

Law of Contract – II

Paper Code: 102

Objective: This paper is to impart knowledge various special contract, law of agency and partnership and specific reliefs.

Unit – I: Indemnity and Guarantee/Bailment and Pledge

- a. Meaning, Distinction between Indemnity and Guarantee
- b. Right / Duties of Indemnifier, Indemnified and Surety
- c. Discharge of Surety
- d. Kinds of Guarantee
- e. Bailment and Pledge
 - _ Meaning and Distinction
 - _ Rights and Duties of Bailor/Bailee, Pawnor/Pawnee
 - _ Lien
 - _ Termination of Bailment

Unit – II: Agency (Lectures – 10)

- a. Definitions of Agent and Principal
- b. Essentials of relationship of agency
- c. Creation of agency: by agreement, ratification and law.
- d. Relation of principal / agent, subagent and substituted agent
- e. Termination of agency

Unit – III: Specific Relief Act, 1963 (Lectures – 08)

- a. Recovery of property
- b. Specific performance of contracts
- c. Injunctions – Temporary and Perpetual, Mandatory

Unit – IV: The Indian Partnership Act, 1932 (Lectures– 10)

- a. Nature of partnership firm
- b. Relations of partners to one another and outsiders
 - i. Rights /Duties of partners inter se
 - ii. Partnership Property
 - iii. Relations of Partners to third parties
 - iv. Liability for holding out
 - v. Minor as a partner
- c. Incoming and outgoing partners
- d. Dissolution
 - i By consent,
 - ii By agreement,
 - iii compulsory dissolution,
 - iv contingent dissolution,
 - v By notice,
 - vi By Court.
 - vii Consequences of dissolution
 - viii Registration of firms and effects of non-registration

UNIT 1

- Meaning and distinction between Indemnity and Guarantee
- Right/duties of Indemnifier, Indemnified and Surety.
- Discharge of surety
- Kinds of Guarantee
- Bailment and Pledge

A) MEANING AND DISTINCTION BETWEEN INDEMNITY AND GARUNTEE

The **Contracts of Indemnity** has been defined as: "A Contract whereby one party promises to save the other from loss caused to him by the conduct of the promisor himself or by the conduct of any other person is called a **contract of indemnity**."

Indemnity, in simple words, is protection against future loss.

The person who promises to save the other is called the **Indemnitor** or **Indemnifier** and the person who is compensated is the **Indemnatee**, **Indemnified** or the **indemnity-holder**. An indemnity can be defined as a sum paid by A to B by way of compensation for a particular loss suffered by B. A, the indemnitor may or may not be responsible for the loss suffered by the B, the indemnatee. Forms of indemnity include cash payments, repairs, replacement, and reinstatement.

Contract of Indemnity should all satisfy the conditions of a valid contract.

eg: All Contracts of Insurance are Contracts of Indemnity except life insurance

Section 124 of Indian contract act says:

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

Illustration

A contracts to indemnify B against the consequences of any proceedings which C may take against B in respect of a certain sum of 200 rupees. This is a contract of indemnity.

GARUNTEE:

A Contract to perform the promise, or discharge the liability, of a third person in case of his default is called **Contract of Guarantee**. A guarantee may be either oral or written.

- The person who gives the guarantee is called the **Surety**
- The person on whose default the guarantee is given is called the **Principal Debtor**
- The person to whom the guarantee is given is called the **Creditor**

Under Section 126, of the Act, a contract of guarantee is defined as, "a contract to perform the promise, or discharge the liability of a third person in case of his default."

This type of contract is formed mainly to facilitate borrowing and lending money.

The three parties involved in this type of contract are:

- Surety**: is the person by whom the guarantee is given
- Principal Debtor**: is the person from whom the assurance is given.
- Creditor**: is the person to whom the guarantee is given.

MEMORABLE POINTS:

- There are three parties in every Contract of Guarantee
- The liability arises right from the beginning. The surety becomes liable when the principle debtor commits default in meeting the liability.
- Surety has the right to sue the third party (Principle Debtor) directly. The Law puts him in the position of Creditor. Where as in Contracts of Indemnity, the Indemnifier cannot sue the third party in his name. He has to sue in the name of the Indemnity-holder or after obtaining the rights from him.
- Anything done, or any promise made, for the benefit of the principal debtor, may
- be a sufficient consideration to the surety for giving the guarantee. The guarantor need not personally derive any benefit from the guarantee.
- The liability of the surety is co-extensive with that of the principal debtor, unless it is otherwise provided by the contract.
- The creditor can straightway proceed against the guarantor without first proceeding against the principal debtor.
- The liability of the surety can never be greater than that of the principal debtor. The surety can however may restrict his liability to part of the Principal debtor's liability by contract.
- Surety's liability is distinct and separate

Differences between Contract of Indemnity and Guarantee

Indemnity
Section 124 of Indian Contract Act: a contract by which one party promises to save others from loss caused to

him by the conduct of the promisor himself, or by the conduct of **any other person**

Guarantee
Section 126 of Indian Contract Act: a contract to perform the promise, or discharge the liability of a third person in case of his default.

Two parties (Indemnifier and Indemnified) Three parties (Principal Debtor, Creditor, Surety)

To provide compensation for loss To give assurance to the creditor in lieu for his money

Indemnifier is the sole person liable Liability shared between Principal Debtor (primary liability) and Surety (secondary liability)

Liability arises only on occurrence of a loss Fixed legal liability

B) RIGHTS AND DUTIES OF INDEMNIFIER, INDEMNIFIED, SURETY

i) RIGHTS OF THE INDEMNIFIER -

The rights of the indemnifier have not been mentioned expressly anywhere in the Act. In *JASWANT SINGH vs. SECTION OF STATE* 14 BOM 299, it was decided that the rights of the indemnifier are similar to the rights of a surety under Section 141 where he becomes entitled to the benefit of all securities that the creditor has against the principal debtor whether he was aware of them or not.

Where a person agrees to indemnify, he will, upon such indemnification, be entitled to succeed to all the ways and means by which the person originally indemnified might have protected himself against loss or set up his compensation for the loss.

The principle of subrogation i.e., substitution is founded in equitable principles.

Once the indemnifier pays for the loss or damage caused, he will step into the

shoes of the indemnified. Thus, he will have all the rights with which the original indemnifier protected himself against loss or damage. The principle of subrogation is applicable due to the ICA and principles of equity.

Insurance - Under Section 126, of the ICA, a contract of guarantee is defined as, “a contract to perform the promise, or discharge the liability of a third person in case of his default.” This type of contract is formed mainly to facilitate borrowing and lending money.

The three parties involved in this type of contract are:

- Surety: is the person by whom the guarantee is given
- Principal Debtor: is the person from whom the assurance is given.
- Creditor: is the person to whom the guarantee is given.

C) RIGHTS OF THE INDEMNITY-HOLDER

D) Section 125 of the Contract Act lays down that the indemnity-holder is entitled to get from the indemnifier :

E) all damages which he may be compelled to pay in any suit in respect of any matter to which the promise to indemnify applies ;

F) all costs which he may be compelled to pay in such suits (provided he acted prudently or with the authority of the indemnifier) ;

G) all sums which he may have paid upon compromise of such suit (provided the compromise was prudent or was authorized by the indemnifier).

H) Comments :

I) It has been held that the rights of the Indemnity holder, under Section 125, are not exhaustive. The indemnity holder may be entitled to other equitable reliefs also.

J) Bombay and Nagpur High Courts have held the indemnifier will be liable only after the actual loss was incurred. But according to the High Courts of Calcutta, Madras and Allahabad, the indemnity-holder can compel payment from the indemnifier even before he (the indemnity-holder) has met his liability. Osman Jamal & Sons v. Gopal

ii) RIGHTS OF SURETY:

Surety's right to benefit of creditor's securities

A surety is entitled to the benefit of every security which the creditor has against the principal debtor at the time when the contract of suretyship entered

into, whether the surety knows of the existence of such security or not; and if the creditor loses, or without the consent of the existence of such security or not; and if the creditor loses, or without the consent of the surety, parts with such security, the surety is discharged to the extent of the value of the security.

Illustrations

(a) C advances to B, his tenant, 2,000 rupees on the guarantee of A. C has also further security for the 2,000 rupees by a mortgage of B's furniture. C, cancels the mortgaged. B becomes insolvent and C sues A on his guarantee. A is discharged from liability to the amount of the value of the furniture.

(b) C, a creditor, whose advance to B's is secured by a decree, receives also a guarantee for that advance from A. C afterwards takes B's goods in execution

under the decree, and then, without the knowledge of A, withdraws the execution. A is discharged.

(c) A, as surety for B, makes a bond jointly with B to C, to secure a loan from C to B. Afterwards, C obtains from B a further security for the same debt. Subsequently, C gives up the further security. A is not discharged.

c) DISCHARGE OF SURETY:

By variance in terms of contract: any change made without the guarantor's concern to the terms of contract between the debtor and the lender discharges the surety from his obligations.

b. By release or discharge of principal debtor: The surety is discharged when the principal debtor is discharged from his obligation to the lender.

c. When creditor compounds with, gives to, or agrees not to sue, principal debtor: A contract between the creditor and the principal debtor by which creditor makes a composition with or promises to give time to, or not to sue the principal debtor, discharges the surety, unless the surety assents to such contract.

d. By creditor's act or omission impairing surety's eventual remedy: if the creditor does any act which is inconsistent with the rights of surety, or omits to do, and the eventual remedy of the surety himself against the principal debtor is thereby impaired, the surety is discharged.

Bank Guarantee: a bank guarantee is a contract between the beneficiary and the bank. A bank guarantee is payable on demand made by the beneficiary. The bank is however, not compelled to pay if the guarantee is vitiated by fraud.

Performance guarantee: this type of guarantee is given for the benefit of the person who suffers a loss due to non performance of an obligation. A performance guarantee is given by a bank. It is paid in case of default on non performance of his obligation by the person, on whose behalf guarantee is given by the bank.

Stamp duty is payable on the guarantee under Article 5 (c) of Schedule 1 of the Indian Stamp Act. However, the stamp duty is different in different States.

No registration of any guarantee is required.

d) THERE ARE SEVERAL TYPES OF GUARANTEES:

- Personal Guarantee: this is a guarantee when an individual agrees to be responsible for completing the obligations of a principal debtor to the lender, in the event that the principal debtor fails to fulfill his obligation under the contract.
- Corporate Guarantee: this guarantee is given by a corporate that agrees to be responsible for completing obligations of a principal debtor to a lender, in the event that the principal debtor fails to fulfill his obligation under the contract.
- Continuing Guarantee: this guarantee which extends to a series of transactions is called a continuing guarantee. In this type of Guarantee, the guarantor assumes liability for future obligations by a principal debtor to the lender.
- Non continuing guarantee: in this type of guarantee, a guarantor assumes

responsibility for the past and present obligation of the principal debtor. The obligations ceases once the liability has been satisfied.

• Limited Guarantee: in this type of guarantee, the guarantor is only responsible for orpre determined portion of the principal debtor's liability to the lender.

Under the Indian Contract Act, the liability of a guarantor or surety is co extensive with that of principal debtor. A creditor can enforce his right against the surety even without exhausting his remedy against the principal debtor. A guarantor is not liable beyond the terms of guarantee and its enforceability depends on the terms of the contract.

B. BAILMENT AND PLEDGE UNDER INDIAN CONTRACT ACT-1872

Bailment and pledge are special class of contract. Chapter IX (Section 148 to 181) of the Indian Contract Act, 1872 deals with the contract of bailment and pledge.

The word bailment is derived from the French word "baillier" the meaning of which is "to deliver". It implies any kind of handing over. According to Section 148, bailment is the delivery of goods by one person to another for some purpose, upon a contract that they shall when the purpose is accomplished, be returned or otherwise disposed of according to the directions of the person delivering them. There are two parties in the contract of bailment. They are bailor and bailee. The bailor is the person who delivers the goods and bailee is the person to whom they are delivered.

Examples:

1. M delivers a piece of cloth to N, a tailor to be stitched into a suit. There is a contract of bailment between M and N.
2. X lends two books to Y to be returned after the examination. It is a contract of bailment between X and Y.

Essential elements of bailment:

Following are the essential elements of bailment-

- 1) Contract- A bailment is usually created by an agreement between a bailor and a bailee except finder of goods.
- 2) Delivery of Possession- The contract of bailment necessarily involves a delivery of possession of goods by bailor to bailee. It requires temporary delivery of goods. Mere custody of goods without possession cannot make a bailment e.g. a domestic servant uses goods of his owner is not a bailment.
- 3) Return of goods- In bailment, the goods should be returned as soon as the purpose is fulfilled. It must be returned as per the direction of bailor.
- 4) No transfer of ownership- Incase of bailment ownership is not transferred. The bailor

will be the actual owner of the goods bailment.

Duties and rights of bailor and bailee:

Duties of bailor:

Following are the duties of the bailor:

- i. To disclose all known faults in the goods as per Section 150.
- ii. It is duty of the bailor for those faults, which are unknown to him, where goods are bailed on hire as per Section 150.
- iii. The bailor is to bear the extraordinary expenditure of bailment as per Section 158.

iv. The bailor is responsible to bear such types of loss, which arised due to his defective goods as per Section 164.

v. The bailor is to receive back the goods whenever it is returned by the bailee as per Section 165.

Duties of bailee-

Following are the duties of baileei.

It is the duty of the bailee to take reasonable care of the goods as per Section 151 to152.

ii. The bailee is to act in consistent with the terms of bailment and follow these strictly as per Section 153.

iii. The bailee is to use the goods of bailment according to terms and conditions of bailment as per Section 154.

iv. It is a duty of bailee not to mix his own goods with the goods of bailment as per Section 155 to157.

v. The bailee is to return the goods of bailment as soon as expiry of the specific period of time as per Section 160 to161.

vi. The bailee is to deliver the profit to the bailor, if any such profit is acquired from the goods of bailment as per Section 163.

vii. It is a duty to the bailor to hold the goods on behalf of the bailor as per Section

Rights of bailee-

Following are the rights of baileei.

Right of compensation for defective goods as per Section 150.

ii. Right to claim for necessary extraordinary expenditure as per Section 158.

iii. Right in case of gratuitous bailment as per Section 158.

iv. Right to claim for compensation or loss because of the defective enrollment of the bailor as per Section 164.

v. Right to delivery of goods to any of the joint bailors as per Section 165.

vi. Right to delivery of good to bailor without title as per Section 166.

vii. Right to ask the court to decide the ownership of the goods of bailment, if the third party claims the ownership of the good as per Section 167.

viii. Right to bring an action against third party, if a third party wrongfully deprives the bailee as per Section 180.

ix. Right of particular lien over the goods until his expenditure is paid as per Section 171.

Rights of bailor –

Following are the rights of bailori.

Right of compensation for loss caused by lack of reasonable care by the bailee as per Section 152.

ii. Right to terminate bailment for consistent use of goods by bailee as per Section 153.

iii. Right to claim damages in case of unauthorized use of goods bailed as per Section 154.

iv. Right against mixture of goods bailed as per Section 155.

v. Right to terminate the contract and take back the goods in case of gratuitous bailment as per Section 159.

vi. Right to get the goods returned as per Section 160.

- vii. Right of compensation for non- return of goods as per Section 161.
- viii. Right to get accretion to the goods as per Section 163.

ix. Right to enforce by suit all the liabilities of the bailee as his rights.

Contracts of pledge:

Pledge can be defined as a special kind of bailment. Pledge is a transfer of goods as a security for the payment of a debt or for the performance of a promise. According to Section 172 of the Indian Contract Act, 1872, pledge is the bailment of goods as security for the payment of a debt or performance of a promise. In case of the contract of pledge the bailor is called pledger or pawner and the bailee is called pledgee or pawnee. The contract of pledge can be only of movable properties. Transfer of goods in pledge can be either actual or constructive. The pledger should have judicial right on the goods pledged. Example: X borrows a loan of Rs. 1, 00,000 from Y and X give his car as security. It is a valid pledge. In this case X is "pledger" and Y is the "pledgee".

Duties and rights of Pawner and Pawnee:

Like bailor and bailee, the pawner and pawnee have some duties as well as rights, which are discussed as follows:

Duties of pawner:

1. To repay the debt or to make performance in time.
2. To inform the pawnee about any default or risk of goods if any.
3. To repay the expenditure incurred by the pawnee on the goods pledged.

Duties of pawnee:

1. To take reasonable care of the goods.
2. To act as per the terms and conditions of the pledge.
3. To avoid unauthorized use of the goods bailed.
4. Pawnee should not mix the goods pledged with his own goods.
5. To return the goods to the pawner as soon as receiving the payment of debt.
6. It is a duty of pawnee to use the particular lien for the refund of the interest on debt.

7. To return the profit if any accrued from the goods pledged to the pawner.
8. It is a duty of pawnee not to conceal anything regarding decay, destruction or deterioration.

Right of the pawner:

1. Right to withdraw the goods pledged as per Section 177.
2. Right to take back the goods pledged on payment of his debt.
3. Right to get the surplus in case of sale.

Right to pawnee:

1. Right to retain goods for payment of the debt and for the performance of the promise as per Section 173.
2. Right to retain goods for any subsequent advances as per Section 174.
3. Right to receive any extraordinary expenses from the pawner as per Section 175.
4. Right against the true owner if the pawner's title to the goods is defective as per Section 178A.
5. Pawnee can exercise his right in case of default by Pawner as per Section 176.
6. Right to redeem the debt in the manner and time at his choice as per Section 177.

UNIT-II

AGENCY

INTRODUCTION TO CONTRACT OF AGENCY (Sec.182)

Meaning of 'agent'

An 'agent' is a person employed to –

Do any act for another; or

Represent another in dealings with third persons.

Meaning of 'principal'

'Principal' is the person –

For whom an act is done by the agent; or

Who is represented by the agent in respect of dealing with third persons.

Test of agency

Where a person has the capacity to –

Create contractual relations between the principal and a third party;

Bind the principal by his own acts, there exists a relationship of agency.

CREATION OF AGENCY

By operation by express by implied agreement by Ratification of acts of Law Agreement

(a) Estoppel,

(b) Holding Out,

(c) Necessity

SALIENT FEATURES OF AGENCY (Sec. 183, 184, 185 and 226)

Principal is liable for the acts of agent

The principal is liable for all the acts of an agent which are lawful and within the scope of agent's authority.

The contracts entered into by the agent on behalf of the principal have the same legal consequences as if these contracts were made by the principal himself.

Who may employ an agent?

Any person may employ an agent if –

He is of the age of majority; and

He is of sound mind.

Who can be an agent?

Any person may become an agent.

Even a minor or a person of unsound mind can become an agent

Liability of agent

Generally an agent is liable to the principal

An agent is not liable to the principal if he is a minor or is of unsound mind.

Requirement of consideration

No consideration is necessary for creating an agency.

MODES OF CREATION OF AGENCY (Sec.187, 189, 196, 214 and 237)

Express agreement

A person may employ another person as his agent by entering into an express agreement with him.

The agreement may be either oral or written.

Implied agreement

Agency by estoppel

If –

a person makes a representation (by his words or conduct) to a third person that a

certain person is his agent; and

the third party believing such representation to be true, enters into a contract with the pretended agent.

Then –

the person making the representation is prevented from denying the truth of agency. He may be held liable as a principal by such third party.

Agency of holding out

Such an agency comes into existence when a person by his affirmative or positive conduct leads third persons to believe that person doing some act on his behalf is doing with authority.

Agency by necessity – Conditions

- (i) There was an actual and definite necessity for acting on behalf of the principal.
- (ii) The agent was not in a position to communicate with the principal.
- (iii) The act was done for the purpose of protecting the interest of his principal.
- (iv) The agent has exercised such reasonable care as a man of ordinary prudence would have exercised in his own case.
- (v) The act was done bonafide.

Agency by operation of law

Agency by operation of law arises where the law treats one person as an agent of another.

Agency by ratification

Meaning

If –

a person (viz., pretended agent) acts on behalf of another person (viz, the principal)

the pretended agent acts without the knowledge or consent of the principal; and

Afterwards, the principal accepts such act.

Then –

Agency by ratification comes into existence.

Effects of ratification

The principal is bound by the acts ratified by him as if such acts had been performed by his authority.

Ratification relates back to the actual date of the act that is ratified and not from the date when the act ratified.

ESSENTIALS OF A VALID RATIFICATION (Sec. 197 to 200)

Full knowledge

No valid ratification can be made by a person whose knowledge of the facts of the case is materially defective. In other words, the principal must have full knowledge of all the material facts.

Whole transaction

It must be done for whole transaction in fact; ratification of the part of a transaction operates as a ratification of the whole transaction.

Act on behalf of another person

The acts done by a person (i.e. pretended agent) on behalf of another person (i.e. pretended principal) can only be ratified.

By the principal

Ratification can be made by only such person for whom the act was done.

Existence of principal

The principal must be in existence at the time when the act was done in his name

Contractual capacity

The principal must have contractual capacity both at the time of entering into the contract and at the time of ratification.

Lawful acts.

Only those acts which are lawful can be ratified. Void, illegal, or ultra vires acts cannot be ratified.

Acts within principal's power

Ratification can be made only for such acts which principal had the power to do.

Communication

Ratification must be communicated to the third party so as to bind him

Within reasonable time

Ratification must be made within reasonable time of the act purported to be ratified.

UNIT-III

SPECIFIC RELIEF ACT, 1963

The **Specific Relief Act, 1963** is an Indian legislation enacted by the Parliament of India which takes care of a large number of remedial aspects of law. It came in the replacement of the earlier Act of 1877. Protection of life and property cannot be assured by a simple declaration of rights and duties. The enumeration of rights and duties must be supplemented by legal devices which help the individual to enforce his rights. Social redress must be provided to every person who is injured in the social process. Basically, the mission of the Specific Act is to assure that whenever there is a wrong there must be a remedy.

Remedies are generally provided by the branch of substantive law which defines its rights

and duties for its own purposes. The law of contract provides the remedy of damages for breach of contract. Similarly the law of tort provides for recovery in cases of tortuous wrongs. However, substantive laws can never afford to be exhaustive in terms of their remedies and reliefs. Scope of the Act remains specific to provide a network of relief. The Act does not confer any Rights on itself. Specific relief is only provided for the violation of a legal right. The network of reliefs allowed by this Act falls under the following outlines:

Specific relief is a form of judicial redress. it belongs to the law of procedure. it is a legal redress which a plaintiff seeks through a civil court. in this kind of relief the contractual

party is compelled, to do or refrained from doing an act. the specific relief act relief on the English principles of equity in granting or refusing such relief.

Definition of specific relief: Specific relief in specie. it is a remedy by which a party to a contract is compelled to do or omit the very acts which he has undertaken to do or omit.

According to 'Bentham' : "The law ought to assure me every thing which is mine, without forcing me to accept equivalents, although I have no particular objections to them."

Nature of specific relief: The specific relief act 1877 is not an exhaustive code. it deals with those specific relief which fall within the domain of court of equity. the relief is ordinary available in a civil courts. the defaulting party is compelled to do or to omit the every act which he has undertaken to do or to omit. the specific relief is adjective law Case Law PLD 1971 Lah. 199

The jurisdiction vested in the court for the grant of decree for specific performance is discretionary and the court is not bound to grant such relief even if it is lawful to do so. however the discretion vested in a court of law must not be exercised arbitrarily rather on sound and convincing reasons guided by judicial principles and capable of correction by a court of appeal.

Object of specific relief: The main object of specific relief is to discourage people from taking law into their own hands. it provides summary and speedy remedy through a medium of civil court.

Explanation: T.S Desai "A person any of whose rights are infringed can go a court of

law for a relief and seek a remedy if he has one. the general remedy at law, the remedy which is most common consists in awarding pecuniary compensation, court will compel the defendant to give up the pecuniary value of some benefit which he has wrongfully obtained, or to pay the pecuniary value of goods which he has wrongfully taken or detained."

8. Illustration: If a person agrees to sell a house to another in case the latter pays him a certain sum and this sum is paid up as agreed upon and the owner of the house does not execute a sale deed, the aggrieved person may either prosecute the other for cheating, or he may sue for the damages and return of the amount paid, or he may ask a competent court to compel the other to perform his contract by executing the sale deed. this last prayer requiring the promisor to do or perform the very thing which he undertook to do will be prayed for specific relief.

9. Features of specific relief:

- (i) Specific relief is granted under the principles of equity.
- (ii) Its basic purpose is to give a very thing to a person who is entitled for it.
- (iii) The defaulting party is compelled to do or to omit the very act which he has undertaken to do or to omit.

10. Modes of specific performance or kinds of equitable remedies:

Under specific performance or equitable remedies relief may be given in the following ways.

I. Delivery of possession: By taking possession of certain property and thereby delivering it to its claimant.

II. Specific performance of contracts: By ordering a party to do the act which he is under an obligation to do.

III. Injunctions: By preventing a party from doing that which he is under an obligation not to do or to do.

IV. Declaration of rights: By determining and declaring the rights of the parties otherwise than by an award of compensation.

V. Appointment of receiver: In a dispute over a business between the two parties the court may appoint a receiver who looks after the affairs the business until the case is decided by the court.

VI. Rectification of instruments:

When through fraud or a mutual mistake of the parties, a contract or the other instrument in writing does not truly express their intention, the court can issue order for its rectification or on the request of the parties entitled thereto.

VII: Rescission of the contracts:

If any contract in writing has been entered by the parties which is voidable or where the contract is unlawful and the defendant is more blamable or where a decree or specific performance of sale of a contract to take a lease has been made and the purchase or the lease holder does not make payment, the court can order to rescind the contract.

VIII. Cancellation of instruments:

Any person against whom a written instrument is void or voidable and the apprehension is of causing serious injury to him, he can get the cancellation of such instrument from the court.

11. Basis of specific relief or equitable remedies:

Basic of specific relief or equitable remedies are as under:

- (i) He who comes to equity must come with clean hands.
- (ii) He who seeks equity must do equity.
- (iii) Delay defeat the equity.

12. Conclusion:

To conclude I can say that, specific relief is relief in specie. it aims consequently at the exact fulfillment of an obligation and is directed straightway to the obtaining of the very thing which he had been deprived. the specific relief or equitable remedies relief on English principles of equity in granting of refusing relief.

5. Procedure of recovering possession of immovable property:

I. Regular procedure: If any person is dispossessed without his consent he may file a

long-drawn regular suit on the basis of title under Sec. 8 of specific relief act according to Sec. 8 of specific relief act.

'A person entitled to the possession of specific immovable property may recover it in the manner prescribed by the code of civil procedure.

(i) Essential of Sec. 8:

(i) Strength of possessory title.

(ii) Proof of prior possession.

(iii) Forcible dispossession.

II. Summary procedure:

Summary procedure for recovery of the possession of immovable property is provided in Sec. 9 of the specific relief act.

'If any person is dispossessed without his consent of immovable property without property otherwise than in due course of law, he or any person claiming through him, may be suit, recover possession there of notwithstanding any other title may be setup in any other suit.

(i) Essential of summary procedure u/s of specific relief act:

(i) The plaintiff must have possession of immovable property.

(ii) He must have been enjoying the possession from the last 6 months, before being forcibly dispossessed.

(iii) He must have been forcibly dispossessed otherwise in due course of law.

(iv) Dispossession must be without the consent of person.

(ii) Exceptions:

Following are exceptions to Sec. 9,.

(i) No suit can be brought against action of central or provincial government.

(ii) No suit can be brought against decree of the court.

(iii) No review or appeal shall lie against such an order of restoration of possession.

(iv) No one can be restrained from establishing his title of possession in the court of law.

(iii) Object of Sec. 9:

It's object is to discourage people from taking the law into their own hands, however good their title may be.

(iv) Nature:

Summary procedure under Sec. 9 provides a speedy remedy under specific relief act.

Case law

2004 YRL 105

It was held that summary procedure have been provided under no Sec. 9 to person dispossessed from immovable his consent. person coming under this Sec. is required to show that he had actual physical possession of immovable property from which he was dispossessed without his consent by defendant with in six months prior to the institution of the suits.

Specific performance is an order of a court which requires a party to perform a specific act, usually what is stated in a contract. It is an alternative to awarding damages, and is classed as an equitable remedy commonly used in the form of injunctive relief concerning confidential information or real property. While *specific performance* can be in the form of any type of forced action, it is usually used to complete a previously

established transaction, thus being the most effective remedy in protecting the

expectation interest of the innocent party to a contract. It is usually the opposite of a prohibitory injunction but there are mandatory injunctions which have a similar effect to specific performance.

Under the common law, specific performance was not a remedy, with the rights of a litigant being limited to the collection of damages. However, the court of equity developed the remedy of specific performance as damages often could not adequately compensate someone for the inability to own a particular piece of real property, land being regarded as unique. Specific performance is often guaranteed through the remedy of a right of possession, giving the plaintiff the right to take possession of the property in dispute. However, in the case of personal performance contracts, it may also be ensured through the threat of proceedings for contempt of court.

Orders of specific performance are granted when damages are not an adequate remedy, and in some specific cases such as land sale. Such orders are discretionary, as with all equitable remedies, so the availability of this remedy will depend on whether it is appropriate in the circumstances of the case.

Exceptional circumstances

There are certain circumstances where an order of specific performance would not be granted. Such circumstances include:

1. Specific performance would cause severe hardship to the defendant
2. The contract was unconscionable
3. The claimant has misbehaved (unclean hands)
4. Specific performance is impossible
5. Performance consists of a personal service
6. The contract is too vague to be enforced
7. The contract was terminable at will (meaning either party can renege without notice)
8. The contract required constant supervision
9. Mutuality was lacking in the initial agreement of the contract
10. The contract was made for no consideration.

Additionally, in England and Wales, under s. 50 of the Senior Courts Act 1981, the High Court has a discretion to award a claimant damages *in lieu* of specific performance (or an injunction). Such damages will normally be assessed on the same basis as damages for breach of contract, namely to place the claimant in the position he would have been had the contract been carried out.

Examples

In practice, *specific performance* is most often used as a remedy in transactions regarding land, such as in the sale of land where the vendor refuses to convey title. The reason being that land is unique and that there is not another legal remedy available to put the non-breaching party in the same position had the contract been performed.

However, the limits of *specific performance* in other contexts are narrow. Moreover, performance that is based on the personal judgment or abilities of the party on which the

demand is made is rarely ordered by the court. The reason behind it is that the forced party will often perform below the party's regular standard when it is in the party's ability to do so. Monetary damages are usually given instead.

Traditionally, equity would only grant specific performance with respect to contracts

involving chattels where the goods were unique in character, such as art, heirlooms, and the like. The rationale behind this was that with goods being fungible, the aggrieved party had an adequate remedy in damages for the other party's non-performance.

In the United States, Article 2 of the Uniform Commercial Code displaces the traditional rule in an attempt to adjust the law of sales of goods to the realities of the modern commercial marketplace. If the goods are identified to the contract for sale and in the possession of the seller, a court may order that the goods be delivered over to the buyer upon payment of the price. This is termed *replevin*. In addition, the Code allows a court to order specific performance where "the goods are unique or in other proper circumstances", leaving the question of what circumstances are proper to be developed by case law. The relief of Specific Performance is an equitable relief which is usually remedial or protective in nature. In the civil law (the law of continental Europe and much of the non English speaking world) specific performance is considered to be the basic right. Money damages are a kind of "substitute specific performance." Indeed, it has been proposed that substitute specific performance better explains the common law rules of contract as well, see (Steven Smith, *Contract Law*, Clarendon Law).

In English law, in principle reparation must be done *in specie* unless another remedy is 'more appropriate'

INJUNCTIONS

From the aforesaid historical background it is manifest that the origin of the power to grant injunction is from equity, hence the exercise of the discretion by the Courts is to be

governed mainly by equitable considerations. In our country in Criminal matters Sections 133, 142 and 144 of the Code of Criminal Procedure deal with grant of injunction. In Civil matters the law relating to grant of injunction is contained in Chapter VII of Part III of the Specific Relief Act, 1963. Sections 36 to 42 deal with the grant of injunction. It has been termed as a preventive relief which is granted at the discretion of the Court by injunction which may be temporary or perpetual. Section 37(1) of the Specific Relief Act, 1963 deals with the temporary injunctions which are such as are to continue until a specified time, or until further orders of the Court, and they may be granted at any stage of the suit or proceedings and are regulated by the Code of Civil Procedure. From the aforesaid it is clear that there can be permanent injunction which is granted as a final relief in the suit and there can be temporary injunction which may be passed at any situation of the suit or proceedings for preservation of the property. Both have to be discussed separately.

Permanent Injunction:

As is clear from Section 37 (2) of Specific Relief Act, 1963 (hereinafter referred to as the Act), a perpetual injunction can only be granted by the decree made at the hearing and upon the merit of the suit. The defendant is thereby perpetually enjoined from the assertion of a right or from the commission of an - act which would be contrary to the

right of the plaintiff. Section 38 of the Act further provides the circumstances where the perpetual injunction may be granted in favour of the plaintiff to prevent the breach of an

obligation existing in his favour, whether expressly or by implication. In contractual matters when such obligation arises, the Court has to seek guidance by the rules and provisions contained in Chapter II of the Act dealing with specific performance of contracts. Sub- Section (3) of Section 38 in clauses (a), (b), (c) and (d) further illustrates the circumstances where a perpetual injunction may be granted by the Court. The mandatory injunctions are contemplated under Section 39 of the Act where it is necessary to prevent the breach of an obligation and the erring party may be compelled to perform certain acts. Section 40 provides for granting damages in lieu of or in addition to injunction. Section 41 provides circumstances where the injunction should be refused. Section 42 provides for grant of injunction to perform a negative agreement. It was made clear at the beginning that the Law of Injunction is vast and expansive jurisdiction and It forcefully illustrates the power of equity in spite of the fetters of codification to march with the times and adjust the beneficial remedies to altered social conditions and the progressive needs of the humanity. The first Specific Relief Act was codified in the year 1877 which was replaced by the Specific Relief Act of 1963 (Act No.47 of 1963). In spite of the codification the law of injunction continued to expand and it fulfilled the needs of the society in different shapes - and forms. The codification of the law has never proved a fetter. In this context, a Civil Court should never have any hesitation in granting injunction to new circumstances and situations. Our society is a progressive society, our

country is a developing country and with the growth of the industry one may be called upon to administer law of injunction to various kinds of new situations which were wholly unknown to this field earlier. The essential test should, however, remain equity. In this context the views expressed by the Courts and Jurists may be gainfully quoted here : "It is the duty of a Court of Equity," said Lord Cot ten hem in Taylor v. Selmon, (and the same is true of all Courts and institutions), "to adopt its practice and course of proceedings, as far as possible, to the existing state of society and to apply its jurisdiction to all those new cases which from the progress daily made in the affairs of men must continually arise and not from too strict an adherence to forms and rules established under very different circumstances decline to administer justice and to enforce rights for which there is no other remedy."

Similarly, the view expressed by the great jurist Shri Banerjee in Tagore Law Lectures as far back as in 1906 may be remembered by us as a good guide even today in this field of law. Banerjee said: 'Since an obligation includes every duty enforceable by law this form of specific relief, it would appear, is applicable to all cases where one person can enforce a duty against another, or to use the correlative term, where one person is vested with a right which empowers him to constrain the other to adopt a particular line of conduct, or to do or abstain from doing a particular act. This right mayor may not arise out of a contract, and the remedy of injunction, by which preventive relief is granted by a Court, may be held to be available throughout the whole range of the law, But the jurisdiction is carefully defined in part III, Specific Relief Act, and to some extent circumscribed. It still remains, however, a vast and expansive jurisdiction, and forcibly illustrates the power of

equity, in spite of the fetters of codification, to march with the times and adjust the beneficial remedies to altered social conditions and the progressive needs of humanity.' Mr. H.C. Joyce also in his Law of Injunctions has expressed identical views. He says, 'As a remedy for preventing wrongs and preserving rights, the injunction has been regarded as more flexible and adjustable to circumstances than any other process known to law. The correctness of the estimate is seen in the readiness with which injunctions yield to the convenience of the parties, the case with which damages are substituted in their place when justice and public interest so require, the facility with which a preventive and a mandatory injunction are made to co-operate so that by single exercise of equitable power an injury is both restrained and repaired, and the facility with which injunctive relief can be applied to new conditions and adjusted to the changing emergencies of modern enterprise. In this connection it may be declared that as writ of injunction may be said to be a process capable of more modification than any other in the law, it is so malleable that it may be moulded to suit the various circumstances and occasions presented to a Court of Equity. It is an instrument in its hands capable of various applications for the purpose of dispensing complete justice between the parties. It may be special, preliminary, temporary or contracted, in short it is adopted, and is used by Courts

of Equity, as a process for preventing wrong between, and preserving the rights of parties in controversy between them...so, where, too, if a party cannot at once comply with an injunction without being put to great expense or grievous annoyance, the Court may order that the injunction do not commence until after a certain stated period.

Injunction should not be denied on the ground of its novelty in application, if the exigencies of the situation required it and if it does not militate against statutory provision. The Courts should act according to justice, equity and good conscience, when there is no specific rule applicable to the circumstance of the case."

Once the aforesaid basics of this equity jurisdiction become clear, there may not be any difficulty in its application to various situations - One may be called upon to grant injunction in various kinds of disputes which may be commercial non-commercial, marital, non-marital, encroachment over civil rights etc. The list of these situations cannot be given here. A civil dispute calling for a preventive relief may come before one in any shape and then one may be guided by principles of equity, justice and good conscience in granting relief. The hesitation should not be there when equitable consideration demand and justify it.

Temporary Injunction:

So far as the grant of temporary injunctions is concerned, it used to be a small step during the progress of the suit or proceeding towards the preservation of its subject matter which could be property or any other right has now gained enormous importance and sometimes it becomes even more important than the final result of the suit or proceedings with the change of the time. The society in general and Judiciary in particular is passing through a

very trying time where the moral values are at their lowest ebb and there does not appear any prospect of coming them up in near future. The dilemma of the Judicial Court or Tribunal is that initially it has to treat the truth and falsehood at par and has to give the same treatment, protection and hearing until it concludes its investigation to find out

which is right or wrong, false or true. This process takes a long time during which by some interim measure the subject matter of the dispute between the parties has to be preserved, and it is this anxiety for preservation of the property on the part of the Judicial Court, which is misused and abused by the side which has come before the Court with a wrong or false case or a doubtful case which had been filed only to take a chance. This category of the unscrupulous litigant once succeeds in obtaining the interim injunction in their favour, they try to prolong proceedings and cause irreparable damage and harm not only to their opposite side but also to the reputation and faith of the public on Courts. Hence, it is high time that the Courts at all levels should be very cautious, alert and vigilant while granting temporary injunction during progress of the suit or proceeding- Section 37(1) of the Specific Relief Act, 1963, deals with the temporary injunctions which are such as are to continue until a specified time or until further orders of the Court and they may be granted at any stage of the suit or proceedings and are regulated by the Code of Civil Procedure⁴

Section 94 (c) and (e) of Code of Civil Procedure contain provisions under which the Court may in order to prevent the ends of justice from being defeated, grant a temporary injunction or make such other interlocutory order as may appear to the Court to be just and convenient. Section 95 further provides that where in any suit a temporary injunction is granted and it appears to the Court that there were no sufficient grounds, or the suit of the plaintiff falls and it appears to the Court that there was no reasonable or probable ground for instituting the same. The Court may on application of the defendant award reasonable compensation which may be to the extent of the pecuniary Jurisdiction of the Court trying the suit. The procedure with regard to the grant of temporary injunction and interlocutory orders has been provided in Order 39 of C.P.C., as far as this State is concerned, drastic changes were brought about by amending the provisions contained in Order 39 by U.P. Act No. 57 of 1976. In Sub-Rule (2) of Rule 2 of Order 39, a proviso was inserted by which power of the Court to grant injunction was taken away in certain matters. Further a proviso was added in Rule 3 which provided that where it is proposed to grant an injunction without giving notice of the application to the opposite party, the Court shall record the reasons for its opinion that the object of granting the injunction would be defeated by the delay and require the applicant to serve the copy of the order of injunction along with copy of the application, affidavit, plaint and other documents relied

on by him. Further, he has also been required to file on the same day on which the injunction is granted, an affidavit stating that the requirements contained in Proviso (a) have been complied with. Rule 3(e) further contains a very important provision which requires the Court to make an endeavour to finally dispose of the application within 30 days from the date on which the Injunction was granted and where it is unable to do so it shall record its reasons for such inability. Thus by introducing the aforesaid amendment an attempt was made to minimise the hardship and harassment caused by the injunction orders passed *ex parte*.

Identical provisions were included in Article 226 of the Constitution by substituting Clause (3) thereof which provides that if an interim order is passed *ex parte* and the party concerned makes an application to the High Court for vacation of such order, the High

Court has to dispose of the application within a period of two weeks and if the application is not so disposed of, the interim order, on the expiry of that period shall stand vacated, There are other local laws also, where the power of the Court or the Tribunal in granting the injunction or stay orders has either been taken away or has been regulated by providing stringent conditions to prevent hardship loss or harassment to the opposite party. It is not necessary to mention a catalogue of such local laws and Central Acts as one come across such laws every day. However, it is a different matter altogether as to how far these legislative measures have succeeded to achieve the object to minimise the

hardship to the opposite party and to prevent the abuse of the injunction or interlocutory orders passed by the Courts during suits.

In my opinion, the aforesaid legislative efforts have not been able to achieve their object. The effect of the amendments made in the provisions contained in Order 39 C. P. C. may be mentioned which instead of remedying the situation has created further problems and complicated the Issue. The first price has to be paid by the High Court itself, which has been run over by a large number of writ petitions filed before it for those causes which were normally being agitated by filing suits in civil court. The situation in High Courts has become so grim and difficult that the pendency of the cases has crossed five lakhs and the time taken in deciding the writ petitions is now more than ten to fifteen years. No body could have contemplated this state of affairs at the time the amendments were brought about by U.P. Act No.57 of 1976. The second price, which has been paid by the Bar. Is that the filing of the original suit in every district has declined to such an extent that the growth and progress of the Civil Bar has stopped.

Now the position in District Courts as well as in High Court is that it Is difficult to find out a good civil lawyer. The growth of civil law has also come to a standstill which Is a matter of great concern. The loss of trust shown by the legislature in subordinate judiciary by taking away the power of granting injunction in the matters enumerated In the Proviso to Sub-Rule (2) of Rule 2 of Order 39 has in fact rendered a disservice of

bigger magnitude than remedying the situation for which it was enacted. It will be better for the State, the High Court and the Judiciary as a whole and also to the Bar, if this proviso is deleted from Order 39, at the earliest.

Now, coming to the role of the Presiding Officer of the Court while granting order of injunction or other interlocutory order, it should always be kept in mind that its origin is from equitable jurisdiction and before passing the order the claim must be tested on all principles of equity. The normal requirements that the applicant praying for the injunction should have a good prima facie case, chance of suffering irreparable injury and balance of convenience is in his favour and other principles connected with the matter, the Court should have extra cautious approach in testing the prima facie case with a certain amount of extra rigour to avoid the abuse of the process of the Court. As already mentioned earlier, we are passing through a difficult time with the population explosion, the pressure on the property has Increased to its maximum and it is likely to go further. In these days the grabbing of the private and Government property has become the fashion of the day. Documents are being manufactured and manipulated and on basis of such

documents orders are obtained. The modus operandi in such cases is that property grabbers manufacture false documents, then file a suit or proceeding and obtain orders. Knowing well that the suit will take its own time, they succeed in their object. I came across a case

which may be quoted here as example and which may also be reminder to all of us that knowingly or unknowingly Injunction or interlocutory orders may not be passed In such matters.

A writ petition was filed for quashing F.I.R. lodged against the petitioner under Sections 420/ 467/468/471 I.P.C. The facts of the case were that the petitioner filed a suit with the allegation that P.W.D. Rest House has been leased out in his favour by the Executive Engineer on a rent of Rs. 500/- per month for a period of 90 years which was decreed in his favour, as no body put In appearance for contest. Petitioner occupied the bungalow and renovated it by investing huge amount. However, when the authorities tried to dispossess him he filed writ petition in the High Court and In view of the decree passed In his favour a Division Bench of the High Court issued a mandamus in his favour directing the authorities not to dispossess petitioner except In accordance with law from the property In dispute. The F.I.R. was lodged thereafter by the district authorities for prosecuting the petitioner, which was challenged In Court. One can very well imagine when this property shall be restored to the Government. Where lay the failure, it is a matter for consideration. Hon'ble Supreme Court in a recent case has laid down that property-grabbers, taxevaders, bank loan dodgers and other unscrupulous persons from all walks of life find the court- process a convenient lever to retain the Illegal gains indefinitely. A bench comprising Mr. Justice Kuldip Singh and Mr. Justice P .B. Sawant

noted while imposing Rs. 11,000/- costs on a litigant, Mr. Jagannath. He had played fraud to secure an order in his favour from the High Court. "Frauds avoid all judicial acts, ecclesiastical or temporal, "the court recalled the observation made over three centuries ago by the then chief Justice of England, Lord Edward Coke. Any decree or judgment obtained by playing fraud on the court is "a nullity and nonest in the eyes of law" the apex court ruled while setting aside the High court's verdict In favour of Mr. Jagannath. Such a decree or judgment passed either by the first court or by the highest court must be treated as a "nullity by every court it can be challenged in any court even in collateral proceedings," the judges added. The judgment is a fall out of the appeal made by the heirs of one S.P., Chengelveraya alleging that Mr. Jagannath had obtained the first decree by fraud. The High Court, however, set aside the trial court's order against Mr. Jagannath, it had also noted that "*there is no legal duty cast upon the plaintiff to come to court with a true case and prove it by true evidence* " Setting aside the High Court's judgment, the apex court said it had fallen into "patent error". The High Court had gone haywire and made observation which were "wholly perverse".

Disagreeing with the High Court's view that no legal duty had been cast upon the plaintiff (Mr. Jagannath) to come to court with a true case and prove it by evidence, the apex court observed that "the principle of 'finality of litigation' *cannot be pressed to the extent of*

such an absurdity that it becomes an engine of fraud in the hands of dishonest litigants.

The courts of law are meant for imparting justice between the parties, the judges noted.

They added that "one who comes to the court, must come with clean hands. More often than not, process of court is being abused."

Elaborating in the light of the present case, the court said a fraud is an act of deliberate deception with the design of securing something by taking unfair advantage of another. It is a deception in order to gain by another's loss. It is a cheating intended to get an advantage. Non-disclosure of the facts amounts to "playing fraud on the Court" The judicial officers must take extra cautiousness and alertness while granting orders of injunction. Their test to the prima facie case and other allied considerations should be rigorous. The rule should be to grant injunction or interlocutory orders only after hearing parties and only in very exceptional cases; the ex parte orders should be passed. If it is not done, the very existence of this entire judicial system shall be under peril.

UNIT-IV

INDIAN PARTNERSHIP ACT, 1932

I Nature of partnership firm

II Relationship of partner with one another and third party

- a) **Rights and duties of partner inter se**
- b) **Partnership property**
- c) **Relationship of partners to third person**
- d) **Liability for holding out**
- e) **Minor as partner**
 - **Incoming and outgoing partner**
 - **Dissolution of partnership**
 - **By contract**
 - **By agreement**

- **Compulsory dissolution**
- **Contingent dissolution**
- **By notice**
- **Consequence of dissolution**

Registration of firm and effect of non- registration

I Definition and Nature of Partnership:

A Partnership is defined by the Indian Partnership Act, 1932, as "the relations between persons who have agreed to share profits of the business carried on by all are any of them acting for all". This Definition gives three minimum requirements to constitute a Partnership, viz:

- There must be an agreement entered into orally or in writing by the persons who desire to form a Partnership,
- The object of the agreement must be to share the profits of business intended to be carried on by the Partnership, and
- The business must be carried on by all the partners or any of them acting for all of them.

Nature of partnership firm:

Partnership is a form of business in which two or more persons come together with their resources to invest in a common business with the purpose of sharing the profits of the business.

There are some limitations of Sole proprietorship viz limited capital, no risk sharing, limited skill etc. Partnership is the solution to such problems faced by a sole proprietor. In a partnership a few persons can come together to start a new business with an agreement to share the profits and losses of the business.

According to Section 4 of the Indian Partnership Act 1932, "Partnership is a relation Between persons who have agreed to share the profits of of a business carried on by all or any of them acting for all."

Thus Partnership is the starting of a relationship among its members i.e. the partners who have agreed to share the profits of a business to be carried on by all or by any of them acting for all. Here we are giving some of the basic features of a Partnership Firm. In the absence of any of these features, a business can not be termed as a Partnership.

1. Two or more Persons:

Minimum number of persons to start a partnership is two however there is no maximum limit on the number of partners according to the Indian Partnership Act.

But the Indian Companies Act has restricted the number of partners in a Banking Business to ten and for any other business it is 20.

2. Agreement among Partners:

Partnership comes into existence by an agreement among the partners willing to enter into a partnership. The agreement can be written or oral. Partnership is not the result of any operation of Law. It is the result of an agreement on the basis of which the rights and duties of the partners are defined.

3. Business:

The purpose of a Partnership firm is to carry on a business. The business must be legal. Any agreement to share the profits of an illegal business is not partnership. Also joint ownership of a property can not be termed as partnership. The business must be continuous in nature. Coming together for a single venture is not partnership.

4. Agreement to share profits:

In a Partnership business the main aim of the partners is to carry on some business for the purpose of earning profits. They share the profits or losses of the business among themselves according to a predetermined ratio. If there is no agreement over the profit sharing ratio these are to be shared equally. A person not having the right to share profits can not be called partner. However the partners can agree that one or more partners among is not liable to share the losses.

5. Business is to be carried on by all or any of them acting for all:

Each partner has the right to participate in the proceedings of the business. The business can be carried by any one or more of them or by all of them. Some partners may be sleeping i.e. they are not actively involved in the activities of the firm. Each partner is an agent as well as a principal. As an agent he can bind all the other partners by his acts. As a principal he is bound by the acts of the other partners.

These were the essentials of a partnership firm. In the absence of any of these a partnership business can not come into existence.

Relevant statutory provision:

4. DEFINITION OF “PARTNERSHIP”, “FIRM”, AND FIRM” NAME” -

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

business is carried on is called the “firm name”.

5. PARTNERSHIP NOT CREATED BY STATUS. -The relation of partnership arises from contract and not from status;

And, in particular, the members of a Hindu undivided family carrying on a family business as such, or a Burmese Buddhist husband and wife carrying business as such, are not partners in such business.

6. MODE OF DETERMINING EXISTENCE OF PARTNERSHIP. -In determining whether a group of persons is or is not a firm, or whether a person is or is not a partner in a firm, regard shall be had to the real relation between the parties, as shown by all relevant facts taken together.

EXPLANATION-1. -The sharing of profits or of gross returns arising from property by persons holding a joint or common interest in that property does not of itself make such persons partners.

EXPLANATION- 2. -The receipt by a person of a share of the profits of a business, or of a payment contingent upon the earning of profits or varying with the profits earned by a business, does not of itself make him a partner with the persons carrying on the business;

And, in particular, the receipt of such share or payment, -

(a) By a lender of money to persons engaged or about to engage in any business,

(b) By a servant or agent or remuneration,

(c) By the widow or child of a deceased partner, as annuity, or

(d) By a previous owner or part owner of the business, as consideration for the sale of goodwill or share thereof, does not of itself make the receiver a partner with the person’s carrying on the business.

II RELATION OF PARTNER TO ONE ANOTHER

Each partner has a right to share in the profits of the partnership. Unless the partnership agreement states otherwise, partners share profits equally. Moreover, partners must contribute equally to partnership losses unless a partnership agreement provides for another arrangement. In some jurisdictions a partner is entitled to the return of her or his capital contributions. In jurisdictions that have adopted the RUPA, however, the partner is not entitled to such a return.

In addition to sharing in the profits, each partner also has a right to participate

equally in the management of the partnership. In many partnerships a majority vote resolves disputes relating to management of the partnership. Nevertheless, some decisions, such as admitting a new partner or expelling a partner, require the

partners' unanimous consent.

Each partner owes a fiduciary duty to the partnership and to copartners. This duty requires that a partner deal with copartners in **Good Faith**, and it also requires a partner to

account to copartners for any benefit that he or she receives while engaged in partnership business. If a partner generates profits for the partnership, for example, that partner must hold the profits as a trustee for the partnership. Each partner also has a duty of loyalty to the partnership. Unless copartners consent, a partner's duty of loyalty restricts the partner from using partnership property for personal benefit and restricts the partner from competing with the partnership, engaging in self-dealing, or usurping partnership opportunities.

Relations of Partners to one another

Relevant statutes:

9. General duties of partners – Partners are bound to carry on the business of the firm to the greatest common advantage, to be just and faithful to each other, and to render true accounts and full information of all things affecting the firm to any partner or his legal representative.

10. Duty to indemnify for loss caused by fraud- Every partner shall indemnify the firm for any loss caused to it by his fraud in the conduct of the business of the firm.

11. Determination of rights and duties of partners by contract between the partners- (1) subject to the provisions of this Act, the mutual rights and duties of the partners of a firm may be determined by contract between the partners, and such contract may be expressed or may be implied by a course of dealing.

Such contract may be varied by consent of all the partners, and such consent may be expressed or may be implied by a course of dealing.

(2) Agreements in restraints of trade- Notwithstanding anything contained in section 27 of the Indian Contract Act, 1872 (9 of 1872), such contracts may provide that a partner shall not carry on any business other than that of the firm while he is a partner.

12. The conduct of the business-Subject to contract between the partners-

(a) every partner has a right to take part in the conduct of the business.

(b) Every partner is bound to attend diligently to his duties in the conduct of the

business;

(c) Any difference arising as to ordinary matters connected with the business may be decided by a majority of the partners, and every partner shall have the right to express his opinion, before the matters decided, but no change may be made in the nature of the business without the consent of all the partners; and

(d) Every partner has a right to have access to and to inspect and copy any of the books of the firm.

13. Mutual rights and liabilities- Subject to contract between the partners-

(a) a partner is not entitled to receive remuneration for taking part in the conduct of the business.

(b) The partners are entitled to share equally in the profits earned, and shall contribute equally to the losses sustained by the firm;

- (c) Where a partner is entitled to interest on the capital subscribed by him, such interest shall be payable only out of profits.
- (d) 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;
- (e) 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 purpose of protecting the firm from loss, as would be done by a person of ordinary prudence, in his own case, under similar circumstances, and
- (f) a partner shall indemnify the firm for any loss caused to it by his willful neglect in the conduct of the business of the firm.

14. The property of the firm- Subject to contract between the partners, the property of the firm includes all property and rights and interests in property originally brought into the stock of the firm, or acquired, by purchase or otherwise, by or for the firm, or for the purposes and in the course of the business of the firm and includes also the goodwill of the business.

Unless the contrary intention appears, property and rights and interest in property acquired with money belonging to the firm are deemed to have been acquired for the firm.

15. Application of the property of the firm- 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.

16. Personal profits earned by partners- 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 the profit and pay it to the firm;
- (b) if 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.

17. Rights and duties of partners -

- (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;
- (b) After the expiry of the term of the firm, and- 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 may be consistent with the incidents of partnership at will; and
- (c) Where additional undertakings are carried out. – Where a firm constituted to carry out one or more adventures or undertakings carries out other adventures or undertakings, are the same as those in respect of the original adventures or undertakings.

a) Rights and duties of partners

Section 9 and 10 of the Act lay down the basic duties of every partner and the said duties are not subject to any contract on the contrary. Therefore, partners are bound to carry on the business of the firm to the greatest common advantage, to be just and faithful to each other and render accounts and full information of all things affecting the firm to any partner or his legal representative and every partner is bound to indemnify the firm for any loss caused to it by fraud in the conduct of the business of the firm.

Subject to this the mutual rights and duties of the partner may be decided by contract between the partner either express or implied.

Subject to any contrary to the contrary such duties and rights of each partner or provided in Sections 12 and 13 of the Partnership Act. They are:

- Every partner has a right to take part in the conduct of the business,

- Every partner is bound to attend diligently to his duties in the conduct of business,
- Any difference arising as to ordinary matters connected with the business may be decided by a majority of partner and no change in the nature of the business shall be made without the consent of all the partners,
- Every partner has as a right to have access to and to inspect and copy any books of the firm,
- A partner is not entitled to receive remuneration for taking part in the conduct of the business,
- The partners are entitled to share equally the profits earned and shall contribute equally to the losses sustained by the firm,
- Where the partner is entitled to interest on the capital subscribed by them, such interest shall be payable only out of the profits,
- A partner making, for the purpose of the business, any payment or advance being the amount of capital he has agreed to subscribe, is entitled to interest thereon at the rate of 6% P.A.,
- The firm shall indemnify a partner in respect of payment made and liabilities incurred by them,
 - o in the ordinary and proper course of conduct of the business and
 - o in doing such act in an emergency, for the purpose of protecting the firm from any loss, as would be done by a person of ordinary prudence, under similar circumstances
 - o The partners shall indemnify the firm from any loss caused due to his willful neglect in the conduct of the business of the firm. This rights and duties will be implied in the Partnership, unless the Partnership agreement provides to the contrary i.e., makes any variation in the said rights and duties. Similarly, subject to a contract to the contrary, if any partner derives any profit for himself from any transaction of the firm or from the use of the property or business connection with the firm or the firm name is liable to account for the benefit and pay it to the firm, and if the partner carries a 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.

c) Relationship of partners to third party

A partner is an agent of the partnership. When a partner has the apparent or actual authority and acts on behalf of the business, the partner binds the partnership and each of the partners for the resulting obligations. Similarly, a partner's admission concerning the partnership's affairs is considered an admission of the partnership. A partner may only bind the partnership, however, if the partner has the authority to do so and undertakes transactions while conducting the usual partnership business. If a third person, however, knows that the partner is not authorized to act on behalf of the partnership, the partnership is generally not liable for the partner's unauthorized acts. Moreover, a partnership is not responsible for a partner's wrongful acts or omissions committed after the dissolution of the partnership or after the dissociation of the partner. A partner who is new to the partnership is not liable for the obligations of the partnership that occurred prior to the partner's admission.

e) Minor as a partner

Section 30 in The Indian Partnership Act, 1932

(1) Minors admitted to the benefits of partnership. 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 the 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 acts 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 share 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 pro- ceed 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 partners.

(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 person 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 regards 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 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 persons asserting that fact.

(7) Where such person becomes a partner,-

(a) his rights and liabilities as a minor continue up to the date on which he becomes a partner, but he also becomes personally liable to third parties for all acts of 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 the 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 up to 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).

Retirement of a partner

• Under the Partnership Act no person can be admitted into Partnership without the consent of the other partner or partners unless there is any contrary to the contract (s. 31). Any partner may, with the consent of all the other partners or in terms of the deed of Partnership where the Partnership is at will, by giving notice in writing to all other partners, to that effect, dissolve the Partnership or retire from Partnership. A retiring partner, however, continues to be liable to third parties even if the liability is taken

over by the remaining partners (S 32). Therefore in a deed of retirement it is necessary to provide that in the event of the retiring partner being held liable by a third party, the remaining partners shall indemnify him to that extent, when the liabilities are taken over by the remaining partners. Insolvency of a partner also causes compulsory retirement of an insolvent partner (S. 35). It is, therefore, generally provided in a deed of Partnership when there are more than two partners that the insolvency of any partner will not dissolve the Partnership. If a partner retires, unless there is contract to the contrary, the retiring partner cannot use the firm name, represent himself as carrying on the business of the firm or solicit the customers of the Firm (S. 36). Therefore, in a deed of retirement it is generally not necessary to make explicit that the retiring partner shall not do any of these things. But, if he is to be restrained from carrying on similar business for a specified period or in a specified area, such condition can be provided in the deed of retirement and it is legal (S 36 (2)).

Dissolution

- The Act also provides that a Partnership firm may be dissolved under the following circumstances namely
 - (a) as a result of any agreement between all the partners
 - (b) by adjudication of all the partners or all partners but one as insolvent, or
 - (c) by the happening of an event which makes it unlawful for the business of the firm to be carried on in Partnership or
 - (d) subject to agreement between the parties, on the happening of any of the following events such as (i) efflux of time, (ii) completion of the adventure, (iii) death of a partner, and (iv) insolvency of a partner. In these last four cases the Partnership agreement may provide events.
- Even if the deed provides that the Partnership will not be dissolved on the death or insolvency of a partner, it does not mean that on the death or insolvency of a partner he ceases to have interest in the Partnership property. In such cases his interest in the Partnership property will survive to his heirs in case of his death and to his assignees in case of insolvency. In the absence of a term in the deed of Partnership to that effect, it cannot be that, the Partnership shall continue, and notwithstanding the death of a partner it will operate to extinguish his proprietary rights in the assets of the Firm. A

Partnership can also be dissolved by the Court under the circumstances mentioned in Section 44 of the Act. Where the Partnership is 'at will' the Partnership can be dissolved by any partner or partners giving notice his/their intention to dissolve the firm.

Dissolution of a Partnership firm

* Dissolution of a partnership means:-The act of ending of the old Partnership

Agreement and a reconstruction of the firm due to admission, retirement and death of a partner. It may or may not close the business.

* Dissolution of a Partnership 'firm' means:-The firm close its business then the assets of the firm is sold and liabilities are paid off and remaining amount is distributed among the partners.

*Cases of Dissolution of Partnership:-

1. In case of change in profit-sharing ratio of the exiting partners.
2. In case of admission of a new partner.
3. In case of retirement of a partner.
4. In case of expulsion of a partner.
5. In case of death of a partner.
6. In case of insolvency of a partner.
7. In case of expiry of the period of partnership.

*Cases of Dissolution of Partnership firm:-

***Without the intervention of the court:**

1. When all partners agree to dissolve the firm.[sec.40]
2. Compulsory Dissolution [sec.41]
 - When all or one partner of the firm becomes insolvent.
 - When business of the firm becomes unlawful.

3. On the happening of any incidents:[sec.42]

- Insolvency of a partner.
- Fulfillment of the object for which the firm was formed.
- Expiry of the period.

= 4. When any partner giving notice to other partners can dissolve the firm.[sec.43]

· **By order of the court [sec.44]:** cases in which the court may order the dissolution of the partnership firm.

1. A partner has become of unsound mind.
2. When a partner unable to perform his duties as a partner.
3. When a partner is guilty of misconduct.
4. When a partner willfully, commits violation of law of partnership agreement.
5. When a partner has transferred the whole of his interest in the firm to a third party.
6. The firm cannot be carried on except at a loss.
7. The dissolution is just and equitable due to some other reasons.

*Difference between Dissolution of Partnership and Dissolution of firm:-

s.no. Dissolution of partnership Dissolution of firm

I.

Change in the exiting agreement between the partners.

Dissolution of partnership between all the partners of the firm.

II.

The firm continues its business. The firm dose not continue its business.

III.

Books of accounts may not be closed. Books of accounts have to be closed.

IV.

Dissolution of partnership dose not mean the dissolution of firm.

Dissolution of firm means the dissolution of partnership also.

V.

It is voluntary nature. It is voluntary and compulsory nature.

Types of Partnership

• The result of this summary of the Act is that a Partnership is generally created by agreement between the partners. A Partnership can be formed between (i) one or more individuals or (ii) between an individual and a person representing a H.U.F. or (iii) between an individual and other partner representing his firm, or between Limited Company or a Corporation and an

Individual or Partnership firm. (iv) between two Partnership firms (v) or



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between a Limited Company or a Corporation and an individual or Partnership firm (vi) between a Partnership firm and H.U.F. (vii) between members of HUF in their individual and independent capacity (viii) between a HUF and a member of that HUF independently.

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