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UNIT-1

DEFINITION OF 'GOODS' AND 'SALE'

According to section 2(7) of the Sale of Goods Act, 1930, Goods means every kind of movable property, other than actionable claims and money; and includes stocks, shares, growing crops, grass, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale.

Thus we can define goods as every kind of movable property except actionable claims and money.

Types of Goods

a) Specific Goods,

b) Future goods and

c) Generic Goods

a) Specific Goods: means goods identified and agreed upon at the time of a contract of sale is made. They are also called existing goods or ascertained goods.

b) Future goods: means goods to be manufactured or produced or acquired by the seller after making the contract of sale.

d) Generic Goods are unascertained goods that are not specifically identified at the time of a contract of sale is made. E.g. 50 kg of rice out of 500 kg of rice.

Sale

Sale: When under a contract of sale the property in the goods is transferred from the seller to the buyer, the contract is called a sale.

Agreement to sell: The transfer of property in the goods that is to take place at a future time, or subject to some conditions, thereafter to be fulfilled, it is called an agreement to sell. 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.

Distinguish between a sale and an agreement to sell.

Sale	Agreement to sell
1. Property or ownership is of goods is transferred immediately to the future time or subject to certain buyer.	1. Ownership is to be transferred at conditions to be fulfilled.
2. If the buyer fails to pay for the goods the seller may sue for price.	2. The seller can sue only for the damages and not for the price.
3. If the goods are destroyed the loss falls upon the buyer	3. If the goods are destroyed the loss falls upon the seller unless otherwise agreed.
4. The seller cannot resell the goods	4.The seller can resell the goods
5. A sale is an executed contract	5. Agreement to sell is an executing contract.

Distinguish between Agreement to sell and Hire-Purchase Agreement

Agreement to sell Hire purchase Agreement

a) An agreement to sell can be in writing or oral

a) Hire purchase agreement must be in writing.

b) Possession: the buyer may or may not get the possession of the goods.

b) Possession: The buyer gets the possession of the goods and enjoys it.

c) Generally businessmen and consumers may enter into an agreement to sell with the purpose of resale of goods or to enjoy them.

c) Consumers without sufficient money, but interested in the goods, enter into hire-purchase agreement for the purpose of enjoying the goods.

d) Under this, if a person buys any goods and subsequently sells them to a third party, the third party acquires a good title.

d) A hire-purchaser is not entitled to sell the goods until all the installments are paid because until then the ownership lies with the vendor.

e) Under this, a buyer is entitled to claim implied conditions and warranties.

e) A hire-purchaser cannot claim the benefits of implied conditions and warranties given by the law as sale is not completed.

f) An agreement to sell imposes a legal obligation on the buyer to purchase it.

f) A hire-purchaser has liberty to opt whether to continue to pay the installments or put an end to it.

ESSENTIALS OF A VALID CONTRACT OF SALE

Some essential elements are to be present in a contract which makes the contract of sale valid. If, the essential elements are missing, then the contract of sale will not be valid. For example, Ram agrees to sell his Car to Shyam without any consideration. This contract of sale is not valid since there is no consideration.

From the Section 4 of the Sale of Good Act, we can understand that the following essential elements must be present in the Contract of Sale.

1. There must be two parties.

There must be at least two parties, i.e. one buyer and the other seller. A person cannot buy his own goods.

For example Shyam is the owner of certain goods, but he is not aware of this fact. Ram pretends to be the owner of the goods and sells them to Shyam. Since the goods already belongs to Shyam, he cannot buy his own goods, hence there is no sale and the contract is not valid. There is exemption in the case of a part owner. For the purpose of sale of partnership property, partners are not regarded as separate persons. They cannot be both seller and buyer. But a partner may sell goods to the firm or buy goods from the firm. However, a part owner can sell his ownership to another part owner.

2. Subject matter of Sale must be "goods"

The subject matter of contract of sale must be movable goods. Sale and purchase of immovable property is regulated by the Transfer of Property Act. Contracts relating to services are also not treated as contract of sale. So the subject matter of contract must be goods which can be movable.

3. Transfer of property in the goods: It is the ownership that is transferred in a Contract of sale. The ownership is agreed to be transferred in an agreement to sell as in case of pledge. According to Section 2 (II) of the Act, property means the

general property in the goods and not merely a special property. The general property is transferred from seller to the buyer in a contract of sale. When the goods are pledged, it is only the special property which is transferred i.e., possession of the goods is transferred to the pledgee while the ownership rights remain with the pledger. You should note that for transferring the ownership of goods, the physical delivery of the goods is not essential.

4. Consideration in Price:

Consideration in a contract of sale has necessarily to be money. Thus, if for instance, goods are offered as consideration for goods, it will not amount to sale, but it will be called a 'brater'. Similarly, in case there is no consideration, it amounts to gift and not sale. However the consideration may be partly in money and partly in goods.

Sale and Contract for Work and Labor

A Contract of sale of goods has to be distinguished from a contract for work and labor, involving the exercise of skill or labor on some material. The dividing line between the two is very minute. The distinction essentially rests on whether the rendering of the service and exercise of skill is the essence of the contract or the delivery of the goods is the essence of the contract, although some labor on the part of the seller might also have been out. In case of the former, it is a contract of work while in the later case it will be a contract of sale of goods. The distinction between the two may be understood by referring to the case of Robinson V. Graves. In this case A engaged an artist to paint a portrait. Canvas, paint and other necessary articles were to be supplied by A to the painter. Applying the above-mentioned test that whether application of skill and labor in the production of the portrait is the substance of the contract, it was held that it is a contract for work and labor and not a contract of sale. On the other hand, a contract for

providing and fixing four different types of windows of certain size according to specifications, designs, drawings and instructions set out in the contract and a

contract for making and supplying of wagons or coaches on the under frame supplied by Railways have been held by the Supreme Court to be contracts for work and labor and not a contract of sale.

From the above it should become clear to you that in a contract of sale ownership and possession of goods are transferred, while in a contract for work and labour through there may be delivery of goods, yet the emphasis is on the exercise of skill and labor upon the goods.

CONDITIONS AND WARRANTIES

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

a) 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 a right to reject the goods and treat the contract as repudiated.

b) Condition is essential to the main purpose.

b) Warranty is incidental or collateral to the main purpose.

c) Breach of a condition may be treated as breach of warranty.

c) Breach of warranty cannot be treated as breach of condition.

Difference between condition and warranty with an example.

X sells food-stuff to Y. The contract between X and Y states that the food to be sold should be fit for consumption and this is the essential term in the contract.

So, if it contains any poisonous substance, Y is entitled to reject the food-stuff and to repudiate the contract this essential term is called a **condition.**

On the other hand, if the contract stipulates that the food-stuff should be packed in 1 kilo box but the seller packs it in half-kilo box, only an auxiliary or minor term of the contract is broken, Y may be able to claim compensation in respect of its breach, but not avoid the contract. Such an auxiliary term is called **warranty.**

The importance of the distinction between a condition and a warranty is that the breach of a "condition" normally entitles the innocent party to terminate the Contract and claim damages; while the breach of a "warranty" normally entitles the innocent party to only claim damages.

An example of a "condition" is a term that entitles the Buyer to vacant Possession of the property. If the Seller is unable to deliver vacant possession and is in breach of the condition, then the Buyer may have the right to affirm the Contract and sue for damages for default and/or sue for specific performance and/or terminate the Contract.

The remedies available to the Buyer may be set out in detail in the Contract and may oblige the Buyer to first issue a default notice requiring the breached condition to be fulfilled within a certain time period before exercising its further rights. A Buyer who terminates a Contract after a breach of a condition by the Seller will normally be entitled to recover the deposit and any other moneys paid under the Contract.

An example of a "warranty" is where the Seller warrants or agrees that at Settlement the property will be in the same state and condition it was in immediately before the date of the Contract. There may be a change in a physical feature of the property between the date of the Contract and settlement that the Seller is not willing to rectify. In this instance the Buyer normally does not have a right to terminate or delay settlement unless the Contract provides otherwise.
Rather, the Buyer must settle and separately pursue a claim for damages/ Compensation from the Seller.

A party should always seek legal advice so it can correctly identify the nature of a term of a Contract and ascertain what remedies are available in each particular Case. Depending on the type of term, the remedies for breach are likely to be quite different and the strategies to deal with the breach are also likely to be Different.

When is condition treated as a warranty?

In certain circumstances, a condition may be treated as a warranty:

a) Election in the hands of the buyer-Where a seller failed to fulfill a condition in a contract of sale; the buyer has a right to waive such condition or elect to treat the breach of condition as a breach of warranty. It depends upon the consent of the buyer, not the seller.

b) If a contract of sale is not severable and the buyer has accepted the goods partly, this is called part-performance. In such a case, it cannot be treated as a breach of condition by the seller but it can be treated as a breach of warranty.

However, if the parties have an express contract, the seller is liable for the breach of condition and not for breach of warranty.

c) Impossibility of performance: If the seller is unable to perform his contract due to impossibility, then also a condition is treated as a warranty.

PASSING OF PROPERTY/TRANSFER OF PROPERTY BETWEEN BUYER AND SELLER:

Transfer of property is the process of transferring the property in goods to the buyer for a price. It is the essence of a contract of sale.

Rules:

a. Sale of specific goods:

i) Passing of property at the time of contract.

ii) Goods to be weighed or measured for ascertaining price.

b. Sale of unascertained goods:

i) Goods must be ascertained.

ii) Goods must be appropriated.

c .Sale of approval:

i) Acceptance.

ii) Failure to return.

B. Goods Delivered on Approval or Sale on return basis.

TRANSFER OF TITLE/NEMO DOT QUOD NON HABET

This means No person can pass a better title than what he has.

The object of the maxim Nemo Dot Quod Non Habet is to protect the property from mishandling. The owner of the property is entitled to transfer his title. A person, who is not the owner of the property, is not entitled to sell it.

As per Sec. 27, no one can sell the goods and convey a better title thereof unless he is the owner. Therefore when the goods are sold by a person who is not the owner thereof and who does not sell them under the authority or without the consent of the owner, the buyer acquires no better title than the seller had.

The exceptions are:

a) **Estoppels by owner**: - This states that unless the owner of the goods is by his conduct precluded from denying the sellers authority to sell gives the right to a third person to sell a property not of his own by estoppels of the owner.

E.g. A son sells his mothers jewellery in presence of his mother who does not object to the sale. The buyer gets a good title due to estoppels by mother.

b) Sale by mercantile agent:-provides that where a sale by a mercantile agent on behalf of the owner is valid.

E.g. A share broker obtains the signature of the share-holder on original share certificates and sells them on behalf of the share-holder. Here the broker is the mercantile agent.

c) **Sale by one of joint owners**:- The third exception to the maxim, Nemo Dot Quod Non Habet lays down that if one of the several joint owners of goods has the sole possession of them by permission of the co-owners, the property in the goods is transferred to any person to any person who buys them of such joint owners in good faith and has not at the time of the contract of sale notice that the seller has no authority to sell.

E.g. A, B and C are joint owners of a horse. A who is in sole possession of it, sells it to X who purchases it in good faith. The sale is valid. B and C cannot claim the horse back.

d) **Sale by a person in possession under voidable contract**: - When the seller of the goods has obtained possession thereof under a voidable contract (a contract involving coercion or undue influence or fraud results in a voidable contract) but the contract has not been rescinded at the time of sale, the buyer acquires a good title to the goods, provided he buys them in good faith and without notice of the sellers defect of title.

e) **Seller in possession after sale**: A person having sold the goods, continues to be in possession of the goods or document of title to the goods, the delivery or transfer by that person of the goods or document of title under any sale or pledge to any person receiving the same in good faith and without notice of previous sale shall have the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make the same.

E.g. A, a seller sells some goods to Z, a buyer. Z keeps the stock of goods with A for some time due to lack of warehouse facility. A sells the same goods to another buyer, X. The buyer, X gets a good title. Z has a legal remedy against A for the recovery of the price paid and damages if any.

f) **Buyer in possession**: Under a contract of sale of goods, a buyer is allowed to take the possession of the goods even though he has to pay the price for it.

Eg. A purchases certain goods from B by issuing a cheque and takes the delivery of the goods from B. A, thereafter sells the goods to C. B has a right to claim for the price of the goods and damages from A. However, C gets a bona fide title on the goods.

What is Caveat Emptor?

In business laws, the phrase 'Caveat Emptor' stands for 'let the buyer beware.' This implies that the responsibility of identifying goods and finding defects with them lies with buyer. He should be finalizing the goods that he needs. It implies that the seller is not responsible to enquire what the buyer's requirements are and not required to reveal faults in his products or services.

E.g. Ram bought 10 cows from a cattle broker. Out of those 10, 2 cows had defects. However, Ram did not know this because he didn't check all 10 cows though he paid for them. Guess what happened? The 2 infected cows died within three days of the purchase. Now, as there was no tacit condition that the cows would be in great health at the time of the sale, Ram cannot hold the cattle broker as responsible for having sold him those infected cows. It was Ram's basic duty to check the health of those cows and not expect the cattle broker to state all the defects.

In an interesting case, *Jones vs. Padgett*, the buyer bought cloth for making uniforms. However, the seller was not aware of the purpose of buying the cloth. Later, the buyer found that the cloth is not fit making uniforms. It was, however, fit for other normal purposes. The seller was not found guilty as the principle of 'Caveat Emptor' applied in this case.

Exceptions to the Doctrine of Caveat Emptor

Over time, some exceptions have been made to the rule of 'let the buyer beware,' in business laws. These exceptions include:

Quality: Under Section 16(1), these conditions are:

- When the buyer makes the seller aware of the purpose for which the goods are needed.
- When the buyer puts trust in the judgment of the seller.

Merchantability: As per section 16(3), if the goods are sold on the basis of description, there is a tacit condition that these are of merchantable quality.

Wholesomeness: This exception implies that foodstuff sold must be apt for human consumption.

Misrepresentation or fraud by seller: A condition in which a seller misrepresents the products and the buyer buys it trusting the misrepresentation, would be an exception to the principle 'Caveat Emptor. 'Others the chance to mislead, cheat or exploit you during any purchase or transaction.

PERFORMANCE OF CONTRACT.

Performance of a contract of sale implies a duty of the seller to deliver the goods, and of the buyer to accept the delivery of the goods and make payment in accordance with the terms of the contract (**sec. 31**).

Delivery of Goods:

'Delivery' has been defined as voluntary transfer of possession of goods from one person to another.

How is Delivery Made?

Delivery of goods sold may be made by doing anything which the parties agree shall be treated as delivery or which has the effect of putting the goods in the possession of the buyer or of any person authorized by him (Sec. 33).

Mode of Delivery:

1. Actual delivery:

Actual delivery means physical transfer of goods by the seller to the buyer. The delivery may be made by the agent of the seller to the agent of the buyer.

2. Symbolic delivery:

Where the goods are bulky, it is usual for the seller to give symbolic delivery. For example, where the timber is lying in a warehouse, the delivery of key is regarded as symbolic delivery which has the effect of putting the buyer in possession or actual control of the goods.

It should be noted that the key must give complete access to the goods. If for example, the key of a room in which the goods are kept is given but the key of the main gate or door is not given, it is not regarded as a valid delivery

3. Constructive delivery:

In place of actual or symbolic delivery, the goods may be delivered without any change in their actual or visible custody. For example, where the goods at the time of sale are in possession of a third person and such third person acknowledges to the buyer that he holds the goods on his (buyer's) behalf; the delivery is called constructive delivery.

Example:

A sells to B 100 bags of rice lying in C's warehouse. C acknowledges to B that he is holding these 100 bags on behalf of B. It is constructive delivery by A to B.

Rules Regarding Delivery:

1. Delivery by whom and to whom (Sec. 31):

It is the duty of the seller to deliver the goods and of the buyer to accept and pay for the goods delivered.

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

Unless otherwise agreed, delivery of goods and payment of price are concurrent conditions, i.e., at the same time or reciprocally.

The seller shall be ready and willing to deliver the goods and the buyer shall be ready and willing to pay the price in exchange for delivery of the goods.

3. Mode of delivery (Sec. 33):

This has been discussed in detail in earlier paragraphs. The delivery may be actual, symbolic or constructive. The parties may agree to any mode of delivery expressly or impliedly.

4. Effect of part delivery (Sec. 34):

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

Example:

A ship arrived at the port laden with a cargo of wheat. The owner endorsed the bill of lading to A. The master of the ship reported to the customs that the cargo was for A. Next day, A made entry of the wheat in his name at the customs house. Thereupon, part of the cargo was delivered to A. Held; this constituted a delivery of the whole.

5. Delivery to be made on request of the buyer (Sec. 35):

Apart from any express contract, a seller is not bound to deliver the goods unless and until requested by the buyer.

If the seller fails to deliver the goods on the application of the buyer, the seller is guilty of breach of contract.

6. Place of delivery [Sec. 36(1)]:

In the absence of an agreement, express or implied, the goods sold are to be delivered at the place at which they are at the time of sale. The goods agreed to be sold are to be delivered at the place at which they are at the time of the agreement to sell, or if not then in existence, at the place at which they are manufactured or produced.

7. Time of delivery:

If any time is specified by the parties, the goods must be delivered by that time.

(i) If the seller is bound to send the goods to the buyer and no time has been fixed by the parties, the goods must be delivered within a reasonable time [Sec. 36(2)]. What is reasonable time is a question of fact in each case?

(ii) The demand for delivery should be made at a reasonable hour. What is a reasonable hour is a question of fact?

8. Delivery of goods in possession of third persons [Sec. 36(3)]:

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

It should be noted that this rule does not affect the transfer of goods by means of a document of title of goods, e.g., where goods have been sold by a bill of lading, consent of the third party is not necessary.

9. Expenses of delivery:

Unless otherwise agreed, the expenses of and incidental to putting the goods into a deliverable state shall be borne by the seller. In case the buyer is compelled to pay these expenses, he can recover the same from the seller.

10. Effect of delivery of wrong quantity (Sec. 37)

(i) Short Delivery [Sec. 37(1)]:

Where the seller delivers lesser quantity than contracted for, the buyer has the option to accept or reject the whole. Naturally, when he accepts, he must pay for them at the contract price.

Example:

A ordered B to supply 10 bags of rice. B supplied only 6 bags. A is at liberty to accept 6 bags or to reject them. When he accepts them, he must pay for the 6 bags at the contracted price.

Example:

A ordered B to supply 10 bags of rice. B supplied 15 bags. A has the option to accept 10 bags and pay for them. He may accept even 15 bags and pay for him. He is entitled to reject the whole.

It should be noted that the right to reject the goods in excess of the contract does not apply where the variation is negligible. This is due to the reason that the law does not take account of trifles, i.e., the Court applies the maxim de minimise non curat lex.

(ii) Delivery of mixed goods [Sec. 37(3)]:

Where the seller delivers to the buyer the goods he contracted to sell mixed with goods of a different description not included in the contract, the buyer may accept the goods which are in accordance with the contract and reject the rest, or may reject the whole.

Example:

Certain specific articles of China were ordered. The seller in addition sent some of his articles of China. Held, the buyer could reject the whole.

These rules can be modified by a contract expressly or implied, i.e., usage or custom of the trade [Sec. 37 (4)].

11. Delivery by installment (Sec. 38):

Unless otherwise agreed, the buyer of goods is not bound to accept delivery in installments. He may, if he so desires, refuse the goods.

Example:

25 tons of pepper October/November shipment was sold. The seller shipped 20 tons in November and 5 tons in December. Held, the buyer was entitled to reject the whole In case there is a contract for the sale of goods to be delivered by stated instalments which are to be paid for separately and the buyer or seller commits a breach in respect of one or more instalments. In such a case a question arises as to whether the buyer or seller can treat it as a breach of the whole contract, or a severable breach giving rise to a claim for compensation.

The answer to this question would depend upon facts and circumstances of each case. However, the following factors should be kept in mind:

(i) The quantum of breach which it bears to the contract as a whole.

(ii) The degree of probability that it will be repeated

(iii) The nature of breach whether it goes to the root of the transactions.

12. Delivery to carrier or wharfinger (Sec. 39).

(i) Unconditional delivery to carrier or wharfinger means delivery by buyer (sec. 39):

Where in pursuance of a contract of sale, the seller is authorized or required to send the goods to the buyer, delivery of goods to a carrier for the purpose of transmission to the buyer or to a wharfinger for safe custody is prima facie deemed to be a delivery of the goods to the buyer.

(ii) Seller's duty to reasonably secure goods before delivery [Sec. 39(2)]:

Where the goods are delivered to a carrier or wharfinger, it is the duty of the seller to reasonably secure the responsibility of the carrier for the safe delivery of the goods. In case the seller fails to do so, he will be liable to make good the loss suffered by the buyer.

Example:

B, at Agra orders A, who lives at Calcutta, three casks of oil to be sent to him by railway. A takes three casks of oil directed to B to the railway station and leaves them there without conforming to the rules which must be complied with in order to render the railway company liable for their safe carriage. The goods are lost on the way. There has not been a sufficient delivery to charge B in a suit for the price.

(iii) Seller's duty to inform the buyer to get the goods insured in case the goods involve a sea transit [Sec. 39(3)]:

Where the goods are sent by the seller to the buyer by a route involving sea transit, the seller is bound to give such notice to the buyer as may enable him to insure the goods during sea transit. Failure to do so will mean that the goods are at the seller's risk during the transit and the seller will have to make good the loss suffered by the buyer.

13. Acceptance of delivery by the buyer:

(i) Buyer's right to examine the goods [Sec. 41)]:

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

When is buyer deemed to have accepted the delivery of goods? (Sec. 42):

A buyer is deemed to have accepted the goods:

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

(ii) When he does an act in relation to such goods which is inconsistent with the ownership of the seller.

The buyer has the following options:

(i) Short delivery: Lesser quantity than ordered for. He may accept or reject the whole.

(ii) Excess delivery: More quantity than ordered for. He may accept the quantity asked and pay for the same or reject the whole.

(iii) Delivery of goods ordered mixed with other goods not ordered: He may accept the goods ordered and reject the rest or the whole.

11. The buyer is not bound to accept the delivery by installments.

12. Unconditional delivery to the carrier or wharfinger means delivery to the buyer. In this case, the seller should:

(1) Reasonably secure the goods, and

(2) In case of goods involving sea route, the seller should inform the buyer to get the goods insured.

UNIT-2

RIGHTS OF AN UNPAID SELLER AGAINST GOODS

An unpaid seller is one who is not paid for the goods sold by him. Any seller would be deemed to be an unpaid seller if:

A. The whole price is not paid or tendered.

B. The credit period allowed has passed and the payment is due.

C. The negotiable instrument issued against payment has been dishonoured.

D. The buyer is declared insolvent.

His rights against goods are:

a. Rights when the property is passed to the buyer:

i) Right of lien.

ii) Right of stoppage in transit.

iii) Right of resale.

b. Rights when the property has not passed to the buyer

i) Right of withholding delivery.

ii) Right of stoppage in transit.

Rights of an unpaid seller against the buyer.

If the goods are delivered to the buyer, the unpaid seller has a right to sue the buyer for recovery of price, including costs of suit, customary interest and damages, if any.

If the buyer takes the delivery of the goods from the seller, by issuing a cheque and later the cheque gets bounced, the unpaid seller can sue the buyer under the Negotiable Instruments Act, 1881. Such a buyer is liable for punishment with imprisonment or a fine.

Sellers lien

Seller's lien refers to the seller's right to retain the possession of goods until certain charges due in respect of them are paid. 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:

Where the goods have been sold without any stipulation as to credit;

Where the goods have been sold on credit but the term of credit has expired;

Where the buyer becomes insolvent.

Stoppage in Transit

Stoppage in transit is one of the rights of an unpaid seller. This right consists of stopping the goods while they are in the possession of a carrier or lodged at any place in the course of transmission to the buyer. The seller can resume the possession of the goods and retain until the price is tendered or paid.

Rights of an unpaid seller to stop the goods in transit. They are:

a) The buyer of goods must have become insolvent.

c) The goods should be in possession of a middleman or some person intervening between the vendor who has parted with the goods and a buyer who has not received them.

c) The goods must be in transit or in possession of a middleman for the purpose of transit.

d) The seller's right of stoppage in transit can be exercised as long as the goods are in transit and not yet delivered to the buyer.

e) The seller may retain the goods until price is tendered or paid.

Right of Resale by a Seller

When a seller exercises his right of lien or right of stoppage in transit over goods, he cannot resale them as he wishes because of the existence of the original contract between the seller and buyer. The buyer has the right to pay for the goods and have them. If the seller resells them without notice of the buyer, he has to give the profit accrued on the resale to the buyer. Therefore the seller has limited right to resell the goods.

The seller can resell the goods that are under his lien or stopped in transit in the following cases:

If the goods are perishable in nature; the seller has given a notice to the defaulting buyer granting reasonable time for the payment. The buyer fails to pay the price within the specified time; the seller can sell the goods and also retain the profits, if any.

The original contract can provide the right to resale in case the buyer fails to pay the price and in such a case the seller need not send a notice to the buyer.

REMEDIES FOR BREACH OF CONTRACT

Remedies Available To the Seller:

In case of breach of the contract of sale of goods where the seller is the aggrieved party he has the following remedies:

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 certain day 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. In short, section 55 gives right to the seller to sue the buyer for the price. Now a seller can institute suit for the price when:

(i) The property in the goods has passed to the buyer, for example, goods have been sold and delivered.

(ii) Where the goods have not been delivered and the property in the goods has not passed to the buyer. The seller can sue for the price under clause (2), if the price is payable on a certain day and the buyer wrongfully neglects or refuses to pay such price. He may also exercise right of lien and stoppage in transit as discussed.

Suit for damages:

For non-acceptance: Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may sue him for damages for non-acceptance. The measure of damages is according to the provisions of section 73 of The Indian Contract Act, depending upon the available market for the goods. In action for damages for breach of contract to buy goods, plaintiff can only recover difference between contract price and market price and not between contract price and actual price.

For repudiation of the contract – Anticipatory breach: Where the buyer repudiates the contract before the date of delivery, the seller may either treat the contract as subsisting and wait till the date of delivery, or he may treat the contract as rescinded and sue for damages for the breach. This remedy is in anticipation of the breach of contract popularly known as anticipatory breach of contract.

The words repudiates the contract occurring in section 60, demonstrate that the repudiation must be of the contract in its entirety and that it is only in that event, that there is anticipatory breach which can create the right to rescind the contract.

Remedies Available To the Buyer:

In case of breach of the contract of sale, where the buyer is the aggrieved party he has the following remedies:

Suit for damages for non-delivery of the goods (Sec 57):

Where the seller wrongfully neglects or refuses to deliver the goods to the buyer, the buyer may sue the seller for damages for non-delivery. This remedy of the buyer is similar to that of the seller under section 56, discussed above under suit for damages by the seller.

Suit for specific performance:

In any suit by the buyer for breach of contract to deliver specific or ascertained goods, the Court may, if it thinks fit, on application of the buyer, by its decree, direct that the contract shall be performed specifically, without giving the seller the option of retaining the goods on payment of damages. The decree, may be unconditional, or upon such terms and conditions as to damages, payment of the price or otherwise as the court may deem just. Specific performance is subject to the provisions of The Specific Relief Act 1877. It should be noted that this section

applies only to specific or ascertained goods. The Court has discretion to order specific performance whenever damages would not be an adequate remedy.

Breach of Contract & Remedies

Nature of breach

A breach of contract occurs where a party to a contract fails to perform, precisely and exactly, his obligations under the contract. This can take various forms for example, the failure to supply goods or perform a service as agreed. Breach of contract may be either actual or anticipatory

Actual breach occurs where one party refuses to form his side of the bargain on the due date or performs incompletely.

Anticipatory breach occurs where one party announces, in advance of the due date for performance, that he intends not to perform his side of the bargain. The innocent party may sue for damages immediately the breach is announced.

Effects of Breach

A breach of contract, no matter what form it may take, always entitles the innocent party to maintain an action for damages, but the rule established by a long line of authorities is that the right of a party to treat a contract as discharged arises only in three situations.

The breaches which give the innocent party the option of terminating the Contracts are:

(a) Renunciation
Renunciation occurs where a party refuses to perform his obligations under the contract. It may be either express or implied.

(b) Breach of condition
The second repudiatory breach occurs where the party in default has committed a breach of condition.

(c) Fundamental breach
The third repudiatory breach is where the party in breach has committed a serious (or fundamental) breach of an in nominate term or totally fails to perform the contract. A repudiatory breach does not automatically bring the contract to an end.

The innocent party has two options:
He may treat the contract as discharged and bring an action for damages for breach of contract immediately.

He may elect to treat the contract as still valid, complete his side of the bargain and then sue for payment by the other side.

Introduction to Damages

Damages are the basic remedy available for a breach of contract. It is a common law remedy that can be claimed as of right by the innocent party. The object of damages is usually to put the injured party into the same financial position he would have been in had the contract been properly performed. Sometimes damages are not an adequate remedy and this is where the equitable remedies (such as specific performance and injunction) may be awarded.

Damages

Nature:

The major remedy available at common law for breach of contract is an award of damages. This is a monetary sum fixed by the court to compensate the injured Party. In order to recover substantial damages the innocent party must show that he has suffered actual loss; if there is no actual loss he will only be entitled to nominal damages in recognition of the fact that he has a valid cause of action.

In making an award of damages, the court has two major considerations:
Remoteness – for what consequences of the breach is the defendant legally responsible? The measure of damages – the principles upon which the loss or damage is evaluated or quantified in monetary terms. The second consideration is

quite distinct from the first, and can be decided by the court only after the first has been determined.

Remoteness of Loss

The rule governing remoteness of loss in contract was established in **Hadley v Baxendale**. The court established the principle that where one party is in breach of contract, the other should receive damages which can fairly and reasonably be considered to arise naturally from the breach of contract itself ('in the normal course of things'), or which may reasonably be assumed to have been within the contemplation of the parties at the time they made the contract as being the probable result of a breach.

Thus, there are two types of loss for which damages may be recovered:

1. What arises naturally; and
2. What the parties could foresee when the contract was made as the likely result of breach.

As a consequence of the first limb of the rule in **Hadley v Baxendale**, the party in breach is deemed to expect the normal consequences of the breach, whether he actually expected them or not.

Under the second limb of the rule, the party in breach can only be held liable for abnormal consequences where he has actual knowledge that the abnormal consequences might follow or where he reasonably ought to know that the abnormal consequences might follow.

The measure (or quantum) of damages

In assessing the amount of damages payable, the courts use the following Principles: The amount of damages is to compensate the claimant for his loss not to punish the defendant.

The most usual basis of compensatory damages is to put the innocent party into the same financial position he would have been in had the contract been properly performed. This is sometimes called the 'expectation loss' basis.

Sometimes a claimant may prefer to frame his claim in the alternative on the 'reliance loss' basis and thereby recover expenses incurred in anticipation of performance and wasted as a result of the breach. In a contract for the sale of goods, the statutory (Sale of Goods Act 1979) measure of damages is the difference between the market price at the date of the breach and the contract price, so that only nominal damages will be awarded to a claimant buyer or claimant seller if the price at the date of breach was respectively less or more than the contract price.

In fixing the amount of damages, the courts will usually deduct the tax (if any) which would have been payable by the claimant if the contract had not been broken. Thus if damages are awarded for loss of earnings, they will normally be by reference to net, not gross, pay. Difficulty in assessing the amount of damages does not prevent the injured party from receiving them.

In general, damages are not awarded for non-pecuniary loss such as mental distress and loss of enjoyment. Exceptionally, however, damages are awarded for such losses where the contract's purpose is to promote happiness or enjoyment, as is the situation with contracts for holidays. The innocent party must take reasonable steps to mitigate (minimize) his loss, for example, by trying to find an alternative method of performance of the contract

Liquidated damages clauses and penalty clauses.

If a contract includes a provision that, on a breach of contract, damages of a certain amount or calculable at a certain rate will be payable, the courts will normally accept the relevant figure as a measure of damages. Such clauses are called liquidated damages clauses. The courts will uphold a liquidated damages clause even if that means that the injured party receives less (or more as the case may be) than his actual loss arising on the breach. This is because the clause setting out the damages constitutes one of the agreed contractual terms. However, a court will ignore a figure for damages put in a contract if it is classed as a penalty clause – that is, a sum which is not a genuine pre-estimate of the expected loss on breach.

This could be the case where:
1. The prescribed sum is extravagant in comparison with the maximum loss that could follow from a breach.

2. The contract provides for payment of a certain sum but a larger sum is stipulated to be payable on a breach.
3. The same sum is fixed as being payable for several breaches which would be likely to cause varying amounts of damage.

All of the above cases would be regarded as penalties, even though the clause might be described in the contract as a liquidated damages clause. The court will not enforce payment of a penalty, and if the contract is broken only the actual loss suffered may be recovered.

Equitable remedies

Specific performance

This is an order of the court requiring performance of a positive contractual obligation. Specific performance is not available in the following circumstances:

- Damages provide an adequate remedy.
- Where the order could cause undue hardship.
- Where the contract is of such a nature that constant supervision by the court would be required.
- Where an order of specific performance would be possible against one part to the contract, but not the other.
- Where the party seeking the order has acted unfairly or unconscionably. He is barred by the maxim 'He who comes to Equity must come with clean hands'.
- Where the order is not sought promptly the claimant will be barred by the maxims 'Delay defeats the Equities' and 'Equity assists the vigilant but not the indolent'. In general the court will only grant specific performance where it would be just and equitable to do so.

Injunction

An injunction is an order of the court requiring a person to perform a negative obligation. Injunctions fall into two broad categories:

Prohibitory injunction, which is an order that something, must not be done.

Mandatory injunction, which is an order that something, must be done.

For example to pull down a wall which has been erected in breach of contract. Like specific performance it is an equitable remedy and the court exercises its discretion according to the same principles as with specific performance.

UNIT-3

DEFINITION, ESSENTIAL AND KINDS OF NEGOTIABLE INSTRUMENTS

Introduction:

The law relating to negotiable instrument is embodied in the negotiable instruments act 1881. It deals with the promissory notice, bills of exchange and cheques. The negotiable instruments act came into force of the first day of March 1884. It extends to the whole of Pakistan but it does not affect the provision of Sec 24 and 35 of the state. Bank of Pakistan act 1956 and accordingly every negotiable instrument shall be governed by the provisions of this act.

Meaning:

The word negotiable means transferable by delivery and instrument means a written document, so it means a document which can be transferred from one person to another making the receiver of that document entitled to receive that same amount of value which is contained.

Definition:

According to Sec 13 (1) of the negotiable instrument act "A negotiable instrument means a promissory note, bill of exchange or cheque payable either to order or bearer.

Types / Kinds of negotiable instrument:

According to Sec (13) of negotiable instrument act 1881, a negotiable instrument includes.
(a) A bill of exchange.
(b) A promissory note or.
(c) A cheque.

Above three types of negotiable instrument are mentioned in the said section. However of instrument to be treated as negotiable instrument.
(i) If it is in such a form which entitles the holder to sue in his own name.
(ii) If it is transferable.

Examples:
(i) Bill of exchange.
(ii) Promissory notice.
(iii) Cheques.
(iv) Divident warrants.
(v) Share warrants.
(vi) Bearer debentures.
(vii) Bank drafts.
(viii) Railway receipts.

Documents which are not considered negotiable instruments:
Following documents are not considered negotiable instruments:
(i) Money orders.
(ii) Postal orders.
(iii) Deposit receipts.
(iv) Share certificate.
(v) Bill of lading.
(vi) Fixed deposit.
(vii) Dock warrant.

Conditions:
(i) The instrument should be freely transferable.
(ii) The person who obtains it in good faith and for gets it free from all defects and is entitled to sue upon.

CHARACTERISTICS/ ESSENTIALS OF A NEGOTIABLE INSTRUMENT:

I. Written:
Negotiable instrument is in writing.
II. Transferable:
Negotiable instrument is transferable from one person to another. The right of ownership is transferred from one person to another person.
III. Rights of the holder:
Negotiable instrument gives the rights to the creditor to recover something from debtor. The creditor can recover himself or he can transfer his right to another person.
IV. Unconditional promise:
Negotiable instrument contains an unconditional promise or order to pay.
V. Certain amount:
In the negotiable instrument, the promise or order is made for payment of certain amount. The sum payable may be certain notwithstanding that it includes further interest or it is payable at a indicated rate of exchange.
VI. Payable in money:
Negotiable instrument is always payable in money.
VII. Discharge of debt:
It can be conveniently in the discharge of debts.
VIII. Transferee can sue in his name:
The transferee of the negotiable instrument can sue the debtor in his own name in case of dishoner.
IX. Title:
A holder in due course of negotiable instrument is free from all defects. The term holder in due course means the bona -fied transferee for values of a negotiable instrument who takes it in good faith and before majority. The title of holder in due course is not in any way affected by defective title of the transferor or any party.
X. Presumptions:

Certain legal presumptions are applicable to all the negotiable instrument. The presumptions are regarding consideration, time, date, stamp and holder in due course.

Parties to Negotiable Instrument:

Following are the parties to the negotiable instrument.

(i) Drawer

(ii) Endorser

HOLDER AND HOLDER IN DUE COURSE

A holder is an individual who is in possession of an instrument that is either payable to him or her as the payee, endorsed to him or her, or payable to the bearer. Those who obtain instruments after the payee are holders if such instrument is either payable to the bearer or endorsed properly to their order. The party in possession is not considered to be the holder in a case in which a necessary endorsement has been forged.

Introduction:

The holder of a promissory note bill of exchange or cheque means any person entitled in his own name to the possession there of and to receive or receive the amount due. Thus a person who is in possession may or may not be a holder. However in due course means any person who for consideration becomes the possessor of a negotiable instrument.

Definition of holder:

According to Sec 8.

"Holder of a promissory note, a bill of exchange or cheque means the payee or endorsee who is in possession of it or the bearer there of but it does not include a beneficial owner claiming through a Benamidar.

Conditions to be holder:

(i) He must be entitled to the possession.
(ii) He must be entitled to receive the amount.
(iii) He must be entitled to negotiate.
(iv) He must be entitled to sue.

Definition of holder in due course:

According to Sec 9.

'Holder in due course means any person who for consideration becomes the possessor of a promissory note bill of exchange or cheque if payable to bearer, or the payee, or endorsee thereof, if payable to order, before it becomes overdue, without notice that the title of the person from whom derived his own titled was defective.

Conditions to be holder in due course:

Following are the condition to be holder in due course.

I. Holder:

Holder in due course must be entitled to the possession of the instrument in his own name under a legal title.

II. Lawful consideration:

He must be the holder of the instrument against the lawful consideration.

III. Complete instrument:

Instrument must be complete in all respects.

IV. Before maturity of the instrument:

In order to become holder in due course he must possess the instrument before its date of maturity.

V. Good faith:

Holder in due course must get the instrument in good faith. Under the belief that the title of the transferee is not defective.

RIGHTS AND PRIVILEGES OF A "HOLDER IN DUE COURSE".

Following are the right and privileges of a holder in due course.

I. Better title:

A holder is due course gets better title than the transferor while a holder cannot get a better title.

II. Transfer of good title:

A holder in due course also transfers a good title to the subsequent holders.

III. Incomplete stamped instrument:

If unstamped instrument is transferred to the holder in due course, he can claim the whole amount.

IV. Free from all defects:

As the instrument passes through the hands of a holder in due course to the subsequent holders, it become free from all defects.

V. Validity of instrument:

Executor of a negotiable instrument and acceptor of a bill of exchange for the honour of the drawer cannot deny the validity of the instrument.

VI. Fictitious bill:

An acceptor of a bill of exchange drawn in a fictitious name and payable to the drawer's order is not exempted from liability to any holder in due course by reason and such name being fictitious one.

VII. Conditional instrument:

When one instrument is delivered for special purpose and not for the transfer of ownership this does not affect the holder in due course.

VIII. Payee's incapacity:

Maker of a note and acceptor of a bill payable order cannot deny the payee's capacity, at the date of the note or the bill to endorsed it in a suit by holder in due course.

IX. Capacity of prior party:

No endorser of a negotiable instrument shall in a suit thereon by a subsequent holder, be permitted to deny the signature or capacity to contract for any prior party to the instrument.

NEGOTIATION AND ASSIGNMENT

Meaning

Easy transferability is one of the important characteristics of a negotiable instrument. An instrument may be transferred:

1. By assignment, or

2. By negotiation.

Transfer by assignment:

A negotiable instrument can also be transferred by assignment. Assignment means transfer of ownership by a written document under the provisions of the Transfer of Property Act, 1882.

Example:

A executed a promissory note in favour of B. B sold this note by assignment under a sale deed to C. C sued A to recover the amount. A contended that since C was not a holder in due course, no suit was maintainable. The Court held, although C was not a holder in due course, yet he is a holder within the meaning of Sec. 8 as he is in possession of the note and as an assignee, entitled to recover the amount in his own name. Hence an instrument can be transferred by assignment. But a transferee acquires only those rights which the transferor had at the time of assignment and no more.

Transfer by negotiation (Sec. 47):

When a note, bill or cheque is transferred to any person, so as to make that person holder of the instrument, the instrument is said to be negotiated.

Mode of negotiation or how negotiation is effected?

(i) Negotiation by delivery (Sec.47) The transfer of a negotiable instrument payable to bearer can be effected by mere delivery.

Example:

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

(ii) Negotiation by endorsements and delivery (Sec. 48). A negotiable instrument, payable to order, is negotiable by the holder, by indorsement and delivery thereof.

Example:

A holds a cheque payable to order. A signs on the back of the cheque and writes 'Pay B'. Therefore, A delivers the cheque to B. It is negotiation by indorsement and delivery.

Significance or Importance of the Term 'Delivery':

The term 'delivery' is very important in negotiation: Delivery here means actual or constructive delivery with an intention of transferring property in the instrument. If the instrument is executed but is not delivered, there is no negotiation.

Example:

(a) A person executed a promissory note but died before delivering it to the payee. The promissory note was found in his papers and it was delivered to the indorsee. There is no negotiation and payee cannot recover the amount.

(b) Similarly, when an instrument payable to bearer was accidentally lost and picked up by a passer-by X, the passer-by did not acquire any title. However, if he transfers it, say, to Mr. Y. who takes it for value and in good faith, he (Y) will acquire a good title to the instrument.

TRANSFER OF INSTRUMENTS

Assignment: Under general contract principles, a negotiable instrument may be transferred to an assignee, who then holds the instrument with all the rights of the Assignor.

Negotiation: Transfer of an instrument in such a form that the transferee becomes a ***holder***, who has at least the same rights in the instrument as the transferor, and may have more rights than the transferor.

Negotiating Order Instruments: An order instrument may be negotiated by delivery with any necessary **endorsements.**

Negotiating Bearer Instruments: Unlike an order instrument, a bearer instrument need not be indorsed to transfer the payee's rights to the transferee. All that is required is **delivery** to the new bearer.

INDORSEMENTS

Indorsement: A signature, with or without additional words or statements (e.g., "for deposit only," "payable to Jane Smith," "payable from acct. # 000001," etc.), made by the ***indorser*** in order to transfer his or her rights to the

indorsee.

Blank Indorsement: An indorsement that **specifies no particular indorsee** and can consist of a **mere signature**.

Special Indorsement: An indorsement that indicates the specific person to whom the indorser intends to make the instrument payable -- i.e., the indorsee.

Qualified Indorsement: An indorsement which **disclaims any contract liability** on the instrument (e.g., "without recourse").

Restrictive Indorsement: Any indorsement on a negotiable instrument that requires the indorsee to comply with certain instructions regarding the funds involved.

Indorsement for Deposit or Collection: *"For deposit only."*

Difference between Negotiation and Assignment

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

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

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

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

4. The assignee takes the instrument subject to all the defects in the title of the transferor. If the title of the assignor was defective the title of the assignee is also defective. However, in case of negotiation the transferee takes the instrument free

from all the defects in the title of the transferor. A holder in due course is not affected by any defect in the title of the transferor; He may therefore have a better title than the transferor.

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

Effect of negotiation:

Negotiation involves transfer of ownership of the instrument from its holder to the other person. When the instrument has been transferred by negotiation the holder who has taken it for value gets good title to the instrument notwithstanding any defect in the title of the transferor, except in the case of forgery because forgery conveys no title. Thus, where the title of any prior endorser is defective by virtue of fraud, coercion or misrepresentation, the bona fide holder who has taken the instrument, in good faith gets a good title. Negotiation thus conveys a better title to the transferee than the transferor, when the holder is a holder in due course.

UNIT-4

PRESENTATION OF NEGOTIABLE INSTRUMENTS

Presentment of a negotiable instrument means presenting or showing a negotiable instrument to the drawee, maker or acceptor. This presentment may be (i) for acceptance, (ii) for sight or, (iii) for payment.

Presentment of acceptance:

Only certain types of bills of exchange require presentment for acceptance. The following bills must be presented for acceptance.

(i) A bill payable after sight or after presentment must be presented for acceptance so that date of maturity of the bill may be fixed.

(ii) A bill in which it has been expressly stipulated that it shall be presented for acceptance before payment.

However, a bill payable (a) on demand, or (b) on a fixed day, or (c) a certain number of days after date need not be presented for acceptance. Even in case where presentment for acceptance is optional, it is advisable to present the bill for acceptance so as to get (i) the benefit of additional security of drawee's name on the bill, (ii) and immediate cause of action against the drawee for dishonour by non- acceptance.

ESSENTIAL RULES OF VALID ACCEPTANCE ARE:

1. Acceptance must be given on the bill:

No specific form is prescribed. However, the acceptance must be given on the bill and it should not be on any other paper. In case the bill is drawn in sets, only one of the copies should be accepted. If the acceptor signs on all the parts, he will be liable to holder in due course as if each part were a separate bill.

2. Acceptance must be signed by the drawee or by his agent, duly authorized in this respect. Signing on the bill by the drawee, or his duly authorized agent is essential

to charge him as a party to the bill. The world "accepted" may or may not be used but signature must be there. Merely writing the word "accepted" without drawee's signature is not enough.

3. Acceptance must be completed by delivering the instrument to the holder:

Acceptance is complete only when the accepted bill is delivered to the holder.

4. Presentment must be made in time:

Presentment for acceptance must be made at a reasonable time on a business day and before maturity.

5. Not more than 48 hours should be given to accept the bill:

Not more than 48 hours should be allowed to the drawee to consider whether or not he will accept the bill.

To whom Presentment for Acceptance is made?

Obviously, to the drawee. However, presentment for acceptance may be made to the following:

(i) To the drawee himself or his duly authorized agent.

(ii) To his legal representative, if the drawee, before acceptance, has died.

(iii) To his Official Receiver or Assignee if the drawee, before acceptance, has been declared insolvent (Sec.75).

(iv) To drawee in case of need (Sec. 33).

(v) To acceptor for honour (Sec. 108).

(vi) To all the drawees, in case there are more drawees and they are not partners. In case they are partners, to any of the drawees (Sec. 34).

It should be noted that a partner or an agent can accept a bill on behalf of others only when he has express or implied authority to accept the bills.

CROSSING OF CHEQUES

A **crossed cheque** is a cheque that has been marked to specify an instruction about the way it is to be redeemed. A common instruction is to specify that it may only be deposited directly into an account with a bank and cannot be immediately cashed by a bank over the counter. The format and wording varies between countries, but generally two parallel lines and/or the words 'Account Payee' or similar may be placed either vertically across the cheque or in the top left hand corner. By using crossed cheques, cheque writers can effectively protect the cheques they write from being stolen and cashed.

From the above discussion, it should be clear that a cheque can be made safe by crossing it. To cross a cheque, two transverse parallel lines are drawn on the left hand corner of the cheque. It is also usual to write the words "& Co", in between these two lines. However, it is not necessary to write these words. A crossing is a direction to the paying banker not to pay the money to the holder at the counter.

Crossing of cheques

Cheques can be of two types:-

1. Open or an uncrossed cheque
2. Crossed cheque

Open cheque

An open cheque is a cheque which is not crossed on the left corner and payable at the counter of the drawee bank on presentation of the cheque.

Crossed cheque

A crossed cheque is a cheque which is payable only through a collecting banker and not directly at the counter of the bank. Crossing ensures security to the holder

of the cheque as only the collecting banker credits the proceeds to the account of the payee of the cheque.

When two parallel transverse lines, with or without any words, are drawn generally, on the left hand top corner of the cheque. A crossed cheque does not affect the negotiability of the instrument.

Types of Crossing:

Crossings are of the following types:

(1) General crossing;

(2) Special crossing;

(3) However, there is yet another type of crossing which is recognized by usage and custom, called restrictive crossing:

(4) Not negotiable crossing.

1. General Crossing:

In a general crossing, simply two parallel transverse lines, with or without the words 'not negotiable' in between, may be drawn. Such a cheque is crossed generally.

The effect of general crossing is that the payment of the cheque will not be made at the counter; it can be collected only through a banker.

2. Special Crossing:

In a special crossing, the name of a banker with or without the words 'not negotiable' is written on the cheque. Such a cheque is crossed specially to that banker.

It should be noted that two transverse parallel lines are necessary for a general crossing, whereas for a special crossing, no such lines are necessary.

The effect to special crossing is that the paying banker will be the amount of the cheque only through the bank named in the cheque.

3. Restrictive crossing:

Besides the two statutory types of crossing discussed above, there is one more type of crossing namely**; restrictive crossing**. This type of crossing has been recognised by usage and custom of the trade.

In a restrictive crossing the words 'Account Payee' or Account Payee Only' are added to the general or special crossing.

The effect of restrictive crossing is that the payment of the cheque will be made by the bank to the collecting banker only for the account payee named. If the collecting banker collects the amount for any other person, he will be liable for wrongful conversion of funds.

It should be noted that the duty of the paying banker is only to ensure that the payment is made through the named bank, if there is any. He is not liable, in case the collecting banker collects the cheque for any other person than the account payee. In that case collecting banker will be liable to the true owner.

4. Not negotiable Crossing (Sec. 130):

A person taking is cheque crossed generally or specially, bearing in either case the words 'not negotiable' shall not be able to give a better title to the holder than that of the transferor.

The effect of a not negotiable crossing is that the cheque can be transferred but the transferee will not acquire a better title to the cheque. Thus a cheque is deprived of its essential feature of negotiability.

The object of "not negotiable" crossing is to protect the drawer against loss or theft in the course of transit.

Example:

A cheque was drawn in favour of a firm B & Co. The cheque was crossed 'not negotiable'; one of the partners, A in fraud of his Co-partner B, endorsed the cheque to P who in cashed it. Held that B, who under the terms of the partnership agreement was entitled to the cheque could recover the amount from P as A could not transfer better title than he himself had.

Who may cross a cheque? As a rule, it is the drawer who can cross a cheque. However, Sec. 125 provides that even a holder can cross the cheque. It further

provides that a banker can cross the cheque specially for collecting to another banker as his agent for collection.

Discharge from liability

The maker, acceptor or endorser respectively of a negotiable instrument is discharged from liability thereon-

(a) By cancellation-to a holder thereof who cancels such acceptor's or endorser's name with intent to discharge him, and to all parties claiming under such holder.

(b) By release- to a holder thereof who otherwise discharges such maker, acceptor or endorser, and to all parties deriving title under such holder after notice of such discharge;

(c) By payment-to all parties thereto, if the instrument is payable to bearer, or has been endorsed in blank, and such maker, acceptor or endorser makes payment in due course of the amount due thereon.

The term 'discharge' in relation to negotiable instruments is used in two senses:

(1) Discharge of an instrument, and

(2) Discharge of one or more parties.

1. Discharge of an instrument:

An instrument is discharged when all the rights under it are extinguished so that the instrument ceases to be negotiable. For example, when the party primarily liable on the instrument, i.e. the maker or the acceptor is discharged, the instrument is also discharged. After an instrument is discharged all the parties are also

discharged from their liabilities even holder in due course cannot claim the amount of the instrument from any party to the instrument.

2. Discharge of one or more parties:

When one or more parties are discharged, the instrument continues to be liable and the undercharged parties remain liable on the instrument.

For example when the name of the indorser is cancelled, the drawer and acceptor continue to be liable.

It may be pointed out that the term 'discharge of instrument' is wider than the term 'discharge of party (ies).' When an instrument is discharged, all the parties to the instrument are also discharged automatically. However, discharge of one or more parties does not necessarily discharge the instrument.

DISCHARGE FROM LIABILITY / INSTRUMENT :

An instrument is discharged in the following ways:

1. By payment in due course [Sec. 10 and 82(c)]:

Perhaps this is the most natural and usual mode of discharge of an instrument. All parties to an instrument are discharged by payment made in due course.

Essential Rules Regarding Payment:

1. The payment should be made by the party primarily liable, i.e. the maker of a note or the acceptor of a bill and the drawee of a cheque. If the payment is made by any indorser, the instrument will not be discharged; only that indorser and subsequent parties will be discharged.

2. The payment of the instrument should be made at or after maturity. If the payment is made before maturity, it will not discharge the instrument unless the instrument is cancelled. If it is not cancelled, it is likely to reach again in the hands of a holder in due course who can enforce payment.

3. Payment should be made to the holder; otherwise it will not discharge the party liable to pay (Sec. 78). In case the instrument is payable to bearer, the payment may be made to any person in possession of the instrument unless there is a suspicion to show that he is not entitled to payment.

In that case, payment even to a thief or finder will discharge the instrument. In case the instrument is payable to order, the payment should be made to the payee named. This condition is very strict. Even if the payment is made to another person of the same name, it will not discharge the party liable to pay it.

Example:

A bill was drawn payable to Ram Lai. Another Ram Lai picked up the bill and got the payment. The acceptor is not discharged. The true Ram Lai can still recover the amount from the acceptor.

However, in case of a cheque, special protection has been granted by Sec. 85(1):

"Where a cheque payable to order purports to be indorsed by or on behalf of the payee, the drawee is discharged by payment in due course".

Thus, in the above example, if it were a cheque and not a bill, then the true Ram Lai would have no remedy against the drawee, i.e. the bank.

2. Discharge by cancellation [Sec. 82 (a)]:

Where the holder of an instrument with the intention of discharging the instrument, cancels the name of the party primarily liable (i.e. the maker of a note or the acceptor of a bill), the instrument is discharged. An instrument is also discharged if the holder cancels the instrument itself with an intention of discharging all the parties to the instrument. He may cancel the instrument by scoring it out or tearing it off.

Example:

A drew a bill for Rs. 500 on B. A indorsed the bill to C, C to D and D to E.

E, the holder of the bill, cancels the name of the drawer A. Now B, C and D are also discharged as their liability is dependent upon the liability of the drawer A.

It should be noted that cancellation should be intentional.

An accidental cancellation will not discharge the instrument. To discharge the instrument, the name of the party primarily liable should be cancelled. If the name of a party who is secondarily liable is cancelled, the instrument will not be

discharged; only the subsequent parties will be discharged in that case. The instrument should be destroyed physically so that it may not be used again.

3. By acceptor of a bill becoming its holder [Sec. 90]:

Where the acceptor of a bill of exchange (which has been negotiated) becomes its holder at or after maturity, the bill is discharged. This is based on the principle of 'Negotiation Back' discussed earlier. The party primarily liable becomes the holder of the instrument; it will not be allowed to enforce its claim against other parties. Hence the instrument is discharged.

4. By release [Sec. 82 (b)]:

Where the holder of the instrument releases the party primarily liable on the instrument or otherwise discharges him, the instrument is also discharged. The reason is very simple. Discharge of principal debtor discharges the surety. In a negotiable instrument, an indorser and subsequent parties are in the position of sureties.

Discharge of One or more Parties to an Instrument:

1. Discharge by cancellation [Sec. 82 (a)]:

This point has already been discussed as point No. 2 on the last page while discussing discharge of an instrument.

2. Discharge by release [Sec. 82 (b)]:

Where the holder of the instrument releases any indorser or otherwise discharges him, then that indorser and subsequent parties are discharged from the liabilities.

3. Discharge by payment [Sec. 82 (c)]:

Where the party primarily liable on the instrument makes the payment, the instruments as well as all the parties to the instrument are discharged. For essential rules regarding payment, please refer to discharge of instrument discussed earlier.

4. Discharge by allowing more than 48 hours to the drawee to accept the bill [Sec. 83]:

If the holder allows more than 48 hours to the drawee to consider whether or not he will accept the bill, all previous parties not consenting to such allowance, are discharged from their liability to such holder.

5. Discharge by delay in presenting cheques [Sec. 48]:

A cheque must be presented for payment within a reasonable time. When a cheque is not presented for payment within a reasonable time of its issue and the drawer suffers actual damage through the delay, he is to that extent discharged from his liability. However, the holder shall become the creditor of the bank to that extent.

Example:

A issued a cheque for Rs. 500 to B. When the cheque should have been presented, there was enough balance in his account. But the cheque is delayed beyond reasonable time and the bank fails in the meantime. A is discharged from his liability. However, B can claim Rs. 500 from the liquidator of the bank, i.e. whatever dividend is paid to the other creditors.

If in the above example, before A could present the cheque in the ordinary course, the bank fails. A will not be discharged because A has not suffered any loss due to the presentment of the cheque which was in time.

6. Discharge by qualified acceptance:

As a rule, acceptance must be absolute or unqualified. A holder is entitled to object to a qualified acceptance. However, if he does not object to such qualified acceptance, all other parties who do not consent to such qualified acceptance are discharged to such holder and those claiming under him, unless, on notice given by the holder, they agree to such acceptance.

7. Discharge by material alteration [Sec. 87]:

Any material alteration of a negotiable instrument renders the same void as against anyone who is party thereto at the time of making such alteration. However, if the party consents to such alteration or it was made to carry out the common intention of the parties, the alteration does not discharge the party concerned.

Alteration by Indorsee:

Any alteration made by the indorsee, discharges his indorser from all liability to him. However, it should be noted that an acceptor or indorser of a negotiable instrument is bound by his acceptance or indorsement if the alteration was made before he accepted or indorsed the instrument. The reason is simple. In such a case, he has in a way consented to such alteration.

An alteration is void only if it is made subsequent to acceptance or indorsement.

8. Discharge by payment of instrument on which alteration is not apparent:

When an instrument has been materially altered but does not look like that or where cheque has been crossed but does not appear to have been crossed, e.g. crossing clearly erased, the person paying or the banker is discharged from all liabilities thereon.

9. Discharge by debtor becoming its holder, i.e. when the acceptor of a bill again becomes its holder [Sec. 90]:

We have already made reference to negotiation back which discharges all the parties to the bill. A debtor (acceptor) who again becomes the holder of a bill, discharges all other parties on the same principle.

10. Discharge by operation of law:

Liability of party to a negotiable instrument is discharged by operation of law. It may be by:

(a) Insolvency. An insolvent is discharged from his liability.

(b) Merger. When merger takes place, the liability is discharged, i.e., merging of debt under the instrument into the judgement debt.

(c) Law of limitation. Further, the liability may be discharged by the debt becoming time- barred by the law of limitation.

Material Alteration:

An alteration which in any way alters the operational character of the instrument or rights and liabilities of the parties is called material alteration? It is immaterial whether the alteration is advantageous or disadvantageous. Alteration must be intentional. An accidental alteration is not bad. It need not be made by the holder.

It is sufficient if it was made when the instrument was in the possession of the holder. The holder must take every care to protect it from such alteration, otherwise he will be liable for the consequence of the alteration.

Material Alterations:

The following alterations are regarded as material:

1. The date,

2. The sum payable,

3. The place of payment,

4. The time of payment,

5. The rate of interest,

6. The place where the instrument is drawn,

7. Addition of a party's name or place of payment.

Any of the above alterations made will discharge the parties liable on the instrument.

Alterations which are not material (Sec. 87):

The following alterations are not regarded as material alterations:

1. Alteration made before acceptance or indorsement. An acceptor and indorser are bound by previous alterations (Sec. 88).

2. Alteration made to carry out the common intention of the parties.

3. Alteration consented to or agreed by the other parties.

1. Filling an inchoate but stamped instrument (Sec. 20):

A holder has the authority to fill in the blanks in such an instrument. Even where the holder fills an amount larger than intended (but is covered by the stamp) the instrument is not void against a holder in due course.

2. Converting blank indorsement into full (Sec. 49):

A holder has the authority to convert an indorsement in blank into an indorsement in full.

3. Conditional or qualified acceptance (Sec. 86):

A holder may take a qualified acceptance.

4. Crossing of cheques (Sec. 125):

A holder and a banker are empowered to cross the cheques.

Effect of Material Alteration (Sec. 87):

When a material alteration has been made a negotiable instrument, as well as all the parties to the instrument are discharged. If the alteration is made by an indorsee, then his indorser is discharged from all liabilities to him.

It should be noted that even if a material alteration is agreed to by all the parties, it becomes a new instrument which requires a new stamp.

NOTING & PROTEST

Negotiable instruments, such as bills of exchange, promissory notes or cheques are pieces of paper representing the ownership of debts and obligations and are used to settle the debt by an exchange or transfer of credit without the need for cash.

Negotiable instruments may be inland or foreign. A bill of exchange is an inland bill because it is both drawn and payable within the British Isles or drawn within the British Isles on a person resident in the British Isles.

When a negotiable instrument is dishonoured, it should be noted for non-acceptance or nonpayment (as the case may be). This is where the notary presents the dishonoured instrument to the defaulting party for acceptance or payment and recording on the instrument the reason for dishonour. Noting must take place at a reasonable time of day on the date due date or the next succeeding business day.

A foreign negotiable instrument as opposed to an inland negotiable instrument which is dishonoured, i.e. not accepted or paid by the due date, must be protested in order for action to be taken on it. However there is generally no need to protest an inland negotiable instrument.

Please contact us for further information and in the case of the need for noting and protesting on or before the due date.

The term 'noting' may be defined as the recording of the fact of dishonor by a Notary Public upon the negotiable instrument- Where a promissory note or bill of exchange is dishonoured, the holder can, after giving due notice of dishonor, sue the liable parties for the recovery of amount due on the instrument. But before he files such a suit, he needs some authenticated proof of the fact, to be put up before the court, that the bill or note is actually dishonoured, For this the holder takes the bill or note to the Notary Public who makes a demand for acceptance or payment upon the drawee or acceptor or maker formally and on his refusal to do so notes the same on the bill or note. Thus 'noting' means recording the fact of dishonor on the dishonoured instrument or on a paper attached thereto for the purpose. Noting should be done within a reasonable time after dishonor.

Noting should specify the following on the instrument:

(a) The fact of the instrument being dishonoured;

(b) The date of dishonor;

(c) The reason, if any assigned to the dishonor;

(d) If the instrument has not been expressly dishonoured, the reason, why it is being treated as dishonoured

(e) The Notary's charges for such noting;

(f) A reference to the Notary's register.

Noting is not compulsory under law. If the dishonoured instrument is not 'noted', it does not affect the rights of the holder of the instrument in any way. However, it has certain advantages. For instance, it provides an authentic evidence of dishonor. 'Noting' is authentic and official proof of presentment and dishonor of a negotiable instrument. The question of noting does not arise in the case of a dishonor of a cheque because in such a case the bank, while refusing payment returns back the cheque giving reasons in writing for the dishonor of the same and that itself acts as an authentic evidence of the fact of dishonor.

Protesting (Sec. 100)

According to Sec. 100, "when the promissory note or bill of exchange has been dishonoured by non- acceptance or non-payment, the holder may, within a reasonable time, cause such dishonor to be noted and certified by a notary public. Such certificate is called a protest."

Protest or better security: (Sec- 100, Para 2)

"When the acceptor of a bill of exchange has become insolvent, or his credit has been publicly impeached, before the maturity of the bill, the holder may, within a reasonable time, cause a notary public to demand better security of the acceptor and on its being refused may, within a reasonable time, cause such facts to be

noted and certified as aforesaid. Such certificate is called a protest for better security.

Contents of Protest (Sec. 101)

A protest under Section 100 must contain:

1) The instrument itself or a literal transcript of the instrument and of everything written or printed thereupon.

2) The name of the person for whom and against whom the instrument has been protested.

3) The fact and the reasons for dishonor this is a statement that payment or acceptance, or better security, as the case may be, was demanded by the notary public from the person concerned and he refused to give it or did not answer, or that he could not be found.

4) The place and time of dishonor.

5) The signature of the Notary Public.

6) In the case of acceptance for honor or payment for honor, the names of the persons by whom and for whom it is accepted or paid.

Notice of Protest (Sec. 102)

"When a promissory note or bill of exchange is required by law to be protested, notice of such protest must be given instead of notice of dishonor, in the same manner and subject to the same conditions; but the notice may be given by the notary public who makes the protest."

Protest of Foreign Bill (Sec. 104)

"Foreign bills of exchange must be protested for dishonor when such protest is required by the law of the place where they are drawn."

The following are the points of distinction between Noting and Protesting:

1) Noting is merely a record of the fact of dishonor. When the notary public issues a certificate stating the particulars regarding the dishonor, it is called a protest.

2) Noting is the preliminary step to 'Protesting'.

3) Noting is made on the negotiable instrument by the notary public by way of memorandum while a protest is a formal certificate drawn up later on the basis of noting.

DISHONOUR OF NEGOTIABLE INSTRUMENTS.

Introduction:

If negotiable instrument is presented for acceptance, sight or payment before the acceptor, maker, drawer or other party liable thereon by or on behalf of the holder but such persons refused to accept it or to make payment upon it.

Types of discharge of negotiable instrument:

A negotiable instrument may be dishonoured in two different way.

(i) Non-acceptance.
(ii)

Non-payment.

I. Non-acceptance:

A bill of exchange is non accepted in the following cases.
I. When the drawer or one of several drawers fails to accept the bill within 42 hrs of its due presentment for acceptance.
II. When the presentment is exceeded and the bill remains unaccepted.
III. Where the drawee has not capacity to contract.
IV. Where the drawee gives the conditional acceptance.
V. Where a drawee in case of need is named in a bill of exchange, or any endorsement thereon, the bill not dischonoured until it has been dishonoured by such drawee.

II. Dishonour by non-payment:

A promissory note, bill of exchange or cheque is said to be dishnoured by nonpayment when the maker of the note, acceptor of the bill or drawee of the being duly required to pay the same.

Effect of dishonour:

The drawer and all the endorsers of the bill become liable to the holder if the bill is dishonoured either by non-payment provided that he gives them notice of such dishonour.

4. Notice of dishonour:

The holder must give a notice of dishonour to all parties against whom he wants to file suit.

Persons who can give notice:

The following persons can give notice of dishonour.
(i) The holder of the instrument.
(ii) The authorized agent of the holder.
(iii) The party receiving the notice of dishonour to all prior parties to make them liable.

Persons to whom notice is given:

Notice can be given to the following persons.

(i) All the parties of negotiable instrument.

Exception:
Maker of a note acceptor of a bill or drawee of a cheque.
(ii) In case of persons jointly liable, notice to any one of them is sufficient.
(iii) To the official assignee if the person has been declared insolvent.

Form of notice:

It may be (i) oral (ii) written.

Time of notice:

Notice must be given within reasonable time.

Effect of notice:
(i) When the party to whom notice of dishonour is dispatched is dead, the party dispatching the notice is ignorant of his death, the notice is sufficient.
(ii) If the notice is duly directed and sent by the post and miscarries, such miscarriage does not render the notice invalid.

Cases when notice of dishonour is unnecessary:
Notice of dishonour is unnecessary in the following cases.

(i) When it is dispensed with by the party entitled to notice.
(ii) In order to charge the drawer, when he has countermanded payment.
(iii) When the party charged could not suffer damage for want of notice.
(iv) When the party entitled to notice cannot after due search, be found.
(v) To charge the drawers, when the acceptors is also a drawer.
(vi) In case of promissory note.
(vii) When after knowing the facts, the party entitled to notice promises to pay unconditionally.

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