sold it. But there is a difference between the transfer of ordinary goods and negotiation of negotiable instruments. The Negotiable Instruments Act provides protection to those persons who acquire the instruments in good faith and for valuable consideration. A holder in due course who has no means to discover the defect of title in an instrument of any previous holder when the instrument may have passed through several hands must be protected if he obtains the instrument for value and in good faith.Section 58 of the Act provides that no person in possession of an instrument with a defect of title can claim the amount of the instrument unless he is a holder in due course. The moment an instrument comesinto the hands of a holder in due course, not only does he get a title which is free from all defects, but having passed through his hands the instrument is cleaned of all defects.

Lost instruments

Where the holder of a bill or note loses it, the finder gets no title to it. The finder cannot lawfully transfer it. The man who lost it can recover it from the finder. But if the instrument is transferable by mere delivery and there is nothing on its face to show that it does not belong to the finder, a holder obtaining it from the finder in good faith and for valuable consideration and before maturity is entitled to the instrument and can recover payment from all the parties thereof. If the instrument is transferable by endorsement, the finder cannot negotiate it except by forging the endorsement.The holder of the instrument when it is lost must give a notice of loss to all the parties liable on it and also a public notice by advertisement. The holder of a lost bill remains owner in law and as such on maturity can demand payment from the acceptor, and if isdishonoured he must give notice of dishonour to prior parties. The owner of the lost bill has a right to obtain the duplicate from the drawer and on refusal he can sue the drawer for the same.

Stolen instrument

The position of thief of an instrument is exactly the same as that of a finder of lost instruments. A thief acquires no title to an instrument if he receives payment on it the owner can sue him for the recovery of the amount. But if an instrument payable to bearer is stolen and if transferred to a holder in due course, the owner must suffer.

Instruments obtained by fraud

It is of the essence of all contracts including those on negotiable instruments, that they must have been brought about by free consent of the parties compenent to contract. Any contract to which consent has been obtained by fraud is voidable at the option of the person whose consent was so obtained. A person who obtains an instrument by fraud gets a defective title. But if such an instrument passes into the hands of a holder in due course, the plea of fraud will not be available against him. If however, it could be shown that a person without negligence on his part was induced to sign an instrument it being represented to him to be a document of a different kind he would not be liable even to a holder in due course.

Instrument obtained for an unlawful consideration

The general rules as to the legality of object or consideration of a contract apply to contracts on negotiable instruments also. An instrument given for an illegal consideration is void and does not covey a valid title to the holder. He cannot enforce payment against any party thereto. Thus, a bill of exchange given in consideration of future illicit cohabitation is void. But if such an instrument passes into the hands of a holder in due course, he obtains a good and complete title to it.

Forged instrument

Forgery confers no title and a holder acquires no title to a forged instrument. A forged instrument is treated as anullity. Forgery with the intention of obtaining title to an instrument would include:

(1) fraudulently writing the name of an existing person,signing the name of a fictitious person with the intention that it may pass that of a real person, or

(2) signing one's own name with the intention that the signature may pass as the signature of some other person of the same name.

Example: A bill is payable to Ram Sunder or order. At maturity it wrongfully comes into the possession of another Ram Sunder who knows that he has no claim on the bill. He puts his own signature and the acceptor pays him. The bill is not discharged and the acceptor remains liable to Ram Sunder who is the owner of the bill.A forged instrument has no existence in the eyes of law. A title which never came into existence cannot be improved even if it passes into the hands of a holder in due course. A forges B's signature on a promissory note and transfers the same to C who takes it in good faith for value. C gets no title of the note even though he is a holder in due course.

Examples: (a) On a note for Rs.1000, A forges B's signature to it as maker. C, a holder who takes it bonafide and for value acquires no title to the note.

(b) On a bill for Rs.1000 A's acceptance to the bill is forged. The bill comes into hands of B, a bonafide holder for value, B acquires no title to the bill.

Forged endorsement

The case of a forged endorsement is slightly different. If an instrument is endorsed in full, it cannot be negotiated except by an endorsement signed by the person to whom or to whose order the instrument is payable, for the endorsee obtains title only through his endorsement. If an endorsement is forged, the endorsee acquires no title to the instrument even if he is a bonafide purchaser. On the other hand, if the instrument is a bearer instrument or has been endorsed in blank,and there is a forged endorsement the holder gets a good title because holder in such a case derives title by delivery and not by endorsement. Bankers are specially protected against forged endorsement under section 85 of the Act.

Examples: (a) A bill is endorsed, "Pay X or order." X must endorse the bill and if his signature is forged, the bill is worthless.

(b) A bill is payable to "X or order." It is stolen from X and the thief forges X's endorsement and endorses it to Y who takes it in good faith and for value. Y acquires no title to the bill.

(c) A bill payable to "A or order" is endorsed in blank by A. It comes into the hands of B. B by simple delivery passes it to C. C forges B's endorsement and transfers it to D. As D does not derive his title through the forged endorsement of B, but through the genuine endorsement of A, he obtains a good title to the instrument in spite of the intervening forged endorsement.

Instrument without consideration

Sections 43 to 45 of the Negotiable Instrument Act deal with the consequences of failure or absence of consideration in negotiable instruments. In the case of negotiable instruments consideration is presumed to exist between the parties unless the contrary is proved. As between immediate parties, if an instrument is made, drawn or endorsed without consideration, or for a consideration which subsequently fails, it is void. As between immediate parties, failure of consideration has the same effect as the absence of consideration. For instance if a promissory note is delivered by the maker to the payee as a gift, it cannot be enforced against such maker.

Examples: (a) C the holder of a bill endorses it in blank to D receiving no value. D for value transfers it by delivery to E. E is a holder of value.

(b) A is the holder of a bill for consideration. A endorses it to B, without consideration. The property in the bill passes to B. The bill is dishonoured at maturity. B cannot sue A on the bill.

As between remote parties, the defence of absence or failure of consideration is not available at all. The holder in due course who has paid consideration can recover it from all prior parties immaterial of the fact whether any of them has received consideration or not.

Where there is a partial absence or failure of consideration, as between immediate parties, only that part can be recovered which was actually paid. However, a holder in due course is not affected by this rule. But even between immediate parties, where the part of the consideration which is absent or cannot be ascertained without collateral inquiry, the whole of the amount is recoverable.

Examples: (a) A owes B Rs. 500. B draws a bill on A for Rs. 1000. A to accommodate B and at his request accepts it. If B sues A on the bill he can only recover Rs. 500.

(b) A draws a bill on B for Rs. 500 payable to the order A. B accepts the bill but subsequently dishonours it by non-payment. A sues B on the bill. B proves that it was accepted for value as to Rs. 400 and as an accommodation to A (the plaintiff) for Rs. 100. A can only recover Rs.

400. But if this bill gets into the hands of a holder in due course, he can recover the full amount of Rs. 500.

HOLDER IN DUE COURSE

Section 9 of the Act defines 'holder in due course' as any person who (i) for valuable consideration, (ii) becomes the possessor of a negotiable instrument payable to bearer or the indorsee or payee thereof,

(iii) before the amount mentioned in the document becomes payable, and

(iv) without having sufficient cause to believe that any defect existed in the title of the person from whom he derives his title. (English law does not regard payee as a holder in due course).

The essential qualification of a holder in due course may, therefore, be summed up as follows:

1. He must be a holder for valuable consideration. Consideration must not be void or illegal, e.g. a debt due on a wagering agreement. It may, however, be inadequate. A donee, who acquired title to the instrument by way of gift, is not a holder in due course, since there is no consideration to the contract. He cannot maintain any action against the debtor on the instrument. Similarly, money due on a promissory note executed in consideration of the balance of the security deposit for the lease of a house taken for immoral purposes cannot be recovered by a suit.

2. He must have become a holder (passessor) before the date of maturity of the negotiable instrument. Therefore, a person who takes a bill or promissory note on the day on which it becomes payable cannot claim rights of a holder in due course because he takes it after it becomes payable, as the bill or note can be discharged at any time on that day.

3. He must have become holder of the negotiable instrument in good faith. Good faith implies that he should not have accepted the negotiable instrument after knowing about any defect in the title to the instrument. But, notice of defect in the title received subsequent to the acquisition of the title will not affect the rights of a holder in due course. Besides good faith, the Indian Law also requires reasonable care on thepart of the holder before he acquires title of the negotiable instrument. He should take the instrument without any negligence on his part. Reasonable care and due caution will be the proper test of his bona fides. It will not be enough to show that the holder acquired the instrument honestly, if in fact, he was negligent or careless. Under conditions of sufficient indications showing the existence of a defect in the title of the transferor, the holder will not become a holder in due course even though he might have taken the instrument without any suspicion or knowledge.

Example:

(i) A bill made out by pasting together pieces of a tom bill taken without enquiry will not make the holder, a holder in due course. It was sufficient to show the intention to cancel the bill. A bill should not be taken without enquiry if suspicion has been aroused.

(ii) A post-dated cheque is not irregular. It will not preclude a bonafide purchase instrument from claiming the rights of a holder in due course.

It is to be noted that it is the notice of the defect in the title of his immediate transferor which deprives a person from claiming the right of a holder in due course. Notice of defect in the title of any prior party does not affect the title of the holder.

4. A holder in due course must take the negotiable instrument complete and regular on the face of it.

Privileges of a holder in due course

1. **Instrument purged of all defects:** A holder in due course who gets the instrument in good faith in the course of its currency is not only himself protected against all defects of title of the person from whom he has received it, but also serves, as a channel to protect all subsequentholders. A holder in due course can recover the amount of the instrument from all previous parties although, as a matter of fact, no consideration was paid by some of the previous parties to instrument or there was a defect of title in the party from whom he took it. Once an instrument passes through the hands of a holder in due course, it is purged of all defects. It is like a current coin. Who-so-ever takes it can recover the amount from all parties previous to such holder (Sec. 53).It is to be noted that a holder in due course can purify a defective title but cannot create any title unless the instrument happens to be a bearer one.

Examples:

(i) A obtains Bs acceptance to a bill by fraud. A indorses it to C who takes it as a holder in due course. The instrument is purged of its defects and C gets a good title to it. In case C indorses it to some other person he will also get a good title to it except when he is also a party to the fraud played by A.

(ii) A bill is payable to “A or order”. It is stolen from A and the thief forges A’s signatures and indorses it to B who takes it as a holder in due course. B cannot recover the money. It is not a case of defective title but a case where title is absolutely absent. The thief does not get any title therefore, cannot transfer any title to it.

(iii) A bill of exchange payable to bearer is stolen. The thief delivers it to B, a holder in due course. B can recover the money of the bill.

2. **Rights not affected in case of an inchoate instrument:** Right of a holder in due course to recover money is not at all affected even though the instrument was originally an inchoate stamped instrument and the transferor completed the instrument for a sum greater than what was intended by the maker. (Sec. 20)

3. **All prior parties liable:** All prior parties to the instrument (the maker or drawer, acceptor and intervening indorers) continue to remain liable to the holder in due course until the instrument is duty satisfied. The holder in due course can file a suit against the parties liable to pay, in his own name (Sec. 36)

4. **Can enforce payment of a fictitious bill:** Where both drawer and payee of a bill are fictitious persons, the acceptor is liable on the bill to a holder in due course. If the latter can show that the signature of the supposed drawer and the first indorser are in the same hand, for the bill being payable to the drawer's order the fictitious drawer must indorse the bill before he can negotiate it. (Sec. 42).

5. **No effect of conditional delivery:** Where negotiable instrument is delivered conditionally or for a special purpose and is negotiated to a holder in due course, a valid delivery of it is conclusively presumed and he acquired good title to it. (Sec. 46).

Example: A, the holder of a bill indorses it "B or order" for the express purpose that B may get it discounted. B does not do so and negotiates it to C, a holder in due course. D acquires a good title to the bill and can sue all the parties on it.

6. **No effect of absence of consideration or presence of an unlawful consideration:** The plea of absence of or unlawful consideration is not available against the holder in due course. The party responsible will have to make payment (Sec. 58).

7. **Estoppel against denying original validity of instrument:** The plea of original invalidity of the instrument cannot be put forth, against the holder in due course by the drawer of a bill of exchange or cheque or by an acceptor for the honour of the drawer. But where the instrument is void on the face of it e.g. promissory note made payable to"bearer", even the holder in due course cannot recover the money. Similarly, a minor cannot be prevented from taking the defence of minority. Also, there is no liability if the signatures are forged. (Sec. 120).

8. **Estoppel against denying capacity of the payee to indorsee:** No maker of promissory note and no acceptor of a bill of exchange payable to order shall, in a suit therein by a holder in due course, be permitted to resist the claim of the holder in due course on the plea that the payee had not the capacity to indorse the instrument on the date of the note as he was a minor or insane or that he had no legal existence (Sec 121)

9. **Estoppel against indorser to deny capacity of parties:** An indorser of the bill by his endorsement guarantees that all previous endorsements are genuine and that all prior parties had capacity to enter into valid contracts. Therefore, he on a suit thereon by the subsequent holder, cannot deny the signature or capacity to contract of any prior party to the instrument.

DISHONOUR OF A NEGOTIABLE INSTRUMENT

When a negotiable instrument is dishonoured, the holder must give a notice of dishonour to all the previous parties in order to make them liable. A negotiable instrument can be dishonoured either by non- acceptance or by non-payment. A cheque and a promissory note can only be dishonoured by non-payment but a bill of exchange can bedishohoured either by non-acceptance or by non-payment.

Dishonour by non-acceptance (Section 91)

A bill of exchange can be dishonoured by non-acceptance in the following ways:

1. If a bill is presented to the drawee for acceptance and he does not accept it within 48 hours from the time of presentment for acceptance. When there are several drawees even if one of them makes a default in acceptance, the bill is deemed to be dishonoured unless these several drawees are partners. Ordinarily when there are a number of drawees all of them must accept the same, but when the drawees are partners acceptance by one of them means acceptance by all.
2. When the drawee is a fictitious person or if he cannot be traced after reasonable search.
3. When the drawee is incompetent to contract, the bill is treated as dishonoured.
4. When a bill is accepted with a qualified acceptance, the holder may treat the bill of exchange having been dishonoured.
5. When the drawee has either become insolvent or is dead.
6. When presentment for acceptance is excused and the bill is not accepted. Where a drawee in case of need is named in a bill or in any indorsement thereon, the bill is not dishonoured until it has been dishonoured by such drawee.

Dishonour by non-payment (Section 92)

A bill after being accepted has got to be presented for payment on the date of its maturity. If the acceptor fails to make payment when it is due, the bill is dishonoured by non-payment. In the case of a promissory note if the maker fails to make payment on the due date the note is dishonoured by non-payment. A cheque is dishonoured by non-payment as soon as a banker refuses to pay. An instrument is also dishonoured by non-payment when presentment for payment is excused and the instrument when overdue remains unpaid (Sec 76).

Effect of dishonour: When a negotiable instrument is dishonoured either by non acceptance or by non-payment, the other parties thereto can be charged with liability. For example if the acceptor of a bill dishonours the bill, the holder may bring an action against the drawer and the indorsers. There is a duty cast upon the holder towards those whom he wants to make liable to give notice of dishonour to them.

Notice of dishonour: Notice of dishonour means the actual notification of the dishonour of the instrument by non-acceptance or by non-payment. When a negotiable instrument is refused acceptance or payment notice of such refusal must immediately be given to parties to whom the holder wishes to make liable. Failure to give notice of the dishonour by the holder would discharge all parties other than the maker or the acceptor (Sec. 93).

Notice by whom: Where a negotiable instrument is dishonoured either by non- acceptance or by non-payment, the holder of the instrument or some party to it who is liable thereon must give a notice of dishonour to all the prior parties whom he wants to make liable on the instrument (Section 93). The agent of any such party may also be given notice of dishonour. A notice given by a stranger is not valid. Each party receiving notice of dishonour must, in order to render any prior party liable give notice of dishonour to such party within a reasonable time after he has received it. (Sec. 95)

When an instrument is deposited with an agent for presentment and is dishonoured, he may either himself give notice to the parties liable on the instrument or he may give notice to his principal. If he gives notice to his principal, he must do so within the same time as if he were the holder. The principal, too, in his turn has the same time for giving notice as if the agent is an independent holder. (Sec. 96)

Notice to whom?: Notice of dishonour must be given to all parties to whom the holder seeks to make liable. No notice need be given to a maker, acceptor or drawee, who are the principal debtors (Section 93).Notice of dishonour may be given to an endorser. Notice of dishonour may be given to a duly authorised agent of the person to whom it is required to be given. In case of the death of such a person, it may be given to his legal representative. Where he has been declared insolvent the notice may be given to him or to his official assignee (Section 94). Where a party entitled to a notice of dishonour is dead, and notice is given to him in ignorance of his death, it is sufficient (Section 97).

Mode of notice: The notice of dishonour may be oral or written or partly oral and partly written. It may be sent by post. It may be in any form but it must inform the party to whom it is given either in express terms or by reasonable intendment that the instrument has been dishonoured and in what way it has been dishonouredand that the person served with the notice will be held liable thereon.

What is reasonable time?: It is not possible to lay down any hard and fast rule for determining what is reasonable time. In determining what is reasonable time, regard shall be had to the nature of the instrument, the usual course the dealings with respect to similar instrument, the distance between the parties and the nature of communication between them. In calculating reasonable time, public holidays shall be excluded (Section 105).

Section 106 lays down two different rules for determining reasonable time in connection with the notice of disnonour (a) when the holder and the party to whom notice is due carry on business or live in different places, (b) when the parties live or carry on business in the same place.

In the first case the notice of dishonour must be dispatched by the next post or on the day next after the day of dishonour. In the second case the notice of dishonour should reach its destination on the day next after dishonour.

Place of notice: The place of business or (in case such party has no place of business) at the residence of the party for whom it is intended, is the place where the notice is to given. If the person who is to give the notice does not know the address of the person to whom the notice is to be given, he must make reasonable efforts to find the latter's address. But if the party entitled to the notice cannot after due search be found, notice of dishonour is dispensed with.

Duties of the holder upon dishonour

(1) **Notice of dishonour.** When a promissory note, bill of exchange or cheque is dishonoured by non-acceptance or non-payment the holder must give notice of dishonour to all the parties to the instrument whom he seeks to make liable thereon. (Sec. 93)

(2) **Noting and protesting.** When a promissory note or bill of exchange has been dishonoured by non-acceptance or non-payment, the holder may cause such dishonour to be noted by a notary public upon the instrument or upon a paper attached thereto or partly upon each (Sec. 99). The holder may also within a reasonable time of the dishonour of the note or bill, get the instrument protested by notary public (Sec. 100).

(3) **Suit for money.** After the formality of noting and protesting is gone through, the holder may bring a suit against the parties liable for the recovery of the amount due on the instrument.

Instrument acquired after dishonour: The holder for value of a negotiable instrument as a rule, is not affected by the defect of title in his transferor. But this rule is subject to two important exceptions (i) when the holder acquires it after maturity and (ii) when he acquires it with notice of dishonour.The holder of a negotiable instrument who acquired it after dishonour, whether by non-acceptance or non-payment, with notice thereof, or after maturity, has only, as against the other parties, the rights thereon of his transfer. (Sec. 59).

Competition Law in India: An Overview

Introduction: Competition Law in India

When there exists an economic rivalry amongst the companies or entities for drawing the maximum number of customers and make most of the profit, such a situation is known as competition. The law drafted by the legislature to regulate such competition is known as competition law. It is also known as antitrust law in some countries around the world. A free, fair, healthy and reasonable competition prevailing in the market is a sine qua non for the creation and maintenance of a conducive environment for business do that the country can prosper. The Competition Law in India has just bloomed from the bud and is still going through various improvements. A lot of time has not elapsed since the new competition law has been adopted. **MRTP Act** was used to operate the competition in market before the **Competition Act, 2002** came to the forefront. The structure of the competition law has been kept in such a way that not only promotes but also provides a fair and reasonable chance to all the enterprises in the market to have a healthy competition so that the interests of the consumers can be protected.

I. MRTP Act, 1969

The MRTP Act had laid down various provisions to regulate the market until it got repealed by some other act in the year of 2009. It is important to have a discussion about the MRTP Act at this point to fulfil the following three objectives:

- To have an idea about the jurisprudence of the competition law that got developed during the past few years by the Hon’ble Supreme Court;

- To have an idea about the nature of cases that came under the MRTP Act; and

- To have an idea about the context which developed a need for the Indian legislature to come out with new competition legislation.

The Constitution of India was drafted with an objective to build a humane and just society and thus, it has mandated for the state to form its policies with an eye on the objective stated hereinabove. In order to secure that end, the Constituent Assembly of India has come up with **Articles 38 and 39 of the Constitution** forming a part of the Directive Principles of State Policy, whereby a State is required to work in a direction that promotes the welfare of the people. The **MRTP Act** was enacted in 1969 to fulfil the above-mentioned mandate stated in Part IV of the Constitution of India.

After independence, India has taken the road to adopt the strategy of developing a planned economy. Industrial Policy Resolution that was announced in 1948 marked the beginning of industrial policies in India. Then, the 1956 Resolution marked the second Industrial policy. This policy was drafted with a focus on self- reliance, social justice and growth. The intervention and control by Government became a cause of pervading the economic activities of all the areas of the country and pursuant to which, there was a lack of competitive and contestable market. Everything was in control of Government, for instance, where scarce financial resources are to be located, the location of plants and sizes of plants and so on had to be decided by the government. The government used to favour the big business houses for granting licenses as they could easily elevate the capital amount and were

Competition is the act of the sellers individually seeking to acquire the patronage of buyers in order to achieve profits or market share. The Competition Act, 2002 was enacted by the Parliament of India and replaced The Monopolies and Restrictive Trade Practices Act, 1969. It is in effect to govern Indian competition law. After the enactment of the Competition Act, 2002, ("Act") it has been amended twice, the Competition (Amendment) Act, 2007 and the Competition (Amendment) Act, 2009. Two of the main features of the Competition Act, 2002 is the framework it provides for the establishment of the Competition Commission, and the tools it provides to prevent anti-competitive practices and to promote positive competition in the Indian market.

Objectives of the Competition Act

The Act seeks to provide the legal framework and tools to ensure competition policies are met, to prevent anti-competition practices and provide for the penalisation of such acts. The Act protects free and fair competition which protects the freedom of trade. The Act seeks to prevent monopolies and also to prevent unnecessary intervention by the government.

objectives of the Competition Act, 2002 are:

- to provide the framework for the establishment of the Competition Commission.
- to prevent monopolies and to promote competition in the market.
- to protect the freedom of trade for the participating individuals and entities in the market.
- to protect the interest of the consumer.

Anti-Competitive Agreements

In simple words, Anti-Competitive agreements are agreements that are made by two or more companies competing in the same market to fix prices or reduce stocks etc, so as to manipulate the market favourably for them. This has the effect of the companies reducing the competition in the market which adversely affects the end consumer.

- Directly affects purchase or sale prices.
- Indirectly affects purchase or sale prices.
- Limits production.
- Limits supply.
- Limits technical development.

- Limits service provision in the market.
- Leads to the rigging of bids.
- Leads to collusive bidding.

Abuse of Dominant Position

The abuse of the dominant position is prohibited by Section 4 of the Competition Act. Abuse of dominant position is defined under the second part of the same Section. According to the act dominant position means any enterprise that enjoys the position and power in the Indian market which enables it to:

- Operate independently of competitive forces in the relevant market.
- Affect its competition, consumer or the relevant market in its favour.

For example, predatory pricing is a practice that is seen to be an abuse of the dominant position. In simple words when a dominant enterprise engages in AAEC acts, it is considered an abuse of the dominant position.

The difference between the definition of anti-competitive agreements and abuse of dominant position is that in anti-competitive agreements there have to be two or more parties and it can be between any enterprise or firm and doesn't require there to be a dominant firm involved. In abuse of dominant position, it can be done by a single party but the party has to be in a dominant position in the relevant market.

Remedies

Remedies against AAEC agreements and abuse of dominant position are provided by the Competition Commission of India. Upon a review and enquiry into the alleged practices the Competition Commission may pass the following orders:

- Direct the discontinuance of such practices.
- Impose a penalty that is less than 10% or the turnover of the preceding three financial years; in the case of a cartel, the penalty shall be 10% or three times the turnover of every financial year and shall continue for the period of continuance of such practices.
- Direct the modification of such an agreement or abuse so as to curtail its adverse effect upon the competition of the market.
- Pass any order that it may so deem fit.

Competition Commission

The Competition Commission of India is established under the Competition Act, 2002. It is a statutory body that has the power to govern and enforce the Competition Act including penalties. It was established when the need for a healthy competitive environment became necessary following liberalisation under the Vajpayee government.

The Commission is composed of a chairman and a minimum of 2 board members and a maximum of 6 board members. These members are required to have a minimum of 15 years of experience in their respective fields.

Its objectives, duties and powers are enumerated in the Competition Act, 2002. Its main duty and object is to ensure that the Indian markets maintain a healthy and fair competitive environment and is granted the power to ensure such an environment and penalise any acts adversely affecting its duties.

Regulation of Combination

The term combination has a broad definition under the Act, it includes:

- any acquisition of shares,
- voting rights,
- control of assets, and
- party to merger or amalgamation of enterprises.

Any person/enterprise shall not enter into a combination that is likely to have an adverse effect on the competition and such a combination will be void. If any person/enterprise proposes to enter into a combination he shall intimate the Competition Commission of India within 30 days of:

- Approval of the proposal relating to mergers and amalgamation by the Board of Directors of the enterprises involved in the process.
- Execution of any agreement pertaining to acquiring control.

Business Perspective

Business operations in India necessitate the knowledge of the various laws and regulations and also the implementation of the same. Competition in the market is a huge challenge that needs to be dealt with carefully.

It is essential for businesses to realize that although competition brings prosperity, thriving and striving shall be a continuous process. The various matters to be kept in mind by the business houses are:

- The markets are susceptible to the formation of cartels which pose a risk of formation of monopolies. The awareness of the fact that such associations are not permitted under the Competition Act, 2002 is essential.
- When discussions are made with competitors documentation of the same should be done.
- Any meetings wherein any matter is being discussed, which shall raise issues under the Competition Law shall be avoided.
- It is advisable to avoid discussions pertaining to price and the actual cost to the company.
- Appointment of an Ombudsman for advice on the Competition Law so as to prevent any legal issues may be done.
- Communication aspects although seem trivial may leave an impact when it comes to abuse of dominant position issues. Any statements made shall be weighed carefully.

The Competition Act, 2002 is a comprehensive law and the intent of the legislation is to promote fair competition, catch up with the global economy, safeguard the interest of the consumers and ensure a stable market for India.

Unit IV

Concept of Partnership

The Indian partnership Act came in to force on Oct 1, 1932 except 69 which came in to force in later.

Section 4 of the Indian partnership Act 1932 defines partnership as the relation between the person who has agreed to share the profit of business carried on by all or any of them acting for all.

Persons who have entered in to partnership with one and another are called individual and collectively a firm and the name under which their business is carried on is called the firm Name.

The Term “firm” is merely a commercial notion. Law does not invest the firm with legal personality apart from its Partners except for the purposes of assessment of Income Tax. A firm cannot become the member of another partnership firm though its partner can join any other firm as partners.

The name of the firm should neither violate any law relating to trade name or goodwill nor should it be calculated to mislead or cause confusion in the minds of those who happen to deal with it.

The Indian Partnership Act – 1932

A partnership firm may add or delete any provision according to the requirement of the firm and its partners and in the interest of firms business.

Section 4 states that 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.

Essentials:

1. Associaltion of two or more person
2. Agreement
3. Business
4. Sharing of Profits
5. Mutual Agency

1. Association of Persons: There should be at least two person should join together to constitute a partnership. Person can have any name for partnership unless it is misleading or prohibited.

2. Agreement: There must be an agreement entered in to by all people to carry on business them. Section 5 states that partnership is created by contract and not status. This is a very important point which shows distinction between a partnership and other business relation such as joint

family business. The agreement may be express or implied. However, it is not necessary that there should be formal or written agreement. An agreement to create partnership may even arise from the conduct of the partners,

Case Law: In the case of Abdul Vs Century wood Industries it was held that agreement need not be express it can arise of course of business.

Also there should be contract to carry out the on business. The contract may be for fixed period or for temporary period. It May be for Particular venture or at will. The contract should have the entire essential element under Indian Contract Act. Co. owners or joint owners of any property are not partners unless there is an agreement between them to carry on business.

3. Business: A partnership can exist in business alone. Business includes every Trade, occupation and profession. Every trade may be a business but every occupation and profession is not a business. There is no judicial definition of this term. Different acts have given inclusive definition. It has been held a single transaction does not constitute a business. The concept of Business Regulatory Framework, business requires continuity of transaction. It is not necessary that the business should consist of a long and permanent undertaking. A partnership may exist in single business venture also. An agreement to carry on business at a future time does not result in partnership. Business must be for lawful purpose.

Case Law: Rangaswami Vs. Easwar Murthi.

IT was held that an agreement to purchase property at auction sales does not amount to partnership.

4. Sharing of Profits. The sharing of profits is an essential element of partnership agreement.

Case law: Cox Vs. Hickman: It was held that No man who is a partner unless he has the right to share the profit or the business but every man who receives the profit is not necessary a partner. Therefore, sharing of profit is only evidence of partnership, members of charitable, religious, political, social or cultural or clubs are not profits because they do not have any intention of making profits and sharing them. An Agreement may not mention any thing regard sharing of losses, because every man has a share in the profits has to share the lossess. The partners may agree themselves that one or more of them shall not be liable for loss. Partners can agree to share profits in different proportions. They may agree to share profits in different proportions. They may agree to receive fixed monthly payment instead of profits.

5. Mutual Agency: Business carried on by all or any of them acting for all this is a most important characteristic of a partnership. The person carrying on the business acts not only for himself but for others also. The person who carry on the business they do so agents for all persons in partnership. They are agents of each other and they are principal themselves. Their relationship is governed by law of agency therefore, a partner has double role that of Principal and Agent. In

order to bind the partners it is necessary that they should contract in the Firms name and also in the course of business. The Partner contracting in his own name can create only personal liability.

Who is not a Partner?

Section 6 states the following persons are not partners

(a) Joint owner sharing gross return

(b) Lender of money receiving profits

(c) Servant or agent receiving profits

(d) Widow or child of deceased partner

(e) Seller of goodwill.

Partnership and Company

Partnership

1. A partnership firm has no existence apart from its members.

2. Partnership is founded on the idea of Mutual agency, that is every partners is an agent of the remaining partner.

3. Liabaility of the partner is unlimited, i.e., even assets are liable for the debts of the firm.

4. A partner cannot transfer his interest without the consent of all other partners.

5. Unless there is contract to the contrary the death retirement or in solvency of partner result in the dissolution of the firm.

6. The Minimum number of person required to the form is two.

7. A partnership cannot be formed for Business with person exceeding 20; the number is limited to 10, in case of banking companies.

8. The audit of the accounts of the firm is not compulsory as per Indian partnership Act 1932.

9. The partnership firm is not expensive.

10. Partners individually are the owners of the Firm.

Company

1. A Company is a Separate legal entity distinct from its members.

2. A member of a company is not an agent of other members.

3. Liability of the member or shareholder of a limited company is limited to the extent of the amount remaining unpaid shares held by him or the amount of guarantee as mentioned in MOA.

4. A share holder subject to restriction contained in the article can freely transfer shares.

5. A company enjoys perpetual sucession. Death or retirement or insolvency of a member does not affect the existence of a company.

6. The Minimum number required to form a private company is 2 and in case public company is 7.

7. In case of public company there is no limit to the maximum numbers of members and for a private company the maximum members are 50.

8. The audit of accounts of a company is mandatory.

9. Limited company is always expensive.

10. The shareholders are the owners of the Limited company.

Test for Determination of Existence for Partnership

Sometimes, it becomes very difficult to determine whether a group of person running a business constitutes a partnership firm or not. Section 6 of the partnership Act provides: “In determining whether a group of persons is or not a firm, regard shall be had to the real relation between the parties, as shown by all relevant facts taken together”.

The important facts which help in determining the existence of partnership firm are as follows:

1. Agreement

2. Sharing of profits

3. Mutual Agency.

Besides these facts, books of accounts, correspondence, evidence of employees etc. will also help in determining the existence of partnership. It is important to note that these facts are not to be considered individually but are to be taken collectively and their cumulatively effect should be studied.

1. Agreement: Partnership is created by an agreement and not by status. Section 5 of the act lays down relation of partnership arises from contract and from status and in particular, the member of HUF carrying on the family business as such, are not partner in such business. Thus, the agreement forms the foundation of the Partnership, and therefore serves as a good test for partnership. But this is not the true test. An agreement, the statement by the parties in a document that they are partners does not necessarily constitute them partners in law. Similarly a person whose

name has not been mentioned as a partner in the partnership agreement may be deemed to be a partner, e.g., a partner by holding out or by estoppels.

2. Sharing of Profits: Section 6 explains that 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, makes such persons partners. The receipt by a person of share of the profits of a business or a payment contingent upon theearning of profits or varying with the profit earned by a business, does not of itself, make him a partner with the persons carrying on the business. Receipt of such share or payment by the following person will not, of itself, make them partners in the firm:

(a) By a lender of money to person engaged or about to engage in any business,

(b) By a servant or agent as remuneration (salaries and bonuses)

(c) By a previous owner of the business as consideration for the sale of goodwill or it share thereof.

Similarly there are certain categories of person who are not given any share in the profits of the partnership firms, and even they can be held liable as partners. For example, a partner by estoppels or a nominal partner does not get a share in the profits of the firm, but he can be held liable to any person who has given credit to the firm on the belief that he is partner in the firm. As held in the case of COX Vs. HICKMAN that the receipt of share of profit of a business is prima facie evidence that he is a partner, but this is not a conclusive test. Though sharing of profits of a business is essential but it does not follow that everyone who participates in the profits of a business shall necessarily become a partner. Sharing of profits UN accompanied by an agreement or mutual agency will not establish partnership. Existence of partnership property, capital or sharing of losses is not essential for the existence of partnership.

Case Law: Barklie Vs. Scott: The father of a minor, paid a sum of money as the minor's share in the capital of a partnership and it was agreed that during the Son's minority, the profit should be paid to A's Account. The court held that Father cannot be regarded as a partner, of the firm, there is conflict of interest and no community of benefit.

3. Mutual Agency: Law of partnership may truly be termed as "an extension of the general principles of agency." The position of partners in a partnership business is largely regulated by the law of principal and agent. The element that the business of partnership may be carried on by all partners or any of them acting for all in the definition of partnership, clearly establishes an implied agency rights for a partner, who conducts the business of the firm, on behalf of other partners. In carrying on the business of the firm, partners act as agents as well as principals. While the relation between the partners inter se is that of principals, they are agents of the firm and of one another inrelation to the third parties, for the purposes of the business of the firm. Every Partner enjoys an implied authority of binding the firm by his acts provided they relate to the business of the firm and are done by him in the name of the firm and in the usual course of the business of the firm.

Existence of the relation of the principal and agent between the partners, therefore, is the true test of the existence of the partnership firm. This relationship of principal and agent distinguishes business from co-ownership as well as from an agreement to share profit of the business.

Kinds of Partnership

Partnership could either be for fixed term is for a particular adventure or partnership at will.

(i) Partnership for a fixed term: It means partnership for a definite period as mentioned in a partnership deed. If the partnership continues even after the fixed period has expired then partnership of fixed terms gets automatically converted to partnership at will, the rights and liabilities are UN affected.

(ii) Particular Partnership: Section 8 states particular partnership would be for particular adventure or undertaking and the partner incurs no responsibility beyond the limits of a particular adventure or undertaking. Example; Two builder may be partners so far as particular construction of building is concerned when they agree to share the profit accruing there from such consideration of that building and no further.

(iii) Partnership at Will: Where no provision is made by contract between the partners for duration of their partnership or for the determination of their partnership, partnership is partnership at will Section 7.

Partnership at will has no provision made in the contract regarding the duration of partnership and therefore such partnership continues till one of the partners exercises. Section 43 read as “where the partnership is at will the firm may, be dissolved by any partner giving notice in writing to all the partners of his intention to dissolve the firm”. The firm is dissolved, as from the date mentioned in the notice if no date is mentioned, as from date of communication of notice”. Notice is communicated, at least 14 days in advance. Dissolution comes in to effect either from dates of such notice or on the receipt of such notice. However, partnership at will may be dissolved by filing a suit for dissolution in court the date of dissolution will be the date fixed in the preliminary decree.

Registration and Effects of Non-registration of Partnership

There was no provision for the registration of the partnership prior to passing of the Partnership Act 1932. In order to avoid difficulties in the enforcement of Provision in the areas not sufficiently developed for registration, each state government has been empowered by Section 56 of the act, to direct by notification in official gazette, that the provision of the act shall not apply to the state, or to any part thereof, specified in the notification.

Registrar of Firms: Each state government has been empowered by Section 57 to appoint a registrar of Firms and define his jurisdiction, i.e.

e.g. the areas within which he shall exercise his power and perform his duties. The Registrar of firms shall maintain “Register of firms”.

Procedure for Registration: The Procedure of registration of firm is very simple. An application in the prescribed form with the prescribed fees is to be filed with Registrar of the Area in which any place of business of the firm is situated or proposed to be situated. The application states the following:

1. The name of the Firm which shall not contain any of the following words, namely- “crown”, King, Queen royal, or words expressing or implying the sanction, approval or patronage of the government unless prior approval of the government has been taken.

2. The Principal Place of the Business of the Firm.

3. The name of any other place/s where the firm carries on business.

4. The date when each partner join the firm.

5. The duration of the firm.

6. The name in full and permanent addresses of the partner.

The application shall be signed and verified by each partner or his agent specially authorized for this purpose in the manner prescribed by law.

As per Section 69 when the registrar is satisfied that the provision of Section 58 above mentioned have been duly complied with, he shall make an application in the register of firms and shall file the same.

As held in the case of Ghelabhai and Co. Vs. Chunilal and Co. It is to be noted that registration is effected as soon as an application in the prescribed form with the prescribed fee and necessary details as to the particulars of the partnership is delivered to the registrar. The registrar inthis section is only required to perform a routine duty of making the entry in the register of Firms.

Need for Registration

A partnership firm need not necessarily be registered. It is optional for a firm either to get itself registered or not. It is agreement between two or more persons and not the registration which brings in to existence a partnership firm. Registration provides only reliable evidence and a conclusive proof of existence of partnership firm. It cannot create a partnership. However partners of an unregistered firm cannot avoid their liabilities by pleading non existence of the partnership. Registration is essential for filing of all those suits arising from the contract or in respects of rights conferred by the act. Non-registration of firm will not make the partnership agreement or any transaction between the partners and their parties void. More ever law does not impose any penalty for registration.

Consequences of Non-registration

Section 69 States that the partnership Act denies the followings rights to an unregistered firm or its partner.

1. A partner of unregistered firm cannot file a suit to enforce a right arising from the contract or conferred by the act against the firm.

2. A partner of an unregistered firm cannot bring a suit to enforce a right arising from a contract against any past or present partner of the firm.

3. An unregistered firm itself cannot enforce a right arising from a contract against a third part in a court of law. The same is the position with regard to a claim of set off or other proceedings to enforce a right arising from a contract. It cannot claim any set off in a suit filed against it.

Non-registration of a firm does not, however affect the following rights:

1. The right of a partner to sue for the dissolution of a firm or for the accounts of a dissolved firm or to enforce any right or power to realize the property of a dissolved firm.

2. The power of an official assignee or receiver to realize the property of an insolvent partner.

3. The right of the firm or partners in a firm having no place business in India.

4. Any suit or set off in which the claim does not exceed rupees one Hundred.

5. The right of the partners of an unregistered firm to refer a Dispute to arbitration. A Partner of a un registered firm can get the arbitration clause in the partnership agreement enforced against the firm or other partner as held in case Jagdish Chandra Gupta Vs. Kajaria Traders.

6. The right of the partnership firm to set up its own claim or a Property under dispute by way of defense.

7. A suit for damages for misconduct against a partner by the firm or a partner of the firm on the firm behalf, as held in the case of Navinchandra Vs. Mool Chand.

8. The right of a third party to proceed against the unregistered Firm or its partners.

A partnership firm may be registered at any time even after the partners have agreed to dissolve it. But it must stand registered on the date of the institution of the suit; otherwise the suit will be dismissed. Also Registration during the pendency of the suit shall not prohibit the firm to file a fresh suit after registration, if it has not become time– barred.

Rights and Duties of Partners

1. Every partner has a right to take part in the conduct and management of the business. It is not necessary that each partner should participate in the conduct of business, but the right of participation is available to each partner.

2. Every partner has an inherent right to be consulted in all matters affecting the business of the partnership and express his views before other partners. Any difference on ordinary matter connected with the business may be decided by the majority and every partner has right to express his opinion before the matter is decided.

3. Every partner has right to have access to and to inspect and copy any books of the firm.

4. Subject to the contract between the partners, the property of the firms shall be held and used by the partners exclusively for the purpose of the business of firm.

5. The partner are entitled to share equally in the profits earned and shall contribute equally to the losses sustained by the firm

6. Where the partner are entitled to the interest, on capital subscribed by him such interest shall be payable only out of profits.

7. If the partner for the purpose of the business of the firm, has made any payment or advance beyond the amount capital he has agreed to subscribe is entitled, to interest thereon the rate of 6% per annum.

8. The partner has a right to be indemnified by the firm in respect of the payment and liabilities incurred by him in ordinary course of business and even when the partner has acted in emergency, for saving the firm as would have been done by person of ordinary prudence.

9. The partner has right not to be expelled, from a firm by any majority of partners except where expulsion is in good faith of powers conferred by the contract between the partners.

10. The partner has a right to prevent the introduction, of a new partner. All partners consent must be obtained for the admission of new partner.

11. Right to retire, a partner can retire either by consent of all partners or as the terms of contract states or by giving notice if it is partnership at will.

12. A partnership has a right to give notice to all the other partners of his intention to dissolve the firm where the partnership is at will.

13. Right of the partners to have the business wound up after the dissolution.

Duties of Partners

1. To carry on the business of the firm to the greatest advantage, to be just, faithful to each other, to render true accounts and full information of all things affecting the firm, to any partner or his legal representative.

2. Every partner shall indemnify the firm, for any loss caused to it, by his fraud in the conduct of the business of the firm.

3. Every partner is not entitled to receive remuneration, for taking part in the conduct of the business.

4. A partner shall indemnify the firm, for any loss caused to it, by his willful neglect in the conduct of the business of the firm.

5. If partners derive any profit for himself from any transaction of the firm, or from the use of the property or business connectionof the firm or in firm's name, he shall account for the profit and pay it to the firm.

6. If a partner carries on any business of the same nature, competing with that of the firm, he shall account for and pay to the firm all profits made by him in that business.

7. A partner is bound to act within the scope of his actual or apparent authority. In case he exceeds his authority and other partners do not ratify his unauthorized acts, he will be liable to the other partners for the loss that they may suffer on account of his such acts.

8. A partner cannot assign his rights or interest in a partnership firm to an outsider, so as to make the outsider a partner in the firm's business without the consent of other partners.

9. Every partner is liable, jointly with all the other partners and also severally, for all the acts of the firm done while he is a partner. A retired partner continues to e liable for the debts of the firm incurred till he gives public notice of his retirement.

Authority and Liability of Partners

Implied Authority: When the deed of partnership confers an authority on partners it is called an express authority. If an express authority is absent, and the partner carry out an act in the usual course and conduct of the business in the name of firm such an act is said to be done under an implied authority and therefore binds the firm. The act carried out; under implied authority binds only firm only.

(a) In the usual way, i.e., an act becomes necessary under the usual way of conducting business. E.g., an order for medical goods is placed by a partner in the garment firm. Such an order is not in the usual course of business.

(b) It is the nature of business of which ascertains as to whether an act under implied authority was in usual way of conducting business.

(c) The act be done in the name of the firm or the instrument be done or executed by a partner or other person on behalf of the firm shall be done or executed in the firm's name or in any other manner expressing or implying, an intention to bind the firm.

(d) In other words any act or instrument executed by a partner or other person be done in the name of the firm, there should be an intention to bind the firm.

However the Implied authority does not empower the partner to don the following unless trade or custom of business permits. Therefore the partner cannot do the followings.

1. To submit a dispute relating to business of the firm to arbitrator.

2. To open a bank account on behalf of firm in his own name.

3. To compromise or relinquish any claim portion of the claim by firm.

4. To withdraw a suit on behalf of firm.

5. To admit any liability on behalf of the firm.

6. To acquire any immoveable property on behalf of the firm.

7. To transfer any immovable property belonging to the firm.

8. To enter in to partnership on behalf of firm.

By virtue of Section 20 implied authorities can e extended or restricted. By contract between partners implied authority can be restricted or extended, implied authority can be exercised under following:

1. To file and defend suit and even engage professional to do the needful.

2. A partner has authority to act in emergency to do all such acts for the purpose of protecting the firm from the 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. In the process of this act the partner has a right to be indemnified by the firm.

3. An admission or representation made by partner concerning the affairs of the firm, if it is made in ordinary course of business.

4. Admission or representation means a statement of fact, made by partner either orally or through documents such a statement, could be admitting the liability, but this admission is made in ordinary course of business of firm and must pertain to the business of firm only. Once this admission or representation is made it is binding on the firm.

Admission, Retirement and Expulsion of Partner

Any change in the relation of the partners will result in the constitution of the firm. Thus a Firm will be reconstituted on the happening of any of the following events:

1. Admission of a Partner

2. Retirement of a Partner

3. Expulsion of a Partner

Admission of Partner

Section 31 states that a new partner cannot be admitted without the consent of all partners unless otherwise agreed upon. The position of new partner will be as follows:

When a new partner is admitted to an existing firm, he is not liable to any debt of the firm incurred, before he comes in as a partner. The new partner cannot be held responsible for the acts of old partner unless it is proved that:

1. The reconstituted firm has assumed the liability to pay debt and

2. The creditor concerned has agreed to accept the reconstituted firm as his debtor and to discharge the old firm from liability.

It is only the minor admitted to the benefits of partnership who, if he elects to become partner in the firm after attainting majority, shall become personally liable for all the acts of the firms done since he was admitted to the benefits of the Partnership. A newly admitted partner shall be liable only for the debts incurred or transaction entered in to by the firm subsequent to his becoming a partner.

Retirement of Partner

Section 32 state that a Partner may retire from the firm:

1. In accordance with an express agreement,

2. With the consent of all other partners, or

3. Where the partnership is at will by giving notice in writing to all the other partners of his intention to retire. A retiring partner may carry on business competing with that often firm and may advertise such business. But he has no right to:

(a) Use the name of the firm,

(b) Represent himself as carrying on the business of the firm,

(c) Solicit the custom of old customers of the firm except when he obtains these rights by an agreement with the other partners of the firm. When a partner retires, the other partners may, by an agreement, discharge him from all theliabilities already incurred when he was a partner in the firm. Creditors may also at their option grant him a complete release either by an express or implied agreement. Example: A customer of a banking partnership, after the death of one of the partners, removed a certain amount from his current account to a fixed deposit account at the same bank. He also accepts a deposit receipt from the surviving partner. It was held in the case of Bilborough Vs Holmes that this amounted to novation and that the estate of the deceased partner was discharged from liability.

Till the retiring partner gives public notice of his retirement, he with the other partners of the firm, shall continue to be liable to the third parties for all the acts of the firm done by any of the partner except when the third parties dealt with the firm without any knowledge of the fact that he was a partner in the firm. Thus a dormant or sleeping partner who is not known to be member of the firm to the third parties dealing with the firm, may retire without giving notice of his retirement to the public. He will not liable at all for debts contracted after his retirement. Such a public notice may be given either by retiring partner or by any partner of the reconstituted firm. Retirement of a partner by death or insolvency also does not require any public notice.

Expulsion of a Partner (Section 33)

Ordinarily, a partner cannot be expelled from a partnership firm. However such expulsion can be made if all the following conditions are satisfied:

1. The power to expel a partner is available by an express agreement between partners.

2. The power has been exercised by a majority of the partners in good faith.

3. The partner, who has been expelled, was given reasonable notice and opportunity to explain his position and to remove the cause of his expulsion. An irregular or a malafide expulsion will not be operative. A partner, who is irregularly expelled, will not cease to be partner. He may, with the help of the law course, get himself reinstated. But in any case, he would not be allowed to recover damages from the other partners for his wrongful expulsion as held in case of wood Vs wood. The rights and liabilities of the expelled partners are the same as that of a retiring partner.

Dissolution of Partnership

The Partnership act makes difference between dissolution of partnership and dissolution of firm.

Dissolution of partnership: Any change in relationship of the partners is called dissolution of partnership. Thus in all those cases where a partnership is reconstituted, there is a dissolution of the partnership. For example in case there is a partnership between X and Y and new Partner Z is admitted, the partnership between X and Y comes to an end and new partnership between X, Y and Z comes in to existence. Hence in dissolution of the partnership, the firm continues in a reconstituted form.

Dissolution of the firm: According to Section 39 the dissolution of partnership between all the partners of a firm is called the dissolution of the firm. In the case of the dissolution of the firm, the business of the firm is closed down and its affair is wound up. The assets are realized and the liabilities are paid off.

The dissolution of a partnership may or may not result in the dissolution of the firm but the dissolution of a firm will necessarily result in the dissolution of the Partnership.

E.g. If there are three partners A, B & C in a business and C becomes insolvent. In the absence of any contract to contrary, the firm will stand dissolved on the insolvency of C. This will automatically result in the dissolution of the partnership. But A and B may agree to continue the business of the firm. In such a case, the firm continues though in a reconstituted form and, therefore, there is only the dissolution of the partnership and not the dissolution of firm.

Compulsory Dissolution - A Firm is dissolved

(a) By the adjudication of all the partners or of all partners but one as insolvent or,

(b) By the happening of any event which makes it unlawful for the business of the firm to be carried on or for the partners to carry it on in partnership.

Where more than one separate adventure or undertaking is carried on by the firm, the illegality of one or more shall not of itself cause the dissolution of the firm in respect of its lawful adventures and undertakings.

Sec-41 When all the partners or all the partners except one declared insolvent, firm shall be dissolved

Dissolution on the happening of certain contingencies - Subject to contract between the partners a firm is dissolved -

(a) If constituted for a fixed term, by the expiry of that term

(b) If constituted to carry out one or more adventures or undertakings by the completion thereof.

(c) By the death of a partner.

(d) By the adjudication of a partner as an insolvent.

On completion of the work, partnership come to an end - Dayalal vs.

Harjeevan,

Partnership will be deemed to be dissolved after expiry of the fixed period 89.

Dissolution by notice of partnership at will:

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

2. The firm is dissolved as from the date mentioned in the `notice as the date of dissolution or, if no date is so mentioned, as from the date of the communication of the notice.

Dissolution of partnership at will Notice in writing to other partners is necessary - Asha Ram vs. Ramchander

Dissolution by the Court

At the suit of a partner, the Court may dissolve a firm on any of the following grounds, namely:

(a) That a partner has become of unsound mind, in which case the suit may be brought as well by the next friend of the partner who has become of unsound mind as by any other partner.

(b) That a partner, other than the partner suing, has become in any way permanently incapable of performing his duties as partner.

(c) That a partner, other than the partner suing, is guilty of conduct which is likely to affect prejudicially the carrying on of the business, regard being had to the nature of the business.

(d) That a partner, other than the partner suing, willfully or persistently commits breach of agreement relating to the management of the affairs of the firm or the conduct of its business, or otherwise so conducts himself in matter relating to the business that it is not reasonably practicable for the other partners to carry on the business in partnership with him.

(e) That a partner, other than the partner suing has in any way transferred the whole of his interest in the firm to a third party, or has allowed his share to be charged under Code of Civil Procedure, 1908 or has allowed it to be sold in the recovery ofarrears, of land revenue or of any dues recoverable as arrears of land revenue due by the partner.

(f) That the business of the firm cannot be carried on save at a loss.

(g) On any other ground which renders it just and equitable that the firm should be dissolved.

Liability for Acts of Partners Done after Dissolution

1. Not withstanding the dissolution of a firm the partners continue to be liable as such to third parties for any act done by any of them which would have been an act of the firm if done before

the dissolution unit public notice is given of the dissolution. The estate of a partner who dies, or who is adjudicated an insolvent or of a partner who not having been known to the person dealing with the firm to be a partner, retires from the firm, is not liable under this section for acts done after the date on which he ceases to be a partner.

2. Notices under Such - Section 91 may be given by any Partner

Right of partners to have business wound by after dissolution - On the dissolution of a firm every partner or his representative is entitled, as against all the other partners or their representatives, to have the property of the firm applied in payment of the debts and liabilities of the firm and to have the surplus distributed among the partners or their representatives according to their rights.

Continuing authority of partners for purposes of winding up - After the dissolution of a firm the authority of each partner to bind the firm, and the other mutual rights and obligations of the partners, continue notwithstanding the dissolution, so far as may be necessary to wind up the affairs of the firm and to complete transactions begun but unfinished at the time of the dissolution, but not otherwise. The firm is no case bound by the acts of a partner who has been adjudicated insolvent, but this proviso does not affect the liability of any person who has after the adjudication represented himself or knowingly permitted himself to be represented as a partner of the insolvent.

Suit on pronote filed by two partners - One partner died Surviving partner is competent to continue the suit - Abdul Rehman vs. Rameshwar Dayal.

Mode of settlement of accounts between partners - In setting the accounts of a firm after dissolution, the following rules shall, subject to agreement by the partners, be observed.

(a) Losses, including deficiencies of capital, shall be paid first out of profits, next out of capital and, lastly, if necessary, by the partners individually in the proportion in which they were entitled to share profits.

(b) The assets of the firm, including any sums contributed by the partners to make up deficiencies of capital, shall be applied in the following manner and order:

(i) In paying the debts of the firm to third parties,

(ii) In paying to each partner ratably what is due to him from the firm for advances as distinguished from capital,

(iii) In paying to each partner ratably what is due to him on account of capital, and

(iv) The residue, if any shall be divided among the partners in the proportions in which they were entitled to share profits.

Personal profits earned after dissolution - Subject to contract between the partners, the provisions of clause:

(a) Of section 16 shall apply to transactions by any surviving partner or by the representatives of a deceased partner, undertaken after the firm is dissolved on account of the death of a partner and before its affairs have been completely wound up. Where any partner or his representative has bought the good will of the firm nothing in this section shall affect his right to use the firm name.

Return of premium on premature dissolution – Where a partner has paid a premium on entering into partnership for a fixed term, and the firm is dissolved before the expiration of that term otherwise than by the death of a partner, he shall be entitled to repayment of the premium or of such part thereof as may be reasonable, regard being had to the terms upon which he became a partner and to the length of time during which he was a partner unless

(b) The dissolution is mainly due to his own misconduct or the dissolution is in pursuance of an agreement containing no provision for the return of the premium or any part of it.

Rights where partnership contract is rescinded for fraud or misrepresentation

Where a contract creating partnership is rescinded on the ground of fraud or misrepresentation of any of the parties thereto, the party entitled rescind is, without prejudice to any other right entitled:

(a) To a lien on or a right of retention of, the surplus of the assets of the firm remaining after the debts of the firm have been paid forany sum paid by him for the purchase of a share in the firm and for any capital contributed by him,

(b) To rank as a creditor of the firm in respect of any payment made by him to wards the debts of the firm, and

(c) To be indemnified by the partner or partners guilty of the fraud or misrepresentation against all the debts of the firm.

Right to restrain from use of firm name or firm property - After a firm is dissolved, every partner or his representative may in the absence of a contract between the partners to the contrary, restrain and other partner or his representative from carrying on a similar business in the firm name or from using any of the property of the firm for his own benefit, until the affairs of the firm have been completely wound up and that Where any partner or his representative has bought the goodwill of the firm, nothing in this section shall affect his right to use the firm name.

Agreement in Restraint of Trade

Partners may upon or in anticipation of the dissolution of the firm, make an agreement that some or all of them will not carry on a business similar to that of the firm within a specific period or within specified local limits and notwithstanding anything contained in Section 27 of the Indian Contract Act 1872 such agreement shall be valid if the restrictions imposed are reasonable.

Sale of good will after:

1. In settling the accounts of a firm after dissolution the goodwill shall, subject to contract between the partners, be included in the assets, and it may be sold either separately or along with other property of the firm.

2. Right of buyer and seller of good will – Where the goodwill of a firm is sold after dissolution, a partner may carry on a business competing with that of the buyer and he may advertise such business, but subject to agreement between him and the buyer, he may not:

(a) Use the firm name,

(b) Represent himself as carrying on the business of the firm, or

(c) Solicit the custom of persons who were dealing with the firm before its dissolution.

3. Agreement in restraint of trade- Any partner may, upon the sale of the goodwill of a firm, make an agreement with the buyer that such partner will not carry on any business similar to that of the firm within a specified period or within specified local limits andnot withstanding any thing contained in Section 27 of the Indian Contract Act, 1872, such agreement shall be valid if the restrictions imposed are reasonable.

Goodwill is a part of assets of the partnership firm – KhusalKhemgal Shah vs. Mrs. Khurshed Banu

Mode of giving public notice – A public notice under this Act is given.

(a) Where it relates to the retirement or expulsion of a partner from a registered firm, or to the dissolution of a registered firm, or to the election to become or not to become a partner in a registered firm by a - person attaining majority who was admitted as a minor to the benefits of partnership, by notice to Registrar of firms under Section 63, and by publication in the Official Gazette and in at least one vernacular newspaper circulating in the district where the firm to which it relates has its place or principal place of business and.

(b) In any other case, by publication in the Official Gazette and in at least one vernacular newspaper circulating in the district where the firm to which it relates has its place or principal place of business.

Unit – V

COMPANY ACT 2013

- Originally founded in the 18th century based on the English company law.
- Committee under the chairmanship of HC Bhaba was formed to revise the Indian Companies Act

Definition :Company Act, 1956 defines the word " company as company formed and registered under the Act or an existing company formed and registered under any of the provisions company laws (Sec -3)

Lord Lindley has described the company as " an association of many persons who contribute money or money's worth to a common stock and employ it in some trade or business ; and who share the profit and loss arising there from".

Characteristic features

1. Incorporated association : a company must be incorporated or registered under the companies act.

Minimum number required incase of a public company is 7, in case of a private company is 2 and maximum of 50 (Sec -12)

2. Artificial Person :a company is created with the sanction of law and is not itself a human being, it is therefore called artificial ; and since it is clothed with certain rights and obligations , it is called a person.

3. Separate legal entity :a company is a legal entity quite distinct and separate from its members(Sec-34(2)).

- It can hold and deal with any type of property of which it is the owner, in any way it likes.
- It can enter into contracts , open a bank account in its own name.
- It can sue and be sued by its members as well as outsiders.

4. Perpetual existence :a company has a perpetual succession.

- The mode of incorporation and dissolution of a company and the right of the members to transfer shares freely guarantee the continuity of the existence of the company quite independent of the life of its members.

5. Common seal :though a company has been given an artificial personality, yet it acts through human beings who are called as directors.

All the acts of the company are authorised by its " <u>Common Seal</u> "

6 . Limited liability :the liability of the members of a company having share capital is generally limited to the extent of the unpaid amount on the shares held by them.

7. Transferability of shares: the shares of a Joint stock company are freely transferable, except in the case of a Pvt. Ltd Company.

<u>KINDS OF COMPANIES</u>

1. ***Statutory companies :*** *A company formed by a special act passed either by the central or state legislature is called a statutory company*

<u>Ex</u> : RBI, SBI

2. Registered companies :*Companies formed by registration under the Companies Act are known as registered companies.*

- *The working of such companies is regulated by the provisions of Company Act, Memo of Assoc, Articles of Assoc.*

3. Companies Deemed to be public :

- *Sec- 43 A added by the companies (amend) Act, 1960 introduced this term to tackle the problem posed by companies, which were private inform but public in content.*

5. Govt. Companies:

- A company, of which not less than 51% of the paid up share capital is held by the central govt or by the state govt or by any two or more of them together shall be a govt company (Sec -617)

6. Foreign companies:

- A company incorporated outside India but which had a place of business in India shall be known as foreign company.

7. Multinational companies:

- It refers to an organisation which is having its headquarters in one country and have business operations in other countries
- This means this type of organisation will have business across many countries.

8. Charitable or Non- profit making companies:

- A company may be formed for a charitable or non profit making objective under Sec -25 of the companies act.

CLASSIFICATION OF COMPANIES

A) **On the basis of liability**

i) **Companies limited by shares :**In this type of the company, the liabilities of the members are limited to the unpaid amount on the shares.

ii) **Companies limited by guarantee :** company in which liability of each member is limited to such amount as he may voluntarily undertake under the memorandum to contribute to meet out the deficiency of the assets of the company in the event of its winding up,and that too, if the liability exceeds its assets.

- The amount guaranteed by each member is in the nature of reserve capital

iii) Unlimited companies :a company, not having any limit on the liability of its members, is termed as an unlimited company.

B) On the basis of number of members and ownership

i) **Private company** : A company which has a minimum paid up capital of Rs 1 lakh or such higher paid up capital as may be prescribed by its articles

- Restricts the right to transfer the shares, if any
- Limits the number of members to 50
- Can be registered with only 2 members.
- Prohibits invitation to the public to subscribe for any shares or debentures of the company and
- Prohibits any invitation or acceptance of deposits from persons other than its members, directors etc..

ii) Public company : It is a company which is

- Not a private company
- Has a minimum paid up capital of Rs 5 lakhs or such higher paid up capital as may be prescribed
- It requires at least 7 members to incorporate.

C) Classification on the basis of incorporation

i) **Statutory company :** A company formed by Special Act passed either by the central or state legislature is called a statutory company.

- They are governed by their respective Acts, and are not required to have any Memorandum or Articles of association

Ex : Indian Railways, RBI

ii) Registered Company : Companies registered under the companies Act 1956 are called registered companies

- Regulated by the Act 1956, Memorandum of association and Articles of association.

D) Classification on the basis of control

i) **Holding Company :** (Sec -4) of the Act says if it holds the composition of the board of directors of another company

- If It holds the majority of the shares of another company i .e. more than 50% of the issued equity capital

- If It holds more than 50% of voting rights.

ii) Subsidiary Company: a company so controlled is termed as subsidiary company.

<u>Formation of a company</u>

The procedure for the formation of a company, from the idea of forming a company is first conceived till the company is actually formed and commences business, may be divided into three principal stages:

- Promotion
- Incorporation
- Commencement of business

<u>A) Promotion</u>

- The stage of conceiving an idea and its working up is termed as promotion
- The person involved in this task is termed as promoter
- The promoter may workup the idea with the help of his won resources, influence or competence or he may, if necessary take the help of technical experts to find out the economics of the project he has in his mind.

<u>Kinds Of Promoters</u>

1. **Professional promoters :**a person who specializes in the job of promotion of companies is termed as professional promoter.
2. **Occasional promoters:** a person who promotes a company once in a while but not on regular basis, is termed as an occasional promoter.
3. **Financial promoters :** institutions like IDBI, ICICI Ltd, Commercial banks etc also promote companies
4. **Entrepreneurial promoters :**such a promoter conceives of a business idea, takes all necessary steps for bringing a company into existence and then really brings it into existence. A large category of promoters in India coming into this category

<u>B) Incorporation</u>

- It is the incorporation which brings a company into existence as a separate corporate entity

1. <u>Selection of the type of company</u>**:**

- It is depending upon the purpose for which the company is to be incorporated.
- The promoter can select the type of the company as they wish to form themselves into viz. One person company, Private company, Public company, Non profit making company etc.

2. Requirement for having DIN**:**

- No company shall appoint or re-appoint any individual as Director of the company unless he has been allotted a Director Identification Number(DIN).
- Therefore, before submission of **e-form INC-1** for reservation of name, all the Directors of proposed company must ensure that they are having DIN.
- Every individual, intending to appointed as Director of company shall make an application for allotment of DIN to the Central Government in the prescribed **Form DIR-3**

3. Applying for reservation of the selected Name **:**

- The promoters of a new company shall make an application in **e-Form INC-1** along with fee as prescribed in the companies (Registration Office and Fees) Rules,2014 electronically with the ROC for his confirmation for the reservation of the proposed name that it is not undesirable.
- Reservation of the name given by the ROC shall be valid for a period up to **60 days** only.

4. Preparation of Memorandum of Association(MOA) and Article of Association(AOA) :

- Drafting of MOA and AOA is generally a step subsequent to the reservation of name made by the Registrar.
- It should be noted that the main objects must be matched with the objects shown in **e-Form INC-1.**

5. Filling of documents with the registrar for incorporation of company:

- File the **e-FormINC-7** (**INC-2 in case OPC**) and the following documents with the ROC for incorporation of the Co. within a period of sixty days from the date of intimation of reservation of name given by the Registrar.
- The MOA and AOA of Co. duly signed by all the subscribers to the memorandum in such manner as prescribed under the Companies (Incorporation) Rules,2014.
- A declaration in prescribed **FormINC-8 (available in word format)** by an Advocate or CS,CMA or CA in practice, who is engaged in the formation of the company, andby a person named in the article as a Director, manager or secretary of the company, that all the

requirements of this Act and the Rules made there under and matters precedent or incidental thereto have been complied with.

- An affidavit in **FormINC-9 (available in word format)** with the **Form INC-7** by each subscribers to the memorandum and by all the persons named as First Directors that they are not convicted of any offence in connection with the promotion, formation or management of any Co. or they have not been found guilty of any fraud or misfeasance under this Act or any previous Co. law during the preceding five years.

- *It should be noted that specimen signature and photograph of subscribers to be attested by Banker or Public Notary.*

- The address of correspondence till its registered office is established.

- The particulars of the persons mentioned in the articles as the first directors of the Co. in prescribed **Form DIR-12**.

- **E-Form INC-22** for verification of the location of the registered office.

6. Certificate of Incorporation and allotment of Corporate Identity Number:

- On satisfaction of the registrar that all the requirements have been complied with by the Co., he will retain the documents and register the AOA & MOA and will issue a Certificate of Incorporation in the **Form INC-11**,within 7 days of the receipt of documents.

C) Commencement of business:

- Section 11 of the Companies Act,2013 says that a company (*Earlier it was for public co. only*) having share capital can not commence any business or exercise any borrowing powers unless it files a declaration with ROC in **E-Form INC-21**.

- Filing of Declaration:

- A Company having share capital shall file the following documents along with **E-Form INC-21** with the ROC:

1. List of members of the co. with their shareholding.

2. List of MD,Directors,Manager,Secretary,CEO,CFO,Auditiors and changes among them, if any since the date of incorporation.

3. Consent of Auditors.

4. Certified true copy of the Memorandum and Article of Association of company.

5. Copy of agreements for appointments of MD, Underwriters,

Contracts etc. entered into by the promoters before incorporation of Co.

6. Details of preliminary expenses already incurred/proposed to be incurred by the Co.

7. Power of Attorney to obtain the certificate of commencement of business from ROC.

8. Certified true copy of the resolution passed by the board for approval of filling of declaration for obtaining COB.

9. Confirmation for paid up share capital to the extent of 5lacs in case of public co. and 1lac in case of private co and OPC , and proof thereof,

10. In the end this declaration form shall be verified by the Company Secretary or CA or CMA in practice.

- *It may be noted that if this declaration(INC-21) is not filled within 180 days of the incorporation, then ROC has the power to strike off the Co.*

Prospectus

- It is essential for a public company to issue a prospectus if it indents to appeal to the public for capital to carry out the objects for which it has been constituted .
- Prospects is a Market Show so as to attract investors for putting money into securities of the company.
- According to the Company Act, prospectus means`` any document described or issued as a prospectus and includes any notice, circular, advertisement or other document inviting deposits from the public or inviting offers from the public for the subscription or purchase of any shares in, or debentures of a body corporate''.

Allotment of shares

- It means " the appropriation out of the previously unappropriated share capital of the company".
- Allotment is the acceptance of the offer to take up shares
- On entry being made in the register of members, allottee becomes members of the company, but until than allotment remains only a contract.
- Allotment of shares is usually done by a resolution of the board of directors.
- Reissue of forfeited shares is not allotment, it is simply taken as a resale of existing shares.

Share & Share Capital:

- The Company Act defines a share as "share in the share capital of a company and includes stock except where a distinction between stock and share is expressed or implied"-Sec-2(46).
- A share may said to be a bundle of rights as well as liabilities. It secures to its owner the right to receive a proportionate part of profits, if any, and proportionate part of the assets of the company upon liquidation.
- On the other hand the shareholder may also be required to pay the full value in winding up.
- A Company can issue two types of shares,

1.Preference Shares :Carry the following two preferential rights,

(a) Preferential right in respect of a fixed dividend .It may consist of a fixed amount.

(b) Preferential right as to the payment of capital in the case of winding up of company in priority to other classes of shares.

2.Equity Shares :Equity shares are those which are not preference shares.

- The sum total of the nominal value of shares of a company is called as its share capital.

MEMORANDUM OF ASSOCIATION

- A document in relation to the proposed company.
- It contains the fundamental conditions upon which alone the company is allowed to be incorporated.
- It is the charter of the company and defines its raison d'etre.
- It also regulates the external affairs of the company in relation to outsiders.
- Its purpose is to enable shareholders and those who deal with the company to know what its permitted range of enterprise is.

PURPOSE:

- The prospective share holders shall know the field in, of the purpose for, which their money is going to be used by the company and what risk they are undertaking in making investment.

- The outsiders dealing with the company shall know with certainty as to what objects of the company are and as to whether the contractualrelation into which they contemplate to enter with the company is within the objects of the company.

PRINTING & SIGNING OF MEMORANDUM:

- Printed
- Divided into paragraphs numbered consecutively
- Signed by seven subscribers

CONTENTS:

- Name of the company
- State(Position)
- Objects of the company
    - Main objects
    - Other objects
- Limited liability
- Share capital

THE NAME CLAUSE

- Undesirable name to be avoided.
    - Too similar to the name of another company
    - Misleading
- Injunction if identical name adopted.
- Limited or Private Limited
- Prohibition of use of certain names
- Use of key words according to authorised capital

THE REGISTERED OFFICE

- Registered office is compulsory from the day it carries on its business.

THE OBJECTS CLAUSE

- To enable subscribers to the memorandum to know the uses to which their money may be put
- To enable the creditors and persons dealing with the company to know what its permitted range of enterprise or activities is.
- Main objects and other objects

OTHER CLAUSES

- The capital clause
- The liability clause
- The association clause

ALTERATION

1.CONDITIONS

- **Change of name**
  - By special resolution
  - By ordinary resolution
- **Change of registered office**
  - From one place to another place
  - From one town to another town
  - From one state to another state

Procedure Of Alteration

- Special resolution
- Confirmation by the company law board
- Notice to affected parties
- Notice to registrar
- Power of the company law board to confirm change discretionary
- Rights and interests of members and creditors to be taken care of

- Copy of special resolution and the order of the company law board to be filed with the registrar

2. OBJECTS

- Substantive limit
  - To carry on its business more economically or more efficiently
  - to attain its main purpose by new or improved means
  - To enlarge or change the local area of its operations
  - To carry on some business which may conveniently or advantageously be combined with the objects specified in the memorandum
  - To restrict or abandon any of the objects specified in the memorandum
  - To sell of dispose of the whole, or part, of the undertaking, or of any of the undertakings of the company or
  - To amalgamate with any other company of body of persons

Procedure Of Alteration

- Special resolution
- Copy of special resolution to be filed
- Certification of registration.

ARTICLES OF ASSOCIATION

- The articles of association are the rules, regulations and bye-laws for the internal management of the affairs of a company.
- They are framed with the object of carrying out the aims and objects as set out in the Memorandum of Association.

CONTENTS:

- Share capital, rights of shareholders, variation of these rights, payment of commissions, share certificates
- Lien on shares
- Calls on shares
- Transfer of shares
- Transmission of shares
- Forfeiture of shares
- Conversion of shares into stock
- Share warrants
- Alteration of capital
- General meetings and proceedings there at
- Voting rights of members, voting and poll, proxies
- Directors, their appointment, remuneration, qualifications, powers and proceedings of board of directors
- Manager
- Secretary
- Dividends and reserves
- Accounts, audit and borrowing powers
- Capitalization of profits
- Winding up.

<u>Companies which must have their own Articles</u>

- Unlimited companies
- Companies limited by guarantee
- Private companies limited by shares

<u>REGULATIONS REQUIRED</u>

Unlimited company

- The number of members with which the company is to be registered and
- If it has a share capital, the amount of share capital with which the company is to be registered

Company limited by guarantee

- The number of members with which the company is to be registered

Private company

- Restrict the right to transfer shares
- Limit the number of its members to 50
- Prohibit any invitation to the public to subscribe for any shares in, or debentures of, the company

STATUTORY REQUIREMENT

- Printed
- Divided into paragraphs
- Signed by each subscriber of the memorandum

Wide powers of alteration

Any clause in the articles that restricts or prohibits alteration of Articles is invalid

Procedure of alteration

- Special resolution
- Lawfully included originally
- A copy of every special resolution altering the Articles shall be filed with the Registrar

Limitations To Alteration

- Must not be inconsistent with the act
- Must not conflict with the Memorandum
- Must not sanction anything illegal

- Must be for the benefit of the company
- Must not increase liability of members
- Alteration by special resolution only
- Approval of Central Government when a public company is converted into a private company
- Breach of contract

ARTICLES & MEMORANDUM - Relations

- The articles are subordinate to Memorandum
- The Memorandum must be read in conjunction with Articles
  - To explain any ambiguity in the terms of the Memorandum, or
- The terms of the Memorandum cannot be modified or controlled by the Articles

ARTICLES & MEMORANDUM – Distinction

Memorandum of Association	**Articles of Association**
Charter of the company	Regulations
Defines the scope	They are the rules
Supreme Document	Subordinate
Must own Memorandum	Need not have Articles of its own
Strict regulation in alteration	Altered by a special resolution

Legal effect of Memorandum and Articles

- The Memorandum and Articles, when registered, bind a company and the members there of to the same extent as it they
  - had been signed by the company and each member and

- contained covenants by the company and each member to observe all the provisions of the Memorandum and of the Articles

- The legal implications of these documents bind
    - Members to the company
    - Company to the members
    - Members inter se
    - Company to the outsiders.

- Constructive notice of Memorandum and Articles
    - Every outsider dealing with a company is deemed to have notice of the contents of the Memorandum and the Articles of Association.
    - These documents, on registration with the registrar, assume the character of public documents. This is known as constructive notice of Memorandum and Articles.
    - Office of Registrar is a public office
    - Presumption that outsider has read Memorandum and Articles

APPOINTMENT OF DIRECTORS

- The directors are the persons elected by the shareholders to direct, conduct, manage or supervise the affairs of the company.
- Directors of a company hold the most crucial position in the Company. With the new Companies Act, 2013 ("New Act") already in force, their position has become even more significant than ever before. They are now formally included within the definition of "key managerial personnel" or "KMP" under Section 2(51) of the New Act.
- Section 152 of the New Act governs the appointment of directors. Certain specific requirements for appointment of director as laid down in the New Act are-
- If there is no provision for appointment of Director in the Articles (AoA), the subscribers to the memorandum, i.e. the shareholders, who are individuals shall be deemed to be the first directors of the company until the directors are duly appointed;
- Director to be appointed in a general meeting. If it is so done, an explanatory statement for such appointment, annexed to the notice for the general meeting, shall include a statement that in the opinion of the Board, he fulfils the conditions specified in this Act for such an appointment;

- The proposed Director has to furnish his DIN (Director Identification Number) mandatorily. DIN is allotted by the Central Government on application by a person intending to be the Director of a company. DIN can be obtained in pursuance of section 153 and 154;

- The proposed Director has to also furnish a declaration stating that he is not disqualified to be a director.

- Furthermore, such appointment should be with his consent. Earlier such consent was not mandatory for private companies. Consent implies that being appointed a director and taking the charge of the office are two different things;

- Consent has to be filed with the Registrar of Companies within 30 days of appointment

- The provisions for optional proportionate representation which was earlier mandated only for public companies and the private companies which are subsidies of a public company, has now been extended to all private companies also (section 163 of the Companies Act, 2013).

- Section 149(1) of the Companies Act, 2013 requires that every company shall have a minimum number of three directors in the case of a public company, two directors in the case of a private company, and one director in the case of a One Person Company.

- The New Act, by adding 149 (1) (b), has also increased the maximum number of directors that a company can have from twelve to fifteen. The number can be further increased by passing a special resolution instead of requiring approval from Central Government as was under the Old Act.

- No person, after the commencement of this Act, shall hold office as a director, including any alternate directorship, in more than twenty companies at the same time , Provided that the maximum number of public companies in which a person can be appointed as a director shall not exceed ten.

New Categories and Qualifications of Directors:

1. **Resident Director:**

- As per Section 149 of the New Act, Board of Directors of a company, must have at least one resident director, i.e. a person who has lived not less than 182 days in India in the previous calendar year.

- The second proviso added to section 149 in the New Act requires all companies to comply with section 149 within a year.

2. **Woman Director:**

- Similarly, a new provision is introduced under section 149, which requires certain categories of companies to have at least one woman director on the board.
- Such companies are any listed company, and any public company having-

- paid up capital of Rs. 100 cr. or more, or
- turnover of Rs. 300 cr. or more.

3. **Additional Directors:**

- Additional Directors may be appointed by a company under section 161 of the New Act.
- The article should confer such power on the Board of Directors of the Company. A provision further added in 2013 with regards to such appointment is that the proposed person should not have failed to get appointed as a Director in a General Meeting.

4. **Alternate Directors:**

- Alternate Directors, under section 161(2) of Companies Act, 2013, may be appointed by a company if the articles confer such power or a decision is passed by a resolution if an independent Director is absent from India for not less than three months.
- He must be qualified to become an independent director, but should not hold any Directorship.
- An alternate Director cannot hold the office longer than the term of the Director in whose place he has been appointed.

5. **Nominee Director:**

- Nominee Director is defined under an explanation to section 149.
- He is a Director nominated by any financial institution pursuant to any law for the time being in force, or of any agreement or appointed by any Government or any other person to represent its interest.

6. **Independent Director:**

- Independent Director is for the first time introduced in the New Act, and has been clearly defined as *"any director other than a managing director, a whole time director, and a nominee director."*
- Such a director not having any significant pecuniary relationship with the company is more efficient.

- Section 149 (4) requires that one third of the directors should be independent directors. Section 149(6) lists in detail the specific qualifications for an independent director-

- Person of integrity and relevant experience.
- Is not a promoter, nor has any relation with the promoters or directors of the company, its holding, subsidiary or associate company;
- Has no pecuniary relationship with company, its holding, subsidiary or associate company, its promoters or directors in the preceding two years of his appointment;
- Has no relatives who have pecuniary relationship with company, its holding, subsidiary or associate company, its promoters or directors;
- Neither he, nor any of his relatives have held a key managerial personnel or is or has been employee of the company or its holding, subsidiary or associate company in any of the three financial years immediately preceding the financial year in which he is proposed to be appointed;
- Neither he nor any of his relatives have been an employee or proprietor or a partner, in any of the three financial years immediately preceding the financial year in which he is proposed to be appointed, of;

(a) a firm of auditors or company secretaries in practice or cost auditors of the company or its holding,

(b) any legal or a consulting firm that has or had any transaction with the company, its holding etc.

- Neither he nor any of his relatives hold together with his relatives two per cent. or more of the total voting power of the company;
- Neither he nor any of his relatives is a Chief Executive or director, by whatever name called, of any non profit organization that receives twenty-five per cent or more of its receipts from the company;
- who possesses such other qualifications as may be prescribed.
- The appointment of independent directors has to also be approved by the shareholders.

Disqualification of directors

- Following persons can notbe appointed as directors of a accompany

i. A person found by court to be of unsound mind and the finding is in force.

ii. An undischarged insolvent

iii. A person who has been convicted by a court, whether in India or elsewhere, of an offence involving more turpitude and sentenced to 6 months imprisonment and period of 5 years has not passed from the date of expiry of the sentence.

iv. If a person has been convicted of any offence and sentenced in respect thereof to imprisonment for a period of seven years or more, he shall not be eligible to be appointed as a director in any company;

v. an order disqualifying him for appointment as a director has been passed by a court or Tribunal and the order is in force;

vi. A person who fails to pay calls when made with in one month

vii. A person disqualified under of the Act, on account of any fraud played in the promotion , formation , management or winding up of the company.

viii. has not filed financial statements or annual returns for any continuous period of three financial years.

ix. has failed to repay the deposits accepted by it or pay interest thereon or to redeem any debentures on the due date or pay interest due thereon or pay any dividend declared and such failure to pay or redeem continues for one year or more.

Vacation of office by a director(Sec-167) :

- The office of the director will fall automatically vacant in the following cases
- He incurs any of the disqualifications specified in section 164;
- He absents himself from all the meetings of the Board of Directors held during a period of twelve months with or without seeking leave of absence of the Board;
- He acts in contravention of the provisions of section 184 relating to entering into contracts or arrangements in which he is directly or indirectly interested;
- He fails to disclose his interest in any contract or arrangement in which he is directly or indirectly interested
- He becomes disqualified by an order of a court or the Tribunal
- He is removed in pursuance of the provisions of this Act
- He is convicted by a court of any offence, whether involving moral turpitude or otherwise and sentenced in respect thereof to imprisonment for not less than 6 months, Provided that

the office shall be vacated by the director even if he has filed an appeal against the order of such court;

- If a person, functions as a director even when he knows that the office of director held by him has become vacant on account of any of the disqualifications specified above, he shall be punishable with imprisonment for a term which may extend to 1 year or with fine which shall not be less than Rs. 1, 00,000 but which may extend to Rs. 5,00,000 or with both.

Removable of Directors (Sec-169):

- A company may, remove a director except the director appointed by National Company Law Tribunal u/s 242, before the expiry of the period of his office after giving him a reasonable opportunity of being heard after passing the ordinary resolution.
- A special notice shall be required of any resolution, to remove a director under this section, or to appoint somebody in place of a director so removed, at the meeting at which he is removed.
- A director so appointed shall hold office till the date up to which his predecessor would have held office if he had not been removed

Resignation by a Director (Sec-168) & Rule15,16:

- A director may resign from his office by giving notice in writing.
- The Board shall, on receipt of such notice within 30 days intimate the Registrar in Form DIR-12 and also place the fact of such resignation in the Directors' Report of subsequent general meeting of the company and post the information on its website.
- The director shall also forward a copy of resignation along with detailed reasons for the resignation to the Registrar in Form DIR-11 within 30 days from the date of resignation.
- The notice shall become effective from the date on which the notice is received by the company or the date, if any, specified by the director in the notice, whichever is later.
- If all the directors of a company resign from their office or vacate their office, the promoter or in his absence the Central Govt shall appoint the required number of directors to hold office till the directors are appointed by the company in General Meeting.

Powers of Directors

- The Board of directors gets its powers from Articles, Memorandum and provisions of Companies Act, 2013. Certain powers of Board can be exercised by individual directors to further the routine affairs as per allocation but certain powers shall be exercised by the board collectively.

1. General Powers of Directors:

- Section 179 says that the Board of Directors of a company shall be entitled to exercise all such powers, and to do all such acts and things, as the company is authorised to exercise and do.
- But in exercising such power or doing such act or thing, the Board shall be subject to the provisions contained in that behalf in this Act, or in the memorandum or articles, or in any regulations not inconsistent therewith and duly made there under, including regulations made by the company in general meeting.

2. Collective Powers of Board :

- The Board of Directors of a company shall exercise the following powers collectively on behalf of the company by means of resolutions passed at meetings of the Board, namely:

(a) To make calls to shareholders in respect of money unpaid on their shares;

(b) To authorise buyback of securities under section 68;

(c) To issue securities, including debentures, whether in or outside India;

(d) To borrow monies;

(e) To invest the funds of the company;

(f) To grant loans or give guarantee or provide security in respect of loans;

(g) To approve financial statement and the Board's report;

(h) To diversify the business of the company;

(i) To approve amalgamation, merger or reconstruction;

(j) To take over a company or acquire a controlling or substantial stake in another company;

(k) Any other matter which may be prescribed:

- Out of these powers the powers mentioned under clauses (a) to (c) can be delegated to a committee of directors but other powers related with borrowing, merger, amalgamation, diversification which are substantial in nature cannot be delegated.
- In following cases shareholders of company can restrict or interfere with powers of board:

i. Where directors are acting mala fide or against the interests of company;

ii. Where the board is interested in a transaction so they shall be incompetent to work;

iii . Where there is complete deadlock in management

- An individual director has no power to act on behalf of company of which he is director unless by some resolution of Board of the company, specific powers are given to him.

3. <u>Powers of Board to be Exercised In General Meetings</u>:

- Certain powers can be exercised by board with sanction in meetings of shareholders only. Section 180 discusses about such powers.

(a)To sell, lease or otherwise dispose of the whole or substantially the whole of the undertaking of the company or where the company owns more than one undertaking, of the whole or substantially the whole of any of such undertakings.

(b)To invest otherwise in trust securities the amount of compensation received by it as a result of any merger or amalgamation;

(c)To borrow money, where the money to be borrowed, together with the money already borrowed by the company will exceed aggregate of its paid-up share capital and free reserves

(d) To remit, or give time for the repayment of, any debt due from a director.

4. <u>Managerial Powers of Directors</u>:

- The directors as are limbs of company so they have all power for better and effective management of company including the following:

i. Power to enter in to contractual relationship for mobilization of stock in trade;

ii. Power to declare dividend

iii. Power to allot, forfeit and transfer of shares

iv. Power to appoint director to fill up casual vacancies

v. Power to issue debentures or hybrid instruments

vi. Power to appoint managing director, manager or secretary of company

vii. Power to formulate and execute policies related with corporate affairs of the company

<u>Further restrictions on the powers of the board :</u>

1. <u>Restrictions on Political Contributions</u>:

- Section 182 provides that a company, other than a Government company and a company which has been in existence for less than three financial years, may contribute any amount directly or indirectly to any political party.

- The aggregate of the amount which may be so contributed by the company in any financial year shall not exceed seven and a half per cent of its average net profits during the three immediately preceding financial years.

- If a company makes any contribution in contravention of the provisions of this section, the company shall be punishable with fine which may extend to five times the amount so contributed and every officer of the company who is in default shall be punishable with imprisonment for a term which may extend to six months and with fine which may extend to five times the amount so contributed.

2. Interested Directors:

- Section 184 provides that an interested director shall disclose his interest to in the first meeting of Board.

- If a director of the company contravenes the provisions of 184, such director shall be punishable with imprisonment for a term which may extend to one year or with fine which shall not be less than fifty thousand rupees but which may extend to one lakh rupees, or with both.

3. Restrictions Related with Loan:

- Section 185 provides that no company shall, directly or indirectly, advance any loan, including any loan represented by a book debt, to any of its directors or to any other person in whom the director is interested or give any guarantee or provide any security in connection with any loan taken by him or such other person.

- But this restriction does not apply to managing and whole time directors who is being extended such loan being resolved by special resolution in AGM for recognition of his services or to a company the business of which is financing.

- In any contravention of the provisions of section 185(1), the company shall be punishable with fine which shall not be less than five lakh rupees but which may extend to twenty-five lakh rupees.

Duties of the Directors(Section 166)

1. Duty of good faith

- Directors must act honestly and diligently in the interests of the company

2. Duty of reasonable care

- A director is bound to observe reasonable care in the performance of his duties.
- He is excepted to act with that much of skill and diligence which an ordinary man would take in his own case.

3. Duty to attend board meetings

- Meetings of the board of directors are held from time to time to exercise the company's powers. Each director should attend such meetings.

4. Personal attendance

- Directors should perform all the duties placed upon them by the Act and Articles personally.
- They can however, delegate their certain functions to the extent to which the Articles of the company permit or according to the demand.
- If a director of the company contravenes the provisions of this section such director shall be punishable with fine which shall not be less than Rs. 1,00,000 but which may extend to Rs. 5,00,000.

Statutory Duties of Directors:

1. Duty not to mislead by offer document; (sec. 34& 35)
2. Duty not to induce investors for share subscription; (Sec. 36)
3. Duty not to issue irredeemable preference shares; (sec. 55)
4. Duty to file annual return to Registrar; (sec. 92)
5. Duty to hold statutory meetings of company; (sec 96)
6. Duty to maintain books and auditing of the books, appoint auditors; (sec. 128)
7. Duty to ensure planning and execution of Corporate Social Responsibility initiatives; (sec. 135)
8. Duty to get DIN (sec. 156 & 159)
9. Duty to perform certain things as enumerated in section 166.
10. Duty to attend board's meetings; (sec. 173)
11. Duty not to make political contribution in contravention of provision; (sec. 182)

12.Duty to disclose his interest in transaction; (184)

13.Duty not to receive loan from company;(sec. 185)

14.Duty to receive remuneration in confirmation of provisions; (sec. 197)

15.Duty to make declaration of solvency in winding up of the company; (sec. 305)

Liabilities of directors

- The liability of a Director to the company may arise from his breach of fiduciary duty.
- He can be made liable to shareholders, outsiders, company and co-directors. Where a Director acts dishonestly to the interest of the company, he will be held liable for breach of fiduciary duty.

1. Ultra vires Acts:

- It is still relevant to save the company from unwarranted reckless transactions done by the directors for personal and vested interests in the garb of contracts done on account of company by the directors.
- For ultra vires acts directors shall be held personally liable. This doctrine aims at protecting the interests of shareholders of company.

2. Negligence:

- If they breach any duty that resultantly would be held negligent in performance of the duties.
- For negligence of such duties directors may be held liable under tortuous liability and they cannot be exonerated from their liabilities by Articles and general body of the company.

3. Mala Fide Acts:

- Since the directors are holding a confidential and powerful position so they have access to information about the assets of the company and if they apply the corporate funds for vested interests they can be held liable for torts like malfeasance and misfeasance and conversion of property.
- They are equally liable for diversion of money for personal use in criminal laws as a case of criminal breach of trust, criminal misappropriation of property etc.

4. Liability for Co-Directors:

- The directors do not act in isolation. They are jointly and severally liable for the acts of company.

- All the directors are agents of each other. They sink and swim together
- A director owes vicarious liability for other directors.
- If a particular act is to be done by the board of directors and the same is done by single directors on behalf of all such directors, then in case of liabilities he can seek contribution from all his co-directors.

5. <u>Criminal Liability of Directors:</u>

- Non-compliance of incorporation formalities (sec. 8);
- Misstatement in prospectus (sec. 35)
- Fraudulent Inducement for share-subscription (sec. 36)
- Failure to return application money
- Criminal liability regarding issuance of bonus shares, discounted shares, irredeemable preference share and calling and falsification of share certificates
- Failure to file annual return; (sec. 92)
- Failure to hold AGM
- Grant of loan in contravention of Companies Act (sec. 185)
- Failure to maintain proper books of accounts
- Failure to distribute dividends (sec. 127)
- Failure to file annual financial statement (sec. 129)
- Failure to get DIN (sec. 159)
- Failure by exceed maxim limit of inter-corporate directorship (sec. 165)
- Failure to comply with statutory duties (sec. 166);
- Criminal liability for fraud, false evidence etc. (sec. 339, 447, 449 & 450)

<u>Meetings</u>

- Directors take decisions regarding matters affecting the company by calling their meetings, but they can not decide about all matters.
- Certain matters are required to be decided by the whole body of the members of the company and therefore, the meetings of the members are held from time to time.

Kinds of meetings

A) **Meeting of the shareholders or general meetings**

1. **Statutory meeting :**

- A statutory meeting is a general meeting of the company which is held to provide an earlier opportunity to the members for discussing all matters relating to the formation of the company. It is the first meeting of the shareholders of a public company .
- The Board of directors shall, at least 21 days before the day on which the meeting is to be held, forward "statutory report" to every member of the company.
- The accuracy of the statutory report must be certified (a) by at least two directors (b) by the auditors
- A certified copy of the statutory report must be sent to the registrar after copies there of have been sent to the members.
- All matters relating to the formation of the company or arising out of the statutory report may be discussed by the members in a statutory meeting.
- On default of the company in holding the statutory meeting in accordance with the above given procedure or in delivering the statutory report to the registrar , the company may become liable to be compulsory wound up.

2. **Annual general meeting: (Sec-96)**

- It is a regular meeting of the members of a company held annually for the purpose of transacting company's ordinary business. It is called by the company for

a) Passing of the Annual accounts

b) Declaration of the dividends

c) Election of the directors in place of those who are retiring by rotation

d) Appointment and the fixation of the remuneration of auditors etc..

- Law imposes following obligations on a company as regards convening of the annual general meeting (Sec-96(1))
- The power to convene the Annual general meeting vests with the Board of directors only but not individual director or secretary.
- The first annual general meeting within 18 months of its in corporation. There can be no extension of this period even by the registrar.

- Subsequent annual general meeting must be held by the company each year within 6 months after the close of the financial year, but the interval between any two annual meetings must not be more then 15 months.

- Company must give at least 21 days written notice to call an annual general meeting of the shareholders (sec-101).

- If the company fails to call an annual meeting within the time limits prescribed, the govt(company law tribunal) may call or direct the calling of a general meeting of the company (sec – 97).

- Persons responsible for the default may be held liable to a fine upto Rs 1 lakh and continuous default ,a further fine of Rs 5000 for every day after the first day during which such default continues (sec -99).

3. **Extraordinary general meeting**

- All general meetings other than the statutory meeting and the annual general meetings shall be known as extraordinary general meetings (sec-100).

- These are called under any of the two circumstances

a) When the directors have to transact some immediate and emergent business for which they cannot wait till the next annual general meeting.

b) The directors shall also call an extraordinary general meeting on requisition by members holding not less than 1/10 of the paid up share capital or 1/10 of the total voting power of all the members at the date of the deposit of the requisition.(Sec-100(2))

- A notice of 21 clear days is necessary for calling the extraordinary general meeting.

- Matters for the consideration of which the meeting is called shall be stated in the requisition and those matters alone shall be considered at the meeting

- Requistionists shall not be allowed to hold the meeting after the expiry of 3 months from date of the deposit of the requisition

- Resolutions, properly passed at a meeting called by requisitionists, shall be binding upon the company.

B) Meetings conveyed by National Company Law Tribunal

- Besides the above 3 kinds of the meetings, the national company law tribunal may also under certain circumstances call, hold and conduct the meeting of a company.

- It may call, hold and conduct of such meeting either

a) of its own motion **or** b) on the application of the any director of the company **or** c) of any member of the company who would be entitled to vote at the meeting.

- Any meeting called held and conducted in accordance with any such order, shall, for all purposes be deemed to be a meeting of the company duly called, held and conducted (sec-98).

C) Class Meetings(Sec-48)

- Where share capital of the company consists of different classes of shares, meetings of different classes of shareholders may have to be called in order to discuss matters affecting them.
- At this meeting the shareholders of that class of share capital only have the right to be present.

Other meetings

1) **Meetings of the creditors**

- Where a compromise or arrangement is proposed between a company and its creditors or any class of them, the court may on the application of company , or of any creditor shall be called, held and conducted in such manner as the court may direct (sec-230).

2) Meetings of the Debenture holders

- Meetings of the debenture holders may also be held from time to time in pursuance of the terms of the debenture trust deed.

3) Meetings of the Directors

The meetings of the directors are more frequent than the meetings of the shareholders since they are the persons who are the responsible for the administration and management of the company (sec-173).

Requisites of valid general meeting

1) **Proper authority:** the authority to call a general meeting lies with the Board of directors

2) **Notice :**notice means bringing a thing to the knowledge of the other party(Sec-101(3))

- A proper notice in writing to every member of the company
- To legal representative of a deceased member or the assignee of an insolvent,
- To the auditors of the company,

- To every director of the company

3) Place : Annual general meeting has to be held by a public company or its subsidiary at its registered office or at some other place in the same city, town or village.

- However, the central govt has the power to grant excemption to any company from this provision.

4) Quoram : minimum number of members required to constitute a valid meeting and to transact business legally there in is called quoram(Sec-103)

No meeting can be valid without quoram

5) Chairman :every general meeting of the company is presided over by a chairman. He regulates and supervises the proper conduct of the business at a meeting(Sec-104)

6) Proxy :the term proxy is used both for

a) The person authorised to act or vote for another at a meeting of the company

b) The instrument by which a person is appointed to act for another at a meeting of the company (sec -105)

7) Voting :company form of organization is democratic in character, therefore the act of the majority is taken to be the act of the whole.(Sec-106)

- Every member have right to vote on such resolutions.

Resolutions

- A proposal when passed and accepted by the members becomes a resolutions (sec – 114)
- Company Act provides for two types of resolutions

1.Ordinary resolution (sec – 114(1))It is passed

i) by a simple majority of votes at a general meetings.

ii) Of which notice required by sec – 171 of the company Act has been duly given.

iii) Any ordinary resolution is required to pass the annual accounts, to declare dividends, to hold elections of directors, to appoint auditors, to issue shares at a discount, etc..

2. Special resolution (sec-114(2))

- It must be passed by a majority of ¾ of the votes in person or by proxy. In other words the votes cast in favour of the resolution must not be less than three times the number of votes cast against the resolution.

- The intention to propose the resolution as a special resolution must specially be mentioned in the notice issued for calling the meeting. It must be accompanied by an explanatory statement.(sec-115).

Minutes of the proceedings:

- The term Minutes means the written record of the proceeding of a meeting.

Sec(118,119) provide the following rules

- Every company shall cause minutes of all the proceedings of every general meeting and of all proceedings of every meeting of its Board of directors or of every committee of the board.

- Every page of every such book shall be initialed or signed.

- The minutes of each meeting shall contain a fair and correct summary of the proceedings (sec – 118(2)).

- Minutes of meeting kept in accordance with provisions of (sec-118) shall be the evidence of the proceedings recorded their in (sec-118(7)).

Winding Up

- Winding Up is the process by which a company is dissolved and its properties are administered for the benefit of its creditors and members.

- It involves realization of a company‘s assets, payment of its liabilities and return of money back to the members in proportion to the contribution made by them to the capital of the company .

- Thus, winding up ultimately leads to the dissolution of the company .In between winding up and dissolution, the legal entity of the company remains and it can be sued in a court of law.

Modes of Winding – Up

- A company may be wound Up in any of the following two ways

1. Winding Up by the National Company law Tribunal

2. Voluntary winding up

- The order for the dissolution of a company shall be passed by the court on receipt of the report by the court from the liquidator regarding the completion of the Winding up process.

I.Winding up by the tribunal:

- Winding up of a company by an order of the National company law Tribunal may also be termed as Compulsory winding up.
- U/sec-271, the Tribunal may order, for the winding up of a company on a petition submitted to it on any of the following grounds.

1. Inability to pay debts:(Sec-271(1)(a))

- If it is proved to the satisfaction of the Tribunal that the company cannot pay its debts. This implies commercial insolvency of the company as is disclosed by the balance sheet.
- However, the applicants have to prove the insolvency of the company.

2. Passing of special resolution for the winding up:(Sec-271(1)(b))

- When the company has, by passing a special resolution, resolved to be wound up by the tribunal, passed for any cause whatsoever.

3. Acting against the state: (Sec-271(1)(c))

- If the company has acted against the interests of the sovereignty and integrity of India, the security of the state, friendly relations with foreign states, public order, decency or morality.

4. Non viable sick industrial company: (Sec-271(1)(d))

- If the tribunal is of the opinion that the company is non viable, sick industrial and hence should be wound up.

5.Conducting company's affairs in fraudulent manner: (Sec-271(1) (e))

- It is new clause providing three new grounds;

(a)If the affairs of the company have been conducted in a fraudulent manner, or

(b)If the company was formed for fraudulent and unlawful purpose, or

(c)If the persons concerned in the formation or management of its affairs have been guilty of fraud, misfeasance or misconduct.

6. Default in filing financial statements: (Sec-271(1)(f)

- If the company has made a default in filing with the registrar its balance sheet and profit and loss account or annual report for any five consecutive financial years.

7. Just and equitable grounds: (Sec-271(1)(g)

- The Tribunal may order for the winding up of a company if it thinks that there are just and equitable grounds for doing so .Following are some of the circumstances;

(i) Complete deadlock in the management of the company

(ii) Failure of company's main object

(iii) Recurring losses

(iv) Aggressive or oppressive policy of majority shareholders

(v) Incorporation of company for fraudulent or illegal purpose

(vi) Public Interest

WHO MAY APPLY

- Petition for compulsory winding up of a company may be filed in the Tribunal.

1. Petition by the company: (Sec-272(5))

- A company can make a petition to the Tribunal for its winding up by an order of the Tribunal, when the members of the company have resolved by passing a special resolution.

2. Petition by the creditors: (Sec-272(6))

- A creditor may make a petition to the tribunal for the winding up of the company, when he is able to prove that the company is unable to pay off his debts exceeding 1 lakh rupees within 3weeks of the notice of demand.

3. Petition by the contributors (sec-272(2)(c)):

- A contributory shall be entitled to present a petition for the winding up of the company, notwithstanding that he may be the holder of fully paid up shares or that the company may have no assets at all, or may have no surplus assets left for distribution among the holders after the satisfaction of its liabilities.

4. Petition by the Registrar (Sec-272(1)(e)):

- Registrar can file petition for the winding up of the company on the ground of the company's inability to pay its debts only when it appears to him either from the financial condition of the company as disclosed in its balance sheet or from the report of a special auditor appointed Sec-210.
- The tribunal may allow any other person who is entitled to present a petition and who is desirous of prosecuting the petition, to be substituted in place of the original petition provided the petition is otherwise sustainable.

5. Petition by any person authorised by the central govt (Sec-272(1)(f)):

- May authorise any person to present a petition in the Tribunal for winding up of the company who may include even Registrar also sometimes.

6. Petition by any Govt (272(1)(g)):

- When the company acts against the sovereignty of state.

Procedure of winding up

- The following consequences will follow

1. It shall be the duty of the petitioner and the company to file with the register a certified copy of the tribunals order within the 7 days from the date of making of the order (Sec-277).
2. On receipt of the copy of winding up order, the registrar shall make an endorsement in his records and notify in the official Gazette.
3. The winding up order shall be deemed to the notice of discharge to the officers and employees of the company except when the business of the company is continued (Sec -277(3))
4. No suit or other legal proceedings shall be commenced or proceeded, against the company except by leave of the tribunal (Sec-279).
5. The winding up order shall operate in favour of all creditors and all the contributories of the company and they can avail themselves of it(Sec-278)

6. The directors and other officers of every company shall ensure that books of accounts of the company are completed and audited up to date of winding up order made by the tribunal.

- Nothing in the section applied to any proceedings for the recovery of any tax or impose any dues payable to the govt. (Sec-279(2))

Provisional liquidator

- The liquidator is the official who helps the tribunal in the completion of the winding up proceedings.
- Official liquidator appointed by the tribunal only can act as the company's liquidator (sec-273(1)(c)
- He may be appointed from a panel of professional firms of Chartered accountants, Advocates, Company secretaries , Cost and Works accountants or firms having a combination of these professions.(Sec-275(2)
- May be a body corporate consisting of professionals
- May be whole time or part time and officer appointed by central govt.
- On appointment of a provisional liquidator, the Tribunal shall cause an intimated of the same to be sent to the provisional liquidator and Registrar within 7 days from the date of passing the order.(Sec-277(1))
- On his appointment, he shall file a declaration in the prescribed form with the Tribunal disclosing conflict of interest, if any within 7 days of his appointment.(Sec-275(6))
- He shall have the same powers as that of the liquidator, however the Tribunal may limit or restrict his powers by an order(Sec-275(3)
- The terms and conditions of his appointment and the fee payable to him will be specified by the Tribunal on the basis of task required to be performed, experience, qualifications and size of the company.(Sec-275(5))

Official Liquidator

- He is an official who helps the Tribunal in conducting and completing the winding up proceedings.(Sec-2(61))
- The central govt may appoint as many official liquidators, Joint, Deputy or Assistant liquidators as it may consider necessary to discharge the functions of the Official Liquidators.(Sec-359(1)
- Once appointed by the central govt they shall be whole –time officers of the central govt.(Sec-359(2))
- The salary and the allowances of them will be paid by the central govt.(Sec-359(3))
- He shall exercise such powers and perform such duties as the central govt may prescribe.(Sec-360(1))

- He may also exercise all or any of the powers as may be exercised by the company liquidator under the Companies Act.(Sec-360(2))

Company Liquidator

- Sec-2(23) of the Act 2013 defines the company liquidator so far it relates to the winding up of a company means a person appointed as Company Liquidator by

(a) The Tribunal in case of compulsory winding up or

(b) The company or creditors in case of voluntary winding up.

- At the time of passing of winding up order, the Tribunal shall appoint either an Official Liquidator or a Liquidator as the company liquidator.(Sec-275(1))
- While passing a winding up order, the Tribunal may also appoint a provisional liquidator, if already appointed by it, as the company liquidator for the conduct of the proceedings for the winding up of the company.(Sec-275(7))
- On his appointment, he shall file a declaration in the prescribed form with the Tribunal disclosing conflict of interest, if any within 7 days of his appointment.(Sec-275(6))

Duties of the liquidator

1. To submit preliminary report (Sec -277(6)&281)

- As soon as practicable on the receipt of the statement of Affairs from the directors and within 60 days from the date of the winding up order.

2. Collection and distribution of company's property (Sec-283)

- Immediately after the petition for liquidation of the company is accepted and the winding up order is made by the tribunal all the property and assets of the company shall vest in the liquidator.

3. Appointment of the officials.

i. Appoint security guards to protect the property of the company taken into his custody

ii. Appoint, as the case may be, valuer, chartered surveyors and charted accountant to assess the value of the company's assets.

Give an advt , inviting bids for sale of the assets of the company.

4. Keeping record of all receipts and payments (Sec-294)

i. Maintain a separate bank account for each company under his charge for depositing the sale proceeds of the assets.

ii. Maintain proper books of account in respect of all receipts and payments made by him.

iii. Shall present to the court twice a year an account of his receipts and payments as liquidator.

5. <u>To obey the order of the tribunal</u>

- Care to see that his actions do not come out to be ultravires the provisions of the company law

6. <u>Meetings of creditors and contributories</u>

- Whenever he may deem fit for the purposes of ascertaining their wishes. <u>(Sec-292(3).</u>

7. <u>To maintain minutes of the proceedings (Sec-293)</u>

8. <u>To Appoint an advisory committee (Sec-287)</u>

- On the directions of the Tribunal, it shall be the duty of the liquidator to call a meeting of the creditors and contributories for the purpose of constituting the advisory committee
- Exercise certain degree of control and supervision over the activities of liquidator.

9. <u>Information as to pending liquidation (Sec-348)</u>

- If it is not completed within one year after its commencement, he shall within <u>two</u> months of the expiry of such year, file a statement in the prescribed form.
- However, the central govt may exempt the liquidator from filling the statement.

<u>General Powers of Tribunal</u>

1. The tribunal may at any time after making a winding up order, on the application either of the liquidator or of any creditor or contributory stop the winding process.(Sec-289)
2. Settlement of list contributories(Sec-285)
3. Summoning and examination of suspected persons(Sec-299)
4. Payment of money by the contributory and allowing set off(Sec-295)
5. Making the calls for dues on shares(Sec-296)
6. Adjustments of rights of contributories(Sec-297)
7. Public examination(Sec-300)

8. Arrest of absconding contributory(Sec-301)

Dissolution of a Company(Sec-302)

1. Dissolution of company by Tribunal: The dissolution puts an end to the existence of the company and the Registrar then strikes off company's name from the Register of Companies.

(i) When the affairs of the company have been completely wound up, the company liquidator shall make an application to the Tribunal for dissolution of the company(Sec-302(1)).

(ii) The Tribunal shall make an order of dissolution in any of the following cases(Sec-302(2))

a) When the affairs of the company have been completely wound up.

b) When the Tribunal is of the opinion that it is just and reasonable to dissolve the company.

(iii) Within 30 days of the order, the company liquidator must forward a copy of the order to the Registrar who shall record the same in his books, on default in forwarding a copy, he shall be punishable with a fine upto Rs 5000 for every day(Sec-302(3)(4)).

2. Application for declaration of dissolution to be void:

- It is be noted that the liquidator or any other interested person may also apply to the Tribunal for an order declaring the dissolution to be void.
- On such application the Tribunal may pass an order declaring the dissolution to be void(Sec-356).
- Within 30 days of the Tribunal order, the person on whose application the order was made, must file a copy of the order with the Registrar of Companies who shall register the same, on default of such filing the copy, he shall be punishable with a fine upto Rs 10000/- for every day during which the default continues.(Sec-356(2)

2.VOLUNTARY WINDING UP

- Winding up by the Creditors or Members without any intervention of the tribunal is termed as voluntary winding up.
- U/Sec-304, a company may be wound up voluntarily

1. By passing an ordinary resolution in general meeting.

(a) When the period, for the duration of which the company was constituted , has expired , or

(b) When the event on the happening of which depended the termination of the existence of the company has happened.

2. By passing a special resolution to wind up voluntarily for any reason what so ever.

Commencement of the voluntary winding up

- A Voluntary winding up shall be deemed to commence at the time when resolution for winding up is passed.
- The date of the commencement of winding up is important for the various matters such as liability of past members, avoidance of fraudulent preference,etc.

LEGAL PROVISIONS:

1. Declaration of Solvency(Sec-305(1)):

- The declaration of solvency shall be made by the majority of directors at a meeting of the Board of Directors, and verified by an affidavit.
- The directors shall declare in it that they have made a full enquiry into the affairs of the company and formed the opinion that the company has no debts or that the company will be able to pay its debts in full from the proceeds of assets sold in winding up.
- It must contain a declaration that the company is not wound up to defraud any persons (Sec-305(2)).
- It must be accompanied by a copy of the report of company's auditors on the profit and loss account.
- It must also contain a statement of the assets and liabilities of the company as the latest practicable date and a report of valuation of the assets of the company prepared by a registered valuer.
- It must be made within 5 weeks immediately before the passing of the resolution for the winding up.

2. Meeting of the Creditors(Sec-306):

- In this winding up process, the meeting of creditors is mandatorily required to be convened by the company along with the meeting of the company at which the resolution for voluntary winding up is to be proposed.
- The board shall present before the creditors' meeting a full statement of the position of affairs of the company.

- The creditors may, with 2/3rd in value of the creditors of the company, from their opinion favour voluntary or compulsory winding up.
- The notice of any resolution passed at the meeting of creditors shall be given to the Registrar within 10 days of the resolution.

Any contravention of the above provisions ,will attract a minimum fine of Rs 50000/- which may extend to 2 lakhs and persons responsible will be imprisoned upto 6 months or both.

3. <u>Publication of Resolution (Sec-307):</u>

- The resolution regarding winding up process ,shall be published by the company within 14 days of passing in the Official Gazette.
- It shall also be published in the local newspaper in the district where the registered office of the company is situated.
- Contravention of this provision will attract a fine which may extend to Rs 5000 for every day of the default which continues.

4. <u>Commencement of Voluntary winding up (Sec-308):</u>

- It shall be deemed to commence from the date of passing a resolution by the company for its voluntary winding up.

5. <u>Effect of Voluntary Winding Up(Sec-309):</u>

- On the commencement of the voluntary winding up, the company shall cease to carry on its business; however it may carry on its business if it is for the beneficial for winding up.
- It may however be noted that the corporate status and powers of the company shall continue until it is dissolved.

6. <u>Appointment of Company Liquidator (Sec-310):</u>

- The company liquidator shall be appointed in the general meeting in which a resolution of winding up is passed.
- He is appointed from the panel of professionals prepared by the central govt for the purposes of winding up its affairs and distributing the assets of the company.
- The fee to be paid to him shall also be recommended by the company.
- The appointment of him shall be effective only if it is approved by the majority of creditors in value of the company.

- The company liquidator shall file declaration in prescribed form with the company and the creditors within 7 days from the date of his appointment disclosing conflict of interest.

The notice of appointment of company liquidator, along with his name and particulars, shall be given by the company to the Registrar within 10 days of such appointment (Sec-312).

- On appointment of the Company Liquidator, all the powers of the Board of Directors including the powers of the MD, whole-time director and manager, if any, shall cease i.e come to an end.

- Board can exercise power only for the purpose of giving notice to the Registrar of such appointment of the Liquidator (Sec-313).

7. Appointment of Committees (Sec-315):

- The Act makes provision for the appointment of committees by the company as well as by the creditors as considered appropriate to supervise the voluntary liquidation, and to assist the company liquidator in discharging his functions.

8. Conduct of Liquidation Proceedings (Sec-316):

- The company liquidator shall report quarterly on the progress of winding up of the company, in such form and in such manner as may be prescribed to the members and the creditors.

- If he fails to report quarterly or to call meetings as stated above, then he shall be punishable with fine which may extend to Rs 10 lakhs for each failure.

Dissolution of the Company(VW)(Sec-318);

1. Final meeting of the Company:

- The general meeting of the company shall be called by the company liquidator in such form and manner as may be prescribed.

- After consideration of the report of the company liquidator, if the majority of the members of the company are satisfied that the company shall be wound up, then they may pass a resolution for its dissolution.

2. Submission of copies to the Registrar:

- Within 2 weeks after the final meeting, the company liquidator shall send a copy of final winding up accounts of the company, and shall make a return in respect of each meeting and of the date there of and copies of resolutions passed at the meetings.

3. Dissolution of the Company:

- After the company passes a resolution for dissolution, the company liquidator shall file an application along with the books and paper of the company relating to winding up before the Tribunal for dissolution of the company.
- If, after considering the report of the company liquidator, the Tribunal is satisfied that the process of winding up has been just and fair, it shall pass an order dissolving the company, such order will be made within 60 days of receipt of application.
- The company liquidator shall file a copy of dissolution order with the Registrar within 30 days.
- On receiving the copy of dissolution order, the Registrar shall forth with publish a notice in the Official Gazette that the company is dissolved.

COMPANY MEETINGS

As per companies act ,2013

The word 'meeting' implies the coming together of a certain number of members for transacting the business in the agenda , for which a pre-notice has been given and sharing the minutes of meetings

Kinds of meetings Meetings

1. **General Meeting**
2. **Annual general meeting**
3. **Extra-ordinary General Meeting**
4. **Class meeting**
5. **Directors**
6. **Board**
7. **Committee**
8. **Creditors**
9. **Debenture holders**
10. **Winding up or Final meeting at dissolution**

General Meetings :

It means any meeting in which all the members of a company who have a right to vote are entitled to attend. The resolution passed in the general meeting are binding on all the members of the company and the company itself, and unless the memorandum or articles or terms of issue of a class of shares take away or limit the voting rights of a class of members , all members of the company may attend and vote at such meetings.

This can be further classified as -:

- **Annual general meeting {u/s 96}**
- **Extraordinary general meeting {u/s 100}**

Annual general meeting(u/s 96)
Every company(other than a one person company) shall hold in addition to any other meeting a general meeting as its annual general meeting. Its is a statutory necessity to conduct a general meeting in a calendar year. Calendar year is to be calculated from 1st january to 31st december and not twelve months from the date of incorporation of the company. The first AGM shall be held within 9 months from the end of the first financial year. ;ate

Extra-ordinary general meeting{u/s100}
All general meetings other than annual general meeting and statutory meetings shall be called extra-ordinary general meetings. It may be held for the purpose of dealing with any extra-ordinary matter which can't be postponed till the next annual general meeting.

Such as -: Changes in M.O.A.

Changes in A.O.A.

Reduction or re-organization of share capital

Issue of debentures

Removal of director

Removal of auditor

Class meetings

Class meetings are held to deal with certain matters affecting the interests of the holders of a particular class of shares.

For ex- preference shareholders ,equity shareholders etc.

The class meetings are usually required to be held when it is proposed to alter, vary or affect the rights of a particular class of shares.

Meetings of the directors

(a)board meetings

It is the meeting of the board of directors of company . In the case of every company ,a meeting of the board of directors must be held : Gap between two board meetings should not exceed 120 days.

At least four such meetings shall be held in every year. (section 173).

First meeting of the BOD of every company must be held within 30 days of its incorporation. Though there is no special penalty provided for non- compliance with the requirements of section 173 ,the default is punishable under section 450.

(b) Meetings of committee of directors

It is not always possible for the board of directors as such to devote time and energy to carry on investigations on different matters connected with the conduct of the company affairs.

It is the usual practice with the board to appoint small committees consisting of a few directors with expert knowledge to investigate and report on various matters and thus facilitate decision-making work of the board.

Audit committee

U/S 177 of the companies act,2013 ,the following companies have to compulsorily constitute an audit committee:

Every listed company

All public companies with a paid up capital of rs.10 crore or more.

All public companies having turnover of Rs.100 crore or more.

All public companies having in aggregate outstanding loans or borrowings or debentures or deposits exceeding Rs. 50 crores or more.

Members of audit committee

Minimum of three directors. Independent directors forming a majority. Majority of members including chairperson shall be persons with the ability to read and understand the financial statements. There is no prescribed quorum of the audit committee.

Meetings of the creditors

The meetings of the creditors is usually called when the company wants to make any compromise or arrangement with the creditors or any class of them. To seek approval of creditors for amalgamation or reconstruction of a company;

To seek consent of the creditors for winding up of a company.

Meeting of the debenture holders

The company may call the meeting of debenture holders to consider -:

Any variation in the conditions of their security.

Any alteration in their rights. The company may also hold debenture holders meeting for issuing new debentures effecting a change in the rate of interest on the existing debenture holders.

Meeting for winding up of the company dissolution

Under this the company shall first call a meeting u/s 304 at which the resolution for the voluntary winding up of the company is to be proposed ; Later the company shall call a meeting of its creditors u/s 306(either on the same day on which the meeting for resolution is called or on its next day).

Requisites of a valid meeting
1.Properly convened (authority)

2. Notice

3.Quorum

4.Chairman

5.Minutes

Winding Up

Winding Up of a company is the process whereby its life is ended and its property administered for the benefit of its creditors and members.

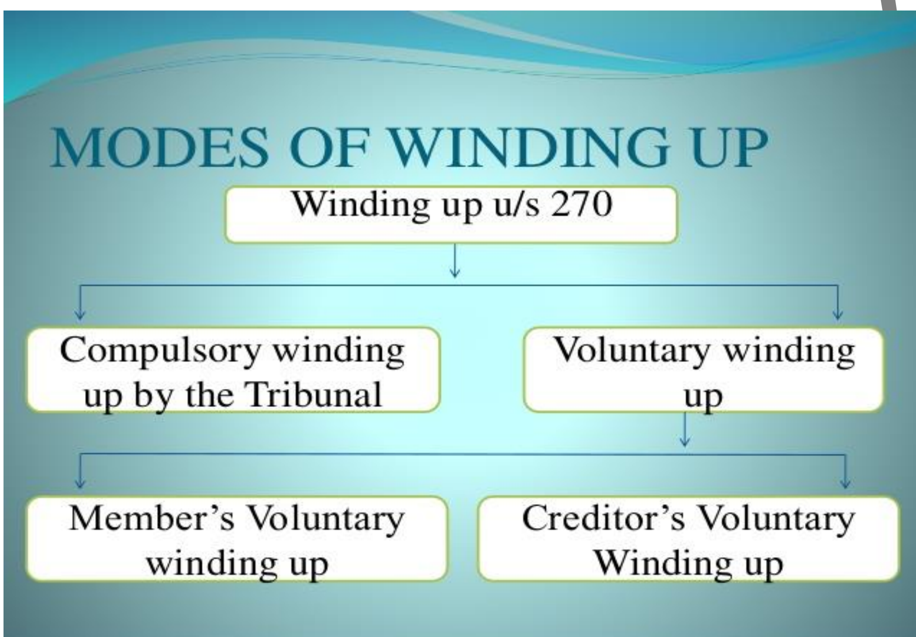
An administrator, called liquidator, is appointed and he takes control of the company,

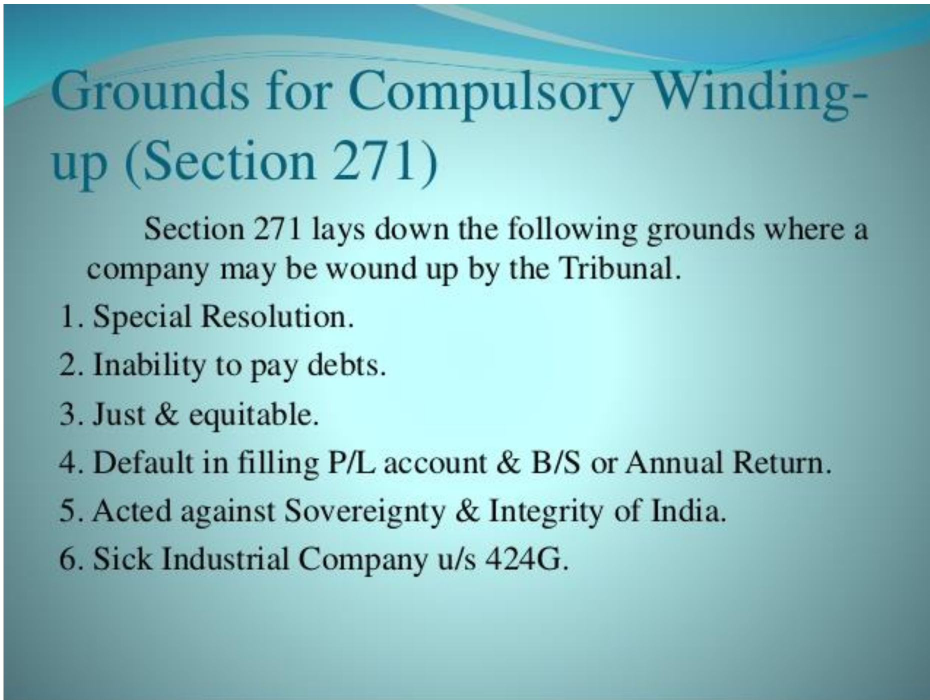
collects its assets,

pays its debts and

finally distributes any surplus among the members in accordance with their rights

Modes of Winding Up




Grounds for Compulsory Winding-up (Section 271)
Section 271 lays down the following grounds where a company may be wound up by the Tribunal.
1. Special Resolution.
2. Inability to pay debts.
3. Just & equitable.
4. Default in filling P/L account & B/S or Annual Return.
5. Acted against Sovereignty & Integrity of India.
6. Sick Industrial Company u/s 424G.

THANK YOU