तेजस्वि नावधीतमस्तु

00190103817

FAIRFIELD

Institute of Management & Technology

(A Grade Institute By DHE, Govt. of NCT Delhi and Affiliated to GGSIP University, Delhi)

BA LLB

Subject: Law of Contract-II

Paper Code: LLB 102

Unit-I: Indemnity, Guarantee and Agency

a. Distinction between Indemnity and Guarantee
b. Right and Duties of Indemnifier and Discharge
c. Rights and Duties of Bailor/Bailee, Lien, etc
d. Definitions of Agent and Principal, Creation of Agency and its Termination

Unit-II: The Indian Partnership Act, 1932

a. Nature of Partnership Firm
b. Rights /Duties of Partners *inter se*
c. Incoming and Outgoing Partners, Position of Minor
d. Dissolution and Consequences

Unit-III: The Sale of Goods Act, 1940

a. Definitions, Distinction between Sale and Agreement to Sale
b. Conditions and Warranties
c. Passing of Property
d. Rights of Unpaid Seller and Remedies for Breach of Contract

Unit-IV: The Negotiable Instrument Act, 1881

a. Definition and Kinds of Negotiable Instruments
b. Holder and Holder-in-Due Course
c. Material Alterations and Crossing of Cheque, etc.
d. Dishonour of Negotiable Instruments

Unit-I: Indemnity, Guarantee and Agency

A. Indemnity and Guarantee

Indemnity

Contract of Indemnity and Guarantee are special types of contract. The contract of indemnity means a compensation to be paid to the person who is victim of loss or any compensation to save him from the loss caused by different cause.

A contract of Indemnity is a contract by which a person promises to other that he will indemnify that person from contingent loss.

In the Contract of Indemnity, one party promises to save the other party from damage or loss caused to him by the conduct of the promisor or by the conduct of any third party. Indemnifier: The person who promises to indemnify the loss.
Indemnified or Indemnity holder: The promise whose loss is indemnified.

Indian Contract Act, 1872 has defined the contract of Indemnity. According to the Section 124 of ICA, "A contract by which one party promises to save the other from the loss caused to him by the conduct of the promisor himself or by the conduct of any person is called a contract of Indemnity"

According to the English Law a contract of indemnity is ' a promise to save another harmless from loss caused as a result of a transaction entered into at the instance of the promisor." English Law in comparison to the Indian law is wider in relation to the definition of the term.

According to the Indian contract Act;

The loss must be caused either by the conduct of the promisor or any other person and if loss is caused by accident there would not be contract of indemnity.

But the According to English law seems wide than Indian law and also covers the loss caused by accident or natural causes etc.

Features of Contract of Indemnity:

1. The contract is made for protecting the promise against anticipated or contingent loss.
2. The liability of the indemnifier started as soon as the loss is occurred to the indemnified.
3. Indemnification is made for actual loss.
4. The event specified in the contract must be happen.
5. The Indemnified himself responsible for the loss if the loss is caused by his own misconduct.
6. Contract may be implied and expressed.

B. Rights and Duties of Indemnifier and Indemnity Holder

A. Rights and duties of Indemnity Holder :
B. Rights of and Indemnity holder:

The Indian Contract Act provides incase any person has concluded a contract relating to indemnity with a provision to pay to any party to a contract or a third person for any loss or damage that may result from his actions while working under the direction of that party to the contract, he may realize as compensation all or any of the following amounts subject to that contract.

a. Indemnity Amount : Indemnity amount mentioned in the contract

b. Amount to be paid or borne: In case any loss or damage has been caused to third person, the amount to be paid or borne in consideration thereof.

c. Amount of Expenses : The amount spent on the case filed or defended by him in connection with the contract relating to indemnity.

d. Amount spent in the suit: Due to non-payment of sum payable mentioned above, if the legal actions is to be taken, the amount to be spent in the suit. .

Duties of Indemnifier :
The Indian Contract Act has no provisions regarding the rights of the Indemnifier.

Generally the Indemnifier has the duty to indemnify the indemnity holder in the following situation:
a. There must be damage or loss
b. Loss or damage must have been caused by an incident as mentioned in the contract.
c. The indemnity holder has to act carefully, prudently and according to the direction or with the authority of the indemnifier.

Contract of Guarantee

Meaning and Definition:
A person who seeks to borrow money or to undertake some obligation may be required to pledge some property with the creditor as security. But the creditor may be willing to lend money to a person if he can get some other person to assume personal liability as security for the payment of the loan or for the performance of the promised acts. In this case the creditor gives a loan to the debtor on the combined financial standing of the debtor and some third person, called surety.

A guarantee means a contract of a promise to be responsible for something to perform the promise or to discharge the liability of a third person, in case of default. Such a contract involves three parties ; the creditor, the surety and the principal debtor. Creditor : The person to whom the guarantee is given
Surety: The person who gives the guarantee
Principal debtor: The person in respect of whose default, the guarantee is given.
A Contract of guarantee is most prevailing practice in the sector of Banking and financial

institutions, Commercial Banks, Development Banks, Finance Companies, Co-operatives are mostly relied on the contract of guarantee for the security of their issued loan.

Section 126 of the ICA

A contract of guarantee is a contract to perform the promise to discharge the liability of a third person in case of his default.

A contract of guarantee is an agreement with the objective of enabling a person to get a loan or goods on credit or an employment.

If 'A" advances a loan of Rs. 5000/- to 'B' and 'C' promises to 'A' that if 'B' does not repay the loan, 'C' will do so. This is a contract of Guarantee.

There are triangular relationship between the parties are as follows; a. Between the creditor and debtor creating loan

b. Between the surety and the creditor creating liability of surety in case of debtor's default and c. An implied contract between the surety and the debtor that the debtor will indemnify the surety the later has paid the creditor on the debtor's default. Thus the contract of guarantee is the tripartite nature.

a. Debtor
b. Surety

Creditor

Features of Contract of Guarantee

a. A tripartite agreement between creditor, surety and principal debtor.
b. No misrepresentation or concealment of the facts regarding the contract.
c. No direct consideration between the surety and the creditor. Consideration of the principal debtor is considered to be adequate for the surety.
d. Primary liability is of the principal debtor and secondary liability is of the surety.
e. The involvement of competent parties is a must along with the other essentials of a valid contract.
f. As a conditional contract, liability of the surety arises only when the principal debtor (primarily liable) defaults.
g. A contract relating to guarantee must be concluded in writing (In Nepal and England)

Distinctions between Indemnity and Guarantee

1.In indemnity a promisor is primarily and independently liable to the promise and therefore there are only two parties.In Guarantee the liability of the surety is only secondary. the primarily principal debtor is liable for the contract hence here the concurrence of three persons is essentials.

2.In the case of contract of indemnity it is not necessary for the indemnifier to act at the request of the debtor.Whereas, in the case of a contract of guarantee it is necessary that the surety should give the guarantee at the request of the debtor.

3.In the case of Indemnity, the possibility or risk of any loss happening is the only contingency against which the indemnifier undertakes to indemnify.In the case of guarantee there is an existing debt or duty, the performance of which is guaranteed by the surety.

4.In the case of indemnity, the indemnifier can not sue third parties in his own name, unless there be assignment. He must bring the suit in the name of indemnifier.In contract of guarantee where the surety discharges the debt payable by the principal debtor to the creditor, the surety, on such payment, is entitled in law to proceed against the principal debtor in his own right.

5The person giving indemnity has some interest in the transaction apart from his indemnity.While the surety is totally unconnected with the contract except by means of his promise to pay on debtor's default. In fact, surety must not have any financial interest in the contract.

6.Rights of indemnity may arise out of express or implied contract or out of obligation imposed by laws e.g. as between principal and agent or master and servant.The liability of the surety arises only out of contract between him and the creditor. The surety undertakes an obligation at the express or implied request of the principal debtor.

Types of Guarantee

Fro the viewpoint of nature objective and the act, the guarantee may be classified as follows;

1. Absolute and conditional guarantee :

An absolute guarantee is one by which the guarantor unconditionally promises to pay the debt, on the default of the principal debtor. But, if some contingency other than the default of the principal debtor arises then is a conditional guarantee.

2. General and special Guarantee

The guarantee that can be accepted by the general public is a general guarantee and the one that can be accepted only by the particular person is special guarantee.

3. Limited and unlimited guarantee

When a guarantee is limited there is a liability by time and amount that is limited, whereas if a guarantee is not limited there is a liability for the surety by time amount and transaction there is an unlimited guarantee.

4. Prospective and retrospective guarantee

A guarantee that is given for future transactions that ay be one or more transactions is a prospective guarantee and if it is given for the past or existing transactions it is called a retrospective.

5. Specific and continuing guarantee

· When a guarantee is extended to a single transaction or debt, it is called a specific guarantee. Such a guarantee comes to an end when the transaction stops or is duly discharged or the promise is duly performed.

· But if a guarantee extends to a series of transactions continuously it is a continuing guarantee.

· There is no water-tight demarcation of the continuing guarantee with specific guarantee; however it is determined by the intention of the parties and or terms and conditions and or subject matter and or circumstances of the transactions. A continuing guarantee may be given for a fixed amount. It only speaks of continuing transaction and not of the period of such transaction. Because of the uncertain nature of time, a continuing guarantee will be continued until the revocation by the surety.

Features of Continuing Guarantee

· The Continuing Guarantor is not exhausted by the first advance
· It can always be revoked by a notice to the creditor.
· A revocation of the guarantee is possible for future transaction
· Death of the surety terminates the contract.

Revocation of Contract of a Continuing Guarantee

1. **By notice of the revocation by surety**: A guarantor (surety) may revoke a continuing guarantee at any time by a notice as to the future transactions. But he is liable for the transactions until the date of revocation.

2. By death of surety: The death of surety automatically terminates the contract of guarantee so far as regards future transactions unless there is a contract to the contrary. It is not necessary that the creditor must have notice of the death. The state of the surety is free after death although the creditor might have entered into a transaction with out knowledge of the death of surety.

3. By other modes;

a. By variance in the terms of contract (Alteration)
b. By novation of the contract.
c. By release or discharge of principal debtor
d. By a loss of security
e. By arrangement with principal debtor
f. By the creditor's act impairing the surety's eventual remedy.

Rights, Duties and liabilities of Surety

Rights of Surety

1. Rights against the Creditor
a. Right to securities :

The surety is entitled to demand from the creditor, at the time of payment, all the securities which the creditor may have against the principal debtor. Creditor must handover to the surety the securities in the same condition as they formerly stood in his hand. If the creditor loss or without consent of the surety, parts with such security, the surety is discharged to the extent of the value of security.

b. Right to Exoneration (Pity, pardon)

In the case of fidelity guarantee the surety can call upon the creditor or the employer to dismiss the employee whose honesty he has guaranteed in the event of proved dishonesty of the servant. He may also file a suit for a declaration that the principal debtor is the person pay the amount. In

such a case the surety is exonerated.
c. Right to Share Reduction

If there are more than one surety exists for the same principal debtor. If any default made by the principal, all the sureties have the rights to divide the default to the extent of their guarantee. d. Right to set off:

Set off means to counter a claim. The surety is also entitled to the benefit of any set of or counter claim, which the principal debtor might possess against the creditor in respect of the same transaction. For example if the creditor owes the debtor something, or has his hand something belonging to the debtor for which the debtor could have counter claimed , the surety can also put that counter claim.

2. Rights against principal debtor
a. Right to subrogation

When the surety has paid the guaranteed debt on the default of the principal debtor, he become the creditor and will be able to exercise as against the principal debtor all these rights and remedies which could be exercised by the creditor.
b. Right to indemnity

In every contract of guarantee there is an implied promise by the principal debtor to indemnify the surety and the surety is entitled to demand from the principal debtor whatever he has paid under the guarantee.
3. Right against Co sureties
a. Right to contribution

Where a debt is guaranteed by more than one sureties, they are called co-sureties. In such a case all the co-sureties are liable to contribute towards the payment of the guaranteed debt as per the agreement among them. But in the absence of any such agreement if one of the co-securities is compelled to pay entire debt, he has a right to contribution from others.

C. Bailment and Pledge

Contract Meaning of Bailment

The term "bailment" is derived from a French word ' Baillier" which means to deliver or handing over.
Bailment means delivery or hand over of goods for a certain period of time or purpose.
Bailor- who deliver goods
Bailee- To whom the goods is delivered.

A bailment arises when one person (the bailor) transfers possession of goods to another person (the bailee) on condition that the bailee will restore them to the bailor after the purpose for which they were delivered is accomplished.

According to Section 148 of the Indian Contract Act, " A bailment is the delivery of goods by one person to another for some purpose upon a contract that they shall, when the purpose is accomplished be returned or otherwise disposed off according to the direction of the person delivering them"

From the above definition the bailment contract has following features:

1. There must be actual or constructive delivery.
2. The goods not immovable property
3. by the owner called bailor
4. to another person called bailee
5. for a specific purpose
6. on condition that the goods shall be returned either in their original or in an altered from or shall be disposed according to the direction of the bailor.
7. The delivery of possession from a bailor to a bailee
8. Possession without ownership.

Thus bailment is a process where one person delivers movable goods to another person for some specific purpose or a specific period of time and after completion of the purpose or after expiry of the time, changed goods bailed should be returned or disposed or sold according to the instruction of the bailor.

Some examples of Bailment

- A deposits goods in a cloakroom at railway station
- A is going out of house delivers a cow to B for care
- A lends B a horse for his riding
- A delivers animal to a doctor
- A delivers gold to goldsmith

Bailor, Bailee and lien

Rights of Bailor

a. Right to demand return of goods
b. Right to claim damages in case of negligence
c. Right to claim compensation in case of unauthorized use
d. Right to claim compensation in case of unauthorized mixture of goods which can not be separated
e. Right to claim compensation in case of unauthorized retention of goods f. Right to claim the separation of goods in case of unauthorized mixture. g. Right to demand accretion of goods.
h. Right to termination of bailment if the bailee uses the goods wrongfully.
i. Right to return of goods at any time incase of gratuitous bailment.

Duties of Bailor

a. To disclose defects in the goods (sec. 27)
b. To take return of goods bailed (sec. 29.2)
c. To repay necessary expenses in case of gratuitous bailment
d. To pay any "extra ordinary" expenses in case of non-gratuitous bailment.
e. To pay indemnity to bailee (sec. 30)
f. To bear the risk of loss of goods
g. To pay indemnity to the bailee in case of premature termination of gratuitous bailment.

Rights and duties of Bailee

Rights of Bailee;

a. Right to claim indemnity
b. Right to claim reimbursement of expenses
c. Right to claim compensation if the bailor refused to receive back the goods after the term of baiment is over.
d. Right to recover lose in case of defective title
e. Right to receive remuneration
f. Right to deliver goods to one of several joint bailors.
g. Right to deliver goods to bailor
h. Right to lien

Duties of Bailee

a. To take reasonable care of goods delivered to him
b. Not to make unauthorized use of goods entrusted to him.
c. Not to mix goods bailed with his own goods (Sec. 28) d.
To return the goods (Sec 29)
e. To deliver any accretion to the goods
f. Not to set up any adverse title.

Lien

Right of Lien: the right to retain possession of the property or goods belonging to another until some debt or claim is paid, is called right of lien. The right depends on possession and is lost as soon as possession of the goods is lost. As such it is also called as “possessory lien”.

TYPES OF LIEN:

1. Particular Lien
2. General Lien

Particular Lien: Section 170 provides that “where the bailee has, in accordance with the purpose of the bailment, rendered any service involving the exercise of labour or skill in respect of the goods bailed, he has, in the absence of a contract to the contrary, a right to retain such goods until he receives due remuneration for the services he had rendered in respect of them.:”

Conditions:

1. The bailee must have rendered some services.
2. It must involve the exercise of some labour or skill.
3. The services must be in accordance with the directions of the bailor.
4. The goods mst be in possession of the bailee.

5. There must not be a contract to the contrary.

General Lien: Section 171 provides that the general lien is a right to retain the goods of another as a security for a general balance of account.

According to section 171, bailees coming within the following categories have a general lien, in the absence of a contract to the contrary.

1. Bankers
2. Factors
3. Wharfingers
4. Attorneys of High Court.
5. Policy Brokers

Pledge or Pawn Contract

· Generally the term pledge is the goods to be deposited as security to repay the debt (loan) or to perform the promise.
· The word pawn is synonymous with the word pledge.
· The pledge is a special kind of contract. It is also regarded as a branch of bailment.
· The bailor is called the Pawnor and the bailee the pawnee.
· In Nepali it is called Dhito or Dharaut.
· In Nepalese context Pledge is also called Mortgage.
Property denotes all types of property whether movable or immovable

Section 172 of the Indian Contract Act defines the term pledge as" the bailment of goods as security for payment of a debt or performance of a promise is called pledge"

Basic Features of Pledge Contract
a. Two parties
b. Pledge can be given only by real or true owner of the property
c. Pledge can be both movable and immovable types of property
d. In case of joint ownership, only own property can be pledged
e. Property which are pledged can not be used by the pawnee
f. Equal position of all the creditors in case the pawner pledged the goods more than a person one at a time.
g. Return the surplus amount to the debtor after auction.
h. Return the pledge Property.

Distinctions between Bailment and Pledge

1. The scope of bailment is wide. All the pledges fall under bailment.
The scope of pledge is limited one. Being a branch of bailment all bailment do not under pledge.

2. In bailment goods are bailed for different purposes such as safe custody, repair, hire etc.
In Pledge goods are pledged for a specific purpose such as to provide security of loan or promise.

3. No security is required at the time of bailment
Security is essential at the time of pledge

4. Goods are bailed either on offer/request of bailor to the bailee or on offer/ request of bailee to the bailor.
Goods are pledged only at request of the pledger to the pledge.

5.The bailor can use the goods bailed in accordance with the terms and conditions of the contract
Generally the pledgee can not use the goods pledged but can use them if the pledger allows the pledgee to do so.

6. The bailment may be both either gratuitous or non-gratuitous.
In Pledge contract consideration is available to either party. It means the pledger has to pay interest to pledgee.

7. Bailment incudes movable goods only
The pledge includes both types of movable and immovable goods.

8. In bailment no loan transaction exists
In pledge loan transaction may exists.

9. Bailee is not entitled to sell the goods bailed. He can retain them until he get remuneration.
Pledgee can sell the goods pledged to recover his amount after giving notice to pledger in case of default by the pledger.

Rights and duties of Pawner & Pawnee

Rights of Pawner

1. Right to receive back the goods pledged from the Pawnee
2. Right to receive accretion to the goods pledged. (benefit, achievement and incensement)
3. Right to claim compensation against the pledge for any losses he suffers due to negligently handling, mixture, and unauthorized use of goods etc.
4. Right to receive a notice from the pawnee before sale or auction of the goods pledged.
5. Right to sue the pawnee in the court to recover the goods in case sale or auction took place without notice.
6. Right to have surplus or excess amount obtained by the sale or auction of the goods pledged.
7. Right to redeem the goods pledged before sale or transferred by repaying the debt, interest, fine and other expenses.

Duties of Pawner

1. Pawner has the dutiy to disclose all the defects in the goods to be pledged.
2. Pledger or pawnee has the duty to repay his loan, interest, expenses if any within or at the specified time.
3. Pledger has to bear extra-ordinary expences for taking care of goods pldeged or has to bear additional liabilities due to default of repaying loan.
4. Not to pledge the goods which is not belongs to him.

Rights of Pawnee or Pledgee

1. Pledgee has right to retain the goods pledged until the pledger repay his debt, interest and other expenses if any.

2. Pledgee has right to sell or auction the goods pledged if pledger is unable to repay within specified a time.

3. Pledgee has right to transfer the goods in his own name if the pledged loan is not recovered by selling or auctioning.

4. Pledgee has right to claim compensation against the pledger for any loss suffered by him due to default in payment of debt in time.

5. If loan amount including interest and other expences is not recovered by selling or auctioning the pledged goods the pledgee can recover the due amount for other assets of the pledger.

6. If the pledger pledged the goods obtained by him under viodable contract unknowingly, as soon as he aware about the fact he can rescind the contract.

Duties of Pawnee or Pledgee

1. Pledgee has to take reasonable care of the goods pledged.
2. Pledgee should not make any unauthorized use of the goods pledged.
3. Pledgee should not mix the goods pledged with his own without consent of pledger.
4. Pledgee should return the goods pledged to the pledger after the payment of the debt or completion of work.
5. Pledgee has to return the accretion or increase or profit from the pledged goods.
6. Pledgee has to indemnify the pledger for any loss suffered by him if the good is lost, damaged, destroyed etc.
7. Pledgee has to refund the surplus amount to the pledger after selling or auctioning the pledged goods.

Finder of lost goods
Meaning

· Finder of goods means a person who has found goods not belonging to him and keeps them with him.

· Though there is no definition of the term provided in Nepalese Contract Act 2056, Sec. 11 of the Act has made the provision relating to responsibilities of the finder of goods as same as bailee.

· According to Sec.71 if the Indian Contract Act, " A person who finds goods belonging to another person and takes them into his custody, he is subject to the same responsibility as bailee"

Rights and Duties of Finder of lost goods
Rights of finder of lost goods

1. The finder of lost goods has right to possess the goods until the true owner of the goods is found.
2. The finder of lost goods has right to reimburse all the expenses from the true owner.
3. The finder of lost goods has right to lien. It means he can refuse to return the goods until he is reimbursed all the expenses to preserve the goods.
4. The finder of the goods can file a suit against the true owner to recover any reward which was offered by the true owner for the return of goods lost.
5. Generally the finder of goods has no right to sell the goods found. However, Sec. 169 of the Indian Contract Act provides that the finder can sell the goods in any of the following cases.

a. Where the owner can not with reasonable diligence be found,
b. Where the owner when found, refuses to pay the expenses incurred by him.
c. Where the goods are of dangerous nature or in danger of losing the greater part of their value and
d. Where the expenses incurred by the finder amount to 2/3 of the value.

Duties of Finder of Goods
1. To take reasonable care of the goods found.
2. Not to use the goods found for personal purpose.
3. Not to mix with his own goods.
4. To inform the police
5. To find out the true owner
6. To return the good.

D. Agency

1. Introduction

· Modern business is becoming complex with the pace of time.

· Due to the vast expansion and globalization of the modern business it is not possible for a person to carry on all the business transaction himself.

· The changing circumstances require a businessman must necessarily depend on other for efficient running of the business.

· In the general course of conducting business, to employ a merchant to distribute the goods, ask the brokers to buy shares and so on are common phenomenon.

· In law;

o Agent: A person who acts on behalf of other is called an agent.

o Principal: The person on whose behalf an agent act is called the Principal.

· The contract which creates relationship between the principal and the agent is called a contract of agency or agency.

·

Meaning

Agency is a legal relationship between two persons whereby a person delegates his authority to do some work on behalf of him to another person.According to Section 182 of the Indian Contract Act, "A contract of agency is a contract by which a person employs another person to do any act for himself or to represent him in dealings with third person."

· The act of the agent binds his principal to third person. Similarly the act of the agent also gives right to third persons against the principal.

· The Function of the agent is to bring his principal into contractual relationship with the third parties. Therefore, the agent is merely a contracting link between the principal and the third party.

· The agent has the power to make the principal answerable to the third party for his conduct. There are Two Rules regarding agency;

a. With certain exceptions, whatever a man competent to contract may lawfully do himself he may do by another.

b. The acts of the agent are the acts of the principal. In other words he who acts through an agent is himself acting.

Characteristics of Agency:

a. Appointment of Agent on the wish of principal.
b. Appointment may be either expressed or implied.
c. The Principal delegates his authority to his agent
d. The works of the agent binds the Principal to the third person.
e. No need of consideration, it is internal matter of principal and agent.
f. The Principal must be competent to contract but the agent may be incompetent to contract.
g. Agency is based on good faith. It means the agent has to inform his principal all the information as he know and the agent must not set up adverse title.

Modes of Creation of Agency

· The Contract of agency, like any other contract may be express or implied; but consideration is not an essential element in this contract.
· Agency may also arise by estoppels, holding out, necessity or subsequent ratification by the principal of the act done by the agent.
· The relationship of principal and agent may be created by statute.
· There are numbers of modes of creation of agency;

1. Agency by expressed agreement:

· The contract of agency, normally created by an expressed agreement with certain exception.
· Agreement may be writing and registration and may be made orally or in the writing.
· In fact in a large number of business dealings agencies are created by word of mouth.
· The usual form of a written contract of agency is the Power of Attorney which gives him the authority to act as agency on behalf of the principal in accordance with the terms and conditions mentioned therein.
· Power of Attorney may be different types;

a. General Power of Attorney: The agent is authorized to do all dealings, i.e. to act generally in the business of agency.

b. Special Power of Attorney: The agent is authorized to do a special transaction only i.e. selling land.

c. Particular power of Attorney: The agent is authorized to do a single act e.g. to present a document before the Registrar of registration.

2. Agency by implied agreement:

· Implied agency arises when there is no express agreement appointing a person as an agent.
· It happens from the conduct, situation or relationship of the parties.
· Partners, wives are usually regarded as agent by implications of their relationship.
· Implied agency would therefore, include agency by estoppels, agency by holding out and agency of necessity.

a. Agency by Estoppel:

· Estoppel is a legal doctrine which prevents a person from denying a fact or circumstance which he has accepted.

· Where a person by his words or conduct has willfully led another to believe that certain set of circumstances or facts exists and that other person has acted on that belief, he is estopped or prevent from denying the truth of such statement.

· A tells B in the presense and within the hearing of C that he "A" is C's agent and C does not contradict this statement and later on B enter into a transaction with A believing that A he is C's agent. C is bound by this transaction and in a suit between himself and B, cannot be permitted to say that A was not his agent.

b. Agency by Holding out:

· It is also a branch of estoppel but is something more than that.

· An agency by holding out requires some affirmative or positive act of conduct by the principal to establish agency.

· A who is domestic servent of B generally purchase goods on credit from C and pays them regularly. C can assume that A is B's implied agent.

c. Agency by necessity :

· In some cases the agency can be created because of the necessity where one may need to work being an agent of another even in the absence of express agreement.

· A person who has been entrusted with another's property, may have to incur unauthorized expenses to preserve it.

· Payment of expenses incurred on lost animals and child etc.

· Following conditions must be fulfilled;

i. It must be impossible to get the principal's instructions.

ii. The course taken only practicable one in the circumstances.

iii. The agent of necessity must act honestly in the interest of all party

iv. There must be real emergency and necessity to act on behalf of principal.

d. Agency by operation of law:

· A partner is the agent of the act of the partner to carry out the business as usual of its partners.

d. Agency by ratification:

· If the agent had no authority to contract on behalf of principal or exceed such authority as he had, afterwards confirms and adopt the contract is known as ratification.

· It is also known as ex post facto agency.

· Contract of agency only be valid if the following conditions are fulfilled.

i. The agent must act on behalf of the principal

ii. The principal must be in existence at the time of conduct.

i. The principal must have contractual capacity

ii. The principal must have full knowledge of material facts or rativication

iii. Whole transaction must be ratified.

iv. Ratification must be done within reasonable time

v. Act to be ratified should not be void or illegal

vi. Ratification must not injure a third party

vii. Act to be ratified must be within power of principal

viii. Ratification may be express or implied and

ix. Ratification must be communicated to the concerned party.

Rights and Duties of Agent

Rights of an Agent

1. Right to receive remuneration and commission

Where the services rendered by the agent were not voluntary or gratuitous, the agent is entitled to receive the agreed remuneration and commission.

2. Right to lien

According to Sec. 221 of the Indian Contract Act, an agent has the right to retain goods, papers and other property whether movable or immovable of the principal received by him until the amount due to himself for commission, disbursement and services in respect of the same has been paid.

3. Right to stoppage goods in transit

An agent has right to stop the goods where they are subscribed by him. This right is acquired by the agent in two cases;

a. Where he has purchased goods for his principal either with his own money or by incurring a personal liability for the price. (he stands towards the principal in the position of an unpaid seller)

b. Where the principal has become insolvent.

4. Right to indemnify against consequence of lawful acts

An agent has right to claim indemnity for any losses suffered by him in spite of all lawful acts done in exercise of his authority. But if the loses suffered by his unlawful and criminal acts are not covered under it.

5. Right to indemnify against the consequences of acts done in good faith

When acting according to the instruction of the principal, any injury to the agent is to be recovered by the principal as a result of such act.

6. Right to reasonable compensation in case of undue removal from the agency

Duties of an Agent

1. To carry out the work undertaken according to instructions and within the scope of authority conferred upon him by the principal.
2. To follow the custom prevailing in the same kind of business if the principal has not given any express instructions.
3. To carry out the works with reasonable care, skill and diligence.
4. To communicate with the principal in case of difficulty and get his instructions.
5. Not to make any profit of his agency other than his agreed or reasonable remuneration.
6. To keep true and correct account of all his transactions and to be always ready to produce them to his principal.
7. Not to deal on his own account and must not become a principal to the transaction against his principal.
8. Not to set up any adverse title.
9. Not to use information obtained in the course of the agency against the principal.
10. Not to delegate authority to another person but perform the work himself.

Rights and Duties of Principal

Rights:

1. Right to revoke or discharge the agency if the agent commit fraud or uses excess authority or deceives him.
2. Right to instruct the agent in respect of working procedures.
3. Right to claim compensation from agent if he does any work beyond the authority provided by principal or works negligently or carelessly.
4. Right to demand secret profit if the agent earned any profit concealing from principal.
5. Right to receive account of the transaction.
6. Right to reject any transactions done by the agents without having authority from the principal.

Duties:

1. To pay remuneration or commission as mentioned in the contract and if not mentioned in the contract reasonable remuneration or commission should be paid to the agent.
2. To reimburse or repay amount spent by the agent in the course of agency.
3. To provide indemnity to his agent against the consequences of lawful acts and against the consequences of the acts with good faith of the agent.
4. To provide the notice to the agent if any information he got from the third party.
5. Not to terminate the agency wrongfully.
6. To give reasonable compensation in case he removes the agent unduly without prior notice.
7. To be responsible for any loss or damage caused by the agent while executing the agency contract.

Delegation of Authority

· An agency is a delegation of authority of the principal.

· Delegation of authority means to give authority for conduct certain work to another person from a responsible person.

· Generally a delegated power or authority can not be delegated.

· It is based on the Latin Maxim "Delegatus nonpotest delegare" which means a delegate can not further delegate.

· An agent being himself a delegate of his principal can not pass on that delegated authority to someone else.

· Generally this is because of the confidence in a particular person is at the root of the contract of agency. And

· An agent usually selected in reliance upon some personal qualification so it would be unfair if the agent delegate to other and also harm to the principal.

· The main cause behind the birth of this principal is that the principal can trust the agent appointed by him much than the agent appointed by his agent.

· Section 190 of the Indian Contract Act has also adopted this principal. According to it "an agent can not lawfully employ another to perform acts which he has expressly or impliedly undertaken to perform personally."

· But there are some exceptions of this rule where the agent also can delegate his authority to any other person by appointing sub agent.

Exception of the General Rule:

1. Where the principal has expressly permitted delegation of such power.
2. Where the custom of the trade permits delegation
3. Where the principal knows that the agent intends to delegate his authority

4. Where the nature of the authority is such that a deputy is necessary to complete the business
5. Where the act to be done is purely ministerial and does not involve the exercise of discretion e.g. clerical or routine work.
6. In an unforeseen emergency the agent can always delegate.

Sub-agent and Substituted agent
Meaning of Sub-agent:

· Where an agent under express or implied delegation of authority appoints another person to act in the matter of the agency is called sub-agent. So the agent appointed by the original agent for conducting principal's work is called sub-agent.

· Section 191 of the Indian Contract Act has defined the term sub-agent as" A sub-agent is a person employed by and acting under the control of, the original agent in the business of agency."

· The relation if the sub-agent to the original agent is as between themselves, that of agent and principal

· Sub-agent acts under the control of the agent and there is no privity of contract between the principal and the sub-agent. Therefore the sub-agent can not use the principal for any money due although he may bind principal as third party.

· If the sub-agent is guilty of fraud or willful wrong the principal has right to proceed both against the agent and the sub-agent.

· In case where the sub-agent is appointed improperly or without authority of the principal the following consequences emerges;
a. The principal is not liable and not bound by the works of sub-agent.
b. The agent is fully responsible for principal, third party and the sub-agent.
c. The sub-agent is not liable with the principal in any including fraud or willful wrong committed by him.

Termination of agency

i. Revocation by principal

ii. Revocation by agent

iii. Destruction of subject matter

iv. Mutual consent

v. Death (sec. 209, by the death of the either party i.e. principal or agent) vi. Insanity (by the insanity of the either party)

vii. Insolvency of principal (termination in case of insolvency of principal but no effect

in case of insolvency of agent)

viii. Alien enemy

ix. Winding up the company

x. Completion of job

xi. Illegal contract

xii. Termination of authority (giving up the authority by the agent through reasonable means)

xiii. Expiry of period (201-211)

Unit-II: The Indian Partnership Act, 1932

A. Nature of partnership Firm;

Definition of partnership

The first part of section 4 of the Indian partnership act, 1932 defines partnership as follows:—
"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.
the second part of section 4 states that "persons who have entered into partnership with one another are called individually "partners" and collectively "a firm", and the name under which their business is carried on is called the "firm name".
"partnership" has not been found easy to define. eminent jurists and

the definition of partnership adopted in section 4 of the indian partnership act. 1932 is that suggested by pollock with only a slight change. it brings out very clearly the fundamental principle of mutual agency, *e.g.,* the partners, when carrying on the business of the firm, are agents as well as principals. thus it is probably the most business-like definition of the term "partnership." it also suggests that partnership is not an agreement itself or an association of persons but is the relation arising out of an agreement.

Partnership is the relation—partnership is regarded differently by different persons either a contract between persons or an association of persons or as a combination of capital, labour or skill by two or more persons or as a relation between persons. it cannot be regarded as a contract between persons because partnership arises out of contract and it is not the contract itself. although association is the result of partnership it .is better to use the word relation because association denotes many other forms of unions and combinations of persons. as said earlier it is not necessarily combination of capital, labour or skill or some or all of them because every partner need not contribute capital, labour or skill or some or all of them. therefore, partnership is the relation arising out of contract and not the contract itself.

Essentials of partnership

an analysis of the definition gives the following essentials of partnership:
1. there must be *two or more persons* as principals carrying on a business.
2. partnership is the result of an *agreement.*

3. it is organized to *carry on a business.*
4. the persons agree to *share the profits* of the business.
5. the business is carried on *by all or any one of them acting for all* these essentials are discussed below:

1. Two or more persons

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. thus for a partnership to exist there must be two or more persons as principals carrying on the business. if abusiness is carried on by several individuals on behalf of a single person, there will be no partnership, but if it is run by one person (or more) on behalf of himself and others there may be a partnership. thus a sleeping or dormant partner may be carrying on a business for the purposes of the act.

a contract of partnership may be entered into by every person who is competent to contract. a person ordinarily enters into a contract of partnership in his individual capacity. but sometimes he may be a *karta* of a joint hindu family. but where two *kartas* of two joint hindu families enter into a contract of partnership it will be a partnership between two *kartas* each being counted as one person, and other members of the family do not *ipso facto* become partners. *the word 'persons' includes artificial as well as natural persons and there may thus be a partnership between a company and individual or between two or more companies.* a partnership firm is not recognized as a separate legal entity therefore, where a firm enters into a contract of partnership with another firm or individual, all the members of the firms or firm become partners in their individual capacity.

thus there must be at least two per sons, natural or artificial competent to contract acting as principals for the existence of partnership. section 11 of the companies act, 1956 provides that the maximum number of persons who can enter into a contract of partnership in the case of banking business is ten, and for any other business twenty. any partnership formed in contravention of this section will be treated as illegal association. the section does not apply to joint hindu family as such carrying on a business and where a business is carried on by two or more joint hindu families, minor members shall be excluded in computing the number of persons.

there can be a valid contract of partnership even though one of the partners is a *benamidar* of or represents some other person or persons.

2. Agreement

the definition of the partnership stresses that 'partnership is the relation between persons *who have agreed.......*" therefore, there must be an agreement entered by two

or more persons to share the profits of a business. this element relates to the voluntary contractual nature of partnership. the partnership is not created by status. the term "agreement" will have to be taken in the sense in which it is defined in section 2 of the contract act. it must satisfy the requirements of a valid contract as stated in section 10 of the contract act. the agreement may be either express or implied. an express agreement means an agreement which is made by means of words, written or spoken, and an implied agreement means one which is inferred from the conduct of the parties. further the agreement must be of voluntary nature.

thus a partnership may be created by means of an express agreement. if the agreement is in writing the instrument is called the partnership deed. writing is advantages, but it is not compulsory. an oral agreement to form a partnership is as valid as a written one. the existence of partnership can be inferred from the conduct of the parties involved.

on the death of the sons the business came to the hands of their descendents and one of them demanded partition of the business as though it were a family property. on behalf of the defendant it was contended that since the property belonged to the partnership firm the claim should be for dissolution of the firm and not for partition. it was noted as facts that the business was in existence and it had been carried on since the death of its founder. one of the plaintiffs was earlier working as an employee and after receiving the share of an heir in the business by way of gift, he discontinued taking salary and instead given a share in the profits of the business. further, the other plaintiff was taking less share of the profits instead of equal to which he was entitled. taking all these circumstances into consideration, the court said, 4we are clearly of the opinion that the firm must be regarded as a partnership concern'. the muslim law does not recognize any such thing as a mohammedan joint family carrying on business as a legal entity. thus partnership can only arise as a result of an agreement (express or implied) between two or more persons. this element distinguishes partnership from noncontractual relations, such as joint hindu family. **it is so essential that section 5 of the indian partnership act states that the relation of partnership arises from contract and not from status; and in particular, the member of hindu undivided family carrying on a family business as such or a burmese buddhist husband and wife carrying on business as such are not partners in such business.** *joint hindu family business—in* case of joint hindu family business, the relation of the member with each other, as also their rights and liabilities, are substantially governed by hindu law and not by the general law of partnership embodied in indian partnership act, 1932. the term family business means (a) an ancestral business, *i.e.,* a business which descends like otherproperty on the member of a joint hindu family from father, grandfather or great grandfather; and (b) a new business started by the managing member or by the members of a joint hindu family with the aid of ancestral or joint hindu family *(niamat rai* verses. *din dayal.* it may be noted that according to hindu law a male child of a hindu acquires an interest in family business by birth. similarly, a burmese buddhist husband and wife become on marriage joint owners of a business which they or any of them are conducting.

thus a joint hindu family carrying on family business cannot be a partnership of itself. this does not mean that there can be no partnership between members of joint hindu family to carry on a family business in partnership. but where it is so alleged it will be required to be established by proper evidence in the light of definition of partnership as given in section 4 of the act. *a joint hindu family is not a juristic person for all purposes and thus cannot enter into partnership with either another joint hindu family or individual but there can be a partnership between two karlas or managers of two joint hindu families, the partnership being between the two kartas or managers and not between the families (uday chand verses. thansing,).* in *pichappu chettiar* verses. *chokalingam pillai,* it was held that where a managing member of a joint family enters into partnership with a stranger the other member of the family do not *ipso facto* become partners in the business, in such a case the family as a unit does not become a partner, but only such of its member as in fact enter into a contractual relation with the stranger. *thus one or more member of a joint hindu family may enter into a contract of partnership with a stranger and they qua the stranger become partners.* this view was also approved by the supreme court in *charandas haridas* verses. *commr of income-tax, bombay,.*

thus a partnership cannot be created without an agreement between persons. the act does not provide the form of partnership agreement. thus it may be either written or oral or may be inferred from the conduct of the persons. where there is no written agreement or any other documentary evidence of the existence of partnership, it can be inferred from the conduct of the persons, the mode in which they deal with each other or with other people,

the account books of the business, the testimony of clerks, agents and other persons, by letters and admissions, and by any other mode by which facts can be established. in this connection section 6 states that "in determining whether a group of persons is or is not a firm, or whether a person is or is not a partner in a firm, regard shall be had to the real relation between the parties, as shown 'by all relevant facts taken together."

the agreement must be enforceable by law. as stated earlier it must have all the essential elements of valid contract as laid down in indian contract act, 1872. the agreement must be lawful. the persons must be competent to contract there can not be a partnership consisting of one adult and one minor or a partnership consisting of all minors. there must be at least two adult members as partners. as regards consideration it is stated in **lindley on partnership** that "any contribution in shape of the capital or labour, or any act which may result in liability to third parties, is a sufficient consideration to support such an agreement."

mere use of the word 'partner' or partnership in an agreement does not necessarily show that there is a partnership.

3. Carrying on of business

a partnership for the purposes of the partnership act means a business partnership in order that an agreement to share the profit may constitute partnership such profit must arise out of a business. thus there must be an agreement to share the profits of a business and for this purpose **business 'includes every trade, occupation and profession'** (section 2).

Mode of determining existence of partnership

Section 4 of the act defines partnership. section 6 prescribes the mode of determining the existence of partnership. section 5, as discussed earlier, and the two explanations to section 6 contain some useful explanatory rules for the guidance of the courts in doing so. the courts must, in the first instance apply the provisions of section 4 and section 6 while determining the existence of partnership. the courts must also seek assistance of other sections of the act and particularly section 5 and the two explanations to section 6, section 6 is reproduced below:—

"in determining whether a group of persons is or is not a firm, or whether a person is or is not a partner in a firm, regard shall be had to the real relation between the partners as shown by all relevant facts taken together.

***explanation* /.—the sharing of the profits or of gross returns arising from property by persons holding a joint or common interest in that property does not of itself make such persons partners.**

***explanation* 2.—the receipt by a person of a share of the profits of a business, or of a payment contingent upon the earning of profits or varying with the profits earned by a business, does not of itself make him a partner with the persons carrying on the business ;**
executors were not liable as they were not partners. there was no evidence whatsoever to establish a contract of partnership between the executors and the surviving partners; there was no mutual agency between them.

Distinction between partnership and co-ownership:

1. mode of creation.—co-ownership is not necessarily the result of agreement, whereas partnership is.
2. community of profit or loss.—co-ownership does not necessarily involve community of profits

or of loss, but partnership does.

3. Transfer of interest.—one co-owner can, without the consent of the other, transfer his interest to a stranger. a partner cannot do this. **4. business**—business is necessary for existence of partnership; mere co-ownership is not a business and it can also exist without business.

5. Mutual agency.—mutual agency is a pre-condition for the existence of partnership; but mere co-owners are not business agents and therefore one co-owner can act for oneself and not on behalf of the other part owners.

6. Remedy.—a co-owner can sue the other part-owner for division of the joint property. partners, on the other hand, can sue only for dissolution and accounts and not for direct division of assets among them. (see *champaran cane concern* verses. *state of bihar,* and *laxmibai* verses. *roshanla*.

Distinction between partnership and joint hindu family business

1. Mode of creation—a partnership arises on the basis of a contract as stated in sections 4 and 5 of the act. a joint hindu family firm arises on the basis of status, *i.e.* by the operation of law, upon the fact of marriage, birth or adoption.

2. Admission of new members—no new partner can be admitted into partnership without the consent of all the existing partners. the membership of a joint hindu family firm is automatic by the birth or in case of adoption into the family of male members if that family is carrying on a business. a minor can also be a member. thus the membership of a joint hindu family keeps changing, whereas in the partnership the members remain more or less fixed and constant.

3. Management and representative capacity—while in a partnership all the members are entitled to take an active part in the management of the business, in the case of a joint hindu family business it is only the manager or *karta* who is the senior male member entitled to manage the business. the other members of the family do not have the representative capacity as held by sarkaria j in *nanchand gangaram selhji* verses. *mm. sadalge,* (1976) 3 scr 287. in partnership, as stated in section i 8, every partner becomes an agent of the firm for the purposes of the business of the firm. there is mutual agency among partners. the existence of mutual agency enables partner to bind the other partners for the acts done by him in the ordinary course of the business of the firm.

4. Nature and extent liability—according to section 25 every partner is liable jointly with others as well as personally for the acts of the firm. in case of the joint hindu family business the members are not personally liable. the liability of the members of a family is limited to their share in the property and profits of the family business. it is only the manager or *karta* who is personally liable to an unlimited extent. in case of partnership the liability of the partners is unlimited.

5. Mode of effecting separation—in case of partnership the remedy against each other is a suit for dissolution of the firm, whereas in case of joint hindu family the remedy is a suit for partition of the family assets. a family is not dissolved; it can split into smaller units.

6. Number of members—in case of partnership the maximum number of partners is ten for partnership 'doing banking business and twenty in any other business. but there is no such limit in case of joint hindu family business.

7. Right to share in the profits—a partner has right to demand his share of profits of the business; but a co-parcener has no such right. he can only demand partition and separate himself from the family business.

8. Death of a partner or member—the death of a partner brings about the dissolution of partnership unless there is a contract to the contrary as per section 42; but the death of a co-parcener does not dissolve the joint family business.

Distinction between partnership and company

although a joint stock company is, like a partnership in or an association of persons, differs from partnership in the following respects:

1. Formation—a partnership is governed by the partnership act while a joint stock company is governed by the companies act. the formation of a partnership is relatively easy while a company has to observe a number of legal formalities connected with its formation.

2. Registration—a partnership may or may not be registered. however, a joint stock company must be registered. the certificate of incorporation is a conclusive evidence of the registration of a company. an unregistered company becomes either a partnership or an illegal association, depending upon the number of members.

3. Legal status—a partnership is not a distinct legal entity. persons who have entered into partnership with one another are called individually partners and collectively a firm. in a case of a company, however, the members are quite distinct from the company, which is a juristic person. in other words, a company is an artificial person in the eyes of law enjoying a distinct entity apart from its members.

4. Nature of contract—the agreement between persons that brings a partnership into existence may, or may not be in writing. if it is in writing, it becomes a private document. as such, outsiders cannot have recourse to its contents. however, the agreement that brings a company into existence, known as the memorandum of association, must be in writing. it is also a public document.

5. Number of members—in the case of a partnership business engaged in banking activity, the maximum number of members is ten. in the case of other types of business, however, the maximum is twenty. the minimum is, of course, 2. in the case of private joint stock company, the minimum number of members is 2, while the maximum is 50 excluding the employees. in a public company, however, the minimum is seven and the maximum is unlimited.

6. Liability—the liability of a partner is joint, several and unlimited, but the liability of a member of a company is limited to the face value of the shares held by him, or the amount guaranteed by him, depending on whether the liability of the members is limited by shares or by guarantee.

7. Objects—a partnership may engage itself in any business, which the partners like whereas a company can engage itself only in the business mentioned under the object clause of the memorandum. thus, this clause restricts the powers of a company with regard to the nature of the business, which it could undertake.

8. Capital—the capital contributions by the partners can be altered freely but, the capital of a company cannot be altered except by observing the legal formalities laid dawn in the companies act*

9. Property—the partnership property belongs to all the partners as such, the property of the firm is the property of the partners. in case of a company, however, the property belongs to the company and not to the members.

10. **Management—**in the case of a partnership, every partner is entitled to take part in the management of partnership business. in the case of a company, the management of its affairs is entrusted to a board of directors duly elected by the members.

11. Agency—principal-agent relationship is the essence of a partnership. every partner is an agent of the firm to make contracts on behalf of the firm. in the case of the company, however, no member is agent of the company or of any other member. consequently, no member can make contracts on behalf of the company. such a power -vests only with the directors who have to act *intra vires* the memorandum and articles.

12. **Transfer of shares—**a partner cannot transfer his interests in the partnership without the consent of the other partners. if he does so without the consent of any others, the partnership is deemed to have been dissolved. a shareholder, however can, effect a transfer of his shares without the consent of any other member. while the shares of a public company are freely transferable, those of a private company can be transferred, subject to restrictions -imposed on the same.

13. Dissolution—while a partnership is dissolved by the death or insolvency of a partner, a company is not affected by any such contingency. a company enjoys perpetual existence.

14. **Accounts and audit—**the accounts of a partnership need not be got audited and disclosed to the public. in the case of the company, however, its accounts should be got audited and placed before the members and a copy of the same should be sent to the registrar of companies. further, in the case of public companies, accounts are also made available to the public.

Meaning of "partners", "firm" and "firm name"

according to first para of section 4 "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. thus a partnership is an abstract legal relationship that exists between the partners.

according to second para of section 4, **persons who have entered into partnership with one another are called individually "partners" and collectively a "firm", and the name under which their business is carried on is called the "firm name".**

thus, a firm is only an aggregate of the individuals who are partners in a business. it is not a distinct legal entity, but a name given to the partners collectively. it is impossible to think of a firm apart from the members constituting it. the property of the firm belongs to the partners jointly. the death or insolvency of a partner puts an end to its existence, and persons who deal with the firm do so with the partners jointly. the firm does not carry on the business, but only the partners who do so in the name of the firm. **restriction on number of partners**

the restriction on the maximum number of partners is contained in the companies act, 1956. as per the companies act, partnerships should not have large number of members because unidentified number of members can create complex problems of rights and liabilities of the members *inter se* and in respect of their relations with others. therefore, section 11 of the companies act, 1956 provides that no company, association or partnership consisting of more than 20 persons (10 in case of banking business) shall be formed for the purpose of carrying on any business that has for its objects the acquisition of the gain for itself or for its members unless it is registered as a company under the companies act or is formed in pursuance of some other law, thus if there is a partnership firm consisting of more than 20 partners (10 in case of banking business) and it is not registered as a company, it becomes an illegal association.. the section, however, does not apply to a joint hindu family carrying on business.

consequences of illegal association.— following are some of the consequences of illegal association.

1. every member of such an association shall be personally liable for all liabilities incurred in the business.

2. members of an illegal association are punishable with a fine which may extend to one

thousand rupees.
3. members of an illegal association cannot maintain an action in respect of any contract made by it.
4. there can be no suit between the members of an illegal association for dissolution or for rendition of accounts.

Duration or types of partnership

1. Partnership at will
section 7 of the act provides as follows:

where no provision is made by contract between the partners for duration of their partnership, or for the determination of their partnership, the partnership is "partnership at will".section 7 provides that where there is a provision in the contract for the duration of partnership, the partnership is not at will. similarly, if there is a provision in the contract for the determination of partnership, it is not partnership at will. thus section 7 recognizes two exceptions to the partnership at will.

the duration of partnership can be expressly provided in the contract or it may be implied from the conduct of the parties. the same principle applies to a case determination.
2. Particular partnership
section 8 of the act provides as follows:

A person may become a partner with another person in particular adventure or undertaking

section 8 of the act makes it clear that there can be a partnership in a single venture and brief business venture provided the requisites of partnership as given by section 4 are present. under section 4 there must be a "business" and there must be an agreement to share the profits of that business, and the business must be carried on by all or any of the partners acting for all. thus relation of partnership need not be a permanent bond.

partnership. purchases were to made jointly in mauritus by either of them after consultation with the other and after taking advice from bombay houses. a ship was then to be chartered after consultation, and loaded with the purchased sugar and dispatched to hong kong, there was a loss in the very first transaction. one of the merchants became bankrupt. the question was whether the other merchant was liable for a bill drawn by the former in connection with the consignment. lord dunedin held that there was a partnership. his lordship further held that it was a partnership of limited character.

an instance of particular partnership was before the supreme court in *gherulal parekh* verses. *mahadeo das,* air 1959 sc 781. in this case, the appellant and the respondents entered into a partnership to carry on wagering contracts with two firms of hapur for a particular season only. they agreed to make the contracts in the name of the respondent on behalf of the firm and to divide the profit and loss resulting from the transactions in equal shares. the respondent entered into 32 such contracts and the net result of these was a loss. since the respondent had to pay the full amount due to the merchants at hapur, he wanted the appellant to bear his share of loss. since the appellant denied his liability, the firm was dissolved andthe respondent sued the appellant for settlement of accounts of the dissolved firm. the supreme court held that in the present case the partnership was not unlawful within the meaning of section 23 of the contract act, and therefore, the appellant was liable to bear his share of the loss. it was further held that it was a valid particular partnership, and section 42 of the partnership act was applicable in the present case.

in *k. jaggaiah verses venkatasatyanarayana,* it was held by the, andhra pradesh high court that "test is not whether the venture consists of a single transaction or more but whether the venture is capable of being participated by more than one individual considering its activity." in this case the plaintiff and the two defendants jointed together and obtained a contract for the maintenance of a road between two mile stones. it was held that there was a partnership between the plaintiff and the two defendants. the court said that road building activity though arising out of a single contract was spread over a particular period and the firm had to employ, certain workers, supervise the work, finalise the work and get approval from the government and all that meant 'carrying on of business' under section 4 of the act.

thus there may be partnership limited to purchase and sale of particular jewels, the working of a particular patent, the development of a parcel of land, the exploitation of a contract of service, sowing, cropping and harvesting and sale of a particular crop. similarly there may be a partnership between two advocates in a particular case. however, the rights and liabilities of partners in these cases are limited as compared to general partnership.

B. Rights and duties of partners to one another

Duties of partners

duties of the partners can be broadly divided into the following two categories:
1. absolute duties
2.duties subject to contract to the contrary.

1. **Absolute duties**

section 9 and 10 reproduced above, have imposed certain duties which cannot be varied by agreement between the partners. these duties are discussed below:—

1. duty to carry on the business to the greatest common advantage and to be just and faithful to each other. section 9 provides that partners are bound to carry on the business of the firm to the greatest common advantage and be just and faithful to each other. duty to carry on the business to the greatest common advantage and the duty to be just and faithful to each other are two sides of the same coin, which is the duty of good faith. all the endeavors of a partner must be to secure the maximum profits to the firm. he should not try to make a personal profit for himself at the cost of his co-partners. duty to carry on the business to the greatest common advantage must be read along with the provisions of section 16. if a partner makes any personal profit, he has to account for it to the firm, as making personal profit would be acting not to the greatest common advantage.

2. Duty to render true accounts and full information affecting the firm. according to section 9 a partner is bound to render true accounts and full information of all things affecting the firm to his co-partners or their legal representatives. in other words the partners must make a full and frank disclosure of facts affecting the affairs of the firm to each other. the duty to render accounts is not confined to submitting statements of accounts, but it includes the duty to handover to the firm the balance of the moneys of the firm which have come in the hands of a partner. he must also be ready to explain to his other partners the true accounts and produce vouchers relating to everything coming into his hands.

if a partner is in possession of more information about the things affecting the firm, he should disclose it to his co-partners. a leading case on this point is *law verses law,* (1905) 1 ch. 140. in this case a partner sold his share in the assets of the firm to his co-partner. subsequently, he (the vendor) discovered that material information had been concealed from him. although he was entitled to set aside the sale, he agreed to modify the original bargain. it should be noted that after electing to modify the original bargain, he is bound by that election, and neither he nor his representative after his death can repudiate the sale.

3. **Duty to indemnify for fraud.** section 10 provides that "every partner shall indemnify the firm for any loss caused to it by his fraud in the conduct of the business." the section makes the liability, to indemnify' for fraud absolute and not subject to contract, i.e. partners are not allowed to contract themselves out of liability for fraud. though partners may agree amongst themselves that the extent of a partners liability to his co-partners is to be limited or that he is not liable to compensate them for loss occasioned by his wrongful act, omission, neglect, want of skill, misconduct or negligence, but it is not open to them to contract themselves, or any one of them, out of liability for loss occasioned to the firm by fraud.

the purpose of section 11 is to induce partners to deal honestly with the customers of the firm. if for example, a partner in the ordinary course of the business of firm, commits a fraud upon a customer of the firm, for which the firm (including the innocent partners) is held liable, the firm is entitled to recover indemnity from partner guilty of the fraud. in *campbell verses campbell*(1834) 12 sh (city of seas) 573, scot, the managing partner of a distillery purchased certain quantity of illicit whisky on behalf of the firm. the plaintiff partner, who did not take part in the conduct of the business of the firm, had no knowledge of the purchases. the firm had to pay penalties for purchase of illicit whisky. they were held liable jointly and severally to indemnify the plaintiff against the amount so paid and interest on it.

2. Duties subject to contract to the contrary

the following duties of the partners as laid down in the act are applicable in the absence of a contract to the contrary:

1. Duty of due diligence. section 12 (b) provides that subject to contract between the partners, "every partner is bound to attend diligently to his duties in the conduct of the business." diligent functioning means working with careful effort and absence of carefulness is negligence. but section 13 provides liability only where there is willful negligence.

2. Duty to indemnify for wilful neglect. section 13 (f) provides that subject to contract between the partners, "a partner shall indemnify the firm for any loss caused to it by his wilful neglect in the conduct of the business of the firm". unlike the duty to indemnify for fraud under section 10, a partner can contract himself out from this duty. to attract clause (f) the loss caused to the firm must be by partner's wilful neglect. mere neglect on the part of partner, i.e. a mere inadvertence or accident, is not sufficient to attract application of this clause and the loss caused has to be due to wilful neglect, i.e. a deliberate, intentional and purposeful commission or omission of a certain act. in case such wilful neglect amounts to fraud provisions of section 10 are attracted.

3. Duty to work without remuneration. according to section 13 (a), subject to contract between the partners, a partner is not entitled to receive remuneration for taking part in the conduct of the business.

4. Duty to contribute to losses. section 13(b) providers that subject to contract between the partners, the partners are bound to contribute equally to the losses sustained by the firm.

5. Duty to apply the property of the firm for purposes of the business of the firm. section 15 provides that "subject to contract between the partners, the property of the firm shall be held and used by the partners exclusively for the purposes of the business." thus it is a duty of the partners that the property of the firm shall be held and used by them exclusively for the purposes of the business of the firm. if a partner uses the property of the firm for his personal purposes he will be accountable to the firm as per section 16, for any private advantage obtained by him. however, the failure of the partner to submit an account of use of partnership property for personal use will not make him liable for criminal breach of trust under section 409 of the indian penal code. in *yelji raghavji* verses. *state of maharashtra,* air 1965, sc 1433, a partner who was assigned the work of realizing the dues of the partnership, failed to deposit in bank some collections, the supreme court held that he was not liable for criminal breach of trust under section 409, ipc as he was authorised by other partners to spend the money for the business of the firm.

6. Duty to account for personal profits. section 16 provides that subject to contract between the partners,—

(a) if a partner derives any profit for himself from any transaction of the firm, or from the use of the property or business connection of the firm or the firm name, he shall account for that profit and pay it to the firm;

(b) if a partner carries on any business of the same nature as and competing with that of the firm, he shall account for and pay to the firm all profits made by him in that business.

thus the section lays down the following two of the most important duties. they are:

(a) duty to account for secret profits, and(b) duty not to compete.

a. Duty to account for secret profits. according to section 16 (a) a partner is liable to account for profits derived for himself arising out of the following:—

(1) from any transaction of the firm;

(2) from the use of property of the firm;

(3) from use of business connection of the firm; and

(4) from use of the firm name.

thus section 16 (a) gives a fairly wide coverage to the liability to account for personal profits. the advantages arising from things connected with the firm should belong to all the partners and not merely to the partner whose mechanism brings them about. a partner being an agent, makes a profit out of the concerns of his principal, and while acting for him, he must disclose it to the principal; he cannot make a profit out of his principal's business for himself. one of the aspects of his duty is that there should not be a conflict of partner's personal interest with his duty to the firm. for example, if he is authorised to purchase something for the firm he should not supply from his own stock, and if he is asked to sell something for the firm, he should not purchase for his personal use without first informing the other partners. (see *bently verses craven,* discussed earlier). in *gordon verses holland,* (1913) 82 lj pc 81, a partner, improperly and without the knowledge of the other partner, sold 'partnership property to a *bonaflde* purchaser for value and without notice. the partner afterwards purchased the property from him. the partner was held liable to account for profits by subsequent dealings, with the property.

b. duty not to compete. section 11 (2) provides that notwithstanding anything contained in section 27 of the indian contract act. the partners may agree that they, or some, or any of them, shall not carry on any business other than that of the firm while he is a partner in the firm. section 16 (b) of the indian partnership act provides that if a partner carries on any business of the same nature as and competing with that of the firm, he shall account for all profits made by him in that business.

<u>Rights of partners</u>

subject to contract between the partners, the indian partnership act confers the following rights upon all the partners:

1. right to take part in the conduct of the business [section 12(a)l. subject to contract between the partners, every partner has a right to take part in the conduct of the business of the firm. this right cannot be taken away except by a contract. unequal capital contribution or no capital contribution is no bar to his right. it is sometimes provided by express agreement that this or that partner will not take active part in the conduct of the business and also for payment for salary to managing or active partner.

2. right to be consulted [section 12(c)l. subject to contract between the partners, any difference arising as to ordinary matters may be decided by a majority of the partners, and every partner shall have the right to express his opinion before the matter is decided by the majority of the partners. this power, though not in itself of a judicial kind, is subject to the rule of natural justice. every partner must have an opportunity of being heard, and the decision must be made in good faith with a view to collective interest of the firm. further, no change may be made in the nature or place of the business without the consent of all the partners. thus in the cases of fundamental matters, the consent of all the partners becomes necessary.

3. right to have access to firm's books [section 12(d)]. subject to contract between the partners, every partner has a right to have access to and to inspect and copy any of the books of the firm. the term 'books', used is section 12 (d), is more comprehensive than the term 'accounts' used in section 30 (2) of the act. as such, no exception can be made to any books of the firm, even though a particular book may contain business secrets. this right can be exercised by the partner personally or by an agent, who is not objectionable. however, the extracts of the books should not be used by a partner for purposes hostile or injurious to the firm after he has ceased to be a partner.

4. right to share the profits [section 13(b)l. subject to contract between the partners, the partners are entitled to share equally in the profits earned, and shall contribute equally to the losses sustained by the firm. since this provision is subject to the contract between the partners, it is open to the partners to divide the profits and losses of the firm in a different ratio. the contract may provide that a particular partner will bear all the losses of the business. the contract to the contrary may even provide that one of the partners is to have a fixed salary.

5. Right to interest (section 13(c) and section 13(d)l. unless otherwise agreed, the partners are not entitled to any interest on their capital. section 13(c) provides that where a partner is entitled to interest on the capital subscribed by him such interest shall be payable out ofprofits. section 13(d) provides that subject to contract between the partners, a partner making for the purposes of the business, any payment or advance, beyond the amount of capital he has agreed to subscribe, is entitled to interest thereon at the rate of six per cent per annum from the firm. a partner has the right of interest on advances whether there are profits or not. but a partner is not entitled to interest after the date of dissolution. the contract may provide a different rate of interest. subject to contract between the partners, a partner is not entitled to receive remuneration for taking part in the conduct of the business [section 13 (a)].

6. Right to indemnity (section 13(e)l. subject to contract between the partners,. the firm shall indemnify a partner in respect of payments made and liabilities incurred by him—

(i) in the ordinary and proper conduct of the business, and (ii) in doing such act, in an emergency, for the purposes of protecting the firm from loss, as would be done by a person of ordinary prudence, in his own case, under similar circumstances.

7. Right to use the property of the firm for the purposes of the business of the firm (section

15l. subject to contract between the partners, the property of the firm shall be held and used by the partners exclusively for the purposes of the business. if a partner uses the property of the firm for his own purposes, he will be liable to account to the firm for the profits, if any, that he may make. a contract of partnership is *uberrimae fidei* i.e., a contract of absolute good faith.

8. Rights of an outgoing partner. the rights of an outgoing partner have been explained in a subsequent chapter. these rights are:

(a) right to carry on competing business [section 36(1)]; and

(b) right in certain cases to share subsequent profits [section 37].

ins*tead verses. salt,* (1825) 3 bing 101, a partner without the authority of the other partner, submitted a dispute to arbitration. the award passed on such submission was held not binding on the other partner as the submission to arbitration ordinarily does not come within the scope of a partner's authority so as to bind the other partners. similar was the decision in *venkatachellam chetty* verses. *ratnanathan,* the partner was not allowed to claim indemnity in the circumstances of the case.

in *thomas verses atherton,* (1878) 10 ch d 185, the managing partner of a colliery worked beyond the boundaries of the colliery without making proper inquiries. the adjoining owner gave a notice to the managing partner to that effect. even after receiving the notice from the adjoining owner that he was committing a trespass, he recklessly continued such workings without consulting his co-partners, even though he had a *bonafide* belief that the adjoining owner had no title to the disputed areas. the adjoining owner brought an action before the arbitration for tress pass and awarded damages of £ 6,000. the co-partners refused to contribute. the managing partner filed a suit against them. the court of appeal held that the managing partner alone was liable for damages.

in *mahadeo verses patel* verses. *ganoo changoo patel,* air 1925 bom 324, a partner was not allowed to recover from his co-partner a part of the losses suffered by the firm because they were due to his own failure to utilize the boats of the firm for plying purposes.

in *sidhu narayan aiyangar* verses. *ramaswami,* ilr 32 mad 203, it was held that the right to indemnity is not lost by the dissolution of the firm and it is immaterial whether there is or has been no settlement of accounts.

Rights and Duties of partners after change in the firm, after the expiry of the term of the firm and where additional undertakings are carried out

the partners may continue the business after the retirement or death of a partner. similarly, a partnership formed for a particular period of time, may continue that business, even after the expiry of the time. again a partnership constituted to carry on a particular venture, may also continue even after the completion of the venture. section 17 of the act has laid down the rights and duties of the partners in these cases. they are as follows:

(a) After a change in the firm. where a change occurs in the constitution of a firm the mutual rights and duties of the partners in the reconstituted firm remain the same as they were immediately before the change, as far as may be. however, it is open to the partners to agree otherwise.

(b) After the expiry of the term of the firm. where a firm constituted for a fixed term continues to carry on business after the expiry of that term, the mutual rights and duties of the partners remain the same as they were before the expiry, so far as they be consistent with the incidents of partnership at will. **(c) Where additional undertaking are carried out.** where a firm constituted to carry out one or more adventures or undertakings carries out others adventures or undertakings, the mutual rights and duties of the partners in respect of the other adventures or undertakings are the same as those in respect of the original adventures or undertakings.

Relations of partners to third parties

Implied authority of a partner

a partner's authority may be express or implied. an authority is said to be express when it is given by words, spoken or written. it is implied where there is no express agreement between the partners, in which case, the law impliedly gives certain powers to a partner and also negatives certain other powers as regards partners. the word "implied" suggests that authority of a partner which is apparent from his position in a partnership firm in relation to the business of the firm. section 19 deals with the subject of implied authority of a partner. it is reproduced below:—

"19. implied authority of a partner as agent of the firm.—(1) subject to the provisions of section 22, the act of a partner which is done to carry on, in the usual way, business of the kind carried on by the firm, binds the-firm.

the authority of a partner to bind the firm conferred by this section is called his implied authority.

(2) in the absence of any usage or custom of trade to the contrary the implied authority of a partner does not empower him to—

(a) submit a dispute relating to the business of the firm to arbitration, (b) open a banking account on behalf of the firm in his own name,

(c) compromise or relinquish any claim or portion of a claim by the firm,

(d) withdraw a suit or proceeding filed on behalf of the firm,

(e) admit any liability in a suit filed on behalf of the firm, (0 acquire immovable property on behalf of the firm, (g) transfer immovable property belonging to the firm, or (h) enter into partnership on behalf of the firm."

thus, section 19 provides for two rules: the first is the affirmative rule prescribed by sub-section (1) and the second is a negative rule provided by sub-section (2).

sub-section (1) states that subject to the provision of section 22 the act of a partner which is done to carry on, in the usual way-business of the kind carried on by the firm, binds the firm. it means that the acts, in order to be within the implied authority of a partner, must be done—

(1) in the conduct of the business of the kind carried by the firm, and

(2) in the usual way of such business

(3) it is also necessary as provided in section 22 that the act must be done in the firm name or in any other manner expressing or implying an intention to bind the firm.

thus a partner, in the case of a trading firm, in the exercise of his implied authority, can bind the firm by any of the following acts:

(1) he may draw, make, sign, endorse, accept, transfer, negotiate and procure to de discounted, promissory notes, bills of exchange, cheques and other negotiable paper in the name and on account of the partnership firm. a partner of a non-trading firm does not ordinarily possess the power to bind his copartners by drawing or accepting bills of exchange. therefore, a partner of a non-trading firm cannot in the exercise of implied authority bind his copartners by giving a post-dated cheque.

(2) he may borrow money for the purposes of the business of the firm,

(3) he may pledge or sell moveable property of the firm,

(4) he may buy goods on account of the firm which are necessary for or usually required for the purposes of the business of the firm,

(5) he may receive payment of debts on account of the firm and give valid discharge by issuing a

receipt for the same,

(6) he may pay debts on account of the partnership firm,

(7) he may employ servants for the partnership.

(8) he may sue on behalf of the firm and for this purpose may engage a lawyer. similarly he can defend a suit brought against the firm and may engage a lawyer for this purpose.

in an ordinary partnership, a partner may bind the firm by any of the acts mentioned in (4) to (7) above.

all the partners of a firm can ratify an act of a partner, which has been done in excess of his implied authority or without any authority, provided the act is such that it can be legally done by the authority of all the partners previously given.

statutory restrictions on implied authority

sub-section (2) of section 19 provides certain acts which do not, in the absence on any usage or custom of trade to the contrary, fall within the implied authority of a partner. thus a partner is not authorised to do these acts without consulting the other partners. the sub-section says that "in the absence of any usage or custom of trade to the contrary, the implied authority of a partner does not empower him to—

(a) submit a dispute relating to the business of the firm to arbitration,

(b) open a banking account on behalf of the firm in his own name,

(c) compromise or relinquish any claim or portion of claim by the firm.

(d) withdraw a suit or proceeding filed on behalf of the firm.

(e) admit any liability in a suit or proceeding against the firm,

(f) acquire immovable property on behalf of the firm. (g) transfer immovable property on behalf of the firm.

(h) enter into partnership on behalf of the firm."

<u>Doctrine of Holding out:</u>

"28. holding out—(1) anyone who by words spoken or written or by contract represents himself, or knowingly permits, himself to be represented, to be a partner in a firm, is liable as a partner in that firm to anyone who has on the faith of any such representation given credit to the firm, whether the person representing himself or represented to be a partner does or does not know that the representation has reached the person so giving credit."

(2) where after a partner's death the business is continued in the old firm name, the continued use of that name or of the deceased partner's name as a part thereof shall not of itself make his legal representative or his estate for any act of the firm liable done after his death.

<u>Meaning of holding out</u>

the above section reproduces the doctrine of "holding out" which is a part of the law of estoppel as laid down in section 115 of the indian evidence act, 1872 which is as follows:

"when one person has, by his declaration, act or omission intentionally caused or permitted another person to believe a thing to be true and to act upon such belief, neither he nor his representative shall be allowed, in any suit or proceeding between himself and such person or his representative to deny the truth of that thing."

according to the section if a person who is not a partner represents himself to be a partner in a firm or allows others to do it, he is estopped or prevented from denying this as regards persons who have acted on the faith of such representation. in such a case he is liable as a partner to such person. the motive of the representation or the state of the knowledge of the person making is immaterial. "moreover, if a person has been induced by promises of irresponsibility or by fraud to hold himself out as a partner with others, this circumstance does not relieve him from liability to third parties who have been induced by his conduct to trust him as well as them, and who had nothing to do with promises made to or the fraud practiced upon him."

To hold a person liable on the basis of holding out the following two elements must be present:

(a) he must have by words, spoken or written, or by conduct represented himself or knowingly permitted himself to be represented as a partner in a firm.
(b) credit must have been given to the firm on the faith of such representation.

(a) Representation

the representation on which a case of holding out is sought to be made may be made (1) by written or spoken words, (2) or by conduct, (3) or by knowingly permitting others, by words or by conduct, to make the representation. the representation must be that a person is a partner in a firm. for example, where a represents to b that he is a partner in the firm of x & co. b, on the faith of the representation, gives credit to x & co. the firm x & co. becomes insolvent. b can make a liable. an express representation takes place where a person allows his name to be used in the name, title or correspondence ‘of the firm.

(b) Giving of credit on the faith of the representation

it is not enough to establish that there is a representation or the person has permitted himself to be represented as a partner, it must also be established that the statement is relied upon by the person who has acted on it by giving credit to the firm on the faith of the representation. a person who gave credit to the firm, without knowing about the representation will not be permitted to take advantage of any such representation which came to his knowledge afterwards. but it is not necessary that the representation must have been given directly to the person giving credit to the firm on the faith of the representation.

Effect of holding out

If a person holds himself out as a partner of a firm, he becomes personally liable. but he is liable as a partner of the firm only to the person who has given credit and to the extent the credit has been given to the firm on the faith of his representation. he does not become a partner in the firm.
rights of a transferee of a partner's interest
section 29 of the act provides as follows:—

"(1) a transfer by a partner of his interest in the firm, absolute, or by mortgage, or by the creation by him of a charge on such interest, does not entitle the transferee, during continuance of the firm, to interfere in the conduct of the business, or to require accounts, or to inspect books of the firm, but entities the transferee only to receive share of profits of the transferring partner, and the transferee shall accept the amount of profits agreed to by the partners.

(2) if the firm is dissolved or if the transferring partner ceases to be partner, the transferee is entitled, and for the purpose of ascertaining that share, to an amount as from the date of the dissolution."

it is one of the fundamental principles of partnership law (recognized in section 31 of the act) that no person may be introduced as a partner without-the—consent of all existing partners. nor can a partner by transferring his own interest make any one else a partner in his stead without the consent of all existing partners. section 29 provides that a partner may transfer his share to a third person, absolutely or by way of security; but cannot make the transferee a partner; unless the other parties recognize the transferee as a partner. sub-section (1) gives a right of such transfer while the business of the firm is going concern. sub-section (2) deals with the rights and remedies in case of dissolution of the firm or the transferring partner ceasing to be a partner.

a transferee of a partner's interest is not entitled, during the continuance of the partnership; (a) to interfere in the conduct of the business; or (b) to require accounts; or (c) to inspect the books of the firm; or (d) to challenge the account of profits agreed to by the partners; and (e) cannot sue for dissolution or for an account before dissolution.

the transferee is entitled to receive the share of the profits of the transferring partner. on dissolution or on the retirement of the transferring partner, the transferee will be entitled, as against the remaining partners, (a) to receive the share of the assets of the firm to which the transferring partner was entitled and (b) for the purpose of ascertaining that share, for an account, as from the date of dissolution.

C. Minors admitted to the benefits of partnership

the position of a minor in a partnership is dealt with in s.30 of the indian partnership act, 1932 which is reproduced below:—

"30 minors admitted to the benefits of partnership.—(1) a person who is a minor according to the law to which he is subject may not be a partner in a firm, but with the consent of all the partners for the time being, he may be admitted to benefits of partnership.

(2) such minor has a right to such share of the property and of the profits of the firm as may be agreed upon, and he may have access to and inspect and copy any of the accounts of the firm.

(3) such minor's share is liable for the act of the firm, but the minor is not personally liable for any such act.

(4) such minor may not sue the partners for an account or payment of his shares of the property or profits of the firm, save when severing his connection with the firm, and in such case the amount of his share shall be determined by a valuation made as far as possible in accordance with the rules contained in section 48:

provided that all the partners acting together or any partner entitled to dissolve the firm upon notice to other partners may elect in such suit to dissolve the firm, and thereupon the court shall proceed with the suit as one for dissolution and for settling accounts between the partners, and the amount of the share of the minor shall be determined along with the shares of the partner.

(5) at any time within six months of his attaining majority, or of his obtaining knowledge that he had been admitted to the benefits of partnership, whichever date is later, such persons may give public notice that he has elected to become or that he has elected not to become a partner in the firm. and such notice shall determine his position as regard the firm:

provided that, if he fails to give such notice, he shall become a partner in the firm on the expiry of the said six months.

(6) where any person has been admitted as a minor to the benefits of partnerships in affirm, the burden of proving the fact, that such person had no knowledge of such admission until a particular date after the expiry of the six months of his attaining majority shall lie on the persons asserting that fact.

(7) where such person becomes a partner:—

(a) his right and liabilities as a minor continue upto the date on which he become a partner, but he also becomes personally liable to third parties for all acts of the firm done since he was admitted to the benefits of partnership, and

(b) his share in the property and profits of the firm shall be share to which he was entitled as a minor.

(8) where such person elects not to become a partner:-

(a) his rights and liabilities shall continue to be those of a minor under this section upto the date on which he gives public notice,

(b) his share shall not be liable for any acts of the firm done after the date of the notice, and

(c) he shall be entitled to sue the partners for his share of the property and profits in accordance with sub-section (4).

(9) nothing in sub-section (7) and (8) shall affect the provisions of section 28." who is a minor

a minor is a person who has not attained the age of majority according to the law to which he is subject. the age of majority of a person as regards matters other than marriage, divorce and adoption is provided by the indian majority act, 1875. section 3 of that act provides that every person domiciled in india shall be deemed to have attained his majority when he shall have completed his age of eighteen years, and not before. but in case of a minor of whose person or property or both a guardian has been appointed by a court, or of whose property the superintendence is assumed by a court of wards, before the minor has attained the age of 18 years, the age of majority shall be deemed to have been attained on the minor completing the age of twenty one years.

Nature of Minor's agreement

an agreement enforceable by law i.e. a contract is an essential element for the existence of partnership. section 11 of the indian contract act. 1872, provides that a person must be competent to contract for entering into a contract. after *mohori bibee* verses. *dharmodas ghose,* pc (1903) 30 ia 114: ilr 30 cal 539 it is settled law in india that a minor is incompetent to contract within the meaning of the indian contract act, 1872. section 30 of the indian partnership act does not render a minor competent to contract. therefore, a minor cannot enter into an agreement of partnership as an agreement with a minor is absolutely void. a guardian of a minor also cannot enter into an agreement of partnership on behalf of his ward to make a minor full-fledged partner.

Admission of minor to benefits of existing firm. make minor a full partner it cannot be regarded as invalid on the ground that a guardian has purported to contract on behalf of a minor. earlier in *cit verses shahjethaji phulchand,* it was held that a guardian can agree on behalf of a minor for constituting a firm into which a minor would be admitted to the benefits of partnership (and not as full-fledged partner).

Position of minor so admitted before attaining majority

sub-section (2) provides certain rights of the minor during partnership. a minor admitted to the benefits of partnership is entitled to such share of the property and of the profits of the firm as may be agreed upon at the time of admission. he is also entitled to inspect and copy any of the accounts of the firm. sub-section (4) provides for the remedy to such minor to enforce his rights. it states that a minor cannot sue for his share of the property or profits except when severing his connections with the firm. the amount of the minor's share in such a case is to be determined as far as possible in accordance with the rules stated in section 48. the proviso to this subsection further safeguard the partners being saddled with a debt which the business cannot meet to convert a minor's suit into one for dissolution and for accounts as between all the partners. sub-section (3) lays down the extent of liability of such minor during minority. he is not personally liable for any act of the firm and his liability is confined only to the extent of his share in the property and profits of the firm which would include capital contributed on his behalf, if any. thus his liability is limited. therefore, he cannot be adjudged insolvent.

Rights and Liabilities of such minor on attaining majority

a minor admitted to the benefits of partnership, according to sub-section (5) has a right to elect to become or not to become a partner in the firm at any time within six months of his attaining majority or of his obtaining knowledge that he had been admitted to the benefits of partnership, whichever is later, by giving a public notice to that effect, and such a notice will determine his position as regards the firm. proviso to this sub-section provides that if he fails to give such notice within the required period he will be deemed to have elected to become a partner in the firm.

in *shiva gouda rayji patel verses chanderkant neelkanth sadatge,* it was held that "it is implicit in term of sub-section (5) of section 30 of the partnership act that the partnership is in existence. a minor after attaining majority cannot elect to become a partner of a firm which ceased to exist." thus, the minor cannot exercise the option where, before the expiry of vital six months, the firm is dissolved. in such a case the minor would remain what he was, that is, a partner with share committed to liability, but no personal liability. section 45 applies only to partners of the firm. in this case a firm consisting of two partners. a minor was admitted to the benefits of the partnership firm. the appellant supplied certain goods to the firm on credit. before satisfying the claim of the appellant the firm was dissolved. subsequently the minor attained majority and did not exercise the option to become a partner. the appellant could not recover the dues from the partners. the minor was held not personally liable/

sub-section 6 provides that where any person has been admitted as a minor to the benefits of partnership in a firm, the burden of proving the fact that such person had no knowledge of such admission until a particular date, after the expiry of six months of his attaining majority shall lie on the person asserting the fact. sub-section (7) deals with the rights and liabilities of such minor where he becomes a partner either by his own election or by his failure to give notice within the stipulated period of six months or of his obtaining knowledge, whichever is later. it provides as follows:—

(a) the rights and liabilities of such a person *vis-a-vis* other partners will continue as that of a minor upto the date on which he becomes a partner. but he becomes personally liable to third parties for all acts of the firm done since he was admitted to the benefits of partnership.

(b) his share in the property and profits of the firm remains the same as that to which he was entitled as a minor.

sub-section 8 deals with the rights and liabilities of a minor where he elects not to become a partner by giving a notice to that effect. the sub-section provides as follows:—

(a) his rights and liabilities shall continue to be those of a minor under this section (section 30) upto the date on which he gives public notice.

(b) his share shall not be liable for any acts of the firm done after the date of the notice.

Incoming and Outgoing partners

sections 31 to 38 deal with the legal consequences which follow from the coming in of a new partner or the going out of an old partner. most of these sections allow a change in the constitution of the firm without any dissolution.

Incoming partner (admission of partner)

section 31 of the act provides:

"(1) subject to contract between the partners and to the provisions of section 30, no person shall be introduced as a partner into a firm without the consent of all the existing partners.

(2) subject to the provisions of section 30, a person who is introduced as a partner into a firm does not thereby become liable for any act of the firm done before he became a partner."

admission with unanimous consent and by nomination

it is one of the fundamental principles of partnership law that no person may be introduced as a partner without the consent of all existing partners as partnership requires mutual trust and confidence. of course, if the partnership deed gives a right to a partner, to introduce a new partner it will be otherwise. thus, for instance, if the partnership agreement provides thata partner shall have the right of introducing a new partner at any time during his life or on his death or retirement, the agreement will be binding on the partners even though when the time comes or the event happens, one or more of the partners may be unwilling to accept the new partner. it has been held that an introduction of a new partner under such circumstances will be enforced by the court by way of specific performance.

the rule has been very well stated in *love grove* verses. *nelson,* (1834) 3 my & kl, "to make a person a partner with two others, their consent must clearly be had, but there is no particular mode or time required for giving that consent: and if they enter into partnership by a contract which provides that, on one retiring, one of the remaining two, or even a fourth person, who is no partner at all, shall name the successor to take the share of the one retiring, it is clear that this would be valid contract which the court must recognize and the new partner would come in as entirely by the consent of the other two, as if they had adopted him by name." **nomination clause and dissolution by death of partner**

in *commissioner of income-tax verses. seth govindram sugar mills,* air 1966 sc 24, the supreme court held that if a firm consists of two partners only, the firm automatically comes to an end on the death of one of them. while in the case of a partnership where there are more than two partners, if there is a contract to the contrary firm may be continued by the surviving partners. if there are only two partners and one of them dies, there is no partnership for a third party to be introduced. in *p. ananda rao verses g. raja rao,* it was held that "an agreement between the two partners that on the death of anyone of them his legal heir or nominee would take the place of the deceased partner, will not have the effect of automatically making such heir or nominee partner of the firm. it is however, open to the surviving partner to enter into a new partnership with the heir of the deceased partner, but that would constitute a (new) partnership."

Liability of new partner

sub-section (2) provides that a person who is introduced as a partner into a firm does not thereby become liable for any act of the firm done before he became a partner, unless he agrees to be liable for obligations incurred by the firm, prior to the date of his admission. even when he agrees with his partners to be liable for pre-existing debts such an agreement does not give any right to a creditor to sue the new partner for preexisting debts. an incoming partner becomes liable to creditors for pre-existing debts only when there is complete novation (section 62 of the indian contract act, 1872) by tripartite contract. the tripartite contract must satisfy the following two conditions:—

(1) the new firm as reconstituted after his admission must agree to take over the liability of the

old firm.

(2) the creditors must agree, expressly or impliedly, to accept the new firm as debtor and to discharge the old partnership from its liability—

in *british homes assurance corporation ltd. verses pater son,* (1902) 2 ch 404, a solicitor, who was engaged by the plaintiff, took the defendant as a partner, and notified the fact to the plaintiff. the plaintiff did not take any notice of the fact of admission and continued to deal with the solicitor. when the solicitor misappropriated the money paid to him by the plaintiff for a mortgage transaction, the plaintiff sued the new partner (the defendant). the defendant was held not liable. the court held that a third party who had elected to continue his dealing with the solicitor, could not sue a person whom the solicitor had into partnership.

section 31 (2) is subject to the provisions of section 30. where a minor admitted to the benefits of partnership chooses to become a partner, after he attains majority, he is necessarily an incoming partner. according to section 30(7)(a), he becomes personally liable for all the acts of the firm since he was admitted to the benefits of partnership. **outgoing partner**

an outgoing partner is one who ceases to be a partner in a firm. a partner ceases to be a partner owing to his retirement, expulsion, insolvency or death. the rights and liabilities of an outgoing partner are laid down in section 32 to 38 of the act.

Retirement of a partner

section 32 provides as follows:— "(1) a partner may retire—

(a) with the consent of all other partners,

(b) in accordance with an express agreement by the partners, or

(c) where the partnership is at will, by giving notice in writing to all the other partners of his intention to retire.

(2) a retiring partner may be discharged from any liability to any third party for acts of the firm done before his retirement by any agreement made by him with such third party and the partners of the reconstituted firm, and such arrangement may be implied by a course of dealing between such third party and the reconstituted firm after he had knowledge of the retirement.

(3) notwithstanding the retirement of a partner from a firm, he and the partners continue to be liable as partners, to third parties for any act done by any of them which would have been an act of the 'firm if done before the retirement, until public notice is given of the retirement:—
provided that a retired partner is not liable to any third party who deals with the firm without knowing that he was a partner.

(4) notice under sub-section (3) may be given by the retired partner or
by any partner of the reconstituted firm."

according to sub-section (1) a partner may retire (a) with the consent of all the partners, (b) in accordance with an express agreement by the partners, or (c) where the partnership is at will; by giving notice in writing to all the other partners of his intention to retire. if there is a subsisting agreement between the partners about retirement, a partners can retire in accordance with the agreement whether other partner are willing or not, whereas in the case of retirement by consent all the partners have to agree to the retirement.

a retiring partner ceases to be a partner and the firm becomes reconstituted without dissolution. on retirement of a partner the firm continues to exist as such, which is not the case when a partnership is dissolved. the old firm continues with the continuing partners as members. following the supreme court decision in *e.f.d. mehta verses m.fd. mehta,* 1653 and *cit verses seth* *govindram sugar mills,* the allahabad high court in *sri kishan gupta verses ram babu gupta,* held that the question of retirement in the case of partnership having two partners only cannot arise at all. in *e.f.d. mehta verses m.f.d. mehta,* the supreme court said: "when the partnership consisted of only two partners and one partner agreed to retire, there can be no doubt that the agreement that one of the partners will retire amounts to dissolution of partnership."

Liability of retiring partner for acts of the firm done upto his retirement

sub-section (2) provides that a retired partner remains liable to the creditors for acts of the firm done before his retirement. a retired partner will, however, be discharged from liability to a third party where there is an agreement *(novation)* between the partners and the third party whereby the third party agrees to make the continuing partners as the persons liable to him in place of the old partners. such an arrangement may be express or can be implied from the course of dealing between the continuing partners and the third party after he had knowledge of the retirement. liability for acts done after retirement

sub-sections (3) and (4) provide that a retired partner continues to be liable to third parties for acts of the firm, after his retirement, until public notice of his retirement as required by section 72 has been given, either by himself or by the other partners. if personal notice is proved, absence of public notice will not come in the way. no public notice is however, necessary in the case of a decease partner, insolvent partner and a dormant partner. semi-dormant partners, i.e. the partners who are known to some customers only and not generally, who retire without public notice will not be liable to such customer who had no knowledge of their being partners in the firm.

D. Dissolution of firms

Modes of dissolution

the act provides the following modes of dissolution:

1. dissolution by agreement (section 40); 2. compulsory dissolution (section 41);
3. contingent dissolution or dissolution on the happening of certain contingencies (section 42);
4. dissolution by notice (section 43);
5. dissolution by court (section 44).

in *ramanarayan verses kashinath,* it was held that partnership could be dissolved only in the modes prescribed by sections 40 to 44 and not by forcible expulsion of a partner from the business in violation of the contract of partnership.

Dissolution by agreement

section 40 provides:

"a firm may be dissolved with the consent of all the partners or in accordance with a contract between partners"

thus a firm, whether for a fixed period or otherwise, may be dissolved at any time with the consent of all the partners. a firm may be dissolved in accordance with a previous contract between the partners. the consent may be express or implied. the mere closure of business of a partnership is not by itself evidence of an agreement to dissolve the firm because it has to be dissolved in one way or the other known to law

Compulsory dissolution

section 41 declares:— "a **firm is dissolved,—**

(a) By the adjudication of all the 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:

provided that, 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 adventure and undertakings."

thus a firm is compulsorily dissolved by the adjudication of all or all but one of the partners as insolvent as the existence of a firm pre-supposes that there are two or more partners carrying on its business. as discussed earlier under section 34 (1) a partner ceases to be a partner of the firm on being adjudicated as insolvent. secondly a firm is compulsorily dissolved by the happening of an event which makes carrying on of partnership business or the continued existence of partnership, unlawful however, if the firm is carrying on more than one business, the illegality of one or more does not cause the dissolution of the firm in respect of its lawful business. also see sections 23, 56 and 65 of the indian contract, act, 1872.

Contingent dissolution or dissolution on the happening of certain contingencies

section 42 provides:—

"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;

(1) it must clearly state the intention of the partner giving the notice to dissolve the firm. it must not be ambiguous or vague. it must be factual, explicit and final.
(2) it must be given in writing to all the other partners of the firm.

Dissolution by retirement of all but one

when all the partners except one retires, the firm's dissolution is inevitable though a contingency of this kind is not provided for in section 41, 42 and 43. this gap can be filled by the partners by entering into an agreement. in *abbashbhai verses r.g. shah,* the partnership provided that in case of retirement all the partners except one, the remaining partner can continue the firm and for this purpose he might take other partners with him. the clause was held valid.

Dissolution by the court

section 44 provides where, there being no possibility of a dissolution either by mutual consent, or under any of the provisions of the previous sections, recourse has to be had to a court of law for dissolving the partnership. the section provides:—

"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 at will 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 the 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 or conduct of its business, or otherwise so conducts himself in matters relating to the business that it is not reasonably practicable for 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 the provisions of rule 49 of order xxi of the first schedule to the code of civil procedure, 1908, or has allowed it to be sold in the recovery of arrears of land-revenue or 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; or

(g) on any other ground which renders it just and equitable that the firm should be dissolved." the powers conferred on the court by this section are not controlled by the other provisions relating to dissolution or by agreement between the partners. the act has given a wide discretion to the courts but this discretion cannot be fettered by any rigid rules and must depend on the facts and circumstances of each case.

section 44 confers an absolute and independent right on a partner to have the partnership dissolved on any of the grounds specified therein and it is not open to the parties to take away that right by means of a contract between them. a minor admitted to the benefits of the firm, being not a full fledged partner, cannot file a suit under section 44. the provisions of section 44 do not apply to a partnership "at will". the following are the grounds of dissolution of a firm under section 44:—

Unsoundness of mind [section 44(a)]. when a partner has become of unsound mind, any partner, including the insane, may apply for dissolution of the firm. dissolution may be necessary to protect the interest of the insane partner and that of other partners. but lunacy of a partner is not dissolution by itself. dissolution requires an order of the court.

the court is not bound to make an order to dissolve the firm if a partner becomes of unsound mind. the power of the court to dissolve the firm is discretionary. the court will pass an order which is in the best interest of all the partners after considering the interest of the insane and other partners. the court may not make an order for dissolution of the firm if a dormant partner becomes of unsound mind as it may not at all affect the business of the firm. the court may make an order for dissolution of the firm on the ground of insanity in very special circumstances. if the court makes an order for dissolution of the firm on the ground of insanity, the date of dissolution will be the date of order or any other date fixed by the court.

as defined in section 12 of the indian contract act 1872, 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 interest. section 52 of the indian lunacy act, 1912 also empowers the high court in the presidency towns to dissolve and dispose of the property of a partnership where a partner becomes lunatic. under the indian lunacy act, 1912, a person of unsound mind is one who is totally unsuited to manage himself and his affairs due to incapacity of his mind. a person who merely possess weak intellect and, therefore, not able to manage his property as efficiently as may be desirable is not an idiot or person of unsound mind.
Permanent incapacity [section 44(b)\\. when any partner, other than the partner suing, has become *permanently* incapable of performing his duties as a partner, *any other partner* may apply to the court for dissolution of the f in. the court may not order dissolution in case of permanent incapacity of a dormant partner except under very special circumstances.

Transfer of interest [section 44(e) where a partner has transferred the *whole* of his interest in the firm to a third party, a suit for dissolution may be brought by *any other partner.* the transfer by a partner of his share must be to a *third party* and of the *whole* of his share and not merely a part of it. thus a partner may transfer his share to his copartner or transfer a part of his share to a third party unless there is a contract to the contrary. the transfer of share must be by a partner, other than the partner suing.

when two out of three partners assigned their shares it was held that the case fell under this clause .

Perpetual losses [section 44(f)]. if the business of the firm cannot be carried on except at a loss, the firm may be dissolved at the suit of a partner. a partnership is always established in order to attain a given objective and when it becomes no longer possible to attain that objective with which the partnership was started a case is made out for dissolution which may be the only remedy under the circumstances. therefore, if it appears that the partnership business can only be carried on at a loss, the attainment of common objective with a view to which the partnership was entered into; has become impossible. thus in such case the court may dissolve the firm. in *handyside verses campbell* (1990), it was observed that before dissolution would be ordered on this ground, and where there are special circumstances to which the loss could be attributed and where the loss could not be traced to any inherent defect in the business itself, the court would not infer impossibility of profit. the loss in that case could not be attributed to any inherent defect in the business but was due only to mismanagement. the court refused to grant dissolution.

the court may order dissolution when there is complete deadlock or when the substratum of the firm has gone. it is stated in lindley on partnership, 14th d. page 628, that "the court ought not to fetter itself by any rigid rules; and any case in which it is no longer reasonably practicable to attain the object with a view to which partnership was entered into or to carry out the partnership contract according to its terms will it is apprehended, be within this (sub)-section." (the word in the bracket added.)

Consequences of dissolution

Liability for acts done after dissolution section 45 provides:

"(1) Notwithstanding 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, until public notice is given of the dissolution:

provided that 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 sub-section(1) may be given by any partner."

the above provision is similar to that of section 32 (3) in respect of a retiring partner and section 33 (2) in respect of an expelled partner. these provisions provide that a public notice must be given before a partner could terminate his further liability whether it is a case of dissolution, retirement or expulsion. section 45 requires that a public notice of the fact of dissolution should be given. in the case of a dissolution of a firm or retirement of one of its partners, the agency between the partners would cease from the time of such dissolution or retirement, but as regards third persons the agency would continue until a public notice of dissolution or retirement is given. the notice may be given by any partner. but in case of death or insolvency of a partner and in the case of a dormant partner public notice of dissolution may not be given. according to section 72 public notice means a notice to the registrar, in case of registered firm, and notice in the local official gazette and in one vernacular newspaper circulating in the district where the firm's place or principal place of business is situated.

UNIT-III THE SALES OF GOODS ACT, 1940

A. Definitions, Distinction between Sale and Agreement to Sale

Sale of Goods Act is one of very old mercantile law. Sale of Goods is one of the special types of Contract. Initially, this was part of Indian Contract Act. Later these sections in Contract Act were deleted, and separate Sale of Goods Act was passed in 1930.

Sec 4. Sale and agreement to sell.-

(1) A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price. There may be a contract of sale between one part-owner and another.

(2)A contract of sale may be absolute or conditional

(3) Where under a contract of sale the property in the goods in transferred from the seller to the buyer, the contract is called a sale, but where the transfer of the property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled, the contract is called an agreement to sell.

(4)An agreement to sell becomes a sale when the time elapses or the conditions are fulfilled subject to which the property in the goods is to be transferred.

Hire Purchase – Pledge – Mortgage –Hypothecation Lease

Hire Purchase

In cases where a buyer cannot afford to pay the asked price for an item of property as a lump sum but can afford to pay a percentage as a deposit, a hire-purchase contract allows the buyer to hire the goods for a monthly rent. When a sum equal to the original full price plus interest has been paid in equal installments, the buyer may then exercise an option to buy the goods at a predetermined price (usually a nominal sum) or return the goods to the owner.

Pledge

It is an oath .The act of deposition of one's personal property to obtain personal loan of money. Such a property is called collateral property and if the loan amount is not paid within the due date the property will be lost to repay the loan.

Mortgage

A mortgage is the pledging of a property to a lender as a security for a mortgage loan. While a mortgage in itself is not a debt, it is evidence of a debt. It is a transfer of an interest in land, from the owner to the mortgage lender, on the condition that this interest will be returned to the owner of the real estate when the terms of the mortgage have been satisfied or performed. In other words, the mortgage is a security for the loan that the lender makes to the borrower.

Hypothecation Lease

This term is used principally in the civil law; it is defined to be a right which a creditor has over a thing belonging to another, and which consists in the power to cause it to be sold, in order to be paid his claim out of the proceeds.

Sec 5 How Contract of sale is made -

A contract of sale is made by an offer to buy or sell goods for a price and the acceptance of such offer. The contract may provide for the immediate delivery of the goods or immediate payment of the price or both, or for the delivery or payment by installments, or that the delivery or payment or both shall be postponed. [section 5(1)].

Subject to the provisions of any law for the time being in force, a contract of sale may be made in writing or by word of mouth, or partly in writing and partly by word of mouth or may be implied from the conduct of the parties. [section 5(2)].

Thus, credit sale is also a 'sale'. - - A verbal contract or contract by conduct of parties is valid. e.g. putting goods in basket in super market or taking food in a hotel.

Subject matter of contract of sale of goods

The subject matter of this act is basically goods. Classification of goods is as follows--

I Existing goods

Specific goods,

Ascertained goods,

Unascertained goods or generic goods

II Future goods

III Contingent goods

Explanation

Sec 6. Existing or future goods.- (1) The goods which form the subject of a contract of sale may be either existing goods, owned or possessed by the seller, or future goods.

(2)There may be a contract for the sale of goods the acquisition of which by the seller depends upon a contingency which may or may not happen.

(3)Where by a contract of sale the seller purports to effect a present sale of future goods, the contract operates as an agreement to sell the goods.

Effect of Destruction of Goods

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

Barrow, Lane & Ballard Ltd v . Philips & co

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

Howell v . Coupland

Price

Price - "Price" means the money consideration for a sale of goods. [section 2(10)]. Consideration is required for any contract. However, in case of contract of sale of goods, the consideration should be 'price' i.e. money consideration.

Sec9. Ascertainment of price.- (1) The price in a contract of sale may be fixed by the contract or may be left to be fixed in manner thereby agreed or may be determined by the course of dealing between the parties.

(2)Where the price is not determined in accordance with the foregoing provisions, the buyer shall pay the seller a reasonable price. What is a reasonable price is a question of fact dependent on the circumstances of each particular case.

Sec10. Agreement to sell at valuation.- (1) Where there is an agreement to sell goods on the terms that the price is to be fixed by the valuation of a third party and such third party cannot or does not make such valuation, the agreement is thereby avoided. Provided that, if the goods or any part thereof have been delivered to, and appropriated by, the buyer, he shall pay a reasonable price therefor.

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

Sec11. Stipulations as to time.- Unless a different intention appears from the terms of the contract, stipulations as to time of payment are not deemed to be of the essence of a contract of sale. Whether any other stipulations as to time is of the essence of the contract or not depends on the terms of the contract.

B. Conditions and Warranties

There are certain stipulations which are essential for main purpose of the contract of sale of goods. These go the root of contract and non-fulfillment will mean loss of foundation of contract. These are termed as 'conditions'.

Other stipulations, which are not essential are termed as 'warranty'. These are collateral to contract of sale of goods. Contract cannot be avoided for breach of warranty, but aggrieved party can claim damages. - - A breach of condition can be treated as breach of warranty, but vice versa is not permissible.

A stipulation in a contract of sale with reference to goods which are the subject thereof may be a condition or a warranty. [section 12(1)].

A condition is a stipulation essential to the main purpose of the contract, the breach of which gives rise to a right to treat the contract as repudiated. [section 12(2)](Where a particular stipulation in contract is a condition or warranty depends on the interpretation of terms of contract. Mere stating 'Conditions of Contract' in agreement does not mean all stipulations mentioned are 'conditions' within meaning of section 12(2))

A warranty is a stipulation collateral to the main purpose of the contract, the breach of which gives rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated. [section 12(3)].

Whether a stipulation in a contract of sale is a condition or a warranty depends in each case on the construction of the con¬tract. A stipulation may be a condition, though called a warranty in the contract. [section 12(4)].

When condition to be treated as warranty -

VOLUNTARY WAIVER OF CONDITION

Where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may waive the condition or elect to treat the breach of the condition as a breach of warran¬ty and not as a ground for treating the contract as repudiated. [section 13(1)].

ACCEPTANCE OF GOODS BY BUYER

Where a contract of sale is not severable and the buyer has accepted the goods or part thereof, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty and not as a ground for rejecting the goods and treating the contract as repudiated, unless there is a term of the con¬tract, express or implied, to that effect. [section 13(2)].

Nothing in this section shall affect the case of any condition or warranty fulfillment of which is excused by law by reason of impossibility or otherwise. [section 13(3)].

C. Passing of Property

Doctrine of caveat emptor

The principle termed as 'caveat emptor' means 'buyer be aware'. Generally, buyer is expected to be careful while purchasing the goods and seller is not liable for any defects in goods sold by him. This principle in basic form is embodied in section 16 that subject to provisions of Sale of Goods Act and any other law, there is no implied condition or warranty as to quality or fitness of goods for any particular purpose. As per section 2(12), "Quality of goods" includes their state or condition.

Exceptions

1. False representation by seller

2. Seller actively conceals a defect

3. Buyer relying upon the skill of the seller Priest v. Last , Bombay Burma Trading Corp.Ltd Aga Muhammed

4. Goods bought by description

Legal ownership

Transfer of general property is required in a sale. 'Property' means legal ownership. It is necessary to decide whether property in goods has transferred to buyer to determine rights and liabilities of buyer and seller. Generally, risk accompanies property in goods i.e. when property in goods passes, risk also passes.

Risk follows ownership

-Action against third party

-Insolvency of seller / buyer

-Suit for price

Transfer of property or ownership sec18-26

Where there is a contract for the sale of unascertained goods, no property in the goods is transferred to the buyer unless and until the goods are ascertained. [section 18].

Property passes when intended to pass - Where there is a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred. For the purpose of ascertaining the intention of the parties regard shall be had to the terms of the contract, the conduct of the parties and the circumstances of the case. (section 19)

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

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

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

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

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

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

(a) when he signifies his approval or acceptance to the seller to does not other act adopting the transaction.

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

NOTE : The property in goods will never pass to anybody if the seller reserves the right of disposal

Reservation of right of disposal.-sec 25

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

(2) Where goods are shipped or delivered to a railway administration for carriage by railway and by the bill of landing or railway receipt, as the case may be, the goods are deliverable to the order of the seller or his agent, the seller is prima facie deemed to reserve the right of disposal.

Sale by non-owners (sec 27-30)

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

Exceptions

1.Mercantile agent

2.Sale by co-owners

3.Sale by person under voidable contract

4.Buyer in possession after sale

5.Estoppels

6.Sale by unpaid seller

7.Sale by person under other laws

Auction sale -

Auction sale is special mode of sale. The sale is made in open after making public announcement. Buyers assemble and make offers on the spot. Person offering to pay highest price gets the goods. Usually, auctioneer is appointed to conduct auction. Higher and higher bids are offered and sale is complete when auctioneer accepts a bid.

D. Unpaid seller

sec45. "Unpaid seller" defined.-

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

(a) When the whole of the price has not been paid or tendered.

(b) When a bill of exchange or other negotiable instrument has been received as conditional payment, and the conditions on which it was received has not been fulfilled by reason of the dishonour of the instrument or otherwise.

(2)The term "seller" includes any person who is in the position of a seller, as, for instance, an agent of the seller to whom the bill of lading has been endorsed, or a consignor or agent who has himself paid, or is directly responsible for, the price.

Unpaid seller's rights.-

I . Right against goods - (these rights can be practiced by the seller till he has the possession of the goods or till buyer has`nt received the goods)

Subject to the provisions of this Act and of any law for the for the time being in force,

- (a) a lien on the goods for the period while he is in possession of them,

• The unpaid seller of goods who is in possession of them is entitled to retain possession of them until payment or tender of the price in the following cases, namely :-

where the goods have been sold without any stipulations as to credit.

• where the goods have been sold on credit, but the term of credit has expired.

• where the buyer becomes insolvent.

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

Termination of lien.-

The unpaid seller of goods losses his lien thereon -

• when he delivers the goods to a carrier or other bailee for the purpose of transmission to the buyer without reserving the right of disposal of the goods.

• when the buyer or his agent lawfully obtains possession of the goods,

• by waiver thereof.

- (b) Right of stopping the goods in transit after he has parted with the possession of them.

The unpaid seller who has parted with the possession of the goods has the right of stopping them in transit, that is to say, he may resume possession of the goods as long as they are in the course of transit, and may retain them until payment or tender of the price.

conditions

• seller has parted with the possession of the goods

- the buyer of goods becomes insolvent

- (c) a right of re-sale as limited by this Act.

The seller can practice this right under following conitions

- where goods are of perishable nature
- where the seller has reserved the right of re-sale in the contract
- where the seller gives notice to the buyer via court order

-(d) right to withhold delivery

This right is co-extensive of right of lien and is practiced between right of lien and right of stopping the goods in transit

II . Right against the buyer(these rights can be practiced by the seller if he has parted with the possession of the goods or buyer has received the goods)

(a)-suit for price

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

(2) Where under a contract of sale the price is payable on a day certain irrespective of delivery and the buyer wrongfully neglects or refuses to pay such price, the seller may sue him for the price although the property in the goods has not passed and the goods have not been appropriated to the contract.

(b)-suit for damages

The right of the seller is to recover interest or special damages if any, or to recover the money paid where the consideration for the payment of it has failed with the help of law.

Unit-IV: The Negotiable Instrument Act, 1881

A. DEFINITION AND 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 exclude the possibility of adding any other instrument which satisfies the following two conditions of negotiability:

1. the instrument should be freely transferable (by delivery or by endorsement. and delivery) by the custom of the trade; and
2. the person who obtains it in good faith and for value should get it free from all defects, and be entitled to recover the money of the instrument in his own name.

As such, documents like share warrants payable to bearer, debentures payable to bearer and dividend warrants are negotiable instruments. But the money orders and postal orders, deposit receipts, share certificates, bill of lading, dock warrant, etc. are not negotiable instruments. Although they are transferable by delivery and endorsements, yet they are not able to give better title to the bonafide transferee for value than what the transferor has.

CHARACTERISTICS OF A NEGOTIABLE INSTRUMENT

A negotiable instrument has the following characteristics:

1. Property: The prossessor of the negotiable instrument is presumed 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 byany 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.

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 elementsinstrument 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 havebeen 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.A 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.

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.

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 areusually 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 thedrawer 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 apromissory 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 noticeof 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.

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.

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 hereon 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 recognised by the Negotiable Instrument Act.

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 such endorser 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 the indorsee 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 maywrite '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).

B. HOLDER OF NEGAOTIABLE INSTRUMENT

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 comes into 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 thefinder, 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 is dishonoured 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,
(2) signing the name of a fictitious person with the intention that it may pass that of a real person, or
(3) signing one's own name with the intention that the signature may pass as the signature of some other person of the same name.

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.

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 thenegotiable instrument after knowing about any defect in the title to the instrument. But, notice of defect in the title received subsequent to theacquisition 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 the part 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.

Privileges of a holder in due course

1. **Instrument purged of all defects:** A holder in due coursewho 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 whomhe has received it, but also serves, as a channel to protect all subsequent holders. 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.

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.

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 signatureof 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 isnegotiated to a holder in due course, a valid delivery of it is conclusively presumed and he acquired good title to it. (Sec. 46).

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 previousendorsements 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.

C. MATERIAL ALTERATION OF CROSSING OF CHEQUES:

Section 87 of the act provides that any material alteration of a negotiable instrument renders the same void as against anyone who is a party thereto at the time of making such alteration and does not consent thereto, unless it was made in order to carry out the common intention of the original parties;

Alteration by endorsee:- And any such alteration, if made by an endorsee, discharges his endorser from all liability to him in respect of the consideration thereof.

The provisions of this section are subject to those of sections 20, 49, 86 and 125.

88. Acceptor or endorser bound notwithstanding previous alteration.-

An acceptor or endorser of a negotiable instrument is bound by the acceptance or endorsement notwithstanding any previous alteration of the instrument.

89. Payment of instrument on which alteration is not apparent

1[(1)] Where a promissory note, bill of exchange or cheque has been materially altered but does not appear to have been so altered, or where a cheque is presented for payment which does not at the time of presentation appear to be crossed or to have had a crossing which has been obliterated, payment thereof by a person or banker liable to pay an paying the same according to the apparent tenor thereof at the time of payment and otherwise in due course, shall discharge such person or banker liable to pay and paying the same according to the apparent tenor thereof at the time of payment and otherwise in due course, shall discharge such a person or banker from all liability thereon, and such payment shall not be questioned by reasons of the instrument having been altered, or the cheque crossed.

2[(2) Where the cheque is an electronic image of a truncated cheque, any difference in apparent tenor of such electronic image and the truncated cheque shall be a material alteration and it shall be the duty of the bank or the clearing house, as the case may be, to ensure the exactness of the apparent tenor of electronic image of the truncated cheque while truncating and transmitting the image.

(3) Any bank or a clearing house which receives a transmitted electronic image of a truncated cheque, shall verify from the party who transmitted the image to it, that the image so transmitted to it and received by it, is exactly the same.

90. Extinguishments of rights of action on bill in acceptor's hands.-

If a bill of exchange which has been negotiated is, at or after maturity, held by the acceptor in his own right, all rights of action thereon are extinguished.

D. 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 nonacceptance or by non-payment. A cheque and a promissory note can only be dishonoured by non-payment but a bill of exchange can be dishohoured 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 thefollowing 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 istreated as dishonoured.
4. When a bill is accepted with a qualified acceptance, theholder may treat the bill of exchange having beendishonoured.
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 bynon-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 theinstrument (Section 93). The agent of any such party may also be givennotice 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 dishonoured and 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).

Text Books:

1. Pollock & Mulla, *Indian Contract and Specific Relief Act*, Lexis Nexis, 2013(14th Edn)
2. Avtar Singh, *Law of Partnership*, Eastern Book Company, 2012 (4th Edn)
3. Avtar Singh, *Law of Contract and Specific Relief*, Eastern Book Company, 2013 (11th Edn)