

FUNDAMENTALS OF LAWS AND ETHICS

FOUNDATION

STUDY NOTES



The Institute of Cost Accountants of India

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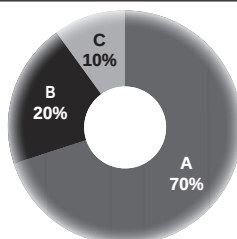
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Syllabus

PAPER 3: FUNDAMENTALS OF LAWS AND ETHICS (FLE)

Syllabus Structure

A	Fundamentals of Commercial Laws	70%
B	Fundamentals of Industrial Laws	20%
C	Fundamentals of Ethics	10%



ASSESSMENT STRATEGY

There will be written examination paper of three hours.

OBJECTIVES

To gain basic knowledge in Laws and Ethics to understand the concepts of regulatory compliance, requirements and desired ethics expected from professionals.

Learning Aims

The syllabus aims to test the student's ability to:

- Acquire adequate knowledge of the basic concepts of laws
- Understand the basic knowledge of ethics including allied regulatory compliance and requirements

Skill sets required

Level A: Requiring the skill levels of knowledge and comprehension

Note: Subjects related to applicable statutes shall be read with amendments made from time to time.

Section A : Fundamentals of Commercial Laws	70%
1. Laws of Contracts	
2. Laws relating to Sale of Goods	
3. Negotiable Instruments Act,1881	
4. Indian Partnership Act,1932	
Section B: Fundamentals of Industrial Laws	20%
5. Factories Act,1948	
6. Payment of Wages Act, 1936 and Minimum Wages Act,1948	
7. The Employees' State Insurance Act, 1948	
8. The Child Labour (Prohibition and Regulation)Act, 1986	
Section C : Fundamentals of Ethics	10%
9. Ethics and Business	

SECTION A: FUNDAMENTALS OF COMMERCIAL LAWS [70 MARKS]

1. Laws of Contracts

- Essential elements of a contract, offer and acceptance
- Void and voidable agreements
- Consideration, legality of object and consideration
- Capacity of Parties, free consent
- Quasi-contracts, contingent contracts, termination or discharge of contracts

2. Laws relating to Sale of Goods

- (a) Definition
- (b) Transfer of ownership
- (c) Performance of the Contract of Sale

3. Negotiable Instruments Act, 1881

- (a) Definition
- (b) Acceptance and negotiation
- (c) Rights and liabilities of Parties
- (d) Dishonour of a Negotiable Instrument
- (e) Hundis
- (f) Bankers and Customers

4. Indian Partnership Act, 1932

- (a) Nature of Partnership
- (b) Rights and liabilities of Partners
- (c) Dissolution of Firms

SECTION B: FUNDAMENTALS OF INDUSTRIAL LAWS [20 MARKS]

5. Factories Act, 1948

- (a) Objective, Scope
- (b) Applicability of Factories Act, 1948

6. Payment of Wages Act, 1936 and Minimum Wages Act, 1948

- (a) Objective, Scope
- (b) Applicability of Payment of Wages Act, 1936 and Minimum Wages Act, 1948

7. The Employees' State Insurance Act, 1948

- (a) Objective, Scope
- (b) Applicability of ESI Act, 1948

8. The Child Labour (Prohibition and Regulation) Act, 1986

- (a) Objective, Scope
- (b) Applicability of the Child Labour (Prohibition and Regulation) Act, 1986

SECTION C: FUNDAMENTALS OF ETHICS [10 MARKS]

9. Ethics and Business

- (a) Ethics – meaning, importance
- (b) The "Seven Principles of Public Life" – selflessness, integrity, objectivity, accountability, openness, honesty and leadership
- (c) The relationship between Ethics and Law

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Section A

Fundamentals of Commercial Laws





Study Note - 1

THE INDIAN CONTRACT ACT, 1872



This Study Note includes

- 1.1 The Indian Contract Act, 1872-Concepts and Definitions**
- 1.2 Offer and Acceptance**
- 1.3 Communication, Acceptance and Revocation of Proposals**
- 1.4 Voidable Contracts and Void Agreements**
- 1.5 Capacity of Parties**
- 1.6 Free Consent**
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- 1.8. Agreements expressly declared to be void**
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1.1 THE INDIAN CONTRACT ACT, 1872 – CONCEPTS AND DEFINITIONS

INTRODUCTION

The word CONTRACT is common to all of us and virtually no business transactions take place without any contract. Genesis of a contract lies in an agreement. Every day we enter into so many agreements, not necessarily in the formal sense of written agreement but consciously or unconsciously whatever personal, social or for that matter day to day interactions take place in our life they are agreement in one way or other, for example in the morning we go to a milk booth, buy milk and pay for it. It is an agreement whereby we pay or agree to pay the vendor on delivery of milk. Non-delivery of milk or non-payment of price to the vendor may amount to breach of contract, for which remedy can be sought. It has all the elements of a valid agreement/contract. After sometime we hire a car to go to our work place, we pay or agree to pay the car hire charges for using the service of Car. This is also an agreement/contract between the Car service provider and us. On reaching the office an invitation for attending the family function of an office colleague is received which we accept. Again this is also another type of agreement though social in nature not resulting into a contract. Suppose you paid the car hiring charges but the service provider did not provide satisfactory service. You paid for the milk but the milk turned out to be contaminated. You accepted the invitation to attend the family function of your colleague but despite elaborate arrangements made by your colleague you did not turn up in the function. How to deal with these situations.

The way to deal with all these situations is provided in the Contract Act.

The Indian Contract Act, 1872, deals with various types of contracts entered into by various people and defines the extremely important aspects of business transactions relating to contracts. In business dealings, offers for sale are made and accepted, consideration is agreed, and conditions of sale are specified. Disputes arise when an offer or acceptance is violated, consideration is unpaid, and conditions of transactions are violated. The Contract Act, 1872 takes care of all these matters and provides remedies for all such disputes.

Before enactment of Indian Contract Act, 1872, the courts in India used to apply English Common laws as suited to Indian conditions, customs and usages. Some difficulties were noticed in using English Common laws. Accordingly later the courts started deciding cases based on Hindu personal laws and Muslim personal laws. But the same were still not found fit to address the business complexities. Accordingly separate Indian

Contract Act, 1872 was enacted. This Act is based on English Common law, which is to a large extent made up of judicial proceedings. Before 1930 the Act contained provisions relating to contract of Sales of goods and partnership. Section 76 to 123 relating to Sales of Goods were deleted from the Indian Contract Act, 1872 and enacted in another act, Sales of Goods Act, 1930. Similarly Section 239-266 relating to partnership were repealed in 1932 and a separate act, Indian Partnership Act, 1932 was passed.

The Indian Contract Act, 1872 is not an exhaustive Act as it does not cover all branches of the law of contract. There are other acts to deal with other types of contract like Sales of Goods Act for Sales of goods, Partnership Act for Partnership Contract, Transfer of Property Act for contract relating to Sale of immovable property etc. Again it does not deal with all types of agreements, it deals with only those agreements which are enforceable by law or which gives rise to legal consequences.

Contract Act, 1872 extends to whole of India except the State of Jammu & Kashmir and came into operation from 1st September 1872.

Before discussing the various clauses of the Indian Contract Act, 1872 let us define the various terms and expressions used in the Act. Section 2 of the Act defines various terms used in the Act.

Section 2

- (a) When one person signifies to another, his willingness to do or to abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal;
- (b) When the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal, when accepted, becomes a promise;
- (c) The person making the proposal is called the “promisor”, and the person accepting the proposal is called the “promisee”;
- (d) When, at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise;
- (e) Every promise and every set of promises, forming the consideration for each other, is an agreement;
- (f) Promises which form the consideration or part of the consideration for each other are called reciprocal promises;
- (g) An agreement not enforceable by law is said to be void;
- (h) An agreement enforceable by law is a contract;
- (i) An agreement which is enforceable by law at the option of one or more of the parties thereto, but not at the option of the other or others, is a voidable contract;
- (j) A contract which ceases to be enforceable by law becomes void when it ceases to be enforceable.

After understanding the various terms and expressions defined in section 2 of the Act, let us first understand what the term contract stands for. For that purpose we need to define the term “**contract**”.

What is contract?

A contract is an agreement made between two or more parties which is enforceable in court of Law.

Section 2(h) defines the term contract “an agreement enforceable by law.” Pollock defines contract as “Every agreement and promise enforceable at law is a contract.”

According to Salmond, a contract is an “agreement creating and defining obligations between the parties.”

After going through the various definitions of the term Contract, we noticed that this term has not been defined directly but defined in term of another term “**agreement**”.



So to understand the term “Contract” we have to first define or understand the term agreement in terms of which the term contract is defined by various authorities.

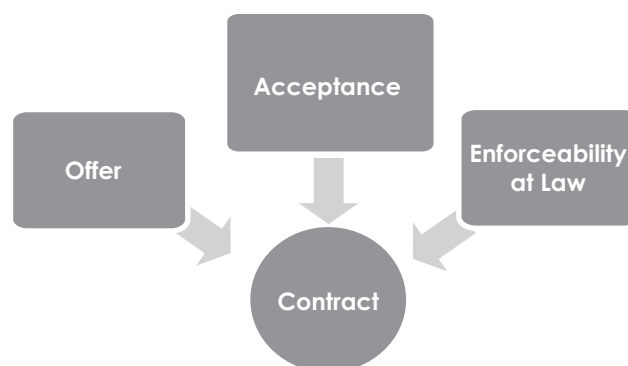
The term agreement has been defined in section 2(e) as “every promise and every set of promises, forming consideration for each other”. Again another term “promise” has been used, which has been defined as “when the person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal, when accepted, becomes a promise.”

From the about circuitous rout followed for defining the term “agreement” to define another term “Contract”, we can say that,

Agreement = Proposal or Offer + Acceptance.

After defining/understanding the term agreement, we can now understand that agreement and its enforceability leads to formation of a contract. Do agreements culminate into a Contract? Certainly not, in day to day life we make so many promises/agreements, do they all lead to formation of a contract? An agreement to become a contract must give rise to a legal obligation or duty. Thus,

Contract = Agreement + Enforceability by Law.



1.1.1 ESSENTIAL ELEMENTS OF A VALID CONTRACT

- (i) **Agreement** – In order to constitute a contract, there must be an agreement in first place. An agreement in turn is composed of two elements, offer and acceptance. Thus there must be at least two parties-one making the offer and another accepting it. The terms of offer must be definite and the acceptance must be absolute and unconditional.

For example, A offers to sell is car to B for ₹50,000. B agrees to it. Here there are 2 parties, A (offeror) and B (acceptor). The offer to sell car for ₹50,000 is a definite offer. This agreement gives to an obligation on part of A to deliver the car to B and on part of B to pay the price.

- (ii) **Intention to create legal relationship** – The parties must intend to create a legal relationship. Agreements of social or domestic nature do not contemplate legal relationship, so they are not contracts.

Example 1: A husband promising his wife to buy her a ‘necklace’ on occasion of her birthday is not a contract.

This is so, because parties never intended to create legal relationship and breach of this promise is not enforceable in any court of law.

Example 2: Mr. X promised to pay his wife a household allowance of ₹5,000 per month. Later the parties separated and the husband failed to pay the amount. Wife sued for monthly household allowance. Held not to be an agreement culminating into a contract enforceable. [Balfour V Balfour (1919)2KB 571]

- (iii) **Lawful consideration** – The agreement must be supported by a lawful consideration. Consideration means ‘something in return’. ‘Something in return’ may be an act or abstinence. But it must be real and lawful. This will be discussed in subsequent sections.

(iv) **Capacity of the parties** – The parties to an agreement must be capable of entering into a contract. A person is considered competent if he is (a) eighteen years of age (b) of sound mind (c) not disqualified from contracting by any law to which he is subject to. This will be discussed in subsequent sections.

(v) **Legality of object** – The object of agreement must be lawful. The object will be unlawful if it is forbidden by law, is deceptive, or causes injury to the person or property of another person or is immoral or opposed to public policy. This will be discussed in subsequent sections.

Example 1 : X promise to help Y in smuggling of goods if Y pays him ₹ 5,100. This is not a valid agreement as the object is unlawful.

Example 2 : X promise to pay Y ₹ 51,000 if Y promise to never get married during the life of X. This is also not a valid contract as the object is opposed to public policy.

(vi) **Existence of free consent** – The consent of the parties must be free and genuine i.e. not induced by coercion, undue influence, fraud or misrepresentation. Parties must have entered into the contract out of their own free will. Consent implies agreeing upon the same thing in the same sense and free consent implies which is not vitiated by coercion, undue influence, fraud, mistake or misrepresentation etc. This will be discussed in the subsequent sections.

Example 1 : X asked Y to sell his car worth ₹ 2 lakh to him for ₹ 20,000 otherwise he will expose his illicit relationship. Y signed the agreement in favour of X selling his car to him for ₹ 20,000. This is not a valid contract as the consent of Y is not free.

Example 2 : X claimed that his horse is of Arabian racing breed. Y believing on his statement agreed to purchase his horse for ₹ 5 lakh.

However, later the horse was found to be not of Arabian Racing breeds. This is also not a valid contract as the consent of Y was obtained through misrepresentation of fact.

(vii) **The agreement not expressly declared void or illegal by law** – Enforceability of an agreement also depends upon whether it is expressly declared void by any law in force in the country or not. There are certain agreements which have been expressly declared void under various sections of the Contract Act, like agreement in restraint of marriage, trade or legal proceedings, wagering agreement etc. These will be discussed separately.

Example 1 : A knowing that B has committed Bank robbery obtain a promise from B for transferring his flat worth ₹ 5 lakh to A for ₹ 2 lakh. This agreement is void and illegal.

Example 2 : A promise to pay B ₹ 11,000 if B secures him employment in the public service. The agreement is void because of illegality of objects.

(viii) **Certainty of terms** – The terms of agreement must be certain and capable of performance. The meaning of the agreement must be certain or capable of being made certain otherwise the agreement will not be enforceable by law. This will be discussed in subsequent sections.

For example, **D** agrees to sell **C'** garments. The type, quality, value etc. are not discussed. The agreement cannot be enforced as terms are uncertain.

Similarly, if **A** promises **B** to bring rainfall through magic. Such agreement cannot be enforced.

(ix) **Legal formalities** – Where nature of agreement is such that it requires compliance of certain formalities, such requirements should be fulfilled. For example, a contract may require registration in addition of being in writing. However as regards to legal effects, an oral contract has same weightage as a contract in writing.



1.1.2 CONTRACTS CAN BE CLASSIFIED IN TERMS OF THEIR ENFORCEABILITY OR FORM OR EXTENT OF PERFORMANCE

A) Based on Enforceability.

- (i) **Valid Contract:** An agreement enforceable by law is a valid contract. In other words it satisfies all the requirements of a valid contract as laid down in section 10. If any of the essential requirements is missing it becomes a void contract.
- (ii) **Void agreement:** An agreement not enforceable by law is said to be void. A void agreement has no legal consequences.
- (iii) **Voidable contract:** An agreement which is enforceable at the option of one or more parties thereto but not at the option of other or others is a voidable contract.
- (iv) **Void contract:** A Contract which ceases to be enforceable by law becomes void when it ceases to be enforceable. Void agreement and void contract are different. Void agreement is void ab-initio but void contract is a valid contract at the beginning but subsequently becomes void when it ceases to be enforceable.
- (v) **Unenforceable contracts:** These are the contracts which cannot be enforced in a court of law because of some technical defects, these contracts becomes fully enforceable if the technical defects are removed.
- (vi) **Illegal Contracts:** An illegal agreement is destitute of any legal effect from the very beginning. All illegal agreements are void agreements but all void agreements are not illegal.

B) Based on method of formation.

- (i) **Formal contracts:** This term is usually found in English laws. Validity of these contracts depends upon their form. They are valid even if they lack consideration. These contracts are of two types; Contract under seal and contract of Records.

Contract under seal are in writing and signed by the parties to them.

Contract of Records includes the court judgements and recognisance, obligations in such cases arise out of judgement and not under the contract.
- (ii) **Simple Contract:** All contracts other than formal are called simple contracts or parole contracts.

C) Based on extent of performance.

- (i) **Executed Contracts:** An executed contract is one which has been completely completed by both the parties.
- (ii) **Executory contracts :** It is a contract which is wholly unperformed. If one party has performed his part of obligation but the other party has not yet completed his obligation on the contract, the contract still remains executory contract.

D) Based on Obligation.

- (i) **Unilateral contract :** Under this type of contract, there is an obligation on the part of only one party when the contract is concluded.
- (ii) **Bilateral Contract :** Here there is an obligation on both the parties to the contract.
- (iii) **Multilateral Contract:** In this type of contract more than two parties are involved. These are very complex contracts and generally take international character. These type of contracts will be discussed subsequently at the appropriate place.

1.2. OFFER AND ACCEPTANCE

1.2.1 OFFER

Earlier we discussed that Agreement = Offer/Proposal + Acceptance.

An offer/proposal when accepted becomes an agreement.

So the obvious question is: What is a proposal?

Again let us refer to the Contract Act.

Section 2(a) defines as under:

A proposal is defined as, 'when one person signifies to another his willingness to do or abstain from doing anything, with a view to obtaining the assent of that other to such act or abstinence, he is said to make a proposal.' [Sec. 2(a)]

The term proposal used in the Indian Contract Act is like the term offer used in English laws. The person making proposal or offer is called the promisor or offeror and the person to whom the offer is made is called the offeree and the person accepting the offer is called the promisee or acceptor.

For an agreement to come into force, there should be a definite offer by one party and unqualified acceptance by the party to whom offer is made.

Thus 'An **offer** is an expression of willingness to contract on certain terms, made with the intention that it shall become binding as soon as it is accepted by the person to whom it is addressed, the "offeree" [G.H. Tretel, The Law of Contract, 10th edn, p.8].'

Legal Rules Regarding Offer :

An offer to be valid must comply with the following rules:

A. Offer may be expressed or implied:

An offer may be expressed or may be implied from the conduct of the parties or circumstances of the case.

Express Offer: An express offer is made by words spoken or written.

Examples:

- (i) P says to Q, "Will you purchase my car for ₹ 17,000?" It is an oral offer.
- (ii) P, through a letter asks Q to buy his car for ₹ 17,000. It is a written offer.

Implied Offer - An implied offer is not made by words spoken or written. It is implied from the conduct of the parties or from the circumstances.

Example:

- (i) Public Transports, like, Railways, DTC in Delhi or MEST in Mumbai offer to carry passengers for a certain fare on a particular route.
- (ii) PCO or Weighing Machines in public places like, Railway Stations or Cinema Houses offer their services for a certain amount, say one rupee.

B. Offer may be specific or general:

A specific offer is one which is made to a particular person. It can be accepted by the person to whom it has been made, no one else can accept such an offer.

Example:

R offers to sell his camera to S for ₹ 1000. This is a specific offer made to S. It is S alone who can accept this offer and no one else can accept this offer, i.e., A or B cannot accept this offer. A general offer is made to the world at large. Therefore, it can be accepted by any person.



Example:

- i. F advertised in a Newspaper that he would give ₹ 2000 to anyone who finds and returns his lost dog.
- ii. A company advertised that a reward of ₹ 100 would be given to any person who contracted influenza after using the medicine (Smoke balls) made by the company according to the printed directions. One lady, called Mrs. Carlill, purchased and used the medicine according to the printed directions of the company but suffered from influenza. She filed a suit to recover the reward of ₹ 100. The Court held that there was a contract as she had accepted a general offer by using the medicine in the prescribed manner and as such, she was entitled to recover the reward from the company.

C. Offer must give rise to legal obligation:

An offer to be valid must create legal relationship between the parties. The very purpose of entering into an agreement is to make it enforceable at a Court of law.

Example:

K promised to pay ₹ 30 to his wife every month. Later, K failed to pay the amount. The wife filed a suit against the husband to recover the amount. The Court held that she could not recover as the promise was not made with an intention to create any legal relationship.

D. Terms of an offer must be definite and certain:

The terms of an offer should not be vague or indefinite.

Example:

G has two cars – Maruti and Fiat. He agrees to sell one of his cars to H for ₹ 20,000.

It is not clear as to which of the cars G has agreed to sell. G might be thinking to sell the Maruti car while H might be thinking to purchase the Fiat car. The offer is not definite.

E. Offer must be distinguished from an invitation to offer:

An offer must be distinguished from an invitation to offer. The shopkeepers generally display their goods in showcases with price tags. The shopkeeper in such cases is not making an offer so that you can accept it. He is, on the other hand, inviting you to make an offer which he may or may not accept. Thus you cannot compel a shopkeeper to sell the goods displayed in the showcase at the marked price. However, if there is a specific law to sell goods at marked price then the seller will have to sell at marked price. For example, during National Emergency essential commodities like sugar etc. have to be sold at marked price.

Example : Goods in a shop are sold under 'self service' system. A selects goods and takes them to the payment counter. The contract is not made when customer selects goods but when the cashier accepts the offer to buy and receives the price. [Pharmaceutical Society of Great Britain v. Boots Cash Chemists, (1953), 1, Q. B. 401].

F. Offer must be distinguished from a mere declaration of intention:

A declaration of intention to make an offer is not an offer. It is regarded as an invitation to an offer. An advertisement for sale in a Newspaper or Magazine etc. is not an offer for sale.

Example:

T advertised to sell certain furniture by auction, V reached T's shop to purchase the furniture. However, T changed his mind not to sell the furniture. V cannot compel T to sell the furniture or even to recover his damages, i.e., conveyance charges and damages for inconvenience caused to him due to cancellation of the sale.

It should be noted that a general offer can be made through advertisement if the terms are certain and capable of being accepted.

Example:

Q lost his camera in a tram. He announced a reward of ₹ 100 to the finder who may return it to him. R found the camera after reading the advertisement and returned it to him. R is entitled to the reward.

G. Offer must be communicated:

An offer must be communicated to the person to whom it is made. A person can accept the offer only when he knows about it. If he does not know it, he cannot accept it.

Example : S offered a reward to anyone who returned his lost dog. G returned the dog to S without knowing the offer. Held G was not entitled to reward.

H. Communication of Special Terms:

Special terms of a contract must be communicated. Generally, such cases arise in respect of general offers, like tickets or receipts for depositing luggage at the Railway Station or receipts for clothes given for dry cleaning etc. The rule in these cases is that parties are not bound unless conditions printed are properly communicated. The special terms must be brought to the customer's notice either (a) by drawing his attention to them specifically or (b) by inferring that a man of ordinary prudence could find them by exercising ordinary prudence.

Example of (a) are where certain conditions are written on the back of a ticket for a journey or deposit of luggage in a cloak room and the words "For condition see back" are printed on the face of it. In such cases the acceptor, the person buying the ticket is bound by whatever condition are written on the back of the ticket whether he has read them or not.

Example of (b) is where the conditions forming part of the offer are printed in a language not understood by the offeree but his attention has been drawn to them in a reasonable manner. In such case the law imposes an obligations upon the offeree to ask for the translation of the conditions. If he fails to do so, it is presumed that he has constructive notice of these special terms and he will be bound by them.

However, if the special conditions forming part of the offer are contained in a document which is delivered after the contract is complete. Then the customer is not bound by them.

I. Offer must be made with a view to obtaining the consent of the other party to do or to abstain from doing the act:

The offer must be made with an intention to get the consent of the other party to do or to abstain from doing the act and not simply with a view to making known the intention of making an offer. An offer must be distinguished from an invitation to receive offer or as it is sometimes expressed as "Invitation to treat". A catalogue or a price list of a shopkeeper is not an offer. It is only an invitation to receive the offer from the customers. The trader merely indicate that he is willing to consider an offer made by a buyer on the terms. That is he is inviting an offer and not making one. A shopkeeper can not be compelled to sell his goods as per the printed price list. The buyer only gives an offer which may or may not be accepted the shopkeeper.

Sometimes a person declare that he has the intention to do something and this does not amount to an offer. Such a declaration only means that the offer will be made or invited in future.

Example:

X tells Y, "I may sell my Television if I can get ₹ 5,000 for it." It is not an offer as it has not been made with a view to get the consent of B. It is a mere declaration of intention. Therefore, Y cannot accept it by saying. "I can pay you ₹ 5,000 for it." Y is not accepting X's offer but is making his offer which X may or may not accept.



J. Offer should not impose an unnecessary obligation to communicate non-acceptance:

Thus an offeror cannot say that if acceptance is not communicated by Sunday next, the offer would be considered as accepted.

Example:

X offers his car to Y for ₹ 20,000 saying, "If you do not reply by Sunday next, I shall presume, you have accepted the offer."

In this case, no contract will be created even if the acceptor does not reply as the law does not permit a party to impose an unnecessary obligation of the acceptor if he does not want to accept the offer. Thus in the above example, if the acceptor does not accept the offer he will be put to an unnecessary burden of informing the offeror that he does not want to accept the offer.

1.2.2 ACCEPTANCE

"Section 2(b) defines acceptance as" When one person to whom the proposal is made signifies his assent thereto, the proposal is said to be accepted. A proposal when accepted becomes a promise." Thus acceptance is the manifestation by the offeree of his assent to the terms of the offer.

Acceptance is a final and unqualified expression of assent to the terms of an offer [G.H. Treitel, The Law of Contract, 10th edn, p.16]. It is no defense to an action based on a contract for the defendant to claim that he never intended to be bound by the agreement if under all the circumstances it is shown at trial that his conduct was such that it communicated to the other party or parties that the defendant had in fact agreed.

Legal rules regarding acceptance:

An acceptance to be valid must comply with the following rules:

- A) Acceptance must be absolute and unqualified: [Sec. 7(1)] In order to be effective, it must be an absolute and unqualified acceptance of all the terms of the offer.

Example: P offered to Q his scooter for ₹5000. M accepted the offer and tendered ₹ 4800 cash down, promising to pay the balance of ₹ 200 by the evening. There is no contract, so the acceptance was not absolute and unqualified.

- B) For an acceptance to be valid, it must not only be made by the offeree but must also be communicated by or with the authority of the offeree to the offeror. Acceptance must be communicated by the acceptor. In order to result in a contract it must be a 'matter of fact'. Silence cannot be construed as acceptance. [Felthouse v. Bindley (1862) 142 ER 1037.]

Example : In *Powell v Lee* (1908) 99 LT 284 P was a candidate for the post of headmaster in a school, The Managing committee of the School passed a resolution selecting him for the post. A member of the committee on his individual capacity informed P that he has been selected but P received no other intimation. Subsequently the resolution was cancelled, and P was not appointed. P filed a suit against the committee for breach of contract. The court held that in the absence of an authorised communication there was no binding contract.

- C) It should be in a prescribed or reasonable mode. [Sec. 7(2)] If the offeror prescribes no mode of acceptance, the acceptances must be communicated according to some usual and reasonable mode. The usual modes of communication are by words spoken or written or by conduct, it is called an implied acceptance.

Example: If the offer or prescribes acceptance by telegram and the offeree sends acceptance through a messenger, there is no acceptance of the offer.

- D) Acceptance must be given within a reasonable time and before the offer lapses :

Acceptance must be given within the specified time limit, if any and if no time is stipulated, acceptance must be given within a reasonable time because an offer cannot be kept open indefinitely.

Example : Where M applied for certain shares in a company in June but the allotment was made in November and he refused to accept the allotted shares. It was held that the offeror could not refuse to take the shares as the offer stood withdrawn and could not be accepted because the reasonable period during which the offer could be accepted had elapsed (Ramsgate Victoria Hotel Co v Montefiore) 1866 LR 1 Ex 109. Again the acceptance must be given before the offer is revoked or lapses by reason of offeree's knowledge of the death or insanity of the offeror.

- E) It cannot precede an offer. Acceptance must be given after receiving the offer. It should not precede the offer.

Example : In a company, shares were allotted to a person who had not applied for them subsequently. He applied for shares being unaware of the previous allotment. It was held that the allotment of shares previous to the application was invalid.

- F) Acceptance must be given only by the person to whom the offer is made: An offer can be accepted only by the person or persons to whom it is made and with whom it imports an intention to contract. It cannot be accepted by another person without the consent of the offeror. The rule of law is, if you propose to make a contract with P and Q, Q can't substitute himself for P without your consent. An offer made to a particular person can be validly accepted by him alone.
- G) Rejected offer can be accepted only, on renewal; offer once rejected can't be accepted again unless a fresh offer is made.

Example : A offers to sell his car to B for ₹ 60,000. B rejects the offer and agrees only to ₹ 50,000. Subsequently B wants to change his mind and accept A's offer. B can do it only if A approaches him again with the offer.

1.2.3 PROMISES, EXPRESS OR IMPLIED (SECTION 9)

So far as the proposal or acceptance of any promise is made in words, the promise is said to be expressed. So far as such proposal or acceptance is made otherwise than in words, the promise is said to be implied.

When assent is communicated by words spoken, written or doing something, it is expressed acceptance. On the other hand when it is to be gathered from the conduct of the parties or surrounding circumstances, it is called implied acceptance.

Example 1:- At an auction sale, X is the highest bidder. The auctioneer accepts the offer by striking the hammer on the table. This is an implied acceptance.

Example 2:- X boarded in DMRC Metro rail at Rajiv Chowk Delhi. This is an implied acceptance.

Example 3:- A offered by letter to B of his intention of selling his flat at ₹ 5,00,000. B, by return letter conveyed his acceptance. This is a case of expressed acceptance.

Example 4:- An offered to sell his car for ₹ 4,00,000. B, made a bank draft of ₹ 4 lakh in favor of A and handed over to him. This is an expressed assent. This is a case of expressed acceptance signified by the conduct of B.

Acceptance by performing conditions, or receiving consideration (Section 8)

Performance of the conditions of a proposal, or the acceptance of any consideration for a reciprocal promise which may be offered with a proposal, is an acceptance of the proposal.

The leading case of Carlil v Carbolic Smoke Ball Co, is a leading testimony of acceptance of an offer by performing the required act. The following examples will help in understanding the concept.

Example 1:- A shopkeeper received an order from a customer, a household lady. He executed the order by sending the goods. The customer's order for goods constitute the offer which was accepted by the shopkeeper by sending the goods. It is a case of acceptance by conduct. Here the shopkeeper is accepting the offer by performing of the act.



Example 2:- A loses his imported watch and announced that any one finding the same will be rewarded with ₹ 5000. B found the watch and return it to A. B has accepted the offer by performing the condition of the offer. B is entitled to the reward of ₹ 5000.

1.3. COMMUNICATIONS, ACCEPTANCE AND REVOCATION OF PROPOSALS

By now we have understood what is a proposal. A proposal when accepted turns into a promise.

A proposal becomes a promise only when accepted. The person to whom the proposal is made will accept or reject it only when it is communicated to him. This leads us to another question, what is communication and when it is said to be complete.

Let us find out if any definition is available in the Contract Act. The term has not been defined in the act anywhere.

In common parlance by communication we mean-to transmit, to make known, to reveal etc.

Oxford University defines the term communication-(noun) the imparting or exchange of information, (verb) a letter or message containing information or news.

From above, we can say that the term “communication” means the process of sending or bringing any matter to the knowledge of the person to whom it is directed. The process of sending or bringing to the notice may be by letters, fax, telegram, telephone etc.

Once we have understood the term communication. Another question is when communication is complete. Completion of communication from whose point of view/side ?. Communication from the side of promisee, from the side of a promisor. Again communication of what ? Communication of offer, Communication of acceptance or Communication of revocation etc.

Let us find out the answer to these questions from the Contract Act itself.

1.3.1 WHEN IS COMMUNICATION OF OFFER COMPLETE ?

As per section 4, the communication of a proposal is complete when it comes to the knowledge of the person to whom it is made.

Example: X sends a proposal of selling his car to Y by letter which was received by Y on 12.10.2012.

The communication of offer is complete when it came to the knowledge of Y on 12.10.12.

1.3.2 WHEN IS COMMUNICATION OF AN ACCEPTANCE COMPLETE?

As per Para 2 of section 4, communication of an acceptance is complete as against the proposer when it is put into a course of transmission to him, so as to be out of the power of the acceptor.

Example: Suppose in the example given above, Y accepts the proposal by a letter sent by post on 15.10.12 which is received by X on 18.10.12. In the instant case the communication of acceptance against X is complete as soon as Y dispatches the letter to be out of his control. So communication of acceptance is complete as against X on 15.10.2012.

Communication of acceptance as against the promisee or acceptor is complete when it comes to the knowledge of the proposer. In the instant case communication of acceptance as against Y is complete on 18.10.12 when the letter of acceptance is received by X.

1.3.3 COMMUNICATION OF REVOCATION :

Revocation means taking back; revocation can be of both offer/proposal as well as acceptance.

Once a proposal or its acceptance has been communicated, it is quite possible the promisor or promisee may like to revisit their decision and decide to revoke. Suppose they decide to revoke, the immediate question is when the revocation is complete.

Para 3 of section 4 states, “**the communication of a revocation is complete**”-

against the person(i) who makes it, when it is put into a course of transmission to the person to whom it is made, so as to be out of the power of the person who makes it;

(ii) as against the person to whom it is made, when it comes to his knowledge.

Suppose in the model example given above, if X decides to revoke his proposal and send an ordinary letter to Y on 14.10.12 which is received by Y on 17.10.12. In the instant, revocation of offer is complete as against X on 14.10.12 and as against Y on 17.10.12

Let us take a few more cases;-

Illustrations

(a) A proposes, by letter, to sell a house to B at a certain price.

The communication of the proposal is complete when B receives the letter.

(b) B accepts A's proposal by a letter sent by post.

The communication of the acceptance is complete—as against A, when the letter is posted; as against B, when the letter is received by A.

(c) A revokes his proposal by telegram.

The revocation is complete as against A when the telegram is dispatched. It is complete as against B when B receives it.

B revokes his acceptance by telegram. B's revocation is complete as against B when the telegram is dispatched, and as against A when it reaches him.

1.3.3.1 Time for revocation of offer and acceptance (Section 5)

A proposal may be revoked at any time before the communication of its acceptance is complete as against the proposer, but not afterwards.

An acceptance may be revoked at any time before the communication of the acceptance, is complete as against the acceptor, but not afterwards.

From above provisions of section 5 it is clear that revocation of offer must be done before the proposal is accepted by the promisee.

Similarly, revocation of acceptance must be done much before the acceptance comes to the notice of the proposer.

Example : A proposes by letter sent by post to sell his horse to B. The letter is posted on 5th March. B accepted the proposal by a letter sent by post on 7th March. Letter reached A on 10th of March.

Now the question arises if A or B is to revoke their offer/acceptance, how fast they should act.

A may revoke his offer any time before B accepts the offer i.e. 7th before B posts the acceptance letter. Similarly B can revoke his acceptance but before the acceptance letter is received by A i.e. 10th March but not after.

What happens if the revocation of offer or acceptance is not done as mentioned above, such revocation either of offer or acceptance will have no effect.

Illustrations

A proposes, by a letter sent by post, to sell his house to B.

B accepts the proposal by a letter sent by post.



A may revoke his proposal at any time before or at the moment when B posts his letter of acceptance, but not afterwards.

B may revoke his acceptance at any time before or at the moment when the letter communicating it reaches A, but not afterwards.

After knowing the time by which the revocation of offer or acceptance must be done. Next question is how revocation is to be made. Section 6 deals with this.

Let us refer to section 6

1.3.3.2 How is Revocation made (Section 6)

A proposal is revoked—

- i) By the communication of notice of revocation by the proposer to the other party;
Example : In an Auction sale. A makes the highest bid for B's Goods. However, he withdrew his bid before fall of the hammer. The offer has been revoked before its acceptance.
- ii) By the lapse of the time prescribed in such proposal for its acceptance, or, if no time is so prescribed, by the lapse of a reasonable time, without communication of the acceptance;
Example : A offered to sell his horse to B on 12/12 and gave him three days time to accept. B conveyed his acceptance on 18/12 but by that time A had already sold his horse. The offer has been revoked by lapse of time to accept it.
- iii) By the failure of the acceptor to fulfill a condition precedent to acceptance;
Example : X a seller agree to sell his car to Y provided Y give a bayana of ₹ 5,000 within two days. Y did not pay the Bayana by the stipulated time. The offer stand revoked.
- iv) By the death or insanity of the proposer, if the fact of the death or insanity comes to the knowledge of the acceptor before acceptance.
- v) If a counter offer is made to it. Where the offer is accepted with some modification in terms of the offer or with some other condition not forming part of the offer, such qualified acceptance amounts to a counter offer.
Example:- S offered to sell his car to Y for ₹ 50,000. Y gave a counter offer of ₹ 40,000. S rejected the offer. The offer stand revoked by counter offer by Y.
- vi) If an offer not accepted according to prescribed or usual mode. However, the offeror gives notice to the offeree within the reasonable time that the acceptance is not according to the prescribed or usual mode of acceptance.
For example, if offeror says, 'acceptance to be made by email', the offeree must make acceptance via email only. Acceptance vide any other mode makes the offer revoked.
- vii) **Change of law:-** An offer comes to an end if the law is changed so as to make the contract contemplated by the offer illegal or incapable of performance.
Example:- A offers to sell his bike to B. But subsequent by change of law makes sale of bike illegal. The offer comes to an end.

1.4 VOIDABLE CONTRACTS AND VOID AGREEMENTS

In section 1.1 we classified contracts on different basis. One such classification was void and voidable on the basis of validity of the contract.

As we know agreement is genesis of a contract. An enforceable agreement culminate into a contract.

An agreement becomes a contract when it fulfills all essential elements of a valid contract. In case one or more of the essential element of a valid contract are missing, the contract is void, voidable, illegal or unenforceable.

Let us discuss them one by one.

We start with a **voidable contract**: An agreement which is enforceable by law at the option of one or more parties thereto but not at the option of other is a voidable contract.

A contract become voidable when it is enforceable at the option of one or more party thereto but not other. How this happens? When in one of the essential element of a valid contract, free consent is absent. We will be discussing this when we are discussing free consent.

Example:- A promise to sell his farm to B for ₹ 5.0 lakh. B was not prepared for this but A by force compelled B to sign the agreement. Here the consent of B was obtained by coercion or fraud. The contract is voidable at the option of B.

Void agreement:- An agreement not enforceable by law is said to be a void agreement. A void agreement does not create any legal rights or obligation, hence is null and void ab initio.

Void contract:- A contract which ceases to be unenforceable by law becomes void when it ceases to be enforceable by law. Void contract is initially a perfectly valid contract but subsequent development turns it into a void contract.

The following agreements have been expressly declared to be void by the Indian Contract Act:

- (i) Agreement by a minor or a person of unsound mind. [Sec(11)]
- (ii) Agreement of which the consideration or object is unlawful. [Sec(23)]
- (iii) Agreement made under a bilateral mistake of fact material to the agreement. [Sec(20)]
- (iv) Agreement of which the consideration or object is unlawful in part and the illegal part cannot be separated from the legal part. [Sec(24)]
- (v) Agreement made without consideration. [Sec(25)]
- (vi) Agreement in restraint of marriage. [Sec(26)]
- (vii) Agreement in restraint of trade. [Sec(27)]
- (viii) Agreement in restraint of legal proceedings. [Sec(28)]
- (ix) Agreements the meaning of which is uncertain. [Sec(29)]
- (x) Agreements by way of wager. [Sec(30)]
- (xi) Agreements contingent on impossible events. [Sec(36)]
- (xii) Agreements to do impossible acts. [Sec(56)]
- (xiii) In case of reciprocal promises to do things legal and also other things illegal, the second set of reciprocal promises is a void agreement [Sec(57)]

Some of these are discussed in detail below:

Agreement in restraint of marriage is void (Section 26)

Every agreement in restraint of the marriage of any person, other than a minor, is void.

An agreement in restraint of marriage is one which curbs the freedom of a person to marry. Whether this restriction is general or partial it makes the contract void.

Example:- X agree never to marry during the life time of Y provided by pay him ₹ 51,000. This agreement is void.

Example:- A agreed to marry B only and no one else provided B's father transfer his entire property in favour of A. This agreement is void being in restraint of marriage.



Agreement in restraint of trade is void (Section 27)

Every agreement by which anyone is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void.

Saving of agreement not to carry on business of which goodwill is sold. —

Exception 1 — One who sells the goodwill of a business may agree with the buyer to refrain from carrying on a similar business, within specified local limits, so long as the buyer, or any person deriving title to the goodwill from him, carries on a, like business, therein :

Provided that such limits appear to the Court reasonable, as may be in the nature of the business.

Agreements in restraint of legal proceedings is void (Section 28)

Every agreement —

- (a) by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights; or
- (b) which extinguishes the rights of any party thereto, or discharges any party thereto from any liability, under or in respect of any contract on the expiry of a specified period so as to restrict any party from enforcing his rights, is void to that extent.

Savings of contract to refer to arbitration dispute that may arise—

Exception 1— This section shall not render illegal a contract, by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred.

Suits barred by such contracts — When such a contract has been made, a suit may be brought for its specific performance, and if a suit, other than for such specific performance, or for the recovery of the amount so awarded, is brought by one party to such contract against any other such party, in respect of any subject which they have so agreed to refer, the existence of such contract shall be a bar to the suit.

Saving of contract to refer questions that have already arisen. — Exception 2 — Nor shall this section render illegal any contract in writing, by which two or more persons agree to refer to arbitration any question between them which has already arisen, or affect any provision of any law in force for the time being as to references to arbitration.

Example:- In *Madhub Chander V Raj Cooner*(1874)14 BLR 76, there were two rival shopkeepers in a locality, one of them agreed to pay a sum of money to the plaintiff if he would close the business in the area. The plaintiff accordingly did so but the defendant refused to give any money. The court held the agreement to be void.

Agreements void for uncertainty (Section 29)

Agreements, the meaning of which is not certain, or capable of being made certain, are void.

Example:

- (a) A agrees to sell to B “a hundred tons of oil”. There is nothing whatever to show what kind of oil was intended. The agreement is void for uncertainty.
- (b) A agrees to sell to B one hundred tons of oil of a specified description, known as an article of commerce. There is no uncertainty here to make the agreement void.

- (c) A, who is a dealer in coconut oil only, agrees to sell to B “one hundred tons of oil”. The nature of A’s trade affords an indication of the meaning of the words, and A has entered into a contract for the sale of one hundred tons of coconut oil.
- (d) A agrees to sell to B “all the grain in my granary at Ramnagar”. There is no uncertainty here to make the agreement void.
- (e) A agrees to sell to B “one thousand maunds of rice at a price to be fixed by C”. As the price is capable of being made certain, there is no uncertainty here to make the agreement void.
- (f) A agrees to sell to B “my white horse for rupees five hundred or rupees one thousand”. There is nothing to show which of the two prices was to be given. The agreement is void.

Agreements by way of wager are void (Section 30)

Agreements by way of wager are void; and no suit shall be brought for recovering anything alleged to be won on any wager, or entrusted to a person to abide by the result of any game or other uncertain event on which any wager is made.

The term wager has not defined in the Act. Sir William Anson has defined the term wager as 'a promise to give money or money worth upon the determination or ascertainment of an uncertain event. In a wagering agreement the event are uncertain not within the control of either party and the parties have no other interest other than winning or losing.

Exception in favour of certain prizes for horse-racing— This section shall not be deemed to render unlawful a subscription, or contribution, or agreement to subscribe or contribute, made or entered into for or towards any plate, prize or sum of money, of the value or amount of five hundred rupees or upwards, to be awarded to the winner or winners of any horse-race.

Section 294A of the Indian Penal Code not affected— Nothing in this section shall be deemed to legalize any transaction connected with horse-racing, to which the provisions of section 294A of the Indian Penal Code, (45 of 1860) apply.

Agreement to do impossible Acts section 56;

According to section 56 an agreement to do impossible event is void. Impossibility may be at the time of entering into a contract or subsequent to the formation of the contract but before performance of the contract. When one person has promised to do something which he knows or with reasonable diligence might have known and which the promisor did not know to be impossible or unlawful, such promisor must make compensation to such promisee for any such loss which the promisee sustains through the non performance of the promise.

Example 1:- A agrees to discover treasure by magic if B pay him ₹5100. This agreement is void due to impossibility of Act.

Example 2:- A promises to bring Moon on earth if B pay him ₹5100. This agreement is also void due to impossibility of Act.

1.5 CAPACITY TO CONTRACT

Another important ingredient of a valid contract is capacity of the parties. When we say capacity of the parties, we mean competence of the parties, competence stands for legal competence and not financial competence, though nobody would enter into any business contract with a person not having financial competence, but nevertheless he is competent to enter into any contract.

According to section 10 every person is competent to contract, who (a) is of the age of majority according to the law to which he is subject (b) is of sound mind and (c) is not disqualified from contracting by any law to which he is subject to.



1.5.1 POSITION OF MINOR

As per section 3 of the Indian Majority Act of 1875, every person in India is a minor, if he has not attained the age of 18 years of age. However in case of a minor of whose person or property or both, a guardian has been appointed under the Guardian and Wards Act, 1890 or whose property is under the superintendence of any court or wards before he attains 18 years of age is 21 years.

A minor who has not completed 18 years of age is not competent to contract. A contract with a minor is void ab initio.

1.5.2 WHAT IS A SOUND MIND FOR THE PURPOSES OF CONTRACTING? (SECTION 12)

A person is said to be of sound mind for the purposes of making a contract if, at the time when he makes it, he is capable of understanding it and of forming a rational judgment as to its effect upon his interests.

A person who is usually of unsound mind, but occasionally of sound mind, may make a contract when he is of sound mind.

A person who is usually of sound mind, but occasionally of unsound mind, may not make a contract when he is of unsound mind.

Illustrations

- (a) A patient in a lunatic asylum, who is at intervals of sound mind, may contract during those intervals.
- (b) A sane man, who is delirious from fever or who is so drunk that he cannot understand the terms of a contract or form a rational judgment as to its effect on his interests, cannot contract whilst such delirium or drunkenness lasts.

Going by the spirit of the section it is clear that a person is sound mind if he fulfills the following two conditions.

- (i) He/she is capable of understanding the contract.
- (ii) He /she is capable of forming a rational judgment about the effects of such contract on his interest. A person not satisfying any of these two conditions is not treated a person of sound mind.

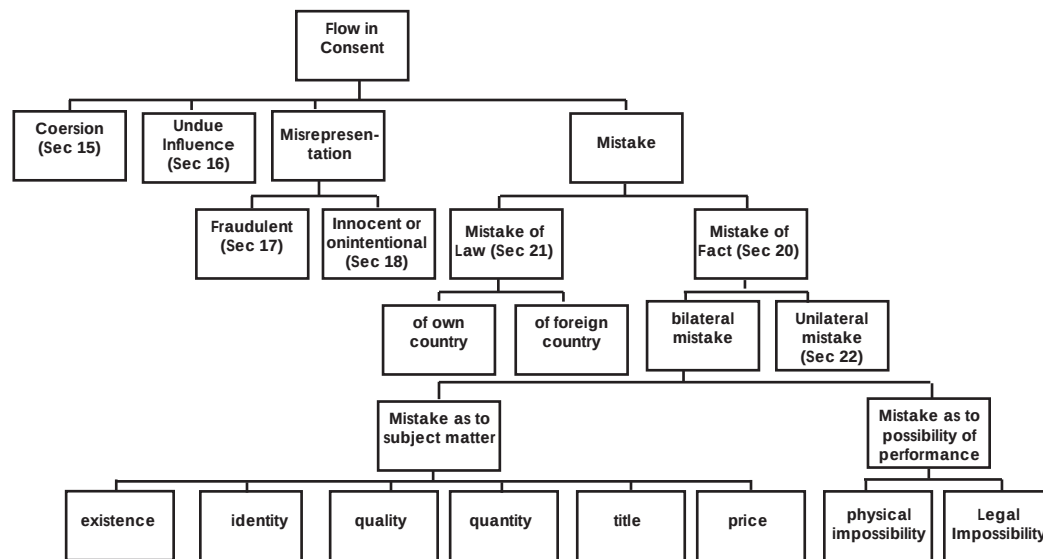
1.5.3 OTHER DISQUALIFIED PERSONS

The persons who are disqualified from entering into contract due to certain other reasons may be from legal status, political status or corporate status. Some of such categories of persons are given below;

- (a) **Alien Enemy:** An agreement with an Alien Enemy is void.
- (b) **Foreign Sovereign and Ambassadors:** Foreign sovereigns and their representatives enjoy certain privileges and immunities in every country. They cannot enter into contract except through their agents residing in India.
- (c) **Convicts:** A convict cannot enter into a contract while he is undergoing imprisonment.
- (d) **Insolvents:** An insolvent person is one who is unable to discharge his liabilities and therefore has applied for being adjudged insolvent or such proceedings have been initiated by any of his creditors. An insolvent person cannot enter into any contract relating to his property.
- (e) **Company or Statutory bodies:** A contract entered into by a corporate body or statutory body will be valid only to the extent it is within its Memorandum of Association.

1.6 FREE CONSENT

One of the essential elements of a valid contract is that there should be free consent of the concerned parties to the contract. 'Two or more persons are said to consent when they agree upon the same thing in the same sense.' [See 13]



1.6.1 Free consent [See 14]

Consent is said to be free when it is not caused by—

- A. coercion, or
- B. undue influence, or
- C. fraud, or
- D. misrepresentation, or
- E. mistake, subject to provisions of sec 20, 21 and 22.

Consent is said to be so caused when it would not have been given but for the existence of such coercion, undue influence, fraud, misrepresentation or mistake.

If the consent of one of the parties to the contract is not free consent due to the above factors the contract is not a valid contract. When the consent is tainted by coercion, undue influence, fraud or misrepresentation is contract is void at the option of the aggrieved party. However, if the consent is tainted by mistake the contract is void.

It may further be noted that in order to enter into a valid contract the there must not only be consent but it must also be free. Consent means they must agree upon the same thing in the same sense. Both the parties have same thing in their mind about the subject matter of contract. The following illustration makes the point more clear.

Example:- X has two horses one black and other one white. He intended to sell black one and expressed his intention of selling one of them to Y without indicating the horse which he intend to sell. Y through the proposal to be for White one conveyed his acceptance of the offer. In the instance there is no meeting of mind. X intended to sell black but thought it to be white one Both have not understood the same thing in the same sense. So there is no consent at all. Only when existence of consent is established, only then the question of whether the consent is free or not arises.

(A) Coercion [Sec 15]

“Coercion” is the committing or threatening to commit, any act forbidden by the Indian Penal Code (45 of 1860), or the unlawful detaining, or threatening to detain, any property, to the prejudice of any person whatever, with the intention of causing any person to enter into an agreement.



Explanation: It is immaterial whether the Indian Penal Code (45 of 1860) is or is not in force in the place where the coercion is employed.

Illustrations

A, on board an English ship on the high seas, causes B to enter into an agreement by an act amounting to criminal intimidation under the Indian Penal Code (45 of 1860).

A afterwards sues B for breach of contract at Calcutta.

A has employed coercion, although his act is not an offence by the law of England, and although section 506 of the Indian Penal Code (45 of 1860) was not in force at the time when, or at the place where the act was done.

A threat of criminal prosecution is not an act forbidden by IPC hence not a coercion. But a threat to file a false charge is forbidden by IPC and therefore amount to coercion.

Example:- X threaten to implicate Y in false theft case if he does not agree to sell his car to him for ₹5000. Y accepted the offer due to threat of X. This is a case of coercion and the consent will not be treated free.

Similarly threat to commit suicide is not punishable under the IPC but any consent obtained under this threat amounts to coercion.

(B) Undue influence [Sec 16]

- (i) A contract is said to be induced by "undue influence" where the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of the other and uses that position to obtain an unfair advantage over the other.
- (ii) In particular and without prejudice to the generality of the foregoing principle, a person is deemed to be in a position to dominate the will of another—
 - (a) Where he holds a real or apparent authority over the other, or where he stands in a fiduciary relation to the other; or
 - (b) Where he makes a contract with a person whose mental capacity is temporarily or permanently affected by reason of age, illness, or mental or bodily distress.
- (iii) Where a person, who is in a position to dominate the will of another, enters into a contract with him, and the transaction appears, on the face of it or on the evidence adduced, to be unconscionable, the burden of proving that such contract was not induced by undue influence shall lie upon the person in a position to dominate the will of the other.

There is however no presumption of undue influence in case of relationship of— (a) landlord and tenant (b) debtor and creditor (c) husband and wife. The wife has to be *pardanashin* for such presumption. In these relationships undue influence has to be proved.

Illustrations

- (a) A, having advanced money to his son, B, during his minority, Upon B's coming of age obtains, by misuse of parental influence, a bond from B for a greater amount than the sum due in respect of the advance. A employs undue influence.
- (b) A, a man enfeebled by disease or age, is induced, by B's influence over him as his medical attendant, to agree to pay B an unreasonable sum for his professional services. B employs undue influence.
- (c) A, being in debt to B, the moneylender of his village, contracts a fresh loan on terms which appear to be unconscionable. It lies on B to prove that the contract was not induced by undue influence.
- (d) A applies to a banker for a loan at a time when there is stringency in the money market. The banker declines to make the loan except at an unusually high rate of interest. A accepts the loan on these

terms. This is a transaction in the ordinary course of business, and the contract is not induced by undue influence.

In order to constitute undue influence it is necessary to prove that (i) the relations subsisting between the parties are such that one of the parties is in a position to dominate the will of other party and (ii) such person uses his dominant position to obtain an unfair advantages over the other.

(C) Fraud [Sec 17]

The term fraud includes all intentional or wilful misrepresentation of facts which are material for the formation of a contract. The most important thing in fraud is the intention to fraud the other party which distinguish it from misrepresentation.

“Fraud” means and includes any of the following acts committed by a party to a contract, or with his connivance, or by his agent, with intent to deceive another party thereto or his agent, or to induce him to enter into the contract: —

- (i) The suggestion, as a fact, of that which is not true by one who does not believe it to be true;
- (ii) The active concealment of a fact by one having knowledge or belief of the fact;
- (iii) A promise made without any intention of performing it;
- (iv) Any other act fitted to deceive;
- (v) Any such act or omission as the law specially declares to be fraudulent.

Explanation : Mere silence as to facts likely to affect the willingness of a person to enter into a contract is not fraud, unless the circumstances of the case are such that, it is the duty of the person keeping silence to speak, or unless his silence is, in itself, equivalent to speech.

Illustrations

- (a) A sells, by auction, to B, a horse which A knows to be unsound. A says nothing to B about the horse’s unsoundness. This is not fraud in A.
- (b) B says to A - “If you do not deny it, I shall assume that the horse is sound”. A says nothing. Here, A’s silence is equivalent to speech.
- (c) A and B, being traders, enter upon a contract. A has private information of a change in prices which would affect B’s willingness to proceed with the contract. A is not bound to inform B.

In the case of *Deny v Peek* in England, it was held that “ Fraud is proved when it is shown that a false representation has been made (i) with knowledge or (2) without belief in its truth or (3) recklessly carelessly whether it be true or false.”

Example:- A purchases good from B, he has no intention of paying for it. The contract is caused by fraud and is voidable at the option of B.

Example : A comes to B's house in the financial experts and ask him to deposit with him ₹10,000 which will be doubled in next two months. He run away with the amount. This amounts to fraud.

(D) Misrepresentation [Sec 18]

“Misrepresentation” means and includes

- (1) The positive assertion, in a manner not warranted by the information of the person making it, of that which is not true, though he believes it to be true;
- (2) Any breach of duty which, without an intent to deceive, gains an advantage to the person committing it, or any one claiming under him, by misleading another to his prejudice or to the prejudice of anyone claiming under him;
- (3) Causing, however innocently, a party to an agreement to make a mistake as to the substance



of the thing which is the subject of the agreement. Misrepresentation is any untrue statement made by a party to the contract to another party which induces the other party to act upon the statement and enter into the contract. This false representation must relate to some fact which is material to the contract caused to obtain consent of the other party. If this false statement is made innocently without an intention to deceive it amounts to misrepresentation. However, if such statement is made intentionally with a view to deceive the other party it amounts to fraud. So we can say an honest misstatement of facts is called misrepresentation.

Example:- X aged 25 years took an Insurance policy stating his age in the application as 22 years unknowing the implications thereby induces the Insurance company to charge lower premium. This amounts to misrepresentation by breach of duty to disclose all the facts without any intention to deceive.

(E) Mistake

When consent of the parties to the contract is caused by mistake, there is no free consent. It is quite possible that the both the parties have different misunderstanding or misapprehensions about some facts relating to the agreement, but for such misunderstanding or misapprehension they would not have entered into such contract. In such cases the consent is caused by mistake and renders the contract void. Mistake means an erroneous belief about something. Mistake can be -

- (a) Mistake of law, or
- (b) Mistake of fact.

(a) Mistake of law

(i) Mistake of Law of the Country :

When a party enters into a contract, without the knowledge of law in the country, the contract is affected by such mistake but it is not void. A contract is not voidable because it was caused by a mistake as to any law in force in India. The reason here is that ignorance of law is not an excuse at all. However if a party is *induced* to enter into a contract by the mistake of law then such a contract is not valid.

Illustration

A and B make a contract grounded on the erroneous belief that a particular debt is barred by the Indian Law of Limitation; the contract is not voidable.

(ii) Mistake of Law of Foreign Country :

Such a mistake is treated as mistake of fact and agreement in such case is void.

(b) Mistake of fact

Where both the parties to an agreement are under a mistake as to a matter of fact essential to the agreement, the agreement is void.

Explanation : An erroneous opinion as to the value of the thing which forms the subject-matter of the agreement is not to be deemed a mistake as to a matter of fact.

- (a) A agrees to sell to B a specific cargo of goods supposed to be on its way from England to Bombay. It turns out that, before the day of the bargain, the ship conveying the cargo had been cast away and the goods lost. Neither party was aware of the facts. The agreement is void.
- (b) A agrees to buy from B a certain horse. It turns out that the horse was dead at the time of the bargain, though neither party was aware of the fact. The agreement is void.
- (c) A, being entitled to an estate for the life of B, agrees to sell it to C. B was dead at the time of the agreement, but both parties were ignorant of the fact. The agreement is void.

Mistake of fact may be either (a) Bilateral or (b) Unilateral.

In bilateral mistake both the parties are mistaken about the material fact whereas in case of unilateral mistake only one party is under some mistake.

Bilateral mistakes may in turn be about:-

- (a) Mistake about subject matter
- (b) Mistake about possibility of performance.

Where both the parties are working under a mistake regarding the subject matter, the agreement is void. Mistake about subject matter may in turn be of following types.

- (i) Mistake as to the existence of subject matter In such a cases the contract is void

Example:- S agree to purchase 50 bales of cotton from T which were believed to be lying in T's godown. But the same had already been stolen from the godown before the contract of sales unknown to both the parties. The Contract is void due to non existence of subject matter.

- (ii) Mistake about the title of the subject matter, In such a cases the contract is void

Example:- In Cooper v Phibbs (1867) LR 2HL 149 an uncle told his nephew that he was entitled to a fishery, and the nephew entered into a contract with uncles daughter to rent the fishery. Unknown to both the parties the fishery belonged to nephew himself. The agreement was held to be void.

- (iii) Mistake as to identity and quality of subject matter. In such a cases the contract is void

Example:- A agree to buy 50Qt of Basmati rice from B both believing it to be Dehradun Basmati. However rice turned out to be local basmati. This agreement is void due to mistake as to quality of subject matter.

- (iv) Mistake as to quantity of subject matter: In such a cases the contract is void.

Example:- X enquired about price of latest version of sleek mobile from Y suggesting that he may buy as many as 15 such mobiles. Y intimated the price by written letter. X send a sms for supply of 5 mobiles but due to mistake in writing sms Y despatched 15 mobles. There is no valid contract between the parties as there was mistake as to quantity of subject matter.

- (v) Mistake as to price of subject matter.-In such a case the contract is void.

Example:- X intending to sell his car for ₹ 51000 but by mistake wrote ₹ 5100 in the price tag. Y though the price to be ₹ 5100 as mentioned in the price tag accepted the offer. The contract is void due to bilateral mistake as to price of the subject matter

Contract caused by mistake of one party, as a matter of fact (Section 22)

A contract is not voidable merely because it was caused by one of the parties to it being under a mistake as to a matter of fact.

1.6.1.1 Voidability of agreements without free consent (Section 19)

When consent to an agreement is caused by coercion, fraud or misrepresentation, the agreement is a contract voidable at the option of the party whose consent was so caused.

A party to a contract, whose consent was caused by fraud or misrepresentation, may, if he thinks fit, insist that the contract shall be performed, and that he shall be put in the position in which he would have been, if the representations made had been true.

Exception : If such consent was caused by misrepresentation or by silence, fraudulent within the meaning of section 17, the contract, nevertheless, is not voidable, if the party whose consent was so caused had the means of discovering the truth with ordinary diligence.



Explanation: A fraud or misrepresentation which did not cause the consent to a contract of the party on whom such fraud was practiced, or to whom such misrepresentation was made, does not render a contract voidable.

Illustrations

- (a) A, intending to deceive B, falsely represents that five hundred mounds of indigo are made annually at A's factory, and thereby induces B to buy the factory. The contract is voidable at the option of B.
- (b) A, by a misrepresentation, leads B erroneously to believe that five hundred mounds of indigo are made annually at A's factory. B examines the accounts of the factory, which show that only four hundred mounds of indigo have been made. After this B buys the factory. The contract is not voidable on account of A's misrepresentation.
- (c) A fraudulently informs B that A's estate is free from encumbrance. B thereupon buys the estate. The estate is subject to a mortgage. B may either avoid the contract, or may insist on its being carried out and the mortgage-debt redeemed.
- (d) B, having discovered a vein of ore on the estate of A, adopts means to conceal, and does conceal, the existence of the ore from A. Through A's ignorance B is enabled to buy the estate at an undervalue. The contract is voidable at the option of A.
- (e) A is entitled to succeed to an estate at the death of B; B dies; C, having received intelligence of B's death, prevents the intelligence reaching A, and thus induces A to sell him his interest in the estate. The sale is voidable at the option of A.

1.6.1.2 Power to set aside contract induced by undue influence (Section 19A)

When consent to an agreement is caused by undue influence, the agreement is a contract voidable at the option of the party whose consent was so caused.

Any such contract may be set aside either absolutely, or, if the party who was entitled to avoid it has received any benefit thereunder, upon such terms and conditions as to the Court may seem just.

- (a) A's son has forged B's name to a promissory note. B, under threat of prosecuting A's son, obtains a bond from A for the amount of the forged note. If B sues on this bond, the Court may set the bond aside.
- (b) A, a moneylender, advances ₹100 to B, an agriculturist, and, by undue influence, induces B to execute a bond for ₹ 200 with interest at 6 per cent per month. The Court may set the bond aside; ordering B to repay ₹ 100 with such interest as may seem just.

1.7 CONSIDERATION

One of the essential elements of a contract is consideration. Consideration means something in return. It may be either some benefit conferred on one party or some detriment suffered by other. It may be an act or abstinence or promise. For example, if A agrees to sale goods to B for a price of ₹ 20,000, the amount is the consideration for A for parting with the goods.

Sec.2(d) defines consideration as, 'When at the desire of the promisor, the promisee or any other person has done or abstained from doing, or does or abstains from doing, or promises to do or to abstain from doing, something, such act or abstinence or promise is called a consideration for the promise.'

An agreement without consideration is not enforceable and therefore is void.

1.7.1 LEGAL RULES REGARDING CONSIDERATION :

- (A) It must move at the desire of the promisor. Any act or abstinence at the desire of third party is not consideration.

Any act or abstinence must be at the behest of a party to the contract. The demand for consideration must come from the parties to the contract and not from outsider or third party.

Example:

X agree to sell his horse to Y for ₹ 50,000. Here consideration for X selling horse to Y is consideration of ₹50,000 from Y and consideration for Y paying ₹ 50,000 to X is X selling his horse. Here considerations had come at the desire of Promisor. X is a promisor for Y and similarly Y is a promisor for X.

- (B) It may move from the promisee or any other person. Consideration may be furnished even by a stranger under Indian Law. Consideration can be from any direction, even a stranger to contract can offer consideration. Under English law consideration must move from promisee and no one else.

Example:

A old lady, by deed of gift, made over certain property to her daughter D under the direction that she would pay her aunt P a certain sum of money annually. The same day D entered into an agreement with P to pay her agreed amount. Later D refused to pay the amount on the plea that no consideration had moved from P to D. It was held that P was entitled to maintain a suit as consideration had come from old lady to the daughter D. [*Chinnaya V Ramayya 1882 4 Mad 137*]

As already mentioned above consideration may come from promisee or promisor or even a third party i.e. stranger to contract. So in the instant case P had a point to maintain a suit against D.

- (C) It may be an act, abstinence or forbearance or a return promise.

It can be a positive act or a negative act. For example:-

Promise to not to smoke is a negative act(abstinence), promise to not to refer the matter to court, (abstinence).

Promise to perform at the wedding anniversary or birthday party (promise to do).

Example: A took a personal loan of ₹50,000 from B @24% rate of interest. Due to heavy rate of interest A neither paid the principal amount nor the interest component. Accordingly B expressed his intention of moving to court for breach of contract on the part of A. A requested him not to do so and agreed to pay interest @ 30 % instead of 24%. Here's B's refraining from moving the court is an act of forbearance and a good consideration.

Example: D is ready to sue her husband for monthly maintenance allowance. R her husband on the other hand agree to pay her monthly ₹4000 as maintenance allowance for not filing any suit against him. She forbears to sue. Held D/Wife's forbearance to sue her husband R on consideration of his paying monthly maintenance amount is a consideration for her husband and a perfectly valid consideration. (*Devi Radha Rani v Ram Das AIR 1941 Pat 282*)

In both the examples given above there is a negative action on the part of other party i.e. not to sue, being consideration for a positive thing i.e. pay higher rate of interest or monthly maintenance allowance for its own etc amount to good consideration to support a contract.

- (D) It may be past, present or future —When consideration by a party for a present promise was given in the past, before the date of promise it is a past consideration.

Example 1: A gave a stage performance at the wedding anniversary of B. After one month B promise to pay him ₹50,000 being the charges for stage performance.

Here stage performance was given by A in the past before the date of present promise by B. This is a case of past consideration and considered to be good consideration.

When consideration is given simultaneously at the time of promise or contract, it is called present consideration.



Example 2: A painted B's flat In return B paid him painting charges of ₹ 25,000.

Here both the act of painting and payment of painting charges were done simultaneously. Both the consideration are present consideration and perfectly good consideration to support each other.

When consideration from one party to another is to pass subsequently in future, it is called future consideration.

Example 3: A agreed to repair B's house after a week. B in turn promised to pay him ₹10,000 three days after completion of repair work by A.

Here both the parties are yet to perform their work in near future. The consideration from both the parties is present consideration.

(E) It must not be unlawful.

The consideration or object of an agreement is lawful, unless —

It is forbidden by law; or is of such a nature that, if permitted, it would defeat the provisions of any law; or is fraudulent; or involves or implies injury to the person or property of another; or the Court regards it as immoral, or opposed to public policy.

In each of these cases, the consideration or object of an agreement is said to be unlawful. Every agreement, of which the object or consideration is unlawful, is void.

Example:

- (a) A agrees to sell his house to B for ₹10,000. Here B's promise to pay the sum of ₹10,000 is the consideration for A's promise to sell the house, and A's promise to sell the house is the consideration for B's promise to pay the ₹10,000. These are lawful considerations.
- (b) A promises to pay B ₹10,000 at the end of six months, if C who owes that sum to B, fails to pay it. B promises to grant time to C accordingly. Here the promise of each party is the consideration for the promise of the other party and they are lawful considerations.
- (c) A promises, for a certain sum paid to him by B, to make good to B the value of his ship if it is wrecked on a certain voyage. Here A's promise is the consideration for B's payment, and B's payment is the consideration for A's promise, and these are lawful considerations.
- (d) A promises to maintain B's child and B promises to pay A ₹1,000 yearly for the purpose. Here the promise of each party is the consideration for the promise of the other party. They are lawful considerations.
- (e) A, B and C enter into an agreement for the division among them of gains acquired, or to be acquired, by them by fraud. The agreement is void, as its object is unlawful.
- (f) A promises to obtain for B an employment in the public service, and B promises to pay ₹1,000 to A. The agreement is void, as the consideration for it is unlawful.
- (g) A, being agent for a landed proprietor, agrees for money, without the knowledge of his principal, to obtain for B a lease of land belonging to his principal. The agreement between A and B is void, as it implies a fraud by concealment by A, on his principal.
- (h) A promises B to drop a prosecution which he has instituted against B for robbery, and B promises to restore the value of the things taken. The agreement is void, as its object is unlawful.
- (i) A's estate is sold for arrears of revenue under the provisions of an act of the legislature, by which the defaulter is prohibited from purchasing the estate. B, upon an understanding with A, becomes the purchaser, and agrees to convey the estate to A upon receiving from him the price which B has paid. The agreement is void, as it renders the transaction, in effect, a purchase by the defaulter, and would so defeat the object of the law.
- (j) A, who is B's power of attorney holder, promises to exercise his influence, as such, with B in favour of C, and C promises to pay 1,000 rupees to A. The agreement is void, because it is immoral.

- (k) A agrees to let her daughter to hire to B for concubine. The agreement is void, because it is immoral, though the letting may not be punishable under the Indian Penal Code, (45 of 1860).

1.7.2 TYPES OF CONSIDERATION: PAST, PRESENT OR FUTURE

1.7.2.1 Past consideration is something wholly done or suffered before making the agreement

Example:

X agreed to supply 50 ton of sugar to Y on 14.01.13 for which Y had already made advance payment of ₹5 lakh being the price of 50 ton of sugar.

Here consideration from X side is supply of 50 ton of sugar which he promised to supply on 14th Jan. 2013. This consideration from X is a future consideration whereas consideration from Y's side is payment of ₹ 5 lakh being price of the sugar supplier. This amount has already been paid by Y in the past. This is a case of past consideration.

Here both the consideration are perfectly valid.

1.7.2.2 Present consideration is basically an act, which has been done in response to a positive promise. It is also called executed consideration.

1.7.2.3 Executory or future consideration; when consideration is to move at a future date it is called future or executory consideration.

Example:- X agreed to supply 50 ton of sugar to Y on 14.01.13. Y promised to pay immediately on delivery.

In the instant case both the parties are yet to perform/execute their part of contract and consideration from both the parties is yet to be received. Here both the consideration are future or executory consideration.

1.7.3 ADEQUACY OF CONSIDERATION

One of the important thing to note about consideration is that consideration need not be adequate. So long as the consent of the parties is free inadequacy of consideration is immaterial. However inadequacy of consideration may be taken into account by the courts in determining the question whether the consent of the parties is free or not.

1.7.4 NO CONSIDERATION, NO CONTRACT- EXCEPTIONS

One of the essential condition of a valid contract is existence of a lawful consideration, but there may be circumstances when there is no consideration from one of the party to the contract even then the contract is perfectly valid. The exception to general rule "no consideration no contract" are provided in section 25 of the Act which are given below; It may be noted that adequacy of consideration is not insisted upon, however, when the consent is not free the court do take into consideration the issue of adequacy of consideration to decide the case.

Section 25 specifies the cases where an agreement though made without consideration will be valid. These are as follow :

A. Natural love and affection [Sec. 25(1)]

An agreement though made without consideration will be valid if it is in writing and registered and is made on account of natural love and affection between parties standing in a near relation to each other.

Example: A out of love and affection promise to give his son B ₹51000. He got this promise registered. This is valid contract despite no consideration from B.

B. Compensation for services rendered [Sec. 25(2)]

An agreement made without consideration will be valid if it is a promise to compensate wholly or



in a part a person who has already voluntarily done something for the promisor or something which the promisor was legally compellable to do.

Example: A find B's lost dog. B promised to pay him ₹5100. This is a valid contract despite no consideration from A.

C. Time-barred debt [Sec. 25(3)]

A promise to pay a time-barred debt is also enforceable. But the promise must be in writing and be signed by the promisor or his agent authorized in that behalf.

Example: A owes ₹5000 to B which has become time barred due to limitation. A promise to pay ₹1000 to B after 3 months. This is a perfectly valid contract despite no consideration from B.

D. Completed gifts [Exp. 1 to Sec. 25]

Explanation 1 to section 25 provides that the rule 'No consideration, No contract' shall not affect validity of any gifts actually made between the donor and the donee.

Example : X runs a NGO Y promise to donate ₹51000 to the NGO of X. This is perfectly valid contract.

E. Agency (Sec. 185).

There is one more exception to the rule. It is given in section 185 which says that no consideration is needed to create an agency.

When a person is appointed agent, his appointment is valid even if there is no consideration for appointing him agent. The fact that the principal has agreed to be represented by the agent is a sufficient determinant to the principal to support the contract of agency.

F. Guarantee (Sec 127)

A contract of guarantee is made without consideration.

G. Remission (Sec 63)

No consideration is required for an agreement to receive less than what is due. This is called remission in the law.

1.8. AGREEMENTS EXPRESSLY DECLARED TO BE VOID

One of the essential elements of an enforceable agreement i.e. a contract is the lawfulness of the object. Behind any enforceable agreement there is an intention to create legal relationship which implies that there is some transaction. The object of such transaction should be lawful, else agreements shall not be enforceable by law. There are some agreements, which have specifically declared as void in the Act itself. Such agreements are specified in section 23, 24, 25 to 30 and 56 of the Act. These agreements are void even if they satisfy the conditions of a valid contract, as they are not enforceable.

1.8.1 TYPES OF VOID AGREEMENT :

A) AGREEMENT OF WHICH CONSIDERATION OR THE OBJECT IS NOT LAWFUL

The Agreements are void, if considerations and objects are unlawful in part.

If any part of a single consideration for one or more objects, or any one or any part of any one of several considerations for a single object, is unlawful, the agreement is void.

Example : A promises to superintend, on behalf of B, a legal manufacturer of indigo, and an illegal traffic in other articles. B promises to pay to A salary of ₹10,000 rupees a year. The agreement is void, the object of A's promise and the consideration for B's promise, being in part unlawful.

B) AGREEMENT IN RESTRAINT OF MARRIAGE VOID (Section 26)

Every agreement in restraint of the marriage of any person, other than a minor, is void. These agreements restrain the freedom of marriage against the fundamental principle of freedom and are thus discouraged by law. These restrictions may be general or partial. In a general restriction, a person is restrained from marrying at all whereas in partial restriction a person is restrained from marrying a particular person. But whether the restriction is partial or general contract is void.

Example:-A agrees to pay B ₹50,000 if promise to never get married. This is general restriction and the contract is void.

Example:-A was promised B not to marry with A's son if A transfers his plot in the name of B. This is void agreement.

C) AGREEMENT IN RESTRAINT OF TRADE VOID (Section 27)

Every agreement by which anyone is restrained from exercising a lawful profession, trade or business of any kind, is to that extent void.

Saving of agreement not to carry on business of which goodwill is sold.—

Exception 1. One who sells the goodwill of a business may agree with the buyer to refrain from carrying on a similar business, within specified local limits, so long as the buyer, or any person deriving title to the goodwill from him, carries on a like business, therein :

Provided that such limits appear to the Court reasonable, regard being had to the nature of the business. The restriction of trade may be general or partial, qualified or unqualified. In all such situations the agreement is void, if it is in the nature of a restraint of trade. But if it is a partial restriction and is separable from the valid portion, the valid portion will be enforceable. This is made evident from section 27 which says "to that extent void". Thus an agreement to not to do similar business for long is void.

D) AGREEMENTS IN RESTRAINT OF LEGAL PROCEEDINGS VOID (Section 28) Every agreement —

- (a) by which any party thereto is restricted absolutely from enforcing his rights under or in respect of any contract, by the usual legal proceedings in the ordinary tribunals, or which limits the time within which he may thus enforce his rights; or
- (b) which extinguishes the rights of any party thereto, or discharges any party thereto from any liability, under or in respect of any contract on the expiry of a specified period so as to restrict any party from enforcing his rights, is void to that extent.

Savings of contract to refer to arbitration dispute that may arise —

Exception 1— This section shall not render illegal a contract, by which two or more persons agree that any dispute which may arise between them in respect of any subject or class of subjects shall be referred to arbitration, and that only the amount awarded in such arbitration shall be recoverable in respect of the dispute so referred.

Suits barred by such contracts— When such a contract has been made, a suit may be brought for its specific performance, and if a suit, other than for such specific performance, or for the recovery of the amount so awarded, is brought by one party to such contract against any other such party, in respect of any subject which they have so agreed to refer, the existence of such contract shall be a bar to the suit.

Saving of contract to refer questions that have already arisen—Exception 2— Nor shall this section render illegal any contract in writing, by which two or more persons agree to refer to arbitration any question between them which has already arisen, or affect any provision of any law in force for the time being as to references to arbitration.



Example1:- A sold his car to B for ₹ 50,000 and delivered the same to B. A has right to claim payment from B and even sue for it in the court of law if B does not make the payment. Any agreement by which A is prohibited from realising the money even through court is void.

Example 2:- A has supplied some goods to B on payment of ₹ 6000 by B. A promise that he will not sue B for payment after two years or if A fails to sue within 2 years A will have no right to sue or payment is void.

E) AGREEMENTS VOID FOR UNCERTAINTY (Section 29)

Agreements, the meaning of which is not certain, or capable of being made certain, are void.

Example:

- (a) A agrees to sell to B “a hundred tons of oil”. There is nothing whatever to show what kind of oil was intended. The agreement is void for uncertainty.
- (b) A agrees to sell to B one hundred tons of oil of a specified description, known as an article of commerce.
There is no uncertainty here to make the agreement void.
- (c) A, who is a dealer in coconut oil only, agrees to sell to B “one hundred tons of oil”. The nature of A’s trade affords an indication of the meaning of the words, and A has entered into a contract for the sale of one hundred tons of coconut oil.
- (d) A agrees to sell to B “all the grain in my granary at Ramnagar”; There is no uncertainty here to make the agreement void.
- (e) A agrees to sell to B “one thousand maunds of rice at a price to be fixed by C”. As the price is capable of being made certain, there is no uncertainty here to make the agreement void.
- (f) A agrees to sell to B “my white horse for rupees five hundred or rupees one thousand”. There is nothing to show which of the two prices was to be given. The agreement is void.

F) AGREEMENTS BY WAY OF WAGER ARE VOID (Section 30)

Agreements by way of wager are void; and no suit shall be brought for recovering anything alleged to be won on any wager, or entrusted to a person to abide by the result of any game or other uncertain event on which any wager is made.

Exception in favour of certain prizes for horse-racing.—This section shall not be deemed to render unlawful a subscription, or contribution, or agreement to subscribe or contribute, made or entered into or towards any plate, prize or sum of money, of the value or amount of five hundred rupees or upwards, to be awarded to the winner or winners of any horse-race.

Section 294A of the Indian Penal Code not affected.—Nothing in this section shall be deemed to legalize any transaction connected with horse-racing, to which the provisions of section 294A of the Indian Penal Code, (45 of 1860) apply.

Example:- A promises to Pay B ₹ 2100 if Monday is a sunny day B will pay ₹ 1000 if it is a cloudy day. This is a wagering agreement and void.

Example:- A promise to pay B ₹ 1000 if India Win T20 World cup, B promise to pay A ₹ 5000 if India loses T-20 World cup. This is also a wagering agreement and void.

G) AGREEMENT TO DO IMPOSSIBLE ACTS (Section 56)

As per section 56 an agreement to do impossible act is void. The impossibility may be at the time of entering into a contract or subsequent to it but before performance of the contract. An agreement to do impossible act is void ab initio. But impossibility arising later on is known as doctrine of supervening impossibility. If the initial impossibility is known to promisor alone, he must pay the compensation to the promisee for any loss due to non performance.

Example1:-A agree with B to discover treasure by magic. This agreement is void due to impossibility of Act.

Example2:-A agree to make B's dead son alive is void.

Illustrations

- (a) A agrees with B to discover treasure by magic. The agreement is void.
- (b) A and B contract to marry each other. Before the time fixed for the marriage, A goes mad. The contract becomes void.
- (c) A contracts to marry B, being already married to C, and being forbidden by the law to which he is subject to practice polygamy. A must make compensation to B for the loss caused to her by the non-performance of his promise.
- (d) A contracts to take in cargo for B at a foreign port. A's Government afterwards declares war against the country in which the port is situated. The contract becomes void when war is declared.
- (e) A contracts to act at a theatre for six months in consideration of a sum paid in advance by B. On several occasions A is too ill to act. The contract to act on those occasions becomes void.

1.9. CONTINGENT CONTRACTS

There are some contracts wherein there is no element of uncertainty in their performance. In other words their performance is not dependent upon a particular event. Such contracts are known as 'absolute contracts'. But there are some contracts, the performance of which depends upon the happening or non happening of an uncertain event, collateral to such contracts. Such contracts are called contingent contracts. Contract of Insurance; guarantee and indemnity are examples of contingent contracts.

1.9.1 CONCEPT AND DEFINITION

1.9.1.1 Contingent contract (Section 31)

A "contingent contract" is a contract to do or not to do something, if some event, collateral to such contract, does or does not happen.

Illustration

A contracts to pay B ₹10,000 if B's house is burnt. This is a contingent contract.

1.9.1.2 Enforcement of contracts contingent on an event happening (Section 32)

Contingent contracts to do or not to do anything if an uncertain future event happens cannot be enforced by law unless and until that event has happened.

If the event becomes impossible, such contracts become void.

Illustrations

- (a) A makes a contract with B to buy B's horse if A survives C. This contract cannot be enforced by law unless and until C dies in A's lifetime.
- (b) A makes a contract with B to sell a horse to B at a specified price, if C, to whom the horse has been offered, refuses to buy him. The contract cannot be enforced by law unless and until C refuses to buy the horse.
- (c) A contracts to pay B a sum of money when B marries C. C dies without being married to B. The contract becomes void.

1.9.1.3 Enforcement of contracts contingent on an event not happening (Section 33)

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



Illustrations

A agrees to pay B a sum of money if a certain ship does not return. This ship is sunk. The contract can be enforced when the ship sinks.

1.9.1.4 When event on which contract is contingent to be deemed impossible, if it is the future conduct of a living person (Section 34)

If the future event on which a contract is contingent is the way in which a person will act at an unspecified time, the event shall be considered to become impossible when such person does anything which renders it impossible that he should so act within any definite time, or otherwise than under further contingencies.

Illustrations

A agrees to pay B a sum of money if B marries C.

C marries D. The marriage of B to C must now be considered impossible, although it is possible that D may die and that C may afterwards marry B.

1.9.1.5 When contracts become void which are contingent on happening of specified event within fixed time (Section 35)

Contingent contracts to do or not to do anything if a specified uncertain event happens within a fixed time become void if, at the expiration of the time fixed, such event has not happened, or if, before the time fixed, such event becomes impossible.

When contracts may be enforced which are contingent on specified event not happening within fixed time —

Contingent contracts to do or not to do anything if a specified uncertain event does not happen within a fixed time may be enforced by law when the time fixed has expired and such event has not happened, or, before the time fixed has expired, if it becomes certain that such event will not happen.

Illustrations

- (a) A promises to pay B a sum of money if a certain ship returns within a year. The contract may be enforced if the ship returns within the year, and becomes void if the ship is burnt within the year.
- (b) A promises to pay B a sum of money if a certain ship does not return within a year. The contract may be enforced if the ship does not return within the year, or is burnt within the year.

1.9.1.6 Agreements contingent on impossible events void (Section 36)

Contingent agreements to do or not to do anything if an impossible event happens, are void, whether the impossibility of the event is known or not to the parties to the agreement at the time when it is made.

Illustrations

- (a) A agrees to pay B ₹1,000 if two-straight lines should enclose a space. The agreement is void.
- (b) A agrees to pay B ₹1,000 if B will marry A's daughter C. C was dead at the time of the agreement. The agreement is void.

1.10 QUASI-CONTRACTS

A quasi contract is a fictitious contract created under legal obligations, similar to a valid contract. These contracts are also known as implied-in-law contracts. What makes this different is that the parties involved do not intend to create a contract. A quasi contract is created by the Court. For the same reason, there is no actual offer or acceptance or an agreement between the parties.

1.10.1 FEATURES OF A QUASI CONTRACT

The salient features of a quasi contract are as under:

- (i) It is imposed by law and does not arise by agreement.
- (ii) The duty of a party and not the promise of any party is the basis of such contract.
- (iii) The right under it is always a right to money and though not always to a liquidated sum of money.
- (iv) The right is available against specific persons and not the whole world.
- (v) A suit for breach may be filed in the same way as in case of a complete contract.

1.10.2 DISTINCTION BETWEEN QUASI CONTRACTS AND CONTRACTS

Basis	Quasi Contracts	Contracts
Essential elements for formation of contracts.	The essential elements for formation of contracts are absent.	Essential elements for formation of contracts are present.
Obligation.	Obligation is imposed by law.	Obligation is created by consent of parties

1.10.3 SIMILARITY BETWEEN QUASI CONTRACTS AND CONTRACTS

The outcome of quasi contract resemble that created by contract. So far as claim for damages are concerned there is a similarity between a quasi contract and contract because in case of breach of a quasi contract, Section 73 provides same remedies as provided in case of breach of contract.

1.10.4 Sections 68 to 72 deal with five kinds of quasi contractual obligations. These are discussed below:

A) Supply of Necessaries to an Incompetent Person

Under section 68 of the Indian Contract Act, 1872, a person, who supplies another person, who is inept to enter into a contract, with necessaries of life is entitled to get a share from the property of the latter.

B) Payment by an Interested Person

Under section 69 of the Act, a person, who is interested in payment of money which was supposed to be paid by another but pays it, is entitled for reimbursement from the said person.

C) Performance of Non-Gratuitous Act

Section 70 provides that if a person has received lawful services from another person, which the former had not asked for but needed at that moment, the other person is entitled to be compensated for the services that were rendered.

D) Becoming Finder of Lost Goods

Under section 71 of the Act, a person who finds goods belonging to another person and takes the custody of the goods is subjected to the responsibilities of having the possession of the property under bailment and cannot use it for his own good. By implication, the finder has to safeguard it.

E) Payment of Money by Mistake

Under section 72 of the Act, a person who receives money or goods by mistake or under compulsion is liable to return it.

1.10.5 QUANTUM MERUIT

1.10.5.1 Meaning of *Quantum Meruit*

The term '*quantum meruit*' means as much as merited or 'as much as earned'. In other words, it means



payment in proportion to the amount of work done. Generally, one cannot claim performance from another unless one has performed his obligation in full but in certain cases, a person who has performed some work under a contract can claim remuneration for the work which he has already done. The right to claim on '*quantum meruit*' does not arise out of a contract as the right to damages does. It is a claim on the quasi contractual obligations which is implied by the circumstances. The claim for *quantum meruit* arises only when the original contract is discharged.

1.10.5.2 Cases in which the Claim of Quantum Meruit Arise

The various cases in which the claim of *quantum meruit* arise are discussed below:

A. Breach of Contract:

Where there is a breach of contract, the injured party is entitled to claim reasonable compensation for what he has done under the contract.

B. When a contract is discovered to be void:

When an agreement is discovered to be void or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it. (Section 65).

C. Where something has been done non-gratuitously:

Where work is done or goods delivered by a person without an intention to do so gratuitously, and the benefit of the same is enjoyed by the other party, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or so delivered. For example, P forgets certain goods at Q's house. He had no intention to leave them with him gratuitously. P uses those goods for his personal benefit. Q can compel P to pay for those goods.

D. Where the contract is divisible:

Where a contract is divisible, and a party to the contract has done a part of his obligation, he may sue on quantum merit. This rule applies even though the party claiming on quantum merit is himself guilty of breach of contract.

1.10.6 COMPENSATION FOR FAILURE TO DISCHARGE OBLIGATION CREATED BY QUASI CONTRACTS

As claim for damages are concerned there is a similarity between a quasi contract and contract because in case of breach of a quasi contract, Section 73 provides same remedied as provided in case of breach of contract.

1.11 THE PERFORMANCE OF CONTRACTS

Every Contract creates certain obligation on each of the parties involved in it. When both the parties to the Contract fulfill their obligations towards each other, the contract is said to be performed. When both the parties to the contract have performed their obligations, the contract is said to be discharged by performance.

1.11.1 OBLIGATION OF PARTIES TO CONTRACTS (Section 37)

The parties to a contract must either perform, or offer to perform, their respective promises, unless such performance is dispensed with or excused under the provisions of this Act, or of any other law.

Promises bind the representatives of the promisor in case of the death of such promisor before performance, unless a contrary intention appears from the contract.

Illustrations

- (a) A promises to deliver goods to B on a certain day on payment of ₹ 1,000. A dies before that day. A's representatives are bound to deliver the goods to B, and B is bound to pay ₹ 1,000 to A's representatives.
- (b) A promises to paint a picture for B by a certain day, at a certain price. A dies before the day. The contract cannot be enforced either by A's representatives or by B.

1.11.2 EFFECT OF REFUSAL TO ACCEPT OFFER OF PERFORMANCE (Section 38)

Where a promisor has made an offer of performance to the promisee, and the offer has not been accepted, the promisor is not responsible for non-performance, nor does he thereby lose his rights under the contract.

Every such offer must fulfill the following conditions :

- (1) it must be unconditional
- (2) it must be made at a proper time and place, and under such circumstances that the person to whom it is made may have a reasonable opportunity of ascertaining that the person by whom it is made is able and willing there and then to do the whole of what he is bound by his promise to do.
- (3) if the offer is an offer to deliver anything to the promisee, the promisee must have a reasonable opportunity of seeing that the thing offered is the thing which the promisor is bound by his promise to deliver.

An offer to one of several joint promisees has the same legal consequences as an offer to all of them.

Illustrations

A contracts to deliver to B at his warehouse, on the 1st March, 1873, 100 bales of cotton of a particular quality. In order to make an offer of a performance with the effect stated in this section, A must bring the cotton to B's warehouse, on the appointed day, under such circumstances that B may have a reasonable opportunity of satisfying himself that the thing offered is cotton of the quality contracted for, and that there are 100 bales.

1.11.3 EFFECT OF REFUSAL OF PARTY TO PERFORM PROMISE WHOLLY (Section 39)

When a party to a contract has refused to perform, or disabled himself from performing his promise in its entirety, the promisee may put an end to the contract, unless he has signified, by words or conduct, his acquiescence in its continuance.

Illustrations

- (a) A, a singer, enters into a contract with B, the manager of a theatre, to sing at his theatre two nights in every week during the next two months, and B engages to pay her 100 rupees for each night's performance. On the sixth night A willfully absents herself from the theatre. B is at liberty to put an end to the contract.
- (b) A, a singer, enters into a contract with B, the manager of a theatre, to sing at his theatre two nights in every week during the next two months, and B engages to pay her at the rate of 100 rupees for each night. On the sixth night A willfully absents herself. With the assent of B, A sings on the seventh night. B has signified his acquiescence in the continuance of the contract, and cannot now put an end to it but is entitled to compensation for the damage sustained by him through A's failure to sing on the sixth night.

1.11.4 PERSON BY WHOM PROMISE IS TO BE PERFORMED (Section 40)

If it appears from the nature of the case that it was the intention of the parties to any contract that any promise contained in it should be performed by the promisor himself, such promise must be performed by the promisor. In other cases, the promisor or his representatives may employ a



competent person to perform it.

Illustrations

- (a) A promises to pay B a sum of money. A may perform this promise, either by personally paying the money to B or by causing it to be paid to B by another; and, if A dies before the time appointed for payment, his representatives must perform the promise, or employ some proper person to do so.
- (b) A promises to paint a picture for B: A must perform this promise personally.

1.11.5 EFFECT OF ACCEPTING PERFORMANCE FROM THIRD PERSON (Section 41)

When a promisee accepts performance of the promise from a third person, he cannot afterwards enforce it against the promisor.

1.11.6 DEVOLUTION OF JOINT LIABILITIES (Section 42)

When two or more persons have made a joint promise then, unless a contrary intention appears by the contract, all such persons, during their joint lives, and after the death of any of them, his representative jointly with the survivor, or survivors, and after the death of the last survivor, the representatives of all jointly, must fulfill the promise.

1.11.6.1 ANY ONE OF JOINT PROMISORS MAY BE COMPELLED TO PERFORM (Section 43)

When two or more persons make a joint promise, the promisee may, in the absence of express agreement to the contrary, compel any one or more of such joint promisors to perform the whole of the promise.

Each promisor may compel contribution– Each of two or more joint promisors may compel every other joint promisor to contribute equally with himself to the performance of the promise, unless a contrary intention appears from the contract.

Sharing of loss by default in contribution– If any one of two or more joint promisors makes default in such contribution, the remaining joint promisors must bear the loss arising from such default in equal shares.

Explanation : Nothing in this section shall prevent a surety from recovering from his principal, payments made by the surety on behalf of the principal, or entitle the principal to recover anything from the surety on account of payments made by the principal.

Illustrations

- (a) A, B and C jointly promise to pay D ₹3,000. D may compel either A or B or C to pay him ₹3,000.
- (b) A, B and C jointly promise to pay D the sum of ₹3,000. C is compelled to pay the whole. A is insolvent, but his assets are sufficient to pay one-half of his debts, C is entitled to receive ₹500 from A's estate, and ₹2,250 from B.
- (c) A, B and C are under a joint promise to pay D ₹3,000. C is unable to pay anything, and A is compelled to pay the whole. A is entitled to receive ₹1,500 from B.
- (d) A, B and C are under a joint promise to pay D ₹3,000, A and B being only sureties for C. C fails to pay. A and B are compelled to pay the whole sum. They are entitled to recover it from C.

1.11.6.2 EFFECT OF RELEASE OF ONE JOINT PROMISOR (Section 44)

Where two or more persons have made a joint promise, a release of one of such joint promisors by the promisee does not discharge the other joint promisor or joint promisors; neither does it free the joint promisor so released from responsibility to the other joint promisor or joint promisors.

1.11.7 DEVOLUTION OF JOINT RIGHTS (Section 45)

When a person has made a promise to two or more persons jointly, then, unless a contrary intention appears from the contract, the right to claim performance rests, as between him and them, with

them during their joint lives, and, after the death of any of them, with the representative of such deceased person jointly with the survivor or survivors, and, after the death of the last survivor, with the representatives of all jointly.

Illustration

A, in consideration of ₹ 5,000, lent to him by B and C, promises B and C jointly to repay them that sum with interest on a day specified. B dies. The right to claim performance rests with B's representative jointly with C during C's life, and after the death of C with the representatives of B and C jointly.

1.11.8 TIME AND PLACE OF PERFORMANCE

The time and place of performance of a contract are determined by an agreement between the parties. The rules regarding time and place of performance are summarized below :

1.11.8.1 TIME FOR PERFORMANCE OF PROMISE, WHERE NO APPLICATION IS TO BE MADE AND NO TIME IS SPECIFIED (Section 46)

Where, by the contract, a promisor is to perform his promise without application by the promisee, and no time for performance is specified, the engagement must be performed within a reasonable time.

Explanation : The question "What is a reasonable time" is, in each particular case, a question of fact.

1.11.8.2 TIME AND PLACE FOR PERFORMANCE OF PROMISE, WHERE TIME IS SPECIFIED AND NO APPLICATION TO BE MADE (Section 47)

When a promise is to be performed on a certain day, and the promisor has undertaken to perform it without application by the promisee, the promisor may perform it at any time during the usual hours of business on such day and at the place at which the promise ought to be performed.

Illustration

A promises to deliver goods at B's warehouse on the 1st January. On that day A brings the goods to B's warehouse, but after the usual hour for closing it, and they are not received. A has not performed his promise.

1.11.8.3 APPLICATION FOR PERFORMANCE ON CERTAIN DAY TO BE AT PROPER TIME AND PLACE (Section 48)

When a promise is to be performed on a certain day, and the promisor has not undertaken to perform it without application by the promisee, it is the duty of the promisee to apply for performance at a proper place and within the usual hours of business.

Explanation : The question "What is a proper time and place" is, in each particular case, a question of fact.

1.11.8.4 PLACE FOR PERFORMANCE OF PROMISE, WHERE NO APPLICATION TO BE MADE AND NO PLACE FIXED FOR PERFORMANCE (Section 49)

When a promise is to be performed without application by the promisee, and no place is fixed for the performance of it, it is the duty of the promisor to apply to the promisee to appoint a reasonable place for the performance of the promise, and to perform it at such place.

Illustration

A undertakes to deliver a thousand maunds of jute to B on a fixed day. A must apply to B to appoint a reasonable place for the purpose of receiving it, and must deliver it to him at such place.

1.11.8.5 PERFORMANCE IN MANNER OR AT TIME PRESCRIBED OR SANCTIONED BY PROMISEE (Section 50)

The performance of any promise may be made in any manner, or at any time which the promisee prescribes or sanctions.



Illustrations

- (a) B owes A ₹ 2,000. A desires B to pay the amount to A's account with C, a banker. B, who also banks with C, orders the amount to be transferred from his account to A's credit, and this is done by C. Afterwards, and before A knows of the transfer, C fails. There has been a good payment by B.
- (b) A and B are mutually indebted. A and B settle an account by setting off one item against another, and B pays A the balance found to be due from him upon such settlement. This amounts to a payment by A and B respectively of the sums which they owed to each other.
- (c) A owes B ₹ 2,000. B accepts some of A's goods in deduction of the debt. The delivery of the goods operates as a part payment.
- (d) A desires B, who owes him ₹ 100, to send him a note for ₹ 100 by post. The debt is discharged as soon as B puts into the post a letter containing the note duly addressed to A.

1.11.9 PERFORMANCE OF RECIPROCAL PROMISES:

1.11.9.1 PROMISOR NOT BOUND TO PERFORM UNLESS RECIPROCAL PROMISEE READY AND WILLING TO PERFORM (Section 51)

When a contract consists of reciprocal promises to be simultaneously performed, no promisor need perform his promise unless the promisee is ready and willing to perform his reciprocal promise.

Illustrations

- (a) A and B contract that A shall deliver goods to B to be paid for by B on delivery.
A need not deliver the goods, unless B is ready and willing to pay for the goods on delivery. B need not pay for the goods, unless A is ready and willing to deliver them on payment.
- (b) A and B contract that A shall deliver goods to B at a price to be paid by installments, the first installment to be paid on delivery.

A need not deliver, unless B is ready and willing to pay the first installment on delivery.

B need not pay the first installment, unless A is ready and willing to deliver the goods on payment of the first installment.

1.11.9.2 ORDER OF PERFORMANCE OF RECIPROCAL PROMISES (Section 52)

Where the order in which reciprocal promises are to be performed is expressly fixed by the contract, they shall be performed in that order; and,

where the order is not expressly fixed by the contract, they shall be performed in that order which the nature of the transaction requires.

Illustrations

- (a) A and B contract that A shall build a house for B at a fixed price. A's promise to build the house must be performed before B's promise to pay for it.
- (b) A and B contract that A shall make over his stock-in-trade to B at a fixed price, and B promises to give security for the payment of the money. A's promise need not be performed until the security is given, for the nature of the transaction requires that A should have security before he delivers up his stock.

1.11.9.3 LIABILITY OF PARTY PREVENTING EVENT ON WHICH THE CONTRACT IS TO TAKE EFFECT (Section 53)

When a contract contains reciprocal promises, and one party to the contract prevents the other from performing his promise, the contract becomes voidable at the option of the party so prevented; and he is entitled to compensation from the other party for any loss which he may sustain in consequence of the non-performance of the contract.

Illustration

A and B contract that B shall execute certain work for A for a thousand rupees. B is ready and willing to execute the work accordingly, but A prevents him from doing so. The contract is voidable at the option of B; and, if he elects to rescind it, he is entitled to recover from A compensation for any loss which he has incurred by its non-performance.

1.11.9.4 EFFECT OF DEFAULT AS TO THAT PROMISE WHICH SHOULD BE FIRST PERFORMED, IN CONTRACT CONSISTING OF RECIPROCAL PROMISES (Section 54)

When a contract consists of reciprocal promises, such that one of them cannot be performed, or that its performance cannot be claimed till the other has been performed, and the promiser of the promise last mentioned fails to perform it, such promisor cannot claim the performance of the reciprocal promise, and must make compensation to the other party to the contract for any loss which such other party may sustain by the non-performance of the contract.

Illustrations

- (a) A hires B's ship to take in and convey, from Calcutta to the Mauritius, a cargo to be provided by A, B receiving a certain freight for its conveyance. A does not provide any cargo for the ship. A cannot claim the performance of B's promise, and must make compensation to B for the loss which B sustains by the non-performance of the contract.
- (b) A contracts with B to execute certain builder's work for a fixed price, B supplying the scaffolding and timber necessary for the work. B refuses to furnish scaffolding or timber, and the work cannot be executed. A need not execute the work, and B is bound to make compensation to A for any loss caused to him by the non-performance of the contract.
- (c) A contracts with B to deliver to him, at a specified price, certain merchandise on board a ship which cannot arrive for a month, and B engages to pay for the merchandise within a week from the date of the contract. B does not pay within the week. A's promise to deliver need not be performed, and B must make compensation.
- (d) A promises B to sell him one hundred bales of merchandise, to be delivered next day, and B promises A to pay for them within a month. A does not deliver according to his promise. B's promise to pay need not be performed and A must make compensation.

1.11.9.5 TIME IS ESSENCE OF THE CONTRACT (Section 55)

When a party to a contract promises to do a certain thing at or before a specified time, or certain things at or before specified times, and fails to do any such thing at or before the specified time, the contract, or so much of it as has not been performed, becomes voidable at the option of the promisee, if the intention of the parties was that time should be of the essence of the contract.

Effect of such failure when time is not essential—If it was not the intention of the parties that time should be of the essence of the contract, the contract does not become voidable by the failure to do such thing at or before the specified time; but the promisee is entitled to compensation from the promisor for any loss occasioned to him by such failure.

Effect of acceptance of performance at time other than that agreed upon—If, in case of a contract voidable on account of the promisor's failure to perform his promise at the time agreed, the promisee accepts performance of such promise at any time other than that agreed, the promisee cannot claim compensation for any loss occasioned by the non-performance of the promise at the time agreed, unless, at the time of such acceptance, he gives notice to the promisor of his intention to do so.

1.11.9.6 RECIPROCAL PROMISES TO DO THINGS LEGAL, AND ALSO OTHER THINGS ILLEGAL (Section 57)

Where persons reciprocally promise, firstly, to do certain things which are legal, and, secondly, under-specified circumstances, to do certain other things which are illegal, the first set of promises is a contract, but the second is a void agreement.



Illustration

A and B agree that A shall sell B a house for ₹ 10,000, but that, if B uses it as a gambling house, he shall pay ₹ 50,000 for it.

The first set of reciprocal promises, namely, to sell the house and to pay ₹10,000 for it, is a contract.

The second set is for an unlawful object, namely, that B may use the house as a gambling house, and is a void agreement.

1.11.10 ALTERNATIVE PROMISE, ONE BRANCH BEING ILLEGAL (Section 58)

In the case of an alternative promise, one branch of which is legal and the other illegal, the legal branch alone can be enforced.

Illustration

A and B agree that A shall pay B ₹1,000, for which B shall afterwards deliver to A either rice or smuggled opium.

This is a valid contract to deliver rice, and a void agreement as to the opium.

1.12 APPROPRIATION OF PAYMENTS

1.12.1 APPLICATION OF PAYMENT WHERE DEBT TO BE DISCHARGED IS INDICATED (Section 59)

Where a debtor, owing several distinct debts to one person, makes a payment to him, either with express intimation, or under circumstances implying that the payment is to be applied to the discharge of some particular debt, the payment, if accepted, must be applied accordingly.

Illustrations

- (a) A owes B, among other debts, ₹1,000 upon a promissory note which falls due on the first June. He owes B no other debt of that amount. On the first June A pays to B ₹1,000. The payment is to be applied to the discharge of the promissory note.
- (b) A owes to B, among other debts, the sum of ₹567. B writes to A and demands payment of this sum.

A sends to B ₹567. This payment is to be applied to the discharge of the debt of which B had demanded payment.

1.12.2 APPLICATION OF PAYMENT WHERE DEBT TO BE DISCHARGED IS NOT INDICATED (Section 60)

Where the debtor has omitted to intimate and there are no other circumstances indicating to which debt the payment is to be applied, the creditor may apply it at his discretion to any lawful debt actually due and payable to him from the debtor, whether its recovery is or is not barred by the law in force for the time being as to the limitation of suits.

1.12.3 APPLICATION OF PAYMENT WHERE NEITHER PARTY APPROPRIATES (Section 61)

Where neither party makes any appropriation the payment shall be applied in discharge of the debts in order of time, whether they are or are not barred by the law in force for the time being as to the limitation of suits. If the debts are of equal standing, the payment shall be applied in discharge of each proportionately.

1.12.4 CONTRACTS WHICH NEED NOT BE PERFORMED, EFFECT OF NOVATION, RESCISSION AND ALTERATION OF CONTRACT (Section 62)

If the parties to a contract agree to substitute a new contract for it, or to rescind or alter it, the original contract need not be performed.

Illustrations

- (a) A owes money to B under a contract. It is agreed between A, B and C that B shall thenceforth accept C as his debtor, instead of A. The old debt of A to B is at an end, a new debt from C to B has been contracted.
- (b) A owes B ₹10,000 rupees. A enters into an agreement with B, and gives B a mortgage of his (A's) estate for ₹5,000 in place of the debt of ₹10,000. This is a new contract and extinguishes the old.
- (c) A owes B ₹1,000 under a contract, B owes C ₹1,000. B orders A to credit C with ₹1,000 in his books, but C does not assent to the arrangement. B still owes C ₹1,000, and no new contract has been entered into.

1.12.5 PROMISEE MAY DISPENSE WITH OR REMIT PERFORMANCE OF PROMISE (Section 63)

Every promisee may dispense with or remit, wholly or in part, the performance of the promise made to him, or may extend the time for such performance, or may accept instead of it any satisfaction which he thinks fit.

Illustrations

- (a) A promises to paint a picture for B. B afterwards forbids him to do so A is no longer bound to perform the promise.
- (b) A owes B ₹5,000. A pays to B, and B accepts in satisfaction of the whole debt, ₹2,000 paid at the time and place at which the ₹5,000 were payable. The whole debt is discharged.
- (c) A owes B ₹5,000. C pays to B ₹1,000, and B accepts them, in satisfaction of his claim on A. This payment is a discharge of the whole claim.
- (d) A owes B, under a contract, a sum of money, the amount of which has not been ascertained. A without ascertaining the amount gives to B, and B, in satisfaction thereof, accepts the sum of ₹2,000. This is a discharge of the whole debt, whatever may be its amount.
- (e) A owes B ₹2,000, and is also indebted to other creditors. A makes an arrangement with his creditors, including B, to pay them, a composition of eight annas in the rupee upon their respective demands. Payment to B of ₹1,000 is a discharge of B's demand.

1.12.6 CONSEQUENCES OF RESCISSION OF VOIDABLE CONTRACT (Section 64)

Where a person at whose option a contract is voidable rescinds it, the other party thereto need not perform any promise therein contained in which he is promisor. The party rescinding a voidable contract shall, if he has received any benefit thereunder from another party to such contract, restore such benefit, so far as may be, to the person from whom it was received.

1.12.7 OBLIGATION OF PERSON WHO HAS RECEIVED ADVANTAGE UNDER VOID AGREEMENT OR CONTRACT THAT BECOMES VOID (Section 65)

When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.

Illustrations

- (a) A pays B ₹1,000 in consideration of B's promising to marry C, A's daughter. C is dead at the time of the promise. The agreement is void, but B must repay A the ₹1,000.
- (b) A contracts with B to deliver to him 250 maunds of rice before the 1st of May. A delivers 130 maunds only before that day, and none after. B retains the 130 maunds after the first day of May. He is bound to pay A for them.



- (c) A, a singer, contracts with B, the manager of a theatre, to sing at his theatre for two nights in every week during the next two months, and B engages to pay her a hundred rupees for each night's performance. On the sixth night, A willfully absents herself from the theatre, and B, in consequence, rescinds the contract. B must pay A for the five nights on which she had sung.
- (d) A contracts to sing for B at a concert for ₹1,000, which are paid in advance. A is too ill to sing. A is not bound to make compensation to B for the loss of the profits which B would have made if A had been able to sing, but must refund to B the ₹1,000 paid in advance.

1.12.8 MODE OF COMMUNICATING OR REVOKING RESCISSION OF VOIDABLE CONTRACT (Section 66)

The rescission of a voidable contract may be communicated or revoked in the same manner, and subject to the same rules, as apply to the communication or revocation of a proposal.

1.12.9 EFFECT OF NEGLECT OF PROMISEE TO AFFORD PROMISOR REASONABLE FACILITIES FOR PERFORMANCE (Section 67)

If any promisee neglects or refuses to afford the promisor reasonable facilities for the performance of his promise, the promisor is excused by such neglect or refusal as to any non-performance caused thereby.

Illustration

A contracts with B to repair B's house.

B neglects or refuses to point out to A the places in which his house requires repair.

A is excused for the non-performance of the contract if it is caused by such neglect or refusal.

1.12.10 CLAIM FOR NECESSARIES SUPPLIED TO PERSON INCAPABLE OF CONTRACTING, OR ON HIS ACCOUNT (Section 68)

If a person, incapable of entering into a contract, or anyone whom he is legally bound to support, is supplied by another person with necessities suited to his condition in life, the person who has furnished such supplies is entitled to be reimbursed from the property of such incapable person.

Illustrations

- (a) A supplies B, a lunatic, with necessities suitable to his condition in life. A is entitled to be reimbursed from B's property.
- (b) A supplies the wife and children of B, a lunatic, with necessities suitable to their condition in life. A is entitled to be reimbursed from B's property.

1.12.11 REIMBURSEMENT OF PERSON PAYING MONEY DUE BY ANOTHER IN PAYMENT OF WHICH HE IS INTERESTED (Section 69)

A person who is interested in the payment of money which another is bound by law to pay, and who therefore pays it, is entitled to be reimbursed by the other.

Illustration

B holds land in Bengal, on a lease granted by A, the zamindar. The revenue payable by A to the Government being in arrear, his land is advertised for sale by the Government. Under the revenue law, the consequence of a such sale will be the annulment of B's lease. B, to prevent the sale and the consequent annulment of his own lease, pays to the Government the sum due from A. A is bound to make good to B the amount so paid.

1.12.12 OBLIGATION OF PERSON ENJOYING BENEFIT OF NON-GRATUITOUS ACT (Section 70)

Where a person lawfully does anything for another person/or delivers anything to him, not intending to do so gratuitously, and such other person enjoys the benefit thereof, the latter is bound to make compensation to the former in respect of, or to restore, the thing so done or delivered.

Illustrations

- (a) A, a tradesman, leaves goods at B's house by mistake, B treats the goods as his own. He is bound to pay A for them.
- (b) A saves B's property from fire. A is not entitled to compensation from-B, if the circumstances show that he intended to act gratuitously.

1.12.13 FINDER OF GOODS (Section 71)

A person who finds goods belonging to another, and takes them into his custody, is subject to the same responsibility as a bailee besides the responsibility of exercising reasonable efforts in finding the real owner.

However, a finder is also bestowed with certain rights as follows:

- (i) Right to retain the goods until the true owner compensates him for the money spent in preserving the goods and finding the owner. The finder, however, cannot sue for compensation. Where the owner has declared specific reward, the finder can sue him for the same.
- (ii) Right to sell: If the owner cannot be found after due search, or he refuses to pay lawful charges of the finder, the finder may sell the goods if-
 - (a) the goods are of perishable nature;
 - (b) lawful charges of the finder amounts to $\frac{2}{3}$ rd of the value of goods.

1.12.14 LIABILITY OF PERSON TO WHOM MONEY IS PAID, OR THING DELIVERED BY MISTAKE OR UNDER COERCION (Section 72)

A person to whom money has been paid, or anything delivered, by mistake or under coercion, must repay or return it.

Illustrations

- (a) A and B jointly owe ₹1,000 to C. A alone pays the amount to C, and B, not knowing this fact, pays ₹100 over again to C. C is bound to repay the amount to B.
- (b) A railway company refuses to deliver up certain goods to the consignee, except upon the payment of an illegal charge for carriage. The consignee pays the sum charged in order to obtain the goods. He is entitled to recover so much of the charge as was illegally excessive.

1.13. DISCHARGE OF CONTRACT

Discharge of Contract implies termination of contractual relationship among parties. When we say a contract is discharged it means it ceases to operate and rights and obligation under it comes to an end. A contract may be discharged by any of the following ways:—

- (i) performance,
 - (ii) mutual consent,
 - (iii) subsequent impossibility of performance,
 - (iv) lapse of time,
 - (v) operation of law,
 - (vi) breach of contract.
- A) Discharge by performance is the most usual form of discharge of a contract. A contract is said to be performed when the parties fulfill their respective obligations.
 - B) A contract may be discharged by a further agreement among parties which may be expressed or implied.



- C) A contract to perform an impossible act is void *ab initio*. A contract is discharged if subsequent performance becomes impossible due to factors beyond the control of the parties. Supervening impossibility occurs in the following circumstances;
- a) When subject matter of contract is destroyed.
 - b) When state of things which form basis of contract changes.
 - c) When performance depends on personal skill, incapacity of that party renders the contract discharged.
 - d) Change of law may render the performance impossible.
 - e) Outbreak of war may make a party alien enemy. Contract with alien enemy is unlawful and such contracts are suspended during duration of war.
 - f) It should however be noted that 'impossibility of performance' as a rule cannot be an excuse for non-performance unless performance becomes absolutely impossible.
- D) As per Law of Limitation, a contract should be performed within a specified time period, called period of limitation. If not performed within 'period of limitation' and no action is taken by the promisee, the contract is terminated.
- E) A contract may be discharged due to operation of law by death of a party, merger, insolvency of a party, unauthorized alteration in terms of contract, rights and liabilities getting vested in the same person.
- F) If a party to a contract breaks his obligation under the contract, he is said to have committed breach. Breach of contract may be actual or anticipatory. Actual breach may occur when performance is due or during performance. Anticipatory breach of contract occurs when a party refuses to perform before the time of performance.

1.13.1 THE CONSEQUENCES OF BREACH OF CONTRACT COMPENSATION FOR LOSS OR DAMAGE CAUSED BY BREACH OF CONTRACT (SECTION 73)

When a contract has been broken, the party who suffers by such breach is entitled to receive, from the party who has broken the contract, compensation for any loss or damage caused to him thereby, which naturally arose in the usual course of things from such breach, or which the parties knew, when they made the contract, to be likely to result from the breach of it.

Such compensation is not to be given for any remote and indirect loss or damage sustained by reason of the breach.

Compensation for failure to discharge obligation resembling those created by contract—

When an obligation resembling those created by contract has been incurred and has not been discharged, any person injured by the failure to discharge it is entitled to receive the same compensation from the party in default, as if such person had contracted to discharge it and had broken his contract.

Explanation : In estimating the loss or damage arising from a breach of contract, the means which existed of remedying the inconvenience caused by the non-performance of the contract must be taken into account.

Illustrations

- (a) A contracts to sell and deliver 50 mounds of saltpeter to B, at a certain price to be paid on delivery. A breaks his promise. B is entitled to receive from A, by way of compensation, the sum, if any, by which the contract price falls short of the price for which B might have obtained 50 mounds of saltpeter of like quality at the time when the saltpeter ought to have been delivered.

- (b) A hires B's ship to go to Bombay, and there take on board on the first of January a cargo which A is to provide, and bring it to Calcutta, the freight to be paid when earned. B's ship does not go to Bombay, but A has opportunities of procuring suitable conveyance for the cargo upon terms as advantageous as those on which he had chartered the ship. A avails himself of those opportunities, but is put to trouble and expense in doing so. A is entitled to receive compensation from B in respect of such trouble and expense.
- (c) A contracts to buy of B, at a stated price, 50 mounds of rice, no time being fixed for delivery. A afterwards informs B that he will not accept the rice if tendered to him. B is entitled to receive from A, by way of compensation, the amount, if any, by which the contract price exceeds that which B can obtain for the rice at the time when A informs B that he will not accept it.
- (d) A contracts to buy B's ship for ₹60,000, but breaks his promise. A must pay to B, by way of compensation, the excess, if any, of the contract price over the price which B can obtain for the ship at the time of the breach of promise.
- (e) A, the owner of a boat, contracts with B to take a cargo of jute to Marzipan, for sale at that place, starting on a specified day. The boat, owing to some avoidable cause, does not start at the time appointed, whereby the arrival of the cargo at Marzipan is delayed beyond the time when it would have arrived if the boat had sailed according to the contract. After that date, and before the arrival of the cargo, the price of jute falls. The measure of the compensation payable to B by A is the difference between the price which B could have obtained for the cargo at Marzipan at the time when it would have arrived if forwarded in due course, and its market price at the time when it actually arrived.
- (f) A contracts to repair B's house in a certain manner, and receives payment in advance. A repairs the house, but not according to contract. B is entitled to recover from A the cost of making the repairs conforming to the contract.
- (j) A contracts to let his ship to B for a year, from the first of January, for a certain price. Freights rise, and, on the first of January, the hire obtainable for the ship is higher than the contract price. A breaks his promise. He must pay to B, by way of compensation, a sum equal to the difference between the contract price and the price for which B could hire a similar ship for a year on and from the first of January.
- (k) A contracts to supply B with a certain quantity of iron at a fixed price, being a higher price than that for which A could procure and deliver the iron. B wrongfully refuses to receive the iron. B must pay to A, by way of compensation, the difference between the contract price of the iron and the sum for which A could have obtained and delivered it.
- (l) A delivers to B, a common carrier, a machine to be conveyed, without delay, to A's mill, informing B that his mill is stopped for want of the machine. B unreasonably delays the delivery of the machine and A, in consequence, loses a profitable contract with the Government. A is entitled to receive from B, by way of compensation, the average amount of profit which would have been made by the working of the mill during the time that delivery of it was delayed, but not the loss sustained through the loss of the Government contract.
- (m) A, having contracted with B to supply B with 1,000 tons of iron at ₹100 a ton, to be delivered at a stated time, contracts with C for the purchase of 1,000 tons of iron at ₹80 a ton, telling C that he does so for the purpose of performing his contract with B. C fails to perform his contract with A, who cannot procure other iron, and B, in consequence, rescinds the contract. C must pay to A ₹20,000, being the profit which A would have made by the performance of his contract with B.
- (n) A contracts with B to make and deliver to B, by a fixed day, for a specified price, a certain piece of machinery. A does not deliver the piece of machinery at the time specified, and in consequence of this, B is obliged to procure another at a higher price than that which he was to have paid to A, and is prevented from performing a contract which B had made with a third person at the



time of his contract with A (but which had not been then communicated to A), and is compelled to make compensation for breach of that contract. A must pay to B, by way of compensation, the difference between the contract price of the piece of machinery and the sum paid by B for another, but not the sum paid by B to the third person by way of compensation.

- (o) A, a builder, contracts to erect and finish a house by the first of January, in order that B may give possession of it at that time to C, to whom B has contracted to let it. A is informed of the contract between B and C. A builds the house so badly that, before the first of January, it falls down and has to be rebuilt by B, who, in consequence, loses the rent which he was to have received from C, and is obliged to make compensation to C for the breach of his contract. A must make compensation to B for the cost of rebuilding the house, for the rent lost, and for the compensation made to C.
- (p) A sells certain merchandise to B, warranting it to be of a particular quality, and B, in reliance upon this warranty, sells it to C with a similar warranty. The goods prove to be not according to the warranty, and B becomes liable to pay C a sum of money by way of compensation. B is entitled to be reimbursed this sum by A.
- (q) A contracts to pay a sum of money to B on a day specified. A does not pay the money on that day; B in consequence of not receiving the money on that day is unable to pay his debts, and is totally ruined. A is not liable to make good to B anything except the principal sum he contracted to pay, together with interest up to the day of payment.
- (r) A contracts to deliver 50 mounds of saltpeter to B on the first of January, at a certain price. B afterwards, before the first day of January, contracts to sell the saltpeter to C at a price higher than the market price of the first of January. A breaks his promise. In estimating the compensation payable by A or to B, the market price of the first of January, and not the profit which would have arisen to B from the sale to C, is to be taken into account.
- (s) A contracts to sell and deliver 500 bales of cotton to B on a fixed day. A knows nothing of B's mode of conducting his business. A breaks his promise, and B, having no cotton, is obliged to close his mill. A is not responsible to B for the loss caused to B by the closing of the mill.
- (t) A contracts to sell and deliver to B, on the first of January, certain cloth which B intends to manufacture into caps of a particular kind, for which there is no demand, except at that season. The cloth is not delivered till after the appointed time, and too late to be used that year in making caps. B is entitled to receive from A, by way of compensation, the difference between the contract price of the cloth and its market price at the time of delivery, but not the profits which he expected to obtain by making caps, nor the expenses which he has been put to in making preparation for the manufacture.
- (u) A, a ship-owner, contracts with B to convey him from Calcutta to Sydney in A's ship sailing on the first of January, and B pays to A, by way of deposit, one-half of his passage money. The ship does not sail on the first of January, and B, after being, in consequence, detained in Calcutta for some time, and thereby put to some expense, proceeds to Sydney in another vessel, and, in consequence, arriving too late in Sydney, loses a sum of money. A is liable to repay to B his deposit, with interest, and the expense to which he is put by his detention in Calcutta, and the excess, if any, of the passage money paid for the second ship over that agreed upon for the first, but not the sum of money which B lost by arriving in Sydney too late.

1.13.2 COMPENSATION FOR BREACH OF CONTRACT WHERE PENALTY STIPULATED FOR (SECTION 74)

When a contract has been broken, if a sum is named in the contract as the amount to be paid in case of such breach, or if the contract contains any other stipulation by way of penalty, the party complaining of the breach is entitled, whether or not actual damage or loss is proved to have been caused thereby, to receive from the party who has broken the contract reasonable compensation not exceeding the amount so named or, as the case may be, the penalty stipulated for.

Explanation: A stipulation for increased interest from the date of default may be a stipulation by way of penalty.

Exception: When any person enters into any bail-bond, recognizance or other instrument of the same nature, or, under the provisions of any law, or under the orders of the Central Government or of any State Government, gives any bond for the performance of any public duty or act in which the public are interested, he shall be liable, upon breach of the condition of any such instrument, to pay the whole sum mentioned therein.

Explanation: A person who enters into a contract with the Government does not necessarily thereby undertake any public duty, or promise to do an act in which the public are interested.

Illustrations

- (a) A contracts with B to pay B ₹1,000, if he fails to pay B ₹500 on a given day. A fails to pay B ₹500 on that day. B is entitled to recover from A such compensation, not exceeding ₹ 1,000, as the Court considers reasonable.
- (b) A contracts with B that if A practices as a surgeon within Calcutta, he will pay B ₹5,000. A practices as a surgeon in Calcutta. B is entitled to such compensation, not exceeding ₹5,000, as the Court considers reasonable.
- (c) A gives a recognizance binding him in a penalty of ₹500 to appear in Court on a certain day. He forfeits his recognizance. He is liable to pay the whole penalty.
- (d) A gives B a bond for the repayment of ₹1,000 with interest at 12 per cent at the end of six months, with a stipulation that, in case of default, interest shall be payable at the rate of 75 per cent from the date of default. This is a stipulation by way of penalty, and B is only entitled to recover from A such compensation as the Court considers reasonable.
- (e) A, who owes money to B, a money-lender, undertakes to repay him by delivering to him 10 mounds of grain on a certain date, and stipulates that, in the event of his not delivering the stipulated amount by the stipulated date, he shall be liable to deliver 20 maunds. This is a stipulation by way of penalty, and B is only entitled to reasonable compensation in case of breach.
- (f) A undertakes to repay B a loan of ₹1,000 by five equal monthly installments, with a stipulation that, in default of payment of any installment, the whole shall become due. This stipulation is not by way of penalty, and the contract may be enforced according to its terms.
- (g) A borrows ₹500 from B and gives him a bond for ₹200 payable by five yearly installments of ₹40, with a stipulation that, in default of payment of any installment, the whole shall become due. This is a stipulation by way of penalty.

1.13.3 PARTY RIGHTFULLY RESCINDING CONTRACT ENTITLED TO COMPENSATION (SECTION 75)

A person who rightfully rescinds a contract is entitled to compensation for any damage which he has sustained through the non-fulfillment of the contract.

Illustration

A, a singer, contracts with B, the manager of a theatre, to sing at his theatre for two nights in every week during the next two months, and B engages to pay her ₹100 for each night's performance. On the sixth night, A willfully absents herself from the theatre, and B, in consequence, rescinds the contract. B is entitled to claim compensation for the damage which he has sustained through the non-fulfillment of the contract.



THE INDIAN CONTRACT ACT,1872

MULTIPLE CHOICE QUESTIONS

Q1. Indian Contract Act,1872 is applicable to---

- (a) Whole of India except the state of Jammu and Kashmir
- (b) Whole of India
- (c) Whole of India except Arunachal Pradesh
- (d) Whole of India except Goa, Delhi, Chandigarh

Q2. Indian Contract Act,1872 came into force with effect from—

- (a) 1st September 1892
- (b) 1st September 1874
- (c) 1st September,1872
- (d) 1st April 1872

Q3. The term contract is defined in section---of the Indian Contract Act,1872

- (a) 2(e)
- (b) 2(h)
- (c) 2(d)
- (d) 3(a)

Q4. An agreement enforceable at law is a----

- (a) enforceable acceptance
- (b) accepted offer
- (c) approved promise
- (d) contract

Q5. Which is correct

- (a) proposal + acceptance = promise
- (b) promise + consideration = agreement
- (c) agreement + enforceability at law = contract
- (d) all the above.

Q6. Offer as defined under section 2(a) is-----

- (a) communication from one person to another
- (b) suggestion by one person to another
- (c) willingness to do or abstain from doing an act in order to obtain the assent of other thereto
- (d) none of the above.

Q7. In an Executed contract, the obligation of ---

- (a) both the parties have been fulfilled
- (b) both the parties are outstanding
- (c) obligation of one party is outstanding
- (d) none of these

Q8. In an Executory contract, the obligation of both the parties—

- (a) are outstanding
- (b) fulfilled
- (c) partly fulfilled
- (d) not satisfactory

Q9. Under section 2(b) if the person to whom the proposal is made signifies his assent the proposal is said to have been-----

- (a) accepted
- (b) agreed
- (c) provisionally agreed
- (d) tentatively accepted.

Q10. Every promise and every set of promises, forming the consideration for each other, is an-----

- (a) agreement
- (b) contract
- (c) offer
- (d) acceptance.

Q11. Promises which form the consideration or part of the consideration for each other are called-----

- (a) reciprocal promises
- (b) cross offers
- (c) conditional offer
- (d) conditional promises.

Q12. A contract voidable at the option of one party to the contract is called—

- (a) void contract
- (b) voidable contract
- (c) illegal Contract
- (d) unenforceable contract

Q13. Void agreement means-----

- (a) agreement illegal in nature
- (b) agreement not enforceable by law
- (c) agreement violating legal procedure
- (d) agreement against public policy.

Q14. A proposal when accepted becomes-----

- (a) promise under section 2(b)
- (b) agreement under section 2(e)
- (c) contract under section 2(h)
- (d) none of the above.



Q15. Which of these is/are essentials of a valid acceptance -----

- (a) be absolute
- (b) be unqualified
- (c) both be absolute & unqualified
- (d) be conditional.

Q16. Which of these ways a proposal can be accepted.-----

- (a) by notice of acceptance
- (b) by performance of condition of proposal
- (c) by acceptance of consideration for a reciprocal promise
- (d) all the above

Q17. General offer can be accepted---

- (a) person to whom it is addressed
- (b) general public at large
- (c) any body fulfilling the conditions attached to the offer
- (d) only senior citizen having PAN number

Q18. Goods displayed in a shop with a price tag is an----

- (a) offer
- (b) invitation to offer
- (c) counter offer
- (d) none of the above.

Q19. Which of these are essential condition of a valid contract—

- (a) free consent
- (b) competency of parties
- (c) consideration
- (d) all the three

Q20. Lack of free consent renders the contract----

- (a) perfect valid
- (b) unenforceable
- (c) voidable at the option of the party whose consent was not free
- (d) Void

Q21. X threaten to kidnap Y's son if he does not sell his flat worth ₹50 lakh to him for ₹5 lakh. This contract is void due to—

- (a) inadequacy of consideration
- (b) absence of free consent
- (c) incompetence of parties
- (d) all the three

Q22. Communication of a proposal is complete----

- (a) when it is put in the course of transmission
- (b) when it comes to the knowledge of the person to whom it is made
- (c) when the proposal is communicated to the person to whom it is made
- (d) all the above.

Q23. Communication of acceptance is complete as against the proposer

- (a) when it comes to the knowledge of the proposer
- (b) when it is put in the course of transmission to him so as to be out of power of the acceptor
- (c) when the acceptance is communicated to the proposer
- (d) all the above.

Q24. Promises which form the consideration or part thereof, for each are called----

- (a) acceptances for different proposals
- (b) agreements
- (c) reciprocal promises
- (d) consideration.

Q25. Every promise or set of promises forming the consideration for each other is called---

- (a) reciprocal promise
- (b) contract
- (c) agreement
- (d) none of the above

Q26. Under section 2(c) promisor is the-----

- (a) person who makes the proposal
- (b) person who accepts the proposal
- (c) person who makes the promise
- (d) person to whom the proposal is made.

Q27. Under section 2(c) promisee is the-----

- (a) person who makes the proposal
- (b) person who accepts the proposal
- (c) person who makes the promise
- (d) person to whom proposal is made.

Q28. Parties are not competent to contract if any of them is---

- (a) minor
- (b) insane
- (c) declared insolvent
- (d) all the above.



Q29. A contract with or by a minor is a----

- (a) valid contract
- (b) void contract
- (c) voidable contract
- (d) voidable at the option of either party.

Q30. Consent under section 13 means---

- (a) agreeing on the same thing in the same sense
- (b) agreeing on the same thing at the same time
- (c) agreeing on the same thing at different time
- (d) agreeing on different things at different times.

Q31. The term consensus ad-idem means--

- (a) general consensus
- (b) reaching an agreement
- (c) meeting of minds upon the same thing in the same sense
- (d) all the above.

Q32. When the consent is caused by misrepresentation, the contract -----

- (a) valid
- (b) void
- (c) voidable
- (d) illegal.

Q33. When the consent is caused by undue influence, the contract under section 19A is--

- (a) valid
- (b) void
- (c) voidable
- (d) illegal.

Q34. Where both the parties are under mistake as to matter of fact, the contract under section 20 is---

- (a) voidable
- (b) void
- (c) valid
- (d) illegal.

Q35. A contract which ceases to be enforceable by law becomes void----

- (a) when it ceases to be enforceable
- (b) before it ceases to be enforceable
- (c) no such condition necessary
- (d) none of above.

Q36. The term consideration means—

- (a) Something in return
- (b) Something of value
- (c) Something of essence
- (d) Something in gratification

Q37. The term consideration is defined in section----of the Indian Contract Act, 1872

- (a) 2(a)
- (b) 2(d)
- (c) 3(a)
- (d) 2(h)

Q38. Consideration should be something in return of promise which--

- (a) both the law and parties regard, as having some value
- (b) only law regards as having some value
- (c) only the parties regard some value
- (d) only adequate value necessary.

Q39. Considerations & objects are unlawful where it is--

- (a) forbidden by law or defeat the provision of any law
- (b) which is fraudulent
- (c) which is immoral & against the public policy
- (d) all the above.

Q40. A contract without consideration under section 25 is--

- (a) valid
- (b) voidable
- (c) void
- (d) illegal.

Q41. Contract without consideration made in writing & registered and made on account of natural love and affection is

- (a) unvoid
- (b) voidable
- (c) valid
- (d) illegal

Q42. Consent is free under section 14 if not caused by

- (a) coercion & undue influence
- (b) fraud and misrepresentation
- (c) mistake subject to the provisions of sections 20, 21 and 22
- (d) all the above.



Q43. When the consent to the contract is caused by coercion, the contract under section 19 is--

- (a) valid
- (b) voidable
- (c) void
- (d) illegal.

Q44. Where one of the parties is under a mistake as to matter of fact the contract is--

- (a) valid
- (b) void
- (c) voidable
- (d) illegal.

Q45. If the proposer prescribes the mode & manner of acceptance, the acceptance

- (a) can be in any manner & mode
- (b) should be in the manner & mode prescribed
- (c) can be in any reasonable mode & manner
- (d) all the above.

Q46. A contract which is valid initially however, ceases to be enforceable subsequently, the contract

- (a) remains valid
- (b) becomes voidable when enforceable
- (c) becomes void when it enforceable
- (d) becomes void since inception.

Q47. An agreement by way of wager under section 30 is--

- (a) void
- (b) voidable
- (c) valid
- (d) unenforceable

Q48. An agreement to remain unmarried is--

- (a) valid
- (b) voidable
- (c) void
- (d) unenforceable.

Q49. Agreements, the meaning of which is not certain or not capable of being made certain is--

- (a) void
- (b) voidable
- (c) illegal
- (d) valid

Q50. S promises to discover hidden wealth through magic if T promise to give him ₹ 51,000. This agreement is---

- (a) valid agreement
- (b) illegal agreement
- (c) void agreement
- (d) voidable agreement

Q51. Inadequacy of consideration is relevant in determining the question of--

- (a) fraud
- (b) misrepresentation
- (c) undue influence
- (d) Free consent.

Q52. Agreement without consideration is valid--

- (a) when made out of love & affection due to near relationship
- (b) when made to compensate a person who has already done something voluntarily
- (c) when made to pay a time barred debt
- (d) all the above.

Q53. A contract based on the happening or non-happening of a future event under section 31 is called--

- (a) a contingent contract
- (b) a wagering contract
- (c) a contract marked with uncertainty and hence void
- (d) none of the above.

Q54. A contingent contract--

- (a) is void
- (b) never becomes void
- (c) becomes void when the event becomes impossible
- (d) is voidable.

Q55. An agreement to do an act impossible in itself under section 56 is--

- (a) void
- (b) valid
- (c) voidable
- (d) illegal

Q56. In case the promisee prescribes the manner and time of performance of promise---

- (a) the performance must be in the manner and at the time prescribed
- (b) the performance can be in a different manner but at the time prescribed



- (c) the performance can be in the manner prescribed but at a time beyond the time prescribed
- (d) the performance need not be in the manner and time prescribed.

Q57. A person is deemed to be in a position to dominate the will of another by undue influence if the mental capacity is affected temporarily or permanently by--

- (a) reason of age
- (b) reason of illness
- (c) mental or bodily distress
- (d) all the above.

Q58. Which one of the following is correct

- (a) past consideration is no consideration
- (b) consideration can be past, present or future
- (c) consideration can only be present
- (d) consideration can only be present & future

Q59. Which of these is a valid consideration to support a proposal

- (a) promise to get never married
- (b) promise to give up smoking
- (c) promise to help in smuggling of goods
- (d) promise to secure job in public service

Q60. An agreement in restraint of marriage is--

- (a) void
- (b) voidable
- (c) valid
- (d) unenforceable

Q61. A contract with minor is--

- (a) voidable at the instance of the minor
- (b) voidable at the instance of other party
- (c) void
- (d) valid.
- (d) unenforceable.

Q62. Communication of acceptance is complete as against the acceptor

- (a) when it comes to the knowledge of the proposer
- (b) when it is put in the course of transmission
- (c) when it is communicated to the acceptor that the acceptance has reached the proposer
- (d) when the proposer conveys the acceptance to the acceptor

Q63. An agreement not to pursue any legal remedy to enforce the rights is-----

- (a) valid
- (b) voidable
- (c) void
- (d) unenforceable.

Q64. A general offer open for world at large can be accepted--

- (a) by sending a communication of acceptance
- (b) by complying with the conditions of offer
- (c) by tendering himself to comply the conditions of offer
- (d) none of the above.

Q65. Coercion which vitiates free consent 15 is--

- (a) committing or threatening to commit any act which is forbidden by law
- (b) committing or threatening to commit any act which is forbidden by Indian Penal Code
- (c) unlawful detaining or threatening to detain any property with an intention to causing any person to enter into an agreement
- (d) all the above.

Q66. Which of these is a contingent contract.

- (a) Insurance agreement
- (b) Guarantee agreement
- (c) Indemnity agreement
- (d) all the three

Q67. ----is/are characteristic of Contingent contract.

- (a) uncertainty of event
- (b) future event
- (c) lack of control over the event
- (d) All the three

Q68. In a contract not specifying the time for performance, the promisor can perform the contract

- (a) immediately
- (b) within the shortest time
- (c) within a reasonable time
- (d) within next 21 days.

Q69. What is a reasonable time for performance of a contract--

- (a) is a question of fact
- (b) is a question of law
- (c) is a mixed question of fact & law
- (d) is a question of prudence.



Q70. A contract, performance of which becomes impossible or unlawful becomes

- (a) void when the performance becomes unlawful or impossible
- (b) void
- (c) voidable when the performance becomes impossible.
- (d) neither becomes void nor voidable

Q71. Past consideration is valid in--

- (a) England only
- (b) India only
- (c) both in England & India
- (d) neither in England nor in India.

Q72. Due to domestic quzarel between H and W, H promised to pay a monthly charges of ₹ 5100 to his wife W if she stay away from him. Later H refused to honour the commitment. W sued H for non payment of monthly charges so promised by H. What is the merit of the case.

- (a) non-enforceable due to lack of consideration
- (b) perfectly enforceable
- (c) consideration being inadequate.
- (d) W can not bring suit because the agreement was not registered.

Q73. A promise in retrun for promise means---

- (a) return promise
- (b) Reciprocal promises
- (c) Cross promises
- (d) Counter promise

Q74. In case of mutual and concurrent promises, the performance is to be---

- (a) in oder of timing of promies
- (b) within a reasonable gap of each other
- (c) simultaneously
- (d) in any way the parties decides

Q75. Appropriation of payment means---

- (a) accounting of payment
- (b) acknowledgement of payment
- (c) discharge of payment
- (d) application of payment

Q76. The Rule laid down in Clayton's case is applied in England for---

- (a) Appropriation of payment
- (b) discharge of contract
- (c) determination of damages
- (d) goodwill valuation

Q77. Where neither party makes any appropriation, the payment is to applied in---

- (a) random manner
- (b) Alphabetical manner
- (c) Alpha-Numeric manner
- (d) in the order of time

Q78. The liability of joint promisors is ---

- (a) joint
- (b) several
- (c) joint as well several
- (d) personal only

Q79. The term Quid Pro quo” is applied in connection with---

- (a) Consideration
- (b) capacity of the parties
- (c) free consent
- (d) legality of object

Q80. ----is/are not covered under force measure clause.

- (a) Storage of raw material
- (b) inflationary pressure
- (c) shortage of agricultural production due to bad monsoon
- (d) all the three

Q81. ----is used for the term Proposal in English law

- (a) offer
- (b) promise
- (c) invitation
- (c) all the three

Q82. -----contracts requires registration.

- (a) Sale/purchase of vehicles
- (b) Sale/purchase of immovable property
- (c) promissory note
- (d) Sale of moveable goods

Q83. Trading with an enemey is a----

- (a) voidable agreement
- (b) valid agreement
- (c) agreement opposite to public policy
- (d) unenforceable agreement



Q84. A person domiciled India attains majority on attaining the age of---

- (a) 16
- (b) 21
- (c) 14
- (d) 18

Q85. Rescission of a contract involves---

- (a) cancellation of old one
- (b) minor alteration
- (c) modification of the terms
- (d) all the three

Q86. Convict person-suffers from---

- (a) Financial disability
- (b) contractual disqualification
- (c) lack of confidentiality
- (d) lack of truthfulness and faith

Q87. X owes ₹11000 to Y, he pays ₹9000 in full and final settlement of the outstanding due. This is a case of---

- (a) novation
- (b) alteration
- (c) Remission
- (d) cancellation

Q88. Force measure covers-events like---

- (a) War
- (b) Natural calamities
- (c) Strike, lock out
- (d) all the three

Q89. Wagering agreement is illegal in---

- (a) Gujarat
- (b) Punjab
- (c) Haryana
- (d) Utter Pradesh

Q90. A agree to pay B ₹1000 if it rains today, otherwise B pays A ₹1500. This is a--

- (a) Gambling
- (b) Wagering agreement
- (c) speculation
- (d) game of chance

Q91. A agreeing to pay B ₹21000 when he marry C. This is a---

- (a) Wagering agreement
- (b) Quasi agreement
- (c) Contingent contract
- (d) unenforceable agreement

Q92. Standing offer means---

- (a) offer open to all
- (b) offer addressed to a big audience
- (c) offer made to public at large
- (d) offer allowed to remain open for acceptance over a certain period of time

Q93. X agree to sell 50 tons of oil. This agreement is void due to---

- (a) uncertainty of subject matter
- (b) uncertainty of price
- (c) uncertainty of delivery period
- (d) all the three

Q94. Abstinence means---

- (a) doing something
- (b) abstaining from doing something
- (c) postponing something
- (d) advancing something

Q95. A contract can not be avoided due to--

- (a) inadequacy of consideration
- (b) mistake of law of land
- (c) both
- (d) none of these

Q96. -----is/are good consideration to support a proposal

- (a) refrain from smoking
- (b) refrain from drinking
- (c) refrain from instituting a legal proceeding
- (d) all the three

Q97. A quasi contract lacks---

- (a) agreement
- (b) consent
- (c) both
- (d) none of these



Q98. An agreement to do impossible thing is---

- (a) invalid agreement
- (b) void
- (c) voidable
- (d) illegal

Q99. Damages are---

- (a) punitive in nature
- (b) deterrent in nature
- (c) compensatory in nature
- (d) all the three

Q100. A contract can be performed by---

- (a) promisor himself
- (b) agent of the promisor
- (c) legal representative of the promisor
- (d) either of these three

Answers

1	(a)	2	(c)	3	(b)	4	(d)	5	(c)	6	(c)	7	(a)	8	(a)	9	(a)	10	(a)
11	(a)	12	(b)	13	(b)	14	(a)	15	(c)	16	(d)	17	(c)	18	(b)	19	(d)	20	(c)
21	(b)	22	(b)	23	(b)	24	(c)	25	(a)	26	(a)	27	(b)	28	(d)	29	(b)	30	(a)
31	(c)	32	(c)	33	(c)	34	(b)	35	(a)	36	(a)	37	(b)	38	(a)	39	(d)	40	(c)
41	(c)	42	(d)	43	(b)	44	(a)	45	(b)	46	(b)	47	(a)	48	(c)	49	(a)	50	(c)
51	(d)	52	(d)	53	(a)	54	(c)	55	(a)	56	(a)	57	(d)	58	(b)	59	(b)	60	(a)
61	(c)	62	(d)	63	(c)	64	(b)	65	(d)	66	(d)	67	(d)	68	(c)	69	(a)	70	(a)
71	(b)	72	(a)	73	(b)	74	(c)	75	(d)	77	(d)	78	(c)	79	(a)	80	(d)	81	(a)
82	(b)	83	(c)	84	(d)	85	(a)	86	(b)	87	(c)	88	(d)	89	(a)	90	(b)	91	(c)
92	(d)	93	(a)	94	(b)	95	(c)	96	(d)	97	(c)	98	(b)	99	(c)	100	(d)		

Study Note - 2

LAWS RELATING TO SALE OF GOODS



This Study Note includes

- 2.1 The Sale of Goods Act, 1930 - Concepts and Definitions**
- 2.2 Condition and Warranty**
- 2.3 Transfer of Ownership**
- 2.4 Performance of the Contract of Sale**
- 2.5 Rights and Duties of Buyer**
- 2.6 Rights and Duties of Seller**
- 2.7 Rights of Unpaid Seller**
- 2.8 Breach of Contract**
- 2.9 Auction Sale**

2.1. THE SALE OF GOODS ACT, 1930 - CONCEPTS AND DEFINITIONS

INTRODUCTION

In trade and commerce, sales and purchase of goods are very common transactions. These transactions may appear to be very simple but the possibilities of complications are always there. Complications may range from whether the subject matter is goods or not to rights and duties of the parties, if there is breach of contract by either party. For resolution of the complications and disputes arising in the contract of purchase or sales of goods, principles are laid down in the Act itself. Accordingly, knowledge of basic principles of sale and purchase is very much essential for all the concerned parties not only confined to business/trading community but everybody including consumer.

The Sale of Goods Act contains the basic principles as well as the legal framework of transactions of sale and purchase of goods in India.

Earlier the law relating to the Sale of goods or movable goods was part of the Indian Contract Act, 1872 and included in Chapter VII section 76 to 123. Due to complexities of the modern business dealing and relations the then Indian Contract Act, 1872 was found to be inadequate to deal with the complexities of modern business. Accordingly the provisions relating to the Sales of Goods contained in the Indian Contract Act, 1872 were repealed and re-enacted as the Sale of Goods Act, 1930. The provisions of Indian Contract Act, 1872 continues to be applicable to the contract of Sale of Goods to the extent they are not inconsistent with the provisions of the Sales of Goods Act, 1930. This act is largely based on the English Sales of Goods Act, 1893. Even now the English authorities on interpretation of different sections of this Act are followed in India even though they are not binding on Indian Courts.

The provisions of this Act are applicable to only moveable goods other than actionable claims and money. Actionable claims are claims which can be enforced by an action or suit for example debt. Provisions relating to sale of immovable property and actionable goods are contained in Transfer of Property Act, 1882. Goods are main subject matter of this Act.

This Act is applicable to the whole of India except the State of Jammu and Kashmir and came into force with effect from 1st July 1930.

Terms and expressions used but not defined in the Act, have the same meaning as defined in the Indian Contract Act, 1872 as contract of sale is nothing but a type of contract for which principle are laid down the Indian Contract Act. Accordingly if in respect of any matter the Act is silent, reference has to be made to the Indian Contract Act, 1872 being the Principle Act or the Mother Act.

2.1.1 BASIC CONCEPTS

Section 2 of the Act defines various terms used in the Act. In this Act, unless there is anything repugnant in the subject or context:-

- (1) “buyer” means a person who buys or agrees to buy goods;
- (2) “delivery” means voluntary transfer of possession from one person to another;
- (3) goods are said to be in a “deliverable state” when they are in such state that the buyer would under the contract be bound to take delivery of them;
- (4) “document of title to goods” includes a bill of lading, dockwarrant, warehouse keeper's certificate, wharfingers' certificate, railway receipt, [multimodal transport document,] warrant or order for the delivery of goods and any other document used in the ordinary course of business as proof of the possession or control of goods, or authorising or purporting to authorise, either by endorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented;
- (5) “fault” means wrongful act or default;
- (6) “future goods” means goods to be manufactured or produced or acquired by the seller after the making of the contract of sale;
- (7) “goods” means every kind of movable property other than actionable claims and money; and includes stock and shares, growing crops, grass, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale;
- (8) a person is said to be “insolvent” who has ceased to pay his debts in the ordinary course of business, or cannot pay his debts as they become due, whether he has committed an act of insolvency or not;
- (9) “Mercantile agent” means a mercantile agent having in the customary course of business as such agent authority either to sell goods, or to consign goods for the purposes of sale, or to buy goods, or to raise money on the security of goods;
- (10) “price” means the money consideration for a sale of goods;
- (11) “property” means the general property in goods, and not merely a special property;
- (12) “quality of goods” includes their state or condition;
- (13) “seller” means a person who sells or agrees to sell goods;
- (14) “specific goods” means goods identified and agreed upon at the time a contract of sale is made; and
- (15) expressions used but not defined in this Act and defined in the Indian Contract Act, 1872 (9 of 1872), have the meanings assigned to them in that Act.

2.1.2 Analysis of the term “Sale of Goods”

After having gone through the definitions of various terms used in the Act, let us discuss two important terms, **Sale** and **Goods**. So to be a subject matter of this Act it is essential that there must be case of sale, which may be in the form of a contract of sale or agreement to sell, secondly the subject matter of sale should be goods. If it is not goods, it is out of the purview of the Act. So these two things must be satisfied simultaneously. After analyzing the name of the Act, next question is what is sales.

2.1.2.1 Definition of Sale:

Section 4 (1) defines ‘sale’ as:

‘A contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price.’

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

> 2.2 | FUNDAMENTALS OF LAWS AND ETHICS



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

Example 1: A sells his old car in exchange of a new bike. This is not a sale but a case of exchange or barter out of the purview of the Act.

Example 2: X agrees to deliver his car to Y for his use on Y agreeing to pay him user charges. This is not a case of sale as there is no transfer of property in goods but merely transfer of possession.

Example 3: X left his car in Honda Motors workshop for repair. Not a case of sale but only a case of bailment.

2.1.2.2 Definition of Goods

We have already discussed the term sale above, we are also now clear as to what does not amount to sales. Next important element of the Act is Goods. The Act does not address all types of Sale, it relates to sale of Goods only. So we now move to the term Goods.

As per section 2(7), 'Goods' means every kind of movable property other than actionable claims and money ; and includes stock and shares, growing crops, grass and things attached to or forming part of the land, which are agreed to be severed before sale or under the contract of sale. To be classified as goods, two conditions are required to be met (i) It must be movable property (ii) it should not be actionable claim and money.

Growing crops, grass and things attached to or forming part of the land are not goods by themselves unless they are agreed to be severed before sale. If they are not to be cut or severed from the land they are not goods. Trade mark, copy right, patents, goodwill, electricity, water, gas etc have been treated goods as per various judgments.

Actionable claims and money excluded from the definition of goods. Actionable claim has not been defined in the Act. As per section 3 of the Transfer of Property Act, 'an actionable claim means a claim to any debt or any beneficial interest in moveable property not in possession'. It is something which can only be enforced in a court of law. A debt due from one person to another is an actionable claim as the same can not be brought or sold.

Money means current currency note and not old rate currency coins which are considered to be goods.

2.1.2.3 Classification of Goods:

The goods which form the subject of a contract of sale may be either existing goods, owned or possessed by the seller, or future goods [Sec 6(1)] or contingent goods [Sec 6(2)].

- A. Existing goods are owned by the seller at the time of sale. They are of the following types:
- (i) Specific goods– These are identified and agreed upon at the time of sale.
 - (ii) Ascertained goods– These become ascertained after the contract is made.
 - (iii) Generic goods– These are not ascertained at the time of contract and is defined only by description.
- B. Future goods are not owned by the seller at the time of contract but manufactured or acquired by him subsequent to formation of contract. Where by a contract of sale the seller purports to affect a present sale of future goods, the contract operates as an agreement to sale.
- C. Contingent goods –These are goods, the acquisition of which by seller depends upon a contingency which may or may not happen.

2.1.2.4 Price (Secs 9and 10)

The 'price' in a contract of sale means the money consideration for sale of goods [Sec. 2(10)]. Unless goods are sold for some price there cannot be sale. Transfer of ownership without any consideration is not a sale but merely a gift. Goods must be sold for some price. In a contract of sale 'price' is the

consideration for sale of goods and is expressed in terms of money. It forms an essential part of contract and any contract of sales/agreement to sell without price is void ab initio. The price can be partly in money terms and partly in goods. Where goods are exchanged for goods, it is not a case of sale but a case of barter which is not within the scope of this Act. Similarly if there is no price, it is not a sales but a case of gift. If any consideration other than money is given/ to be given for the goods purchased/sold it is not a case of sale. It may be noted that the in the Act there is simply a mention of price, whether the price is reasonable or not do not taint the Contract of Sales so long other conditions of a valid contract are satisfied. Once we have discussed the price. Next question how price is decided/fixed or ascertained.

2.1.2.5 Ascertainment of Price

The Act provides different ways in which price can be ascertained. Provisions regarding determination of price are contained in section 9 and 10 of the Act.

- (a) The price in a contract of sale may be fixed by the contract or may be left to be fixed in manner thereby agreed or may be determined by the course of dealing between the parties. [Sec 9(1)]
- (b) Where the price is not determined in accordance with the foregoing provisions, the buyer shall pay the seller a reasonable price. What is a reasonable price is a question of fact dependent on the circumstances of each particular case. [Sec 9(2)]

Thus, we can say that as per section 9 of the Act, the parties to the contract has four ways of fixing price namely fixing in the contract itself, manner of fixation provided in the contract itself, or to be fixed in the course of dealing between the parties and lastly where the price can not be determined in any of the above manner the buyer is required to pay a reasonable price. It may further be noted that where the price is agreed to be whatever the sum the seller is offered by the third party or buyer or where the price is left to be fixed by one of the party to the contract like buyer or seller only the agreement would be uncertain as to the price and would be void to that extent.

Example 1: X agreed to sell his old car to Y for whatever price he consider to be fit. This agreement is void due to uncertainty of price.

Example 2: X agree to sell his car to Y for whatever price is offered by Y to him. This agreement is void as to uncertainty of price.

Example 3: X agree to sell his car to Y at the best price of similar old car prevalent in market.

This is also void due to uncertainty of price.

Section 10 of the Act provides another way of fixation of price. As per section 10 the parties may agree to sell and buy the goods on terms and condition that the price is to be fixed by the valuation of a third party. Quite possible if the third party fails to determine the price the contract becomes void. But if the third part is prevented by any party to the contract from fixation of price the aggrieved party may file a suit for damages against the party in default. The relevant provisions of section 10 regarding valuation by third party are as under.

2.1.2.6 Agreement to sell at valuation

(a) Where there is an agreement to sell goods on the terms that the price is to be fixed by the valuation of a third party and such third party cannot or does not make such valuation, the agreement is thereby avoided:

Provided that, if the goods or any part thereof have been delivered to, and appropriated by, the buyer, he shall pay a reasonable price therefore.

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

Example1: X agree to sell his old painting to Y at a valuation to be made by MF Hussain, however, MF Hussain refuses to value the paintings. This agreement is void.



Example 2 : X agree to sell his old painting to Y at a valuation to be made by MF Hussain, however, MF Hussain is prevented from making fair valuation by the X who wanted higher valuation in his favour. The contract become void but Y can sue X for damages.

Once price has been ascertained or fixed either under section 9 or section 10 of the Act, the next question arise as to the mode of payment and time of payment. It may be noted that the seller is not bound to accept the payment for goods otherwise than in the form of currency unless there is an agreement to the contrary or unless the seller is stopped from disputing the mode of payment. It may further be noted that the payment should be in legal tender money and the seller is not bound to accept payment by cheque.

Example 2 : X and Y agree to sell and buy 50 bales of cotton for ₹ 50,000. Y offered to pay him ₹ 30,000 in cash and balance in the form of crossed cheque. X can refuse payment through Cheque unless it was so agreed at the time of agreement.

Example 3 : X and Y agree to sell and buy 50 bales of cotton for ₹ 50,000. Y offered to pay him ₹ 30,000 in cash and balance in kind. X can insist on cash payment of entire amount unless it was so agreed at the time of agreement that party payment in kind will be accepted.

Once we have decided the mode of payment. Next question is time of payment. Section 11 of the Sales of Goods Act contains provisions relating stipulation as to time.

2.1.3 Contract of Sale of Goods

As already discussed, as per section 4 of the Act, a contract of sale of goods is a contract whereby the seller transfers or agrees to transfer the property in goods to the buyer for a price. Mark the words “transfers” or “agrees to transfer”. When he transfers the property in goods it is a sale. When he “agrees to transfer” it is not a clear cut case of sales but “Agreement to sell”.

So from the above we find that the term contract of sales is generic term and encompasses both a sale and an agreement to sell. When the transfer of property in goods is to take place immediately it is a case of sales, but where the transfer of the property in the goods is to take place at a future date or subject to fulfillment of some conditions the contract is called an agreement to sell. Timing of transfer of property in goods is one of the points of difference between sales and agreement to sales. The other salient difference between sales and agreement to sell is discussed in subsequent section. Here it may be noted that the term property in goods means general property in goods rather than a mere special property. In other words it means absolute ownership.

Point to be noted about contract of sales whether Sales or agreement to sell, timing of delivery or payment is not a determinant factor whether it is a case of Sale or an Agreement to sell. Both payment or delivery can be immediate, in future, in installment etc. What determines whether it is case of Sales or Agreement to sell is the timing of transfer of property or ownership.

Another point to be noted is that such contract need not be in writing unless so provided in any law for the time being in force. Contract can be by mouth of words, partly in words and partly in writing or it may be implied from the conduct of the parties.

We now move on to essentials of a valid contract of sale.

2.1.3.1 Essentials of a Contract of Sale:

- (i) It must satisfy all the conditions of a contract as per the Contract Act; since contract of sales is one of the types of Contract. The essentials of a valid contract have already been discussed in another chapter on Contract Act.
- (ii) There must be at least two parties as a person cannot sell goods to himself. However there may be a contract of sale between one part-owner and another.

Example: A Partnership firm was dissolved and the surplus assets, including the stock in trade were divided among the partners, in specie. It was held that since the partners were joint owners of the

goods, they can not be both buyer as well as seller. [*State of Gujarat v Raman Lal & Co*, AIR(1965)Guj.60]

- (iii) There must be a transfer or agreement to transfer the **ownership** of goods from one person to another. Mere transfer of possession is not sale.

Example: X his car to Y for safe keeping while he is on a tour. This is not sale as there is no transfer of ownership.

- (iv) The subject matter of sale must be 'goods' and movable. The transfer of immovable property is not governed by Sale of Goods Act, 1930.

Example1: X agrees to sell his flat to Y at ₹ 15 lakh. Can the parties refer to any provision of the Sale of Goods Act, 1930 to resolve any issue between them?

As the subject matter is not goods as defined in the Sale of Goods Act. Hence none of the provisions of the Sale of Goods Act will be applicable in case any issue arises between the parties. Flat/house property/ Land etc are immovable goods.

Example 2: A hotel company provided residence and food making a consolidated charge for food and services. No rebate was allowed if food is not taken. Held supply of food was not sale of goods but simply a service as the transaction was an indivisible contract of multiple services and did not involve any sale of food. [*Associate Hotels of India v Excise & taxation officer*, AIR(1996)Punj 449.]

- (v) The consideration for sale is called price which should be stated in terms of 'money'. Exchange of 'goods' for 'goods' is barter and not sale. However price may be paid partly in terms of money and partly in kind.

Example: X agreed to exchange with Y 100 quarters of barley at ₹ 200 per quarter for 52 bullocks valued at ₹ 600 per bullock and pay the difference in cash. Held it was a contract of sales as consideration has been paid both in cash as well in kind. [*Aldridge v Johnson*(1857)7E &B 385]

- (vi) A contract of sale may be absolute or conditional. Where under a contract of sale the property in goods is transferred from the seller to the buyer the contract is called sale; but where the transfer of property in the goods is to take place at a future time or subject to some condition thereafter to be fulfilled the contract is called agreement to sell. The term 'contract of sale' is a generic terms and includes both sale and an agreement to sell.

2.1.3.2 Difference between Sale and Agreement to Sale

Sale	Agreement to Sale
a) Sale is an executed contract. Property in the goods passes from seller to buyer.	It is an executory contract. Transfer of property in goods is to take place at a future date subject to fulfillment of certain conditions.
b) If goods are destroyed, the loss will be borne by the buyer even though they may be in possession of the seller.	The loss will be borne by the seller even though the goods may be in possession of the buyer.
c) A sale gives right to the buyer to enjoy the goods against the whole world including the seller.	The buyer only can sue the seller for damages.
d) In case of sale, the buyer can be sued for price of goods.	The buyer can be sued only for damages.
e) If buyer becomes insolvent before payment is made, the seller has to deliver the goods to the official receiver unless he has lien on them.	Seller may refuse to deliver the goods to the official receiver.



f) If the seller becomes insolvent after payment of price, the buyer can claim the goods from the official receiver.	The buyer cannot claim the goods. He can only claim ratable dividend for the amount paid by him.
g) The seller cannot resale the goods.	In this case, if the subsequent buyer takes in good faith and for consideration, he gets a good title. The original buyer may only sue the seller for damages.

2.1.3.3 Sale distinguished from other similar transactions:

Sale can also be distinguished from other similar transactions as follows:

2.1.3.3.1 Difference between sale and hire-purchase.

Sale	Hire-purchase
a) In Sale the payment may be made cash down or through installments.	In case of hire purchase, the agreement is that the hirer regularly pays the various installments agreed between the parties.
b) In Sale, the property in goods is transferred to the buyer immediately on signing the contract.	The subject matter of the hire, on payment of the last installment, shall become the property of the hirer, if such installments are not paid, the article will remain the property of the hire-vendor (seller) and the hire vendor will be entitled to regain possession thereof.
c) In case of Sale there is option of bailment.	A hire purchase agreement is both a bailment and an option to buy.
d) In Sale the purchaser can sell the property to third party. This is based on the concept of ownership.	In case of hire purchase the hirer cannot sell the article to a third party.

2.1.3.3.2 Difference between Sale and Contract for Work and Labor

Sale and contract for work and labor are two different things. A contract of sales involves the transfer of ownership and possession to buyer for a price. On the other hand a contract for work and labor involves exercise of skill and labor by one party in respect of material supplied by another party. Delivery of goods is a subsidiary condition or incidental to the contract.

Example: A Contract involved the repair of a car and a supply of parts for that purpose. It was held to be a contract for material and works as the contract involves both supply of material as well services. [*Myers & Co v Brent Cross Services co (1934) 1 KB 46*]

2.1.3.3.3 Difference between Sale and Bailment

Sale is different from Bailment. In a contract of bailment goods are delivered by one person to another person for a certain purpose on the condition that the goods will be returned to the bailee on fulfillment of the purpose. Here in the instant case only possession of the goods is given to the bailor and not the ownership.

Example: X gave a piece of suit length to Y a leading tailor of his area to be returned to him on payment of his charges after making a Party dress for him. This is not a case of sale but bailment.

2.1.3.3.4 Difference between Sale and Barter

A sale is always for a 'price'. But in case of 'barter', the transfer of ownership of one thing is in return for transfer of another thing.

2.1.4 Document of title of goods

The term document of title is defined in section 2(4) of the Act which we have already gone through. It symbolizes the goods and confers a right to the owner to take possession of the same or further transfer the right to some other person. This may be done by delivery or by endorsement and delivery. A delivery order, railway receipt, bill of lading, dock warrant, warehouse-keeper or wharfingers certificate are some of the examples of document of title to goods.

2.1.5 Stipulations as to time (Sec 11)

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

From above provisions of section 11 it is clear that failure of the buyer to pay the price in time would not as a rule entitle the seller to treat the contract repudiated unless so provided in the contract itself. As regard the time of delivery of goods or other obligations under the contract whether time is essence or not depends upon the terms of the contract. Such intention is to be gathered from the nature of the goods sold, language of the contract, conduct of the parties, surrounding circumstances.

2.2 CONDITIONS AND WARRANTIES

It is quite customary in a contract of sale that the seller makes certain statements to influence the buyer and motivate him to buy the goods. The question which arises here is that whether the statements made by the seller forms the part of the contract of sale or not? If they do form the part of the contract and if there is a difference between the actual goods and the goods described in the statement, whether the buyer can treat that as a breach of contract? Reply to all these questions depends whether the statement/stipulation made is a condition or warranty.

Such stipulations may be either conditions or warranties. A statement/stipulation/representation, which forms an important part of the contract of sale and effect, the contract is called stipulation. On the other hand a stipulation/statement/ representation, which is of lesser importance, is called warranty.

2.2.1 Definitions:

- (a) A stipulation in a contract of sale with reference to goods which are the subject thereof may be a condition or a warranty. [Sec 12 (1)]
- (b) A condition is a stipulation essential to the main purpose of the contract, the breach of which gives rise to right to treat the contract as repudiated. [Sec 12(2)]
- (c) A warranty is a stipulation collateral to the main purpose of the contract, the breach of which gives rise to a claim for damages but not to a right to reject the goods and treat the contract as repudiated. [Sec 12(3)]
- (d) Whether a stipulation in a contract of sale is a condition or a warranty depends in each case on the construction of the contract, a stipulation may be a condition though called warranty in a contract. [Sec 12(4)]

2.2.2 Distinction between a condition and a warranty

Sl. No.	Basis of distinction	Condition	Warranty
	Value	A Condition is a stipulation which is essential to the main purpose of the contract.	A Warranty is a stipulation which is collateral to the main purpose of the contract.



Rights	The aggrieved party can repudiate the contract of sale in case there is a breach of a condition	The aggrieved party can claim damages only in case of breach of a warranty.
Treatment	A breach of condition may be treated as a breach of a warranty. This would happen where the aggrieved party is contended with damages only.	A breach of a warranty, cannot be treated as a breach of a condition.

2.2.2.1 When condition to be treated as warranty (Section 13)

- (a) Where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may waive the condition or elect to treat the breach of the condition as a breach of warranty and not as a ground for relating the contract as repudiated.
- (b) Where a contract of sale is not severable and the buyer has accepted the goods or part thereof, the breach of any condition to be fulfilled by the seller can only be treated as a breach of warranty and not as a ground for rejecting the goods and treating the contract as repudiated, unless there is a term of the contract, express or implied, to that effect.
- (c) Nothing in this section shall affect the case of any condition or warranty fulfillment of which is excused by law by reason of impossibility of otherwise.

2.2.3 Conditions and Warranties may be either expressed or implied

When terms of contract expressly provide for them, they are known as express conditions or warranties. Implied conditions and warranties are incorporated in every contract of sale unless the circumstances show a different intention.

2.2.3.1 Implied conditions are of the following types:

(i) Condition as to title [Sec 14(a)]

In a contract of sale, unless the circumstances of the contract are such as to show a different intention, there is—

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

(ii) Sale by description (Sec 15)

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

(iii) Condition as to quality or fitness (Sec 16)

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

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

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

(B) Where goods are bought by description from a seller who deals in goods of that description (whether he is the manufacturer or producer or not), there is an implied condition that the goods shall be of merchantable quality. [Sec 16(2)]

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

(C) An implied warranty or condition as to quality or fitness for a particular purpose may be annexed by the usage of trade. [Sec 16(3)]

(D) An express warranty or conditions does not negative a warranty or condition implied by this Act unless inconsistent therewith.

(iv) Sale by sample (Sec 17)

(A) A contract of sale is a contract for sale by sample where there is a term in the contract, express or implied, to that effect.

(B) In the case of a contract for sale by sample there is an implied condition -

- (i) That the bulk shall correspond with the sample in quality.
- (ii) That they shall have a reasonable opportunity of comparing the bulk with the sample.
- (iii) That the goods shall be free from any defect, rendering them un-merchantable, which would not be apparent on reasonable examination of the goods.

(v) Condition as to wholesomeness.

In case of eatables and provisions, in addition to implied condition as to merchantability, there is another implied condition that the goods shall be wholesome.

2.2.3.2 Implied warranties are of following types:

- (i) **Warranty of quiet possession** [Sec. 14(b)] If the buyer in any way is disturbed from enjoying the quiet possession of goods purchased because of seller's defective title, the buyer can claim damages from seller.

Example : 1 X purchased a horse from Y. While X was riding the horse he was intercepted by Z who claimed to be the true owner of the horse as the horse was claimed to be stolen by Y from his stable. Z took over the horse from X. X is entitled the whole of price from Y as Y had committed breach of implied warranty of quiet possession.

Example : 2 X purchased a used car from Y, an old car dealer. While X was driving the car he was interrogated by PVR on the way and interrogated about the car, as the car was stolen one and belonged to one Z who had lodged a FIR of missing of his car from an authorised parking area. Y has committed breach of implied warranty of quiet possession and claim refund of whole of price from X.

- (ii) **Warranty of freedom from encumbrances** [Sec. 14(c)]

The buyer is also entitled to additional warranty that the goods are free from any charge or right of any third party, not declared or known to the buyer.

Example: X pledged some goods with Y. Later on X took the goods back from Y under some pretext and sold them to Z. Since the goods being subject to an encumbrance, there was a breach of warranty. The buyer could recover compensation from him if his possession is disturbed.

It may be noted that this warranty of free from encumbrance will not be available when the charge or encumbrance over the goods is known to the buyer or has notice thereof when the contract of sales was made.

- (iii) **Warranty as to quality or fitness by usage of trade** [Sec. 16(4)]

An implied warranty as to quality or fitness for a particular purpose may be annexed by the usage of trade.



- (iv) **Warranty to disclose dangerous nature of goods.** Where the seller knows the inherent dangerous nature of goods and the fact that the buyer is ignorant, he must warn the buyer of probable danger.

Example : In *Clark v Army and Navy Co-operative Society Ltd* (1903) 1 KB 1553, C purchased a tin of disinfectant powder from S who knew that the tin was to be opened with some special care otherwise it might be dangerous. S knew of the dangerous nature of the good and that C was ignorant of it and did not warn him. C while opening the tin whereon the powder flew into the eye of C and thus caused injury to his eyes. In this case S had committed breach of warranty to disclose dangerous nature of goods. C is entitled to claim damages from S for breach of implied warranty.

2.2.3.3 Exclusion of implied conditions and warranties:

Implied conditions and warranties may be excluded by:

- i) **Express agreement between parties;**
The seller can exclude his liability by expressly providing that he will not be liable for breach of any condition or warranty. However, when the seller is guilty of fundamental breach he can not exclude liability by express contract. However, the seller must make it clear to the buyer that the same is incorporated under the contract, otherwise he can not escape liability.
- ii) **Custom or usage of trade;**
The agreement between the parties is always subject to established customs and trade usage. If such usage and trade practices provide for exclusion of the liability the parties are not liable for breach of implied terms in the contract of sale.
- iii) **The course of dealing between parties.**
The parties may vary their right and duties implied by law by the course of dealings between them. The course of dealing implies repeated occurrence of similar transactions between the parties. However, the course of dealing must be quite clear and unambiguous. A single transaction is not sufficient to establish course of dealing between parties.

2.2.4 Doctrine of Caveat Emptor

The term Caveat Emptor is a Latin word which means 'let buyer be aware'. This principle underlines the concept that it is for the buyer to satisfy himself that the goods which he is purchasing are of the quality required by him. It is a fundamental principle of law of sale of goods and implies that the seller is under no obligation to point out the defects in his own goods. The buyer must take care while purchasing the goods and if he makes a wrong selection he cannot blame the seller if the goods turn out to be defective or do not serve his purpose. This principle was applied in the case of *Ward v Hobbs*. However the doctrine of Caveat Emptor does not mean that the buyer must take a chance, it only means he must take care. However this rule is not without any exception. With the passage of time this doctrine has been considered to be too unreasonable to the buyers. Hence the law in section 16 recognized certain exceptions to the rule. The doctrine is however subject to following exceptions as provided in section 16 of the Act.

- (i) Where the buyer expressly or by implication makes known to the seller the particular purpose for which the goods are required and relied upon the skill and judgment of the seller and the goods are of description which it is the course of the seller's business to supply, there is an implied condition that the goods shall be reasonably fit for such purpose. Accordingly the seller cannot get any immunity on the ground of Caveat Emptor.
- (ii) Implied condition as to Merchantability where the goods are bought by description from the seller in goods of that description.
- (iii) Condition as to Wholesomeness in case of foodstuffs and other goods meant for human consumption.
- (iv) When the seller commits fraud.
- (v) When there is a usage of trade.

2.3 TRANSFER OF OWNERSHIP

A Sale is defined as transfer of ownership of the goods from the seller to the buyer for a price. Therefore what is important in a transaction of sale is the transfer of the ownership. It is essential to determine the exact point of time at which the Property in the goods is transferred in favor of the buyer. The term Property in goods means the ownership of the goods. The term transfer of property means the transfer of ownership from seller to buyer so as to constitute the buyer the real owner of the goods. When the ownership of the goods is transferred to the buyer, he becomes the real owner of the goods and the seller ceases to be the owner from that point of time. This ultimately determines the various rights and liabilities of the buyers and sellers in respect of the goods sold. The Sections 18 to 25 of the Sale of Goods Act, determine when the property passes from the seller to the buyer.

2.3.1 Passing of Property

The primary rules for ascertaining when the property in goods passes from seller to buyer may be summarized as follows:

(A) Goods must be ascertained

As per section 18 in a contract for sale of unascertained goods, the property in the goods does not pass to the buyer unless and until the goods are ascertained.

Example: Under a contract B was entitled to cut teak trees of more than 12 inches girth. The stumps of trees after cutting had to be 3 inches high. It was held that property in the timber that was cut could pass to B when the trees were felled. Till the trees were felled, they were not ascertained. [*Badri Prasad v State of MP AIR (1970) SC 706*]

(B) Intention of the parties for such transfer

As per section 19(2) in a contract for the sale of specific or ascertained goods the property in them is transferred to the buyer at such time as the parties to the contract intended to be transferred. The intention of the parties is ascertained from the terms of the contract, the conduct of the parties and the circumstances of the case. When intention of the parties can not be ascertained, rules contained in section 20-24 are required to be applied for ascertaining the time of transfer of property which are discussed hereunder:

I) Specific goods

i) Specific goods in a deliverable state

In an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment of the price or the time of delivery of the goods, or both, is postponed. (Sec 20). Goods are said to be in deliverable state when they are in such a state that the buyer would under the contract is bound to take delivery thereof.

Example: X selected some party wears in a retail show room. He agreed to take the delivery next day agree to pay next week. The party wears are destroyed by fire that took place same day. The property in goods has passed on to the buyer and he is liable to pay for it whether delivery is taken or not or paid or not.

ii) Specific goods to be put into a deliverable state

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

Example: There was a contract for sale of timber from oak trees. The buyer marked out the selected parts of the tree. As per trade practice the seller was required to remove the rejected portion from the trees. But before he could do so, he was declared bankrupt. It was held that the property in goods has not passed on to the buyer so he can not take away the timber. Until the seller had severed the rejected portion, the goods can not be said to be in a deliverable conditions to enable transfer of property therein. (*Acraman v Morrice (1849) 137ER584.*)



iii) **Specific goods in a deliverable state, when the seller has to do something thereto in order to ascertain price**

If there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act or thing is done and the buyer has notice thereof. (sec 22)

Example : A makes a contract to sell 200 books to Q. The books are stored in racks and P has to select the titles and separate them before they can be delivered. If there is fire and books are destroyed the loss will be A's as ownership is yet to be transferred.

II) **Unascertained goods (sec 23)**

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

In case of transfer of property from buyer to seller when the goods are unascertained, their **ascertainment** and **unconditional appropriation** to the contract are two pre-conditions.

Ascertainment is the process by which the goods answering the description to the contract are identified and set apart. Ascertainment is the unilateral act of seller; appropriation involves selection of goods with the intention of using them in the performance of the contract and with the mutual consent of the seller and buyer.

Example: In a sale of 20 hogsheads of sugar out of a larger quantity, 4 were filled and taken away by the buyer. The remaining 16 hogheads were subsequently filled and the buyer was informed of the same. The buyer promised to take them away, but before he could do so, the goods were lost. Held the property had passed to the buyer at the time of the loss [*Rhode v Thwaites*(1827)(6B\$C388)]

Delivery to carrier: Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee for the purpose of transmission to the buyer and does not reserve the right of disposal, he is deemed to have appropriated the goods for the purpose of the contract.

III) **Goods on approval or 'on sale or return' (Sec 24)**

In order to push up the sales generally there is a practice of sending goods to the customer with the clear cut understanding that he has option to approve or return the goods within a given period. This type of sales is known as "approval on sale or return". In such cases the transaction does not culminate into sale until the goods are approved by the customer and the property in goods still remains with the seller.

When goods are delivered to the buyer on approval or on sale or return or other similar terms, the property therein passes to the buyer—

(a) When he signifies his approval or acceptance to the seller

Example: A send 3 dozen of Silk Saris to B on approval on sale or return basis with an option to return the same within 21 days. B send a letter of approval of goods to A within 15 days. Sales has taken place after 15 days and the property in goods get transferred to B.

(b) When he does any other act adopting the transaction.

Example 1: A send 25 tons of cement to B on approval on sale or return basis, with the option to return the goods within 30 days receipt if not acceptable to him. B used the cement in his project. Since B has appropriated the goods, the sale has crystallized, property in goods stands transferred to B.

Example 2: A send 20 bales of cotton to B on approval on sale or return basis. B has a choice to return the goods within 3 weeks. However, B instead of conveying his approval or rejection of the goods sold the same to C. Here also B by his act has signified his approval, the sale is complete and property in goods passes on to B.

(c) If he does not signify his approval or acceptance to the seller but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time.

Example 1: A horse was delivered to B on the condition of sale or return within 8 days. The horse died within 8 days. It was held that the loss would fall on the seller as the property in goods has not passed on to the buyer. [*Elphick v Barnes (1880)5cpd321*]

Example 2: A delivered some jewellery to B on sale for cash only or return. Before B paid price, he pledged the jewellery with C. Held the pledge was not valid and A could recover jewellery from C. [*Weiner v Smith (1906)2.kb574*]

Example 3: S Ltd agreed to sell a tractor to HC Municipality on the condition that if the latter was not satisfied, it could reject the tractor. The municipality used the tractor for a month and a half and then wanted to reject. Held a reasonable time to reject having elapsed, the property in the tractor had passed to the municipality and therefore it could not reject [*Hooghly Chinsurah Municipality v Spencer Ltd AIR Cal 49*]

2.3.1.1 Reservation of right of disposal (Sec 25)

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

In addition to above, the seller is deemed to have reserved the right of disposal—

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

Example: A placed an order with B requesting him to send the goods by sea. B took a bill of lading in the name of A and sends it to his own agent. The goods were destroyed in route. B had to suffer the loss as the property in good had not passed on from B to A.

(B)Where the seller of goods draws on the buyer for the price and transmits to the buyer the bill of exchange together with the bill of lading or, as the case may be, the railway receipt, to secure acceptance to payment of the bill of exchange, the buyer is bound to return the bill of lading or the railway receipt if he does not honour the bill of exchange, and, if he wrongfully retains the bill of lading or the railway receipt, the property in the goods does not pass to him.

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

2.3.2 Risk prima facie passes with property (Section 26)

Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer, the goods are at the buyer's risk whether delivery has been made or not.

2.3.3 Effect of Destruction of Goods [Sec 7]

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

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



Sec (7 & 8) are applicable only in case of specific goods and not uncertained/generic goods.

Example : 1 In *Demby Humiltan & Co V Barden Engineering Works Ltd* 1949 ALL ER 435, A contracted to purchase 30 tones of apple juice from B. Deliveries were to be made in weekly truckload. B crushed the apples and put the juice in casks for delivery. A delayed the taking of delivery as a result juice got deteriorated in quality. It was held that the property in goods has passed on to A. Accordingly the loss will be borne by A only.

Example : 2 B of Benaras writes C of Chennai to send him 50 pieces of wrist watches by post parcel. C sends the 50 pieces of wrist watches by parcel post with correct address of B. However, the parcel was misplaced in the post and never reached B. This loss will be born by B as the property in goods has passed on to the buyer the moment the parcel is delivered to the post office with correct address.

Example : 3 A of Delhi agree to purchase 500 lts of Engine oil from B. As per the terms of agreement delivery was to made in a special pouches of 500 ML supplied by A. While B was making filling 500 ml pouches for delivery to A, the store got fire as a result the entire quantity of Engine oil lying therein lost in fire. As per section 26 the risk and property in the goods still remained with the seller and the entire loss will be borne by B the seller only.

So far we have discussed effect of destruction of goods after making contract of sales. It is quite possible that the goods are already not in existence or destroyed without fault and knowledge of either party before making contract of sales. Section 7 and 8 of the Sales of Goods Act, 1930 relevant provisions in such circumstances which are discussed hereunder:

Example : 1 A cargo of dates was sold. The dates were contaminated with sewage due so as to be unsalable as dates, though they could be used for making spirit. Held the contract is void. (*Asfar & Co Ltd. vs Blundell* (1896) 1QB123)

Example : 2 X agree to sell his horse to Y for ₹ 51000. Unknown to both the parties the horse had already died two days ago due to infection. The contract is void.

Example : 3 X agree to sell his old bike to Y for ₹ 20,000, unknown to both the parties the bike was badly damaged two days ago in a major accident so as no longer to answer the description in the contract. The contract is void.

It may further be noted that if the seller was aware of the destruction of goods and still enters into a contract. He is stopped from disputing the contract. In such case the buyer can sue him for breach of contractual obligations and claim damages.

2.3.4 Sale by person not the owner

Where goods are sold by a person who is not the owner thereof and who does not sell them under the authority or with the consent of the owner, the buyer acquires no better title to the goods than the seller had, unless the owner of the goods is by conduct precluded from denying the seller's authority to sell.

Generally the owner alone can transfer property in goods "*Nemo dat qui habet*" means that no one can give what he himself does not have. It means a non owner can not make valid transfer of property in goods. If the title of the seller is defective, the buyer's title will also be subject to same defect. If the seller has no title, the buyer does not acquire any title although he might have acted honestly and might have acquired the goods after due payment. This rule is to protect the real owner of the goods. Though this doctrine seeks to protect the interest of real owners, but in the interest of the trade and commerce there must be some safeguard available to a person who acquired such goods in good faith for value; accordingly the Act provides the following exceptions to this doctrine which seeks to protect the interest of bonafide buyers.

(i) Sale by mercantile agent (Sec 27): Where a mercantile agent is, with the consent of the owner, in possession of the goods or of a document of title to the goods, any sale made by him, when acting in the ordinary course of business of a mercantile agent, shall be as valid as if he were expressly authorized

by the owner of the goods to make the same, provided that the buyer's act is in good faith and has not at the time of the contract of sale notice that the seller has no authority to sell.

Example: F the owner of a car, deliver it to H, a mercantile agent for sale at not less than ₹ 20000. H sold the car for ₹ 15000 to K who bought it in good faith and without notice of any fraud. H misappropriated the money. F sued to recover the car from K.

Held as H was in possession of the Car with F's consent for the purpose of sale, K obtained a good title to the Car [Folkes v King 1923 IKB282]

(ii) Sale by one of joint owners (Section 28): If one of several joint owners of goods has the sole possession of them by permission of the co-owners, the property in the goods is transferred to any person who buys them of such joint owner in good faith and has not at the time of the contract of sale notice that the seller has no authority to sell.

Where there is a contract for the sale of unascertained goods, no property in the goods is transferred to the buyer unless and until the goods are sanctioned.

Example 1 : Sale by one of the partners of a firm.

Example 2 : A B and C are three joint owner of a car which is with B with the consent of A and C. B wrongfully sold the car to D without any knowledge and authority of remaining partner. D in good faith purchased the car and paid the price thereof after taking the delivery. The property in goods stand transferred to D despite that B is not the owner of the goods.

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

Example: A purchased a mobile set from B by fraud. A has avoidable title to the mobile set at the option of B. Before B could rescind the contract, A sold the same to C who purchased it from A in good faith and without knowledge of fraud by A and paid for it. C had a good title to the goods.

(iv) Seller or buyer in possession after sale (Section 30):

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

Example: A sells his blackberry mobile to B. He promised to deliver the same after one week. However A instead of delivering to B sold it to C who purchased it from A in good faith and paid the price. C gets a good title to it.

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

(v) Sale by estoppel (Section 27): Where the owner by his conduct or omission, leads the buyer to believe that the seller has authority to sell, he is estopped from denying the fact afterwards. The buyer thus gets a better title than the seller.



For example A tells B in the presence of C that A is agent of C. C maintains silence instead of denying it. Later if A sells C's goods to B, C cannot dispute B's title to the goods.

(vi) Sale by an unpaid seller after exercising his right of lien or stoppage in transit.

In addition to the exceptions discussed above which are provided in various sections of the Sale of Goods Act, the following exceptions are provided in other Acts like Contract Act, Civil Procedure Code etc.

- (a) **Sale by a finder of goods** : Under section 169 of the Contract Act, if a finder of lost goods could not reasonably find the true owner or the true owner refuses to pay the lawful charges of the finder of lost goods, the finder of lost goods can sell the goods when the goods are perishable in nature or when the lawful charges of the finder of lost goods amounts to 2/3rd of its value.
- (b) Under section 176 of the India Contract Act a pawnee can sell the goods under certain circumstances with due notice to the owner.
- (c) **Sale by official receiver or assignee** : In case of insolvency of any individual his official receiver or liquidator of a company can sell the goods and buyer thereof gets good title to it.
- (d) **Execution of Sale**: Under order 21 of the Civil procedure Code officer of court may sell goods and convey good title to the buyer inspite of the fact they are not the true owner of the goods.

2.4 PERFORMANCE OF THE CONTRACT OF SALE

Performance of the contract of sales means due discharge of the contractual obligations by both the parties to the contract i.e Buyer and Seller. The obligation of the seller is to deliver the goods in accordance with the terms of the contract as to time and place and obligation of the buyer is to accept the goods and pay the price agreed upon. As per section 31 performance of a contract of sale means as regards the seller, delivery of the goods to the buyer, and as regards the buyer, acceptance of the delivery of the goods and payment for them, in accordance with the terms of sale. Delivery of goods and payment for thereof are concurrent conditions, however the parties may agree otherwise also. In order to discharge the contractual obligations the seller must be ready and willing to deliver the goods. However, unless otherwise provided in the contract, seller can not demand payment in advance of delivery. Refusal to deliver the goods unless agreed price is paid in advance is breach of contract. But the buyer is required to apply for delivery.

Performance of a contract involves two things timely delivery on the part of the seller and payment of the price as per the terms of contract by the buyer. Unless otherwise agreed, delivery of the goods and payment of the price are concurrent conditions, that is to say, the seller shall be ready and willing to give possession of the goods to the buyer in exchange for the price, and the buyer shall be ready and willing to pay the price in exchange for possession of the goods.

2.4.1 Delivery of Goods

As per the Sale of Goods Act, 1930, 'Delivery is defined as the voluntary transfer of possession from one person to another. '[Sec 2(2)]

Delivery as contemplated in the Act may be actual, symbolic or constructive.

(a) **Actual delivery**: Where the seller hands over the goods to the buyer or his duly authorized agent, the delivery is treated as actual delivery. It may also be done by doing anything which has the effect of putting the goods in possession of the buyer.

Example: S agreed to sell 200 kg potato to T @ ₹15 per kg. S delivered the goods at the godown of T. This is a case of actual delivery.

(b) **Symbolic delivery**: When goods are bulky, it is usual for seller to make symbolic delivery. Example, a symbolic delivery takes place when the seller hands over the key of godown where goods are kept to the buyer. This type of delivery has the same effect as that of an actual delivery even though there is no change in possession of the goods and the goods remain in the custody of seller until they are removed by the buyer.

(c) **Constructive Delivery:** This is also called delivery by attornment. Where a third person who is in possession of the goods of the seller at the time of sale acknowledges to the buyer that he holds the goods on his behalf delivery by attornment or constructive delivery take place.

Example: S sold 10 qt of sugar to T lying in the Godown of U. S instruct U to transfer 10 qt of sugar to T. U acknowledge the instruction of S and transfers the goods in his books to T. This is delivery by attornment and has the same effect as that of actual delivery.

This rule of delivery by attornment is subject to the transfer of documents of title, because where, for example a bill of lading is transferred, the transferee is deemed to have got possession of the goods even when they are in the hands of a carrier who has not acknowledged to the buyer.

2.4.1.1 Rules as to delivery of Goods:

(A) **Mode of Delivery:** The mode of delivery of goods is provided in section 33 which says that, delivery of goods sold may be made by doing anything which the parties agree shall be treated as delivery or which has the effect of putting the goods in the possession of the buyer or of any person authorised to hold them on his behalf. Delivery as contemplated in the Act may be actual, symbolic or constructive.

(B) Delivery of goods and payment of price are concurrent conditions unless otherwise agreed upon. In other words seller must be ready and willing to make delivery and buyer must also be willing to take delivery and willing and ready to pay the price (Sec 32).

Example : A agrees and delivers his car to B and B in turn pays price for it.

(C) **Effect of part delivery:** As per section 34, a delivery of part of goods, in progress of the delivery of the whole has the same effect, for the purpose of passing the property in such goods, as a delivery of the whole, but a delivery of part of the goods, with an intention of severing it from the whole, does not operate as a delivery of the remainder.

Example 1: A sold five bales of certain goods to B. B received one bail, paid for it and refused to accept the remaining four which were delivered later on. It was held that this amounted to part delivery. [*Mitchel Reid co v Baldev Dass*(1888)15 cal]

Example 2: A directed the wharfinger to deliver his goods lying at the wharf to B to whom these goods had been sold. B weighted the goods and took away a part of them. Held, the delivery of a part of the goods had taken place which has the effect as delivery of the whole. [*Hammond v Anderson* (1803) RR763]

(D) **Buyer to apply for delivery:** Apart from any express contract, the seller of goods is not bound to deliver them until the buyer applies for delivery. **(Section 35)**

It may also happen that the goods are subsequently acquired by the seller, he is to intimate the buyer and the buyer then should apply for delivery. Buyer has no cause of action against the seller if he does not apply for delivery, unless otherwise agreed upon.

Example : S agreed to sell his old car to T and T agreed to take delivery thereof on the auspicious day of Deepawali, S kept the car ready for delivery to T but T did not approach him for delivery. T has no reason to take any action against S if delivery of car did not take place on that day.

(E) **Place of delivery:** As per section 36(1), Goods must be delivered at the place and time specified in the contract. Whether it is for the buyer to take possession of the goods or for the seller to send them to the buyer is a question depending in each case on the contract, express or implied, between the parties. Apart from any such contract, goods sold are to be delivered at the place at which they are at the time of the sale, and goods agreed to be sold are to be delivered at the place at which they are at the time of the agreement to sell, if not then in existence, at the place at which they are manufactured or produced.

(F) **Time of delivery:** Where under the contract of sale the seller is bound to send the goods to the buyer, but no time for sending them is fixed, the seller is bound to send them within a reasonable time. If demand or tender of delivery is not at reasonable time tender of delivery may be treated as ineffectual.



What is a reasonable hour is a question of fact which has to be decided taking into consideration various factors. [Sec 36(2)]

(G) Goods in possession of a third person: Where the goods at the time of sale are in the possession of a third person, there is no delivery by seller to buyer unless and until such third person acknowledge to the buyer that he holds the goods on his behalf. [Sec 36(3)]

Example: X sold 50 ton of rice to Y, the goods are lying in the godown of Z which is near the office of B. X ask Y to take delivery from the godown of Z. Delivery shall not be treated as completed unless Z acknowledge to Y that he hold the goods on his behalf.

(H) Cost of delivery: Unless otherwise agreed, the expense of and incidental to putting the goods into a deliverable state are borne by the seller. [Sec 36(5)]

All the expenses incurred for putting the goods into a deliverable state are to be borne by the seller. Similarly all the expenses relating to taking possession the goods must be borne the buyer.

Example: S agrees to sell 50 ton of Basmati Rice to B at FOR Delhi.

All the expenses for delivering the goods up to Delhi will be borne by S. Subsequent expenses from Delhi Railway station to office of B will be borne by B himself.

(I) Delivery of wrong quantity [Sec 37]

(a) It is not necessary that the delivered quantity always confirm to the ordered quantity. If less than contracted quantity is supplied, the buyer may reject them, but if the buyer accepts the goods so delivered he shall pay for them at the contract rate. [Sec 37(1)]

Example: A sells to B 2000 gross of 200 yards reels of swing cotton. After taking delivery B finds that the length of the cotton per reel is less than 200 yds, the average being shortage of about 6%. B may reject the goods. If he waives the right of rejection, he is liable to pay the price of the goods at the contract price. [Beck etc v Synzmanoski(1924)AC43]

(b) Similarly if a quantity of goods larger than contracted to sell is delivered, the buyer may accept the goods included in the contract and reject the rest, or he may reject the whole. If the buyer accepts the whole of the goods so delivered, he shall pay for them at the contract rate. [Sec 37(2)]

(c) If the goods agreed to be supplied are delivered with goods 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. [Sec 37(3)]

Example: A buyer inspected certain timber and branded by hammer marks those which he accepted. When the timber arrived, it contained a large quantity of unbranded timber. Held, the buyer could reject the whole consignment. [London Plywood Ltd v Nasik Oak Ltd (1939)2KB343] The above provisions are subject to any usage of trade, special agreement or course of dealing between the parties.

(J) Installment delivery (Sec 38)

Buyer is not bound to accept installment unless agreed by the parties. If the contract provide for installment delivery which are to be separately paid for, and the seller makes no delivery or defective delivery in respect of one or more installments, or the buyer neglects or refuses to take delivery of or pay for one or more installments, it is a question in each case depending on the terms of the contract and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract, or whether it is a severable breach giving rise to a claim for compensation, but not a right to treat the whole contract as repudiated.

Example: X brought from Y 25 tonnes of pepper Oct-Nov shipment. Y shipped 20 tonnes in November and 5 tonnes in December. Since the goods have not delivered as per the contractual provisions, X is not bound to accept installment delivery unless they had already agreed for it. X could reject the whole lot. [Renter v sala(1879)48LJ492]

(K) Delivery to carrier or wharfinger (Sec 39)

If, in pursuance of a contract of sale, the goods are delivered to a carrier for transmission to the buyer or to a wharfinger for safe custody, delivery of goods to them is prima facie deemed to be delivery of

goods to the buyer. In such a case the seller must enter into a reasonable contract with the carrier or wharfinger on behalf of the buyer for same transmission or custody of goods. Failure to do so coupled with loss of goods in transit, buyer may reject delivery to carrier/wharfinger as delivery to himself and may hold the seller responsible for such loss. Unless otherwise agreed, if goods are sent by the seller to the buyer by a route involving sea transit, in circumstances in which it is usual to insure, the seller is required to give such notice to the buyer as may enable him to insure them during their sea transit and if the seller fails so to do, the goods are deemed to be at his risk during such sea transit.

(L) Risk where goods are delivered at distant place

It is quite possible sometimes for the buyer ask the seller to deliver the goods at the place they were agreed to be delivered. If the seller agrees to deliver the goods at the risk of the buyer at place other than that where they are when sold, the buyer shall, nevertheless, unless otherwise agreed, buyer take any risk of deterioration in the goods necessarily incident to the course of transit.

Example: S sold 50 ton of sugar to T, T requested him to deliver the same to him at his risk at China instead of Delhi. S agreed to deliver the same at China at the risk and cost of T. During transit 5 ton of sugar was lost due to transit leakage and another 5 ton got moisturized. The loss in transit and deterioration in quality will be borne by T instead of S.

(M) Buyer's right of examination of the goods: Section 41 gives the buyer right to examine the goods which are delivered to him which he has not previously examined. He is not deemed to have accepted them unless and until he has a reasonable opportunity of examining them for the purpose of ascertaining whether they are in conformity with the contract. Unless otherwise agreed, when the seller tenders delivery of goods to the buyer, he is bound, on request of buyer, to afford him a reasonable opportunity of examining the goods for the purpose of ascertaining whether they are in conformity with the contract.

2.4.2 Acceptance of Delivery : (Sec 42)

The buyer is deemed to have accepted the goods-

- a) When he has intimated the seller that he has accepted the goods.
- b) When the goods have been delivered to him and he does any action in relation to them which is inconsistent with ownership of the seller.

2.4.3 Liability of buyer for rejecting, neglecting or refusing delivery of goods.

- a) Buyer not bound to return rejected goods (Sec 43) As per section 43 unless otherwise agreed, if the goods are delivered to the buyer and he refuses to accept them, he is not bound to return them to the seller. But at the same time he is to intimate the seller that he refuses to accept them. Quite possible the seller may also refuse to take back the delivery in such cases the buyer becomes bailee and his position is that of a bailee for which he can charge reasonable amount for keeping the goods.
- b) As per section 44 failure of the buyer to take delivery of goods within a reasonable time of seller's request, the buyer becomes liable to the seller for any loss occasioned by his neglect or refusal to take delivery and also for a reasonable charge for the care and custody of the goods. This does not affect the rights of the seller where the neglect or refusal of the buyer to take delivery amounts to a repudiation of the contract.

2.5 RIGHTS AND DUTIES OF BUYER

2.5.1 Rights of Buyer:

- A. To have delivery of the goods as per contract. (Sec. 31 & 32)
- B. To reject the goods when they are not of the description, quality or quantity as specified in the contract (Sec 37).
- C. To repudiate the contract when goods are delivered in installments without any agreement to that effects [Sec. 38 (1)]



- D. To be informed by the seller, when the goods are to be sent by sea route, so that he may arrange for their insurance. [Sec 39 (30)]
- E. To have a reasonable opportunity to examine the goods for ascertaining whether they are in conformity with the contract. (Sec. 41)
- F. To sue the seller for recovery of the price, if already paid, when the seller fails to deliver the goods.
- G. To sue the seller for damages if the seller wrongfully neglects or refuses to deliver the goods to the buyer. (Sec 57)
- H. To sue the seller for specific performance.
- I. To sue the seller for damages for breach of a warranty or for breach of a condition treated as breach of a warranty (Sec 59)
- J. To sue the seller the damages for anticipatory breach of contract (Sec 60)
- K. To sue the seller for interest where there is a breach of contract on the part of the seller and price has to be refunded to the buyer. (Sec 61)

2.5.2 Duties of Buyer

- A. To accept the delivery of goods, when the seller is willing to make the delivery as per the contract (Sec. 31)
- B. To pay the price in exchange for possession of the goods.
- C. To apply for delivery of the goods. (Sec. 35)
- D. To demand delivery of the goods at a reasonable hour. [Sec 36 (4)]
- E. To accept delivery of the goods in installments and pay for them, in accordance with the contract. [(Sec. 38 (2))]
- F. To bear the risk of deterioration in the course of transit, when the goods are to be delivered at a place other than where they are sold. (Sec 40)
- G. To inform the seller in case the buyer refuses to accept or rejects the goods. (Sec 43)
- H. To take the delivery of the goods within a reasonable time after the seller tenders the delivery. (Sec.44)
- I. To pay the price, where the property in the goods are passed to the buyer, in accordance with the terms of the contract. (Sec 55)
- J. To pay damages for non-acceptance of goods. (Sec 56)

2.6 RIGHTS AND DUTIES OF SELLER

2.6.1 Rights of Seller

- A. To reserve the right of disposal of the goods until certain conditions are fulfilled. (Sec 25 (1))
- B. To assume that the buyer has accepted the goods, where the buyer:
 - i) Conveys his acceptance;
 - ii) Does an act adopting the sale; or
 - iii) Retains the goods without giving a notice of rejection, beyond specified date (or reasonable time), in a sale on approval. (Sec 24)
- C. To deliver the goods only when applied for by the buyer (Sec 35)
- D. To make delivery of the goods in installments, when so agreed (Sec 39 (1))

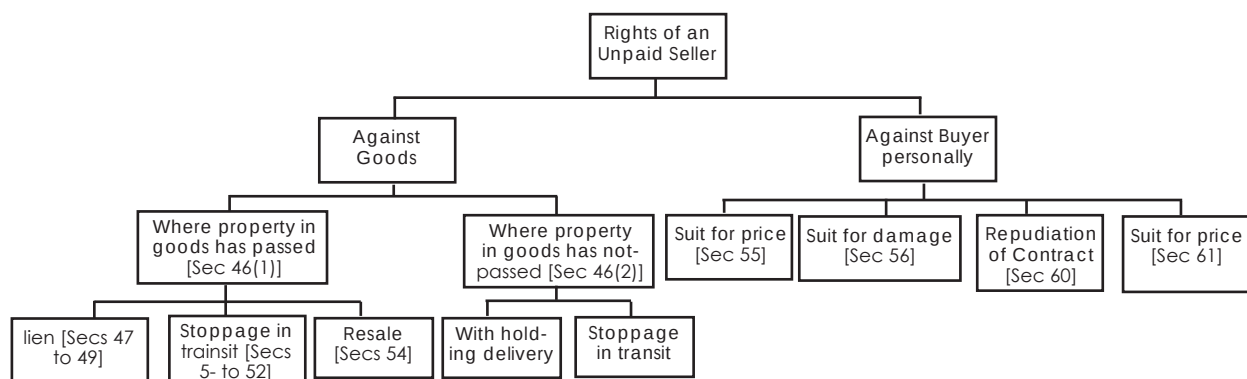
- E. To exercise lien and retain possession of the goods, until payment of the price. (Sec 47 (1))
- F. To stop the goods in transit and resume possession of the goods, until payment of the price. (Sec 49 (2) and 50]
- G. To resell the goods under certain circumstances. (Sec 54)
- H. To withhold delivery of the goods when the property in the goods has not passed to the buyer. (Sec 46 (2))
- I. To sue the buyer for price when the property in the goods has passed to the buyer or when the price is payment on a certain day, in terms of the contract, and the buyer fails to make the payment. (Sec 55)

2.6.2 Duties of Seller

- A. To make the arrangement for transfer of property in the goods to the buyer.
- B. To ascertain and appropriate the goods to the contract of sale.
- C. To pass an absolute and effective title to the goods, to the buyer.
- D. To deliver the goods in accordance with the terms of the contract. (Sec 31)
- E. To ensure that the goods supplied conform to the implied / express conditions and warranties.
- F. To put the goods in a deliverable state and to deliver the goods as and when applied for by the buyer. (Sec 35)
- G. To deliver the goods within the time specified in the contract or within a reasonable time and a reasonable hour. [Sec 36 (2) and (4)]
- H. To bear all expenses of and incidental to making a delivery (i.e. up to the stage of putting the goods into a deliverable state [Sec 36 (5)]
- I. To deliver the goods in the agreed quantity. (Sec. 37 (1))
- J. To deliver the goods in installments only when so desired by the buyer. [Sec 38 (1)]
- K. To arrange for insurance of the goods while they are in transmission or custody of the carrier. [Sec. 39 (2)]
- L. To arrange for insurance of the goods while they are in transmission or custody of the carrier. [Sec. 39 (2)]

2.7 RIGHTS OF UNPAID SELLER

In a transaction of sale it is not possible to avoid credit sales. In credit sales there is a risk of a debtor not paying the price of the goods even after the credit period is over. The seller of the goods therefore must possess some rights which he can use to secure payment of the price. If the recovery of the price is not possible due to the reason of bankruptcy of the buyer, he must have some other remedies. The Sale of Goods Act has made elaborate provisions regarding the rights of an unpaid seller.





2.7.1 Meaning of unpaid seller

In simple words, a seller who has not received the full price of goods sold is termed as unpaid seller. Section 45 of the Sale of Goods Act, 1930 has defined an unpaid seller as follows:

- (a) When the whole of the price has not been paid or tendered.
- (b) When a bill of exchange or other negotiable instrument has been received as conditional payment and the conditions on which it was received has not been fulfilled by reason of the dishonour of the instrument or otherwise. Thus to be called an unpaid seller, the following conditions needs to be satisfied:
 - a) The goods have been sold and price is due;
 - b) The full price has not yet been paid
 - c) A bill of exchange or other negotiable instrument has been received as payment of price but the same was dishonoured.

From the above it may be noted that even if a major portion of price has been paid and a small portion remains to be paid, even then the seller is termed as unpaid seller. But it must be remembered that it is only for non-payment of price that seller is termed as unpaid seller.

Thus if the price has been paid but some other expenses remains to be paid, the seller cannot be termed as unpaid seller. The term "seller" includes any person who is in the position of a seller, as, for instance, an agent of the seller to whom the bill of lading has been endorsed, or a consignor or agent who has himself paid, or is directly responsible for, the price.

Examples:

- (a) Z sells goods worth ₹ 50,000/- to B on credit of 5 months. After 5 months B did not pay the price. Z shall be regarded as an unpaid seller.
- (b) In the above example if B accepts a bill of exchange and it is dishonoured by him on due date, A shall be considered as an unpaid seller.

2.7.2 Rights of an Unpaid Seller (Section 45)

The rights of an unpaid seller can be broadly discussed under two heads: (I) Rights against the goods; and (II) Rights against the buyer personally.

- (I) Rights against the goods are as follows:
 - (a) Where the property in goods has passed to the buyer:
 - (i) Right of lien; a lien on the goods for the period while he is in possession of them,
 - (ii) Right of stoppage in transit; In case of the insolvency of the buyer a right of stopping the goods in transit after he has parted with the possession of them,
 - (iii) Right of resale.
 - (b) Where the property in goods has not passed to the buyer, the unpaid seller has, in addition to his other remedies, a right of withholding delivery.
- (II) The rights against the buyer personally are as follows:
 - (i) Right to file a suit for price;
 - (ii) Right to file a suit for damages; and
 - (iii) Right to file a suit for interest.

Let us now discuss these rights in detail:

2.7.2.1 Rights against the Goods

2.7.2.1.1 Where the property in goods has passed to the buyer:

A) Right of lien (Seller's lien) (Section 47)

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

- (i) Where the goods have been sold without any stipulations as to credit,

- (ii) Where the goods have been sold on credit, but the term of credit has expired,
- (iii) Where the buyer becomes insolvent,

The seller may exercise his right of lien notwithstanding that he is in possession of the goods as agent or bailee for the buyer.

Part delivery (Section 48)

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

Termination of lien (Section 49)

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

B) Right of stoppage in transit (Section 50)

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

Duration of transit (Section 51)

- (i) Goods are deemed to be in course of transit from the time when they are delivered to a carrier or other bailee for the purpose of transmission to the buyer, until the buyer or his agent in that behalf takes delivery of them from such carrier or other bailee.
- (ii) If the buyer or his agent in that behalf obtains delivery of the goods before their arrival at the appointed destination, the transit is at an end.
- (iii) If, after the arrival of the goods at the appointed destination, the carrier or other bailee acknowledges to the buyer or his agent that he holds the goods on his behalf and continues in possession of them as bailee for the buyer or his agent, the transit is at an end and it is immaterial that a further destination for the goods may have been indicated by the buyer.
- (iv) If the goods are rejected by the buyer and the carrier or other bailee continues in possession of them, the transit is not deemed to be at an end, even if the seller has refused to receive them back.
- (v) When goods are delivered to a ship chartered by the buyer, it is a question depending on the circumstances of the particular case, whether they are in the possession of the master as a carrier or as agent of the buyer.
- (vi) Where the carrier or other bailee wrongfully refuses to deliver the goods to the buyer or his agent in that behalf, the transit is deemed to be at an end.
- (vii) Where part delivery of the goods has been made to the buyer or his agent in that behalf, the remainder of the goods may be stopped in transit, unless such part delivery has been given in such circumstances as to show an agreement to give up possession of the whole of the goods.



How stoppage in transit is effected (Section 52)

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

Effect to sub-sale or pledge by buyer (Section 53)

- (i) Subject to the provisions of this Act, the unpaid seller's right of lien or stoppage in transit is not affected by any sale or other disposition of the goods which the buyer may have made, unless the seller has assented thereto.

Provided that where a document of title to goods has been issued or lawfully transferred to any person as buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for consideration, then, if such last mentioned transfer was by way of sale, the unpaid seller's right of lien or stoppage in transit is defeated, and, if such last mentioned transfer was by way of pledge or other disposition for value, the unpaid seller's right of lien or stoppage in transit can only be exercised subject to the rights of the transferee.

- (ii) Where the transfer is by way of pledge, the unpaid seller may require the pledge to have the amount secured by the pledge satisfied in the first instance, as far as possible, out of any other goods or securities of the buyer in the hands of the pledge and available against the buyer.

C) Right of re-sale

- (i) A contract of sale is not rescinded by the mere exercise by an unpaid seller of his right of lien or stoppage in transit.
- (ii) Where the goods are of a perishable nature, or where the unpaid seller who has exercised his right of lien or stoppage in transit gives notices to the buyer of his intentions to re-sell, the unpaid seller may, if the buyer does not within a reasonable time pay or tender the price, re-sell the goods within a reasonable time and recover from the original buyer damages for any loss occasioned by his breach of contract, but the buyer shall not be entitled to any profit which may occur on the re-sale. If such notices are not given, the unpaid seller shall not be entitled to recover such damages and the buyer shall be entitled to the profit, if any, on the re-sale.
- (iii) Where an unpaid seller who has exercised his right of lien or stoppage in transit re-sells the goods, the buyer acquires a good title thereto as against the original buyer, notwithstanding that no notice of the re-sale has been given to the original buyer.
- (iv) Where the seller expressly reserves a right of re-sale in case the buyer should make default, and on, the buyer making default, re-sells the goods, the original contract of sale is thereby rescinded, but without prejudice to any claim which the seller may have for damages.

2.7.2.1.2 Where the property in goods has not passed to the buyer

Where the property in goods has not passed to the buyer, the unpaid seller has, in addition to his other remedies, a right of withholding delivery similar to and co-extensive with his rights of lien and stoppage in transit where the property has passed to the buyer. The right is similar to and co-extensive with his right of lien and stoppage in transit where property has passed to the buyer [Sec 46(2)]

2.7.2.2 Right against the buyer personally:

A) Suit for Price (Sec 55)

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

Example: X sold goods to Y for ₹ 20,000 and price is agreed to be paid after 10 days of the contract. Y fails to pay the price on agreed day. X can file a suit for price against Y even though the goods have not been delivered or property has not been transferred to X.

B) Suit for damages for nonacceptance: (Sec. 56)

Where the buyer wrongfully neglects or refuses to accept and pay for the goods, the seller may sue him for damages for non-acceptance. What shall be the amount of damages is to be determined in accordance with provisions laid down in Sec 73 of The Indian Contract Act,

C) Suit for interest: When under a contract of sale, the seller tenders the goods to buyer and the buyer refuses to pay the price the seller has a further right to claim interest on the amount of the price. The unpaid seller can claim interest only when he can recover the price. The rate of interest to be awarded is at the discretion of the court.

2.8 BREACH OF CONTRACT

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

The remedies available are discussed below:

2.8.1 Suit for price (Sec 55)

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

2.8.2 Damages for non-acceptance (Sec 56)

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

2.8.3 Damages for non-delivery (Section 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.



2.8.4 Remedy for breach of warranty (Section 58)

(a) Where there is a breach of warranty by the seller, or where the buyer elects or is compelled to treat any breach of a condition on the part of the seller as a breach of warranty, the buyer is not by reason only of such breach of warranty entitled to reject the goods; but he may:

- (i) Set up against the seller the breach of warranty in diminution or extinction of the price; or
- (ii) Sue the seller for damages for breach of warranty.

(b) The fact that a buyer has set up a breach of warranty in diminution or extinction of the price does not prevent him from suing for the same breach of warranty if he has suffered further damage.

2.8.5 Repudiation of contract before due date (Section 60)

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

2.8.6 Interest by way of damages and special damages (Section 61)

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

2.9 AUCTION SALES

Auction sale is way of marketing goods without a set price. Bids are taken verbally on the spot, by phone, by mail, by telegram, etc., and the property is sold to the highest bidder. In other words an auction sale is a public sale to any person bidding the highest price, upon terms and conditions previously announced. When goods are to be sold by auction, the auctioneer give wide publicity regarding the time, date and place of sale. The bidders are also given opportunity to inspect the goods.. **It should however be remembered that advertisement to sell goods by auction is not an offer but invitation to offer.** The auctioneer is not bound to sell on date and time and place announced earlier. He may postpone or even cancel the same.

2.9.1 Rules regarding an auction. (Sec. 64)

In the case of sale by auction-

- (a) Where goods are put up for sale in lots, each lot is prima facie deemed to be the subject of a separate contract of sale. [Sec 64(1)]
- (b) The sale is complete when the auctioneer announces its completion by the fall of the hammer or in other customary manner, and, until such announcement is made, any bidder may retract his bid. [Sec 64(2)]
- (c) A right to bid may be reserved expressly by or on behalf of the seller and, where such rights is expressly so reserved, but not otherwise, the seller or any one person on his behalf may, subject to the provisions hereinafter contained, bid at the auction, [Sec 64(3)]

- (d) Where the sale is not notified to be subject to a right to bid on behalf of the seller, it shall not be lawful for the seller to bid himself or to employ any person to bid at such sale, or for the auctioneer knowingly to take any bid from the seller or any such person, and any such person, and any sale contravening this rule may be treated as fraudulent by the buyer.[Sec 64(4)]
- (e) The sale may be notified to be subject to a reserved or upset price.
- (f) If the seller makes use of pretended bidding to raise the price, the sale is voidable at the option of the buyer.

2.9.2 Important Terms used in auction:

The following are some of the important terms used in Auction Sale;

- A. **Knockout Agreement:** It is sort of tacit understanding/agreement among the intending bidders to stifle competition by not bidding against each other in an auction sale. Such agreements are illegal and the seller can protect his interest against such agreement by reserving his right to bid at the auction or by fixing a reserve price.
- B. **Damping:** Damping is an act to dissuade the intending buyer from bidding or from raising the price by pointing out defects in the goods or by doing some other acts which prevent persons from forming a fair estimate of the price of the goods. Damping is illegal and the auctioneer can withdraw the goods from auction.
- C. **Puffers:** Puffer is a person who is employed by the seller to raise the price by fictitious bids. Such persons are known as by bidders or decoy duck.

2.9.3 Implied warranties in an Auction Sale:

In an auction sale, the following warranties are implied;

- (a) The auctioneer warrants his authority to sell.
- (b) He warrants that he has no knowledge of any defect in his principal's title.
- (c) He warrants to give quiet possession of the goods to the buyer against payment of price.



The Sale of Goods Act, 1930

Multiple Choice Questions

- 1. The Sale of Goods Act, 1930 is not applicable---**
 - (a) Jammu & Kashmir
 - (b) Dadra and Nagar Haveli
 - (c) Uttar Pradesh
 - (d) Himachal Pradesh.
- 2. In Sale of Goods Act several provisions of the Indian Contract Act have been retained**
 - (a) to meet the need of the buyers
 - (b) to meet the need of the sellers
 - (c) to meet the need of both the buyers and sellers
 - (d) to meet special conditions existing in India regarding sale of goods.
- 3. Which of these transaction is not covered under the Sales of Goods Act, 1930**
 - (a) X agree to give his car to Y provided Y give a stage performance on his son's wedding anniversary
 - (b) X agree to give his horse to the dealer to purchase new bike in exchange for it.
 - (c) X agree to give his old car to Y free of cost
 - (d) all the three.
- 4. The Sale of Goods Act, 1930 in its operations---**
 - (a) prospective
 - (b) retrospective
 - (c) prospective in certain respects and retrospective in certain other respects
 - (d) only (c) and not (a) or (b).
- 5. Which of these dates is associated with enforcement of The Sale of Goods Act, 1930**
 - (a) 1st July 1930
 - (b) 1st May 1939
 - (c) 1st December, 1936
 - (d) 31st January, 1931.
- 6. A enter into a contract with B a celebrated painter who agree to paint a picture for A for an agreed sum on the canvas and material supplied by A. This is a contract---**
 - (a) sales
 - (b) works and labor
 - (c) exchange of services and goods
 - (d) agreement of sales.
- 7. The term "goods" in the sale of goods means---**
 - (a) moveable goods other than money and actionable claims
 - (b) all moveable goods only
 - (c) tangible consumable goods
 - (d) tangible goods

- 8. Contract for sale of standing trees can be subject matter of Sale of Goods Act, 1930, if they are---**
 - (a) cut before the agreement
 - (b) cut immediately
 - (c) agreed to be cut within a reasonable time
 - (d) priced as if sold after cut according to the requirement of the buyer
- 9. A contract of sales can be made—**
 - (a) in writing only
 - (b) by words of mouth only
 - (c) Partly in writing and partly by words of mouth or either a or b
 - (d) by conduct of parties only
- 10. The term 'delivery', under the Sale of Goods Act, 1930, has**
 - (a) been defined under section 2(4)
 - (b) been defined under section 2(2)
 - (c) been defined under section 2(5)
 - (d) not been defined.
- 11. Agreement for sale of things attached to land or forming part of land can be subject matter of Sale of Goods Act, 1930- if—**
 - (a) they are agreed to be severed under the contract.
 - (b) they are sold in cut or severed form
 - (c) severed immediately
 - (d) not at all subject matter of sales of Goods act
- 12. 'Delivery' within the meaning of section 2(1) of the Sale of Goods Act, 1930, can be----**
 - (a) actual
 - (b) constructive
 - (c) symbolic
 - (d) either (a) or (b) or (c).
- 13. To be treated as a valid delivery under the sales of goods Act, it means---**
 - (a) gratuitous transfer of possession from one person to another
 - (b) involuntary transfer of possession from one person to another
 - (c) voluntary transfer of possession from one person to another
 - (d) gaining possession by any means.
- 14. ----- is an instance of constructive delivery of goods**
 - (a) the transfer of bill of lading
 - (b) attornment by a person in possession of the goods
 - (c) handing over the key of warehouse to the buyer
 - (d) actual delivery of the goods to the buyer



- 15. In an agreement to sell if seller become insolvent which of these rights are available to the buyer-----**
- (a) to claim a rateable dividend for the price.
 - (b) to recover goods from the seller.
 - (c) to claim refund of price
 - (d) all the three
- 16. In order to invoke protection of implied warranty of sale by description which of these is essential----**
- (a) there should be sale by description
 - (b) goods do not correspond with the description
 - (c) both a and b
 - (d) none of these.
- 17. Which of the following documents is a document of title to 'goods' within the meaning of section 2(4) of the Sale of Goods Act, 1930**
- (a) Warehouse keeper's certificate
 - (b) Warfenger's certificate
 - (c) Both (a) and (b)
 - (d) VPP.
- 18. The expression sale by description includes which of these situations.**
- (a) Buyer has not seen the goods but relies upon the description given by the seller.
 - (b) Buyer buying something displayed before him on the counter.
 - (c) Where the buyer has seen the goods but relies not on what he has seen but what was stated to him and the deviation of the goods from the description is not apparent.
 - (d) In all the three cases.
- 19. 'Good the acquisition of which is contingent upon some events happening or non happening will be treated---**
- (a) Future goods
 - (b) Unascertained goods
 - (c) Contingent goods
 - (d) Forward commodities.
- 20. 'The documents of title to goods' in the Sale of Goods Act, 1930 have been described, under---**
- (a) section 2(3)
 - (b) section 2(4)
 - (c) section 2(1)
 - (d) section (2).
- 21. The term Price has been defined in section ---of the Sale of Goods Act.**
- (a) 2(12)
 - (b) 2(7)
 - (c) 2(10)
 - (d) 2(13).

- 22. Under section 2(6) of the Sale of Goods Act, 1930 'future goods' means**
- (a) goods which are not yet to be produced/manufactured/acquired
 - (b) goods in developmental stage
 - (c) goods yet to be declared
 - (d) specific goods
- 23. The term 'goods' has been defined in the Sale of Goods Act, 1930, under**
- (a) section 2(5)
 - (b) section 2(6)
 - (c) section 2(7)
 - (d) section (8).
- 24. -----is/are treated as goods under the Sale of Goods Act.**
- (a) Gas
 - (b) Electricity
 - (c) Ships
 - (d) all the three
- 25. The definition of 'goods' under section 2(7) of the Sale of Goods Act, 1930 is---**
- (a) descriptive
 - (b) exhaustive
 - (c) exhaustive and descriptive
 - (d) declaratory.
- 26. 'Goods' within the meaning of section 2(7) of the Sale of Goods Act, 1930 excludes---**
- (a) actionable claim(s)
 - (b) money
 - (c) both (a) and (b)
 - (d) neither (a) nor (b).
- 27. Section 2(7) of the Sale of Goods Act, 1930, the term 'goods' does not include----**
- (a) stock and share
 - (b) growing crops
 - (c) grass
 - (d) neither (a) nor (b) nor (c).
- 28. In a CIF contract how the buyer recover the loss if the goods are lost or damaged in transit.**
- (a) from the seller
 - (b) from the transporter
 - (c) from Insurance company
 - (d) non of these.
- 29. The Sale of Goods Act, 1930**
- (a) does not define the term mercantile agent
 - (b) defines the term mercantile agent under section 2(9)



- (c) defines the term mercantile agent under section 2(10)
 - (d) defines the term mercantile agent under section 3.
- 30. The question of the insolvency of a buyer, under the Sale of Goods Act, 1930, is of importance in connection with----**
- (a) the seller's lien on the goods
 - (b) the right of stoppage in transit
 - (c) both (a) and (b)
 - (d) only (a) and not (b).
- 31. "Mercantile agent" means the person**
- (a) who sell goods, or consigns for the purpose of sell, or buy goods or raise money on security of goods
 - (b) who only sell or purchase
 - (c) who only consign goods
 - (d) who only transfer goods.
- 32. 'Price' under section 2(10) of the Sale of Goods Act, 1930, means**
- (a) the money consideration
 - (b) the consideration given in the form of goods
 - (c) partly money consideration and part consideration in goods
 - (d) either (a) or (b) or (c).
- 33. A entered into a contract to sell his old car to B at the price to be determined by the true value dealer. A delivered the car to B who in turn converted to a mini-delivery van by some modification, however the True Value dealer did not determine by value. What remedies are available to the A in the instant case.**
- (a) Ask B to return the car to him in its original condition
 - (b) Ask B to return the car in the present condition
 - (c) Ask B to pay a reasonable price of the car
 - (d) No remedy against B except to sue the True value car dealer for non fixation of price
- 34. Which of the following are 'goods' within the meaning of section 2(7) of the Sale of Goods Act, 1930**
- (a) things attached to land which are agreed to be severed before sale
 - (b) things forming part of the land agreed to be severed before sale
 - (c) both (a) and (b)
 - (d) neither (a) nor (b)
- 35. The term Actionable claim is defined in---**
- (a) The Transfer of Property Act, 1882
 - (b) The Sale of Goods Act, 1930
 - (c) The Indian Contract Act, 1872
 - (d) all the above.

- 36. Specific goods become ascertained goods-----formation of a contract of Sales.**
- (a) prior to
 - (b) subsequent to
 - (c) concurrent with
 - (d) all the above.
- 37. What would be the reasonable price in question no 36 when price cannot be fixed**
- (a) Market price plus reasonable margin
 - (b) It is a question of fact dependent on the circumstances of each particular case.
 - (c) Depreciated value
 - (d) Scrap value.
- 38. In an auction sale there is an implied warranty that---**
- (a) the auctioneer has authority to auction the goods.
 - (b) the bid price finally agreed is the best bargain.
 - (c) the intrinsic value of the goods is much more than the bid price
 - (d) all the three.
- 39. A sold his old car to B for ₹ 11,000. How the purchase consideration can be discharged by B---**
- (a) Through cash/bank draft/cheque only
 - (b) Equivalent value in kind
 - (c) Bank draft only
 - (d) Cash/bank draft/cheque or partly in cash/bank draft/cheque and partly in kind
- 40. 'Where the buyer has examined the goods, there is-----as regards defects which such examination ought to have revealed.**
- (a) an implied warranty of merchantability
 - (b) an implied condition as to merchantability
 - (c) no implied condition as to merchantability
 - (d) either (a) or (b) or (c).
- 41. Which of these section define the term 'Specific goods'**
- (a) section 2(12)
 - (b) section 2(15)
 - (c) section 2(13)
 - (d) section 2(14).
- 42. Under section 2(14) of the Sale of the Goods Act, 1930, 'specific goods' means**
- (a) goods which are capable of identification
 - (b) generic goods
 - (c) goods identified and agreed upon
 - (d) either (a) or (c).



- 43. Which of the following are not goods within the meaning of section 2(7) of the Sale of Goods Act, 1930**
- (a) jubilee coins
 - (b) coins of antiquity
 - (c) current coins sold as curiosity
 - (d) none of the above.
- 44. Seller means a person-----**
- (a) who sells or agrees to sell goods
 - (b) who bear authority to sell
 - (c) who only agrees to sell goods
 - (d) who is desirous of selling.
- 45. Contract of Sale under section 4 of the Sale of Goods Act, 1930 comprises of**
- (a) executory contract of sale
 - (b) executed contract of sale
 - (c) both executory and executed contracts of sale
 - (d) only (a) and not (b).
- 46. X sold and delivered 10 qt of wheat to Y, Y instead of expressing his acceptance of the wheat in writing or by words send the same to flour mill. The acceptance of goods ---**
- (a) has not taken place
 - (b) by implied adoption has taken place
 - (c) by default
 - (d) by estoppels
- 47. In a contract of sale of goods, under section 4 of the Sale of Goods Act, 1930, there**
- (a) must be transfer of absolute or general property in the goods
 - (b) must be a transfer of special property in the goods
 - (c) must be transfer of either absolute or special property in the goods
 - (d) neither (a) nor (b).
- 48. Which of this section define the term delivery of goods**
- (a) section 2(3)
 - (b) section 2(2)
 - (c) section 2(1)
 - (d) section 2(4).
- 49. Under section----- it is the duty of the seller to deliver the goods and of the buyer to accept and pay for them.**
- (a) 30
 - (b) 31
 - (c) 33
 - (d) 32

50. A contract of sale under section 4 of the Sale of Goods Act, 1930

- (a) may be absolute
- (b) may be conditional
- (c) either (a) or (b)
- (d) only (a) and not (b).

51. In case of a sale if the seller is declared insolvent, the buyer is entitled to recover the goods from---

- (a) Buyer
- (b) Transporter
- (c) Insurance company
- (d) Official receiver or Assignee

Q52. Right of unpaid seller to enforce stoppage of goods in transit remains open until---

- (a) the the price of the goods is paid.
- (b) the goods are re-sold by him
- (c) the buyer give a fresh undertaking to make the payment
- (d) a fresh draft/promissory note is issued by the promisee

Q53. Unpaid seller can sell the goods on which lien is exercised without notice to the buyer----

- (a) when buyer refuses to tender the payment despite fresh request
- (b) when the goods are of perishable nature
- (c) when the bank draft/Bill of exchange is dishonored.
- (d) when price of the goods sold is increasing.

Q54. The unpaid seller should exercise the right of re-sale--

- (a) as soon as regained possession
- (b) as soon as get know of default on the part of the buyer
- (c) within a reasonable time
- (d) before the buyer is declared insolvent

Q55. The right to stop the goods in transit covers---

- (a) prevent the goods from being going in the possession of the buyer
- (b) regain possession of goods
- (c) retain possession of goods
- (d) all the three.

Q56. In FOB contract the property in goods passes when---

- (a) the goods are put on board a ship
- (b) the documents are received by the buyer and price is paid
- (c) buyers confirmation of receipt is received in writing
- (d) goods are accepted by the buyer after inspection and quality check



Q57. In CIF contract the property in goods passes when---

- (a) the goods are put on board a ship
- (b) the documents are received by the buyer and price is paid
- (c) buyers confirmation of receipt is received in writing
- (d) goods are accepted by the buyer after inspection and quality check

Q58. When the price is not capable of being fixed the buyer must pay---

- (a) at least cost price
- (b) at least market price
- (c) reasonable price
- (d) cost price plus 5% profit margin

Q59. CIF price include(s)---

- (a) FOB price
- (b) cost of freight
- (c) marine insurance upto the port of destination
- (d) all the three

Q60. X sells goods worth ₹12000 to Y. Y tendered a post dated cheque,.

- (a) X is not bound to accept this as a valid tender of payment
- (b) This is a valid tender of payment
- (c) X is bound to accept this as a valid tender of payment if the date of the cheque is current
- (d) X is bound to accept it as a valid payment if so requested by Y

Q61. ----is/are not goods under the Sales of Goods Act.

- (a) Rare coins/currency notes
- (b) Railway Bridge
- (c) Patent right
- (d) Electricity

Q62. Which of these is/are not relevant in a contract of sales---

- (a) Time of payment
- (b) time of delivery
- (c) both
- (d) none of these

Q63. ----is/are not covered under the Sales of Goods Act,1930

- (a) X sold his old car in exchange of new motor bike
- (b) X agree to give his old to Y, in consideration of Y agreeing to give a stage performance on his birthday.
- (c) State Government giving 5 kg of Atta to daily wages employee in lieu of daily wages
- (d) all the three

Q64. The milk sold by X contained germs of typhoid, this is a breach of---

- (a) condition as to wholesomeness
- (b) condition as to fit for a particular purpose
- (c) condition as to merchantability
- (d) free from encumbrance

Q65. X was ordered to supply heavy duty truck to supply ration on hilly terrain. However, on the very first day of its operation the truck broke down and failed to bear the load. This is a breach of---

- (a) condition as to wholesomeness
- (b) condition as to fit for a particular purpose
- (c) condition as to merchantability
- (d) free from encumbrance

Q66. X purchased 10 dozens of pencil sharpeners. The sharpener were found to be blunt and not able to sharpen the pencils. This is a breach of---

- (a) condition as to wholesomeness
- (b) condition as to fit for a particular purpose
- (c) condition as to merchantability
- (d) free from encumbrance

Q67. The Doctrine of "CAVEAT EMPTOR" is not applicable---

- (a) When the goods are of mass consumption
- (b) in case of perishable goods
- (c) where the seller is a well established and known person
- (d) when the buyer has relied upon the skill and judgement of the seller

Q68. In case of foodstuff and eatables----- is implied.

- (a) condition as to wholesomeness
- (b) condition as to fit for a particular purpose
- (c) condition as to merchantability
- (d) free from encumbrance

Q69. Condition as to wholesomeness means---

- (a) goods of best quality
- (b) fit for human consumption
- (c) goods with balanced nutrient contents
- (d) all the three

Q70. Bill of lading is issued by---

- (a) Shipping company
- (b) Merchantile agent
- (c) Railway Administration
- (d) Merchantile exporter



Q71. In the event of the buyer becoming insolvent before paying the price of the goods, in the absence of lien over goods, the seller---

- (a) can sell the goods
- (b) must send the goods to the official receiver
- (c) can retain the goods
- (d) appropriate the goods against any other some due by him to the buyer

Q72. An agreement of sale operates in case of---- goods

- (a) future goods
- (b) contingent goods
- (b) both
- (d) none of these.

Q73. A contract of sales operates in case of---goods

- (a) unascertained goods
- (b) specific goods
- (c) existing goods
- (d) b and C

Q74. For terms not defined in the Sales of Goods Act, reference is made to---

- (a) Indian Contract Act
- (b) Companies Act
- (c) Transfer of Immovable Property Act
- (d) Consumer Protection Act

Q75. CIF Contract is also known as--

- (a) Wagering contract....
- (b) contract for sale of document
- (c) conditional contract of sales
- (d) Quasi contract

Answer

1	(a)	2	(d)	3	(d)	4	(a)	5	(a)	6	(b)	7	(a)	8	(c)	9	(c)	10	(b)
11	(b)	12	(d)	13	(c)	14	(b)	15	(a)	16	(c)	17	(c)	18	(d)	19	(c)	20	(b)
21	(c)	22	(a)	23	(c)	24	(d)	25	(a)	26	(c)	27	(d)	28	(c)	29	(b)	30	(b)
31	(a)	32	(a)	33	(c)	34	(c)	35	(a)	36	(b)	37	(b)	38	(a)	39	(d)	40	(c)
41	(d)	42	(c)	43	(c)	44	(a)	45	(c)	46	(b)	47	(a)	48	(d)	49	(b)	50	(c)
51	(d)	52	(a)	53	(b)	54	(c)	55	(d)	56	(a)	57	(b)	58	(c)	59	(d)	60	(a)
61	(b)	62	(c)	63	(d)	64	(a)	65	(b)	66	(c)	67	(d)	68	(a)	69	(b)	70	(a)
71	(b)	72	(c)	73	(d)	74	(a)	75	(b)										

Study Note - 3

THE NEGOTIABLE INSTRUMENTS ACT, 1881



This Study Note includes

- 3.1** *The Negotiable Instruments Act, 1881-Concepts and Definitions*
- 3.2** *Acceptance and Negotiation*
- 3.3** *Liabilities of Parties*
- 3.4** *Dishonour of Negotiable Instrument*
- 3.5** *Discharge of a Negotiable Instrument*
- 3.6** *Hundis*
- 3.7** *Banker and Customer*
- 3.8** *International Law Relating to Foreign Negotiable Instruments*

3.1 THE NEGOTIABLE INSTRUMENTS ACT, 1881-CONCEPTS AND DEFINITIONS

INTRODUCTION

Negotiable Instrument Act, 1881 primarily contains the law relating to negotiable instruments. The term 'negotiable' means transferable and the term 'instrument' means 'any written document creating a right in favour of some person.' Thus by negotiable instrument we mean a written document by which a right is given to a person and which is transferable in accordance with provisions of Negotiable Instrument Act, 1881. Bill of exchange, promissory note etc are included in schedule 7 list 1 entry no 46. Central Government has power to make enactment on "Promissory" note, Bill of exchange and Cheque etc

3.1.1 What is Negotiable Instrument?

Before discussing the laws relating to Negotiable Instrument let us try to understand the term Negotiable Instrument in common parlance as well as defined in the Act.

In common parlance a negotiable instrument can be understood as a piece of paper which entitles to a sum of money and which is transferable from one person to another merely by delivery or by endorsement and delivery. The person to whom it is so transferred becomes entitled to the sum mentioned therein and also to the right to further transfer it. Though there is a general principle that no one can become owner of any property unless the person who sold the property to him is the true owner of the said property, yet this rule is not applicable in the case of Negotiable instrument. Now let us refer to the Act how the term Negotiable instrument is defined in the section.

Sec. 13 of the Act defines a negotiable instrument as 'a promissory note, bill of exchange or cheque payable either to order or to bearer.'

Explanation:

- (i) A promissory note, bill of exchange or cheque is payable to the order to which it is expressed to be payable or which is expressed to be payable to a particular person, and does not contain words, prohibiting transfer or indicating an intention that it shall not be transferable.
- (ii) A promissory note, bill of exchange or a cheque either originally which is expressed to be so payable or on which the only or last endorsement is an endorsement in blank.
- (iii) Where a promissory note, bill of exchange or cheque, either originally or by endorsement, is expressed to be payable to the order of a specified person and not to him or his order, it is nevertheless payable to him or his order at his option.

A negotiable instrument may be payable to two or more persons jointly or it may be made payable in the alternative to one of two or one or some of several payees.

The above definition of the term "Negotiable Instrument" given in section 13 of the Act, mention of three instruments namely promissory note, bill of exchange or a cheque payable either to order or to bearer'.

Can we say that there are only the above three types of instruments which fall within the definition of the Negotiable Instrument? It is not so, in fact every document can act as a negotiable instrument if it possesses the characteristic of a negotiable instrument. In fact every document which entitles a person a sum of money mentioned therein and is transferable by delivery, is called a negotiable instrument.

In Smith's leading case it is said "Where an instrument is by the custom of trade transferable in this country like cash, by delivery and is capable of being sued upon by the person holding it pro-tempore (for the time being) there it is entitled to the name negotiable instrument and the endorsement must be genuine".

Now that we have understood what a negotiable instrument is., let us understand the characteristics of a Negotiable Instrument.

3.1.2. Characteristics of a Negotiable Instrument

- (i) **Freely transferable-** If a negotiable instrument is payable to bearer, it is transferred by mere delivery and if payable to order, then by endorsement and delivery.
- (ii) **Holder's title is free from all defects-** A transferee taking an instrument bonafide and for value gets the instrument free from all defects in the title of the previous holder. The transferee is known as the holder in due course. So the doctrine of nemo dat quod non-habet (no one can transfer a better title than he himself has) is not applicable in cases of a Negotiable Instrument provided the holder is bonafide holder and get it for value paid.

Example : In *Raephel V Bank of England*. It was found that some banknotes of the Bank of England were stolen in a robbery. The Bank of England distributed list of such stolen notes to various agencies/parties. Raephel, the plaintiff who was a money changer in Paris also received on such list so circulated by the bank. After around 12 months a man came to the plaintiff to exchange a Bank of England currency note which was stolen from the bank. The plaintiff exchanged the note and paid for it without knowing that the same was stolen for which notice had already been issued by the Bank of England. Since the plaintiff Mr. Raephel had taken the same in good faith and also paid for it, was entitled to its payment despite his negligence.

- (iii) The holder in due course can sue on the instrument in his own name and for this purpose notice of transfer need not be given. What is a holder in due course will be discussed in the subsequent sections.
- (iv) A negotiable instrument is subject to certain presumptions which are discussed as under:
 - (a) *Consideration:* Every negotiable instrument is presumed to be made, accepted, endorsed, negotiated or transferred for certain consideration.

Example : In *Marimuthu Kounder V Radhakrishnan and others AIR 1991 Ker 39*, the Kerla High Court observed that the presumption as to existence of consideration for negotiable instrument is not irrefutable . When once the court finds that the defendant has executed the promissory note then the burden is on the defendant to prove that there is no consideration. Initial burden lies upon the plaintiff who has to prove that the promissory note is executed by the defendant. If there is an admission by the defendant, certainly there is no burden on the plaintiff to prove the existence of a promissory note.

- (b) *Date:* Every negotiable instrument bear the date on which it was drawn or made.
- (c) *Time of acceptance:* Every negotiable instrument is deemed to have been accepted within a reasonable time after the date mentioned on it and before its maturity.
- (d) *Time of transfer:* It is presumed to have been transferred before maturity.



- (e) *Order of endorsements*: The endorsement made is deemed to have been made in the order they appear on the instrument.
- (f) Every holder is presumed to be the holder in due course.
- (g) In case an instrument is lost, it is presumed that the instrument was duly stamped.
- (h) In case of dishonour of an instrument, if a suit is filed, the court shall on proof of protest presume the fact of dishonour, unless it is disproved.

3.1.3 Types of Negotiable Instrument

Negotiable Instruments are of two types:

- i) **Negotiable by statute** – Section 13 of the Act, provides that a negotiable Instrument include promissory note, bill of exchange and cheque, whether payable to bearer or order.
- ii) **Negotiable by custom or usage** – Though the Act speaks of only three types of Negotiable Instrument, but it does not consider other kinds of instruments from being treated as a negotiable instrument provided they possess the characteristics of a negotiable instruments. Accordingly certain other instruments takes the character of negotiable instruments by custom or usage-dividend warrant, share certificates, circular notes, bearer debentures are some of them though they are not specifically mentioned in the Act.

3.1.4 Classification of Negotiable Instruments

i) *Bearer and order instruments*

A negotiable instrument is said to be payable to bearer when (i) it is expressed to be so payable (ii) only or last endorsement is a blank endorsement.

A negotiable instrument is said to be payable to order when (i) it is expressed to be so payable (ii) expressed to be payable to a particular person with restricting its transferability.

ii) *Inland and foreign instruments*

A bill, promissory note or cheque if both drawn and payable in India or drawn on a person resident in India is said to be an inland bill.

A bill which is not an inland bill is deemed to be a foreign bill. Foreign bill must be protested for dishonor if such protest is required by the law of the place where it was drawn, this is not case with Inland bills where protest for non payment is optional as per section 104 of the Act.

iii) *Demand and time instruments*

An instrument is payable on demand when it is expressed to be so payable or when no time is specified on it. A cheque is always payable on demand as discussed earlier.

A note or bill if payable after a specified period or happening of a specified event which is certain, it is a time instrument. If a promissory note or bill of exchange bears the expression “ at sight” and “on presentation” mean on demand (section 21). The words “ on demand’ are usually found in a promissory note, where the words “ at sight’ are found in a bill of exchange.

iv) *Genuine, accommodation and fictitious bill*

When a bill is drawn, accepted, or endorsed for consideration it is a genuine bill. When it is drawn, accepted, or endorsed without consideration it is accommodation bill. When drawer or payee or both are fictitious the bill is called fictitious bill. If both drawer and payee of a bill are fictitious person, the acceptor is liable to a holder in due course, if the holder in due course can show that the signature of the supposed drawer and that of first payee are in the same handwriting.

v) *Clean and documentary bill*

When no documents relating to goods are annexed to the bill, it is clean bill. When documents of title or other documents relating to goods are attached, it is documentary bill.

vi) Ambiguous instrument

When an instrument due to faulty drafting may be interpreted either as bill or note, it is an ambiguous instrument. It is for holder to decide how he wants the bill to be treated. Ambiguity may also arise when the amount is stated differently in words and figures. In such case the amount stated in words will be taken into account.

vii) Inchoate instrument

An instrument incomplete in some respect is known as inchoate instrument. When a person signs and delivers to another a blank or incomplete stamped paper, he authorizes the other person to make or complete upon it a negotiable instrument for any amount not exceeding the amount covered by the stamp. The effect of such signing is that the person signing the instrument is liable upon such instrument in the capacity in which he signed it to holder in due course of the instrument.

viii) Escrow Instrument

When an instrument is drawn conditionally or for a special purpose as a collateral security and not for the purpose of transferring property therein, it is called Escrow instrument. The liability to pay in case of an Escrow instrument does not arise if the conditions agreed upon are not fulfilled or the purpose for which the instrument was delivered is not achieved.

3.1.5 Bill in Sets:

A bill of exchange drawn in parts is known as bill in sets. Each part should contain a reference to other parts. This type of bill is specially drawn when it is to be sent to some foreign country. The object of drawing a bill in set is to avoid undue delay and unnecessary inconvenience which may arise due to miscarriage or misplacement of the bill and to ensure same transmission of at least one set of the bill.

3.1.6 Presentation of a Negotiable Instrument

Presentation of a bill means showing the same to the drawee, acceptor or maker for acceptance, sight or payment. An instrument can be presented in three ways:

- (a) Presentation for acceptance.
- (b) Presentation of a promissory note for sight.
- (c) Presentation of a negotiable instrument for payment.

3.1.7 Capacity to become a party to a Negotiable Instrument

A person competent to contract can become a party to a negotiable instrument. If a party who makes, draws, endorses, or negotiates a negotiable instrument is incompetent to do so, the agreement is void as against him. But the contract is still valid against other the parties competent to contract. The manner or conditions under which certain categories of person like a Minor, Corporate body, Agent and Legal representatives can be a party to a negotiable instrument are as under :

(a) Minor

A minor person is not competent to contract; therefore he can not bind himself by becoming a party to a negotiable instrument. But mere presence of a minor as one of the party in a negotiable instrument does not make it invalid. A minor a draw, indorse, deliver and negotiate an instrument so as to bind all parties except himself.

Example: A, B and C a minor executed a promissory note in favor of P. Held, C's immunity from liability did not absolve A and B, other joint promisors, from liability. [*Sulochana vs. Pandiyan Bank Ltd AIR (1975) Mad70*]

A minor is not personally liable on a bill or note given by him for necessities supplied to him. It is only his estate which is liable for such a bill or note.



(b) Corporation

Corporation can be a party to a negotiable instrument if authorized by its Article of Association, otherwise it is ultra vires.

(c) Agent

As per section 27 an agent can bind his principal by acting on his behalf only in the manner in which he is duly authorized to become a party to a negotiable instrument. The agent is required to make it clear that he is acting in representative capacity which must be evidenced by the manner he sign such document. The form of signature must show that he does not intend to incur personal liability. Otherwise he becomes personally liable.

Example 1:

A manager of ABC Ltd accepted a bill of exchange and signed A as manager. It was held that A was personally liable. [*Liverpool bank vs. Walker*(1859)4DeG&J.24]

Example 2:

A manager of ABC Ltd accepted a bill of exchange and signed as for ABC Ltd. It was held that A was not personally liable. [*Alexander vs. Sizer*(1869)LR4 Ex192]

(d) Legal Representative

As per section 30 a legal representative of a deceased person who signs his name to a negotiable instrument incurs personal liability unless by clear words he limits his liability to the extent of the assets of the deceased received by him as legal representative.

3.1.8 Promissory Notes

A 'promissory note' is an instrument in writing (not being a bank note or currency note) containing an *unconditional* undertaking signed by maker, to pay a certain sum of money only to or to order of a certain person or to bearer of the instrument. (Sec.4). There are two parties to it –the maker and the payee.

Example 1:

D signs an instrument stating, 'I promise to pay F or order ₹1000'. This is a promissory note.

Example 2:

I acknowledge myself to be indebted to B in ₹5000 to be paid on demand, for value received.

This is also a promissory note.

Let take a few more examples and see whether these are promissory note or not.

Example : A signs a document like

- (i) "Mr C, I O U ₹1000.
- (ii) I promise to pay B ₹1000 and interest thereon.
- (iii) I promise to pay B ₹1000 and all other sum which shall be due to him.
- (iv) I promise to pay B ₹1000 as soon as possible.
- (v) I promise to pay B ₹1000 if I win my case.
- (vi) I promise to repay the amount due to B ₹1000 by sending him two Kg dry fruits (equivalent value).

None of them are promissory note. Let us find out why they are not promissory note.

Example (i) This is a mere acknowledgement or statement without any promise to pay.

Example (ii) There is a promise but the sum is not certain.

Example (iii) Again amount is not certain.

Example (iv) Amount not certain.

Example (v) Conditional on winning a case.

Example (vi) Being paid other than in money term.

From the above examples we can easily discern the essential characteristics of promissory note. Thus essential elements of a promissory note are:

- (i) Must be in writing.
- (ii) Must contain an express promise to pay. A mere acknowledgement of debt is not a promissory note. A mere receipt of money is not a promissory note even though it may contain the term of repayment.
- (iii) The promise must be definite and unconditional.

If there is a promise to pay on performance or no performance or happening or non-happening of certain events it is not a promissory note.

Example 1: I promise to pay ₹ 5000 to B provided I get my due from D well in time. This is a conditional promise hence not a promissory note.

Example 2: I promise to pay ₹ 5100 to B if he marries C on next Friday. This is also not a promissory note.

- (iv) It should be signed by maker.
- (v) The parties-maker & payee must be certain. Both maker and payee must be indicated with certainty on the face of the instrument. However, it is not necessary that name of payee must be specifically mentioned provided on reading of the document as a whole there is no doubt as to the person who is the payee. The following example will make it clear:

In *Brij Raj Sharan vs. Sah Raghunandan Sharan* a letter addressed to X contained the following statement:

‘In your account ₹4668 are due from my son Mahesh, I shall pay the amount by Dec. 1948. You rest assured’

It was contended that it should not be treated a promissory note because the name of the payee is not indicated. The above contention was not accepted and the instrument was treated a promissory note as the letter is addressed to X from which it was clear that X was intended to be the Payee.

- (vi) The promise should be to pay certain sum of money only. If the promise is to pay something other than money or something more in addition to money, it will not be treated a promissory note. Similarly the amount to be paid must be certain. If the amount to be paid is not certain it can not be treated a promissory note.

Example:

I promise to pay to XY the sum of ₹10,000 with lawful interest for the same, three months after date and also all other sums which may be due to him, is not promise note(*Smith vs Nightingale*) as the amount to be paid is not certain.

- (vii) Must bear necessary stamp as per Indian Stamp Act, 1899.
- (viii) It cannot be made payable to bearer on demand. RBI Act, 1934 prohibits issue of such promissory note except by RBI or Central Government itself.
- (ix) Bank note or currency note is not a promissory note because bank note or currency note itself is money.

Lack of any of these features will not make any document as a promissory note.



3.1.9 Bill of Exchange

A Bill of Exchange is an instrument in writing containing an unconditional order signed by maker directing a certain person to pay a certain sum of money only to, or to the order of a certain person or to the bearer of the instrument (Sec.5) There are three parties to a bill, namely drawer, drawee and payee. The person who gives order to pay or who make the bill is called drawer, the person who accept or who is directed to pay is called drawee and the person who actually receive the payment is called payee. When in the bill or in any endorsement thereon the name of any person is given in addition to the drawee, such a person is called drawee in case of need. The resort to drawee in need arise only when the bill is returned dishonored due to non acceptance or non-payment.

Example:

A signs an instrument directing B 'Pay C or order a sum of ₹ 1000/- only, 3 months after date'. This is BOE.

Essential features of a bill of exchange are –

- (i) Must be in writing.
- (ii) Must contain an unconditional order.
- (iii) The order must be to pay money only.
- (iv) The amount must be certain.
- (v) Requires three parties.
- (vi) The parties must be certain.
- (vii) It should be signed by drawer.
- (viii) Necessary stamp must be affixed.

A bill as originally drawn cannot be made payable to bearer on demand.

Section 33 of the Act declare that a bill can be accepted by the drawee or by all or some of several drawee or by a person mentioned in the instrument as a drawee in case of need or by a person who accepts it for the honour of the drawee. No other person can bind himself by acceptance. In case there are several drawees of a bill of exchange who are not partners, each of them can accept for himself and not for others, unless so authorized.

3.1.10 Cheque

A cheque is a bill of exchange drawn on a specified banker payable on demand.(Sec.6)Further the expression includes the electronic image of a truncated cheque or a cheque in electronic form. All cheques are bills of exchange but all bills of exchange are not cheques. A cheque is required to possess all essential features of a bill of exchange. In the case of Col v Milson a document was drawn absolutely in the form of a cheque. It was made payable to cash or order. A question on the validity of the cheque was raised. Section 5 of Indian Act and section 3(1) of the English Act, require that a bill of exchange must be made payable to or to the order of a specified person or to bearer. Since the instant cheque was made payable to cash or order. Hence it was not payable to any person or to bearer and therefore was not a bill of exchange and accordingly could not be treated as cheque.

A cheque must satisfy the requirement of a valid bill of exchange in addition to the requirement of section 6 of the Act. In the first instance it must be drawn upon a banker and secondly it must be payable on demand.

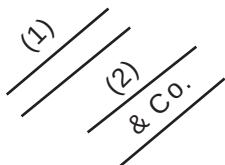
3.1.10.1 Comparative analysis of Promissory Note, Bill of Exchange and Cheque.

Particulars	Promissory Note	Bill of Exchange	Cheque
Parties	2 parties-maker & payee	3 parties-drawer, drawee Payee	3 parties - drawer, banker, and payee
Nature	Contains an unconditional promise by maker to pay the payee	Contains an unconditional order to the drawee to pay the payee	Drawn on specified banker to pay on demand.
Acceptance	Not necessary	Necessary if the bill is payable after sight.	Not necessary.
Liability	Liability of maker is primary and absolute.	Liability of drawer is conditional and secondary upon nonpayment by drawee.	Liability of drawer is conditional and secondary upon nonpayment by banker
Notice of dishonor	Not necessary	Necessary	Not necessary
Payable	On demand or after a specified time. Cannot be made payable to bearer on demand or even after certain period.	On demand or after a specified time. Cannot be made payable to bearer on demand.	On demand even to bearer if so made.
Crossing	Not possible	Not possible	Can be crossed.
Noting and protesting in case of dishonour	Not required	Required to establish the fact of dishonour.	Not required.
Grace period	Available if payable after specified time	Available if payable after specified time (usance bill)	Not available.
Other features	Number, date, place not essential. Must be stamped.	Number, date, place not essential. Must be stamped.	Number, date, place, essential. Need not be stamped.

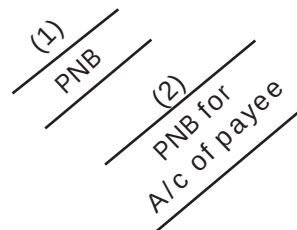
3.1.10.2 Crossing of Cheque

Cheques are of two types-open and crossed. When a cheque is payable in cash across the counter of a bank, it is said to be open. A crossed cheque is one on which two parallel transverse lines with or without the words '&Co.' are drawn. Crossing a cheque implies directing the drawee banker to pay the amount only to a banker or a particular banker so that the party getting payment can be easily traced. The payment of such crossed cheques can be made only through a banker and not over the counter. A cheque may be crossed by the drawer, holder, or banker. Crossing may be of two types –general and special. Specimens are shown below:

General Crossing



Special Crossing



In addition to above two crossing prescribed in the Act, there is another type of crossing known as restrictive crossing developed out of business usages. In this type of crossing the word a/c payee are added to general or special crossing. The effect of making the cheque a/c payee is to give direction to the bank to credit the amount to the account of the payee. Account payee cheques despite being



crossed are fully negotiable.

Not Negotiable crossing

At times the cheques are marked “not-negotiable”. The effect of such marking is that the transferee does not get title better than that of the transferor. Any one who takes a cheque marked “Not negotiable” takes it on his own risk and cost.

3.1.10.3 Marking of cheques

One of the essential difference between a Bill of Exchange and a Cheque is that a cheque does not require acceptance as it is intended for immediate payment on presentation. However, by custom there is a practice of marking a cheque good for payment by drawee bank which does not amount to acceptance. Marking is writing on a cheque by drawee banker that it would be honoured when it is duly presented for payment. Cheques may be marked at the instance of the drawer, holder or collecting banker. In India no such practice of getting cheques marked has been established either by judicial decisions or by statutes.

3.1.10.4 Essential features of a cheque.

A cheque has the following essential features.

- (a) It must be in writing. A cheque must be an instrument in writing. It may be written with pencil, pen, typed, printed.
- (b) Unconditional order: A cheque must contain an unconditional order to pay by the Banker upon whom it is written. It is not necessary that the word order or its equivalent must be used to make the document a cheque.
- (c) Written on a specified bank only. A cheque must be drawn on a specified banker. To avoid any mistake, the name and address of the banker should be specified.
- (d) A certain sum of money only: The order must be only for payment of money and that too must be specified. Thus an order upon the bank to deliver or pay things other than a sum of money is not a cheque.
- (e) Payee to be a certain person. The person to whom it is paid must be certain.
- (f) To be payable on demand: A cheque must be payable on demand and not otherwise.
- (g) Dating of cheque. The drawer is expected to put the date of writing the cheque before delivering the same.

3.1.10.5 “Who can cross a cheque”?

As we have discussed above, by crossing the cheque the drawer instruct the banker to not to pay it over the counter but only credit to the account of the person named therein. It adds to the security and thus ensures payment to the payee or to his order. A cheque may be crossed by any of the following persons;—

- (a) The drawer of a cheque.
- (b) The holder of a cheque. Where a cheque is issued uncrossed it may be crossed by the holder generally or specially.
- (c) The banker in whose favour the cheque has been crossed specially may again cross it specially in favour of another banker. The later bank in such a case acts as the agent of the former.

Example1 : A of Delhi draw a bill on B of Ghaziabad payable at Faridabad.

Example 2 : A of Delhi draw a bill on B of Ghaziabad payable at Washington, USA.

The above two are examples of an Inland bill.

Example 3 : A of Delhi draw a bill on B of Britain payable at London

Example 4 : A of Australia draw a bill on B of Ghaziabad payable at Faridabad.

Bills of example no. 3 and 4 are Foreign bills.

3.1.11 Due Date of a Bill or Note

Every instrument payable, otherwise, than on demand is entitled to three days of grace. Instruments not entitled to 'period of grace' are:

- i) a cheque
- ii) a bill or note payable on demand,
- iii) a bill or note in which no time is mentioned.

Instruments entitled to 'period of grace' are:

- i) a bill or note payable on a specified day,
- ii) a bill or note payable 'after sight',
- iii) a bill or note payable at a certain period on happening of a certain event.

So in case of time bill or note, it becomes due on the last day of grace period. Where an instrument is payable by installments, each installment is due three days after the date fixed for payment of the installment. If the due date falls on a public holiday, the bill becomes due on immediate preceding business day. If the month in which the period is to terminate has no corresponding day, the period will terminate on the last day of the month.

Examples:

- (i) A bill dated 6th February, 2012 is made payable 90 days after date. Its due date is 9th May, 2012.
- (ii) A bill dated 1st January, 2012 is made payable one month after date. It falls due on 3rd March, 2012.
- (iii) A bill falls due on 9th May, 2012 which happens to be a Sunday. Then due date becomes 8th May, 2012.

3.1.12 Payment in Due course

What is payment in due course?

Payment in due course means payment in accordance with the apparent tenor of the instrument in good faith and without negligence to any person in possession thereof. The payment to the person in possession of the instrument must be under circumstances which do not afford a reasonable ground for believing that he is not entitled to receive payment of the amount mentioned in the instrument.

Payment in due course results in discharge of the instrument. A payment is said to be 'payment in due course' if it satisfies the following conditions:

- (i) It is in accordance with apparent tenor of the instrument. A payment before the maturity date is not a payment according to the apparent tenor of the instrument.
- (ii) It is made on behalf of drawee or acceptor. It must be made in money term only which includes cheque and currency notes. The holder of a negotiable instrument can not be forced to accept payment in any other mode except with his consent.
- (iii) It is made to the person in possession of the instrument and also entitled to payment.
- (iv) It is made in good faith, without negligence and under bonafide circumstances. If a cheque bears



forged signature of the drawer, the payment will not be payment in due course if the banker fails to exercise the necessary care. (*Allahabad Bank Ltd vs. Kul Bhushan*)

- (v) There is no ground for believing that possessor is not entitled to receive payment.

3.2 ACCEPTANCE AND NEGOTIATION

3.2.1 Acceptance

Only certain types of bills require acceptance. Essentials of a valid acceptance are—

- (i) Must be written on the face of the bill.
- (ii) The bill must be signed by drawee or his authorized agent.
- (iii) The accepted bill is required to be delivered to the holder of the instrument.

3.2.1.1 Acceptance of a Bill of Exchange:

The drawee of a bill of exchange, as such, has no liability on any bill addressed to him for acceptance or payment. A refusal to accept or to pay such bill gives the holder no rights against him. The drawee becomes liable only after he accepts the bill. The acceptor has to write the word 'accepted' on the bill and sign his name below it. Thus, it is the acceptor who is primarily liable on a bill.

The acceptance of a bill is the indication by the drawee of his assent to the order of the drawer. Thus, when the drawee writes across the face of the bill the word "accepted" and signs his name underneath he becomes the acceptor of the bill.

3.2.1.2 Meaning of Acceptance:

A bill is said to be accepted when the drawee (i.e., the person on whom the bill is drawn), after putting his signature on it, *either delivers it or gives* notice of such acceptance to the holder of the bill or to some person on his behalf.

The drawee of a bill of exchange, as such, has no liability on any bill addressed to him for acceptance or payment. A refusal to accept or to pay such bill gives the holder no rights against him. The drawee becomes liable only after he accepts the bill. The acceptor has to write the word 'accepted' on the bill and sign his name below it. Thus, it is the acceptor who is primarily liable on a bill.

The acceptance of a bill is the indication by the drawee of his assent to the order of the drawer. Thus, when the drawee writes across the face of the bill the word "accepted" and signs his name underneath he becomes the acceptor of the bill.

3.2.1.3 Acceptor:

After the drawee has accepted the bill, he is known as the acceptor. It is only the bill of exchange (other than cheque) which requires acceptance. However, acceptance is not necessary to make a valid bill. If a bill is not accepted, it does not become invalid. It only becomes dishonoured by non-acceptance.

3.2.1.4 Presentation for acceptance may be excused in the following circumstances:

- (a) Where the drawee is dead or insolvent.
- (b) Where the drawee is a fictitious person or one incapable of contracting.
- (c) When the drawee cannot be found with reasonable efforts.
- (d) When acceptance has been refused on some other grounds.

3.2.1.5 Acceptance in Case of Bills in Sets:

Where a bill is drawn in sets, the acceptance is required to be put on one part only. Where the drawee signs his acceptance on two or more parts, he may become liable on each of them respectively.

3.2.1.6 When presentation for acceptance is necessary:

- (a) Where the bill is payable at a given time after acceptance or after sight.
- (b) Where the bill expressly stipulates that it shall be presented for acceptance before presented for payment.
- (c) Where the bill is made payable at a place other than the place of residence or business of the drawee.

In no other case is presentation for acceptance necessary in order to render liable any party to the bill.

3.2.1.7 Types of Acceptance:

Acceptance may be *either general* or qualified.

- (a) **General Acceptance:** An acceptance is said to be general when the drawee accepts the bill without qualification to the order of the drawer. If the acceptance is not absolute, the holder may treat the bill as dishonoured by non- acceptance.
- (b) **Qualified Acceptance:** *An acceptance is said to be qualified when the drawee accepts the bill subject to qualification.* It may be noted that an acceptance will not be treated as a qualified acceptance unless the qualification is expressed on the bill in the clearest language. The qualification may relate to an event, amount, place, time, etc.

Circumstances indicating Qualified Acceptance

According to Section 86, an acceptance is qualified under the following circumstances:

- (a) Where it undertakes the payment on the happening of an event therein stated;
- (b) Where it undertakes the payment of part only of the sum ordered to be paid;
- (c) Where it undertakes the payment at a specified place of his choice and not otherwise or elsewhere;
- (d) Where it undertakes the payment at a time other than that at which under the order it would be legally due.
- (e) Where it is not signed by all drawees who are not partners.

Effect of Qualified Acceptance

- (a) The holder, may, treat the bill as dishonoured due to non-acceptance and after giving due notice of dishonour, sue the drawer and prior endorsers.
- (b) If he accepts a qualified acceptance all prior parties whose consent is not obtained are discharged as against the holder and those deriving title from him.

Examples of Qualified Acceptance

- (a) Accepted payable when in funds.
- (b) Accepted payable on giving up bill of lading.
- (c) Accepted payable when a cargo consigned to me is sold.
- (d) A bill drawn for ₹ 1,000 accepted for ₹ 900 only.
- (e) Accepted payable at Delhi only where no place of payment being specified in the order.
- (f) Accepted payable at Delhi only where the place of payment specified in the order was Bombay.
- (g) Accepted payable 4 months after date where the bill drawn as payable 3 months after date.
Accepted by A, B and C where drawees were A, B, C and D who not partners.



- (h) Accepted payable on receiving income tax refund.
- (i) A bill drawn for ₹1000 but accepted to the extent considered reasonable and just by a common friend of both.

3.2.1.8 Time for Presentation for Sight

If promissory note is payable after sight it must be presented for acceptance within the specified time or if no time is specified within a reasonable time. What is a reasonable time, is a question of fact that depends upon the means of communication available and usage of a particular trade.

Where to present: As per section 61 the bill should be presented at a place specified for presentation. If the drawee can not be found at that place after reasonable effort the bill is deemed to be dishonored. If no such place is mentioned it should be presented at the drawee's place of business or residence.

3.2.1.9 Presentation for Payment

As per section 64 it is the duty of the holder to present the bill for payment in accordance with the provisions of the Act. If the bill is not presented for payment in accordance with the rules provided the other party is discharged from their liability to the holder.

In case of a promissory note which is payable on demand and is not made payable at a specified place, presentation for payment is not required.

Time of presentation:

As per section 67 where an instrument is payable after a fixed period of time it should be presented for payment on its maturity. If the promissory note is payable in installment, it should be presented for payment on the 3rd day after the date fixed for each installment. A instrument payable on demand must be presented for payment within a reasonable time after it is received by the holder.

Place of Presentation:

Where a bill or cheque is made, drawn or accepted payable at a specified place and not elsewhere it must be presented at that place otherwise no party would be liable to the holder. Similarly a bill or note made payable at a specified place must be presented at that place, otherwise the drawer or maker will be discharged from liability to the holder.

Presentment for Payment when Excused

No presentment is necessary and the instrument can be treated as dishonoured in the following cases:

- (a) Where the maker, drawer or acceptor actively does something so as to intentionally obstruct the presentment of the instrument, e.g., deprives the holder of the instrument and keeps it after maturity.
- (b) Where his business place is closed on the due date.
- (c) Where no person is present to make payment at the place specified for payment.
- (d) Where he cannot, after due search be found. (Section 61)
- (e) Where there is a promise to pay notwithstanding non-presentment.
- (f) Where the presentment is express or impliedly waived by the party entitled to presentment.
- (g) Where the drawer could not possibly have suffered any damage by non-presentment.
- (h) Where the drawer is a fictitious person, or one incompetent to contract.
- (i) Where the drawer and the drawee are the same person.
- (j) Where the bill is dishonoured by non-acceptance.

- (k) Where presentment has become impossible, e.g., the declaration of war between the countries of the holder and drawee.
- (l) Where though the presentment is irregular, acceptance has been refused on some other grounds.

3.2.2 Negotiation and Assignment

An essential characteristic of a negotiable instrument is that it is freely transferable. The transfer may take place through (i) negotiation (ii) assignment.

Under negotiable instrument act the instruments are freely transferred from one person to another for making payments or discharging liabilities. Generally the holder of instrument but transfers it to his creditors in order to clear his debts.

According to Sec 14," When a promissory note, bill of exchange or cheque is transferred to any person, so as to constitute that person the holder thereof, the instrument is said to be negotiated. In order to negotiate an instrument the following conditions must be satisfied :

- (i) Instrument must be transferred in accordance with the provision of negotiable instrument act.
- (ii) Title of the instrument must be transferred.

A negotiable instrument may be transferred in any of two ways:

- (i) By negotiation.
- (ii) By assignment.

I. By negotiation:

A instrument may be transferred from one person to another person by negotiation. The process of transferring the title or ownership of the negotiable instrument is called negotiation.

(i) Modes of negotiations:

There are two ways of negotiation to transfer a negotiable instrument.

(A) Negotiation by delivery:

A negotiable instrument payable to bearer can be transferred by delivery if does not require the signature of the transferor.

(i) Kinds of delivery:

Following are two kinds of delivery.

Actual delivery:

As between the parties standing in immediate relation to each other, delivery shall take effect from the moment its possession is transferred by the party making the instrument.

Constructive delivery:

As between the parties and any holder of the instrument other than holder in due course, instrument may be delivered conditionally or for some special purpose only and not transfer the property absolutely.

(B) Negotiation by endorsement and delivery:

A negotiable instrument payable to order can be negotiated only by the holder by the endorsement and delivery. Unless the holder signs his endorsement on the instrument and delivers in the transferee does not become a holder.

II. By assignment:

By assignment means transfer of ownership in the negotiable instrument by means of a written and



registered document under the provisions of transfer of property act. The assignee of the instrument becomes entitled in his own name to possession and to recover the amount due on the instrument from the parties thereof.

The basic difference between Negotiation and assignment are summarised as under :

Difference between Negotiation and Assignment

Negotiation	Assignment
(1) Negotiation may be effected by mere delivery if the instrument is bearer one or endorsement and delivery if it is an order instrument.	Assignment should always be on a written document signed by transferor.
(2) Transferee gets the rights of Holder in due course.	Title of the transferee is always subject to the title of the transferor.
(3) Consideration is always presumed.	Consideration must be proved.
(4) No information of transfer needs to be given to the debtor in order to bind him.	Notice of assignment is must in order to bind the debtor.

The Negotiable Instruments Act does not deal with transfer of negotiable instrument through assignment. Transfer through negotiation takes place by two methods:

- (i) Bearer instruments – Negotiable by delivery only.
- (ii) Order instruments – Negotiable by endorsement and delivery.

3.2.3 Endorsement

Endorsement (Indorsement) means writing of a person's name (other than maker) on the face or back of an instrument or on a slip of paper attached thereto for the purpose of negotiation. The person signing the instrument is known as endorser and the person in whose favour it is endorsed is known as endorsee.

3.2.3.1 Essentials of a valid endorsement

- (1) It must be on the instrument itself or on a separate slip of paper (called allonge) attached thereto.
- (2) For the purpose of negotiation, it must be signed by the endorser.
- (3) The instrument may contain in addition to the signature of the endorser, the name of the endorsee also.

No particular form of words is necessary for endorsement.

- (4) Endorsement is complete when the instrument is delivered to the endorsee with the intention of passing the property in it to the endorsee. Delivery is to be made by the endorser himself or someone on behalf of him.

Who may endorse a negotiable instrument

After having understood the meaning of endorsement of a negotiable instrument next question is who can endorse a negotiable instrument.

As per Section 51 of the Act every sole maker, drawer, payee or endorsee, or all of several joint makers, drawers, payees or endorsees, of a negotiable instrument may, if the negotiability of such instrument has not been restricted or excluded as mentioned in Section 50 endorse and negotiate the same.

A maker or drawer can endorse or negotiate an instrument, only when he is in lawful possession or is holder thereof, or enables a payee or endorsee to endorse or negotiate an instrument, unless he is holder thereof.

Illustration:

A bill is drawn payable to A or order. A endorses it to B, the endorsement not containing the words “or order” or any equivalent words. B may negotiate the instrument.

3.2.3.2 Class of Endorsement

An endorsement can be of the following types;

- (a) **Blank or general endorsement:** It is an endorsement when the endorser merely signs on the instrument without mentioning the name of the person in whose favor the endorsement is made. Endorsement in blank does not signify any endorsement. An endorsement in blank may be followed by an endorsement in full.

Example: A bill is payable to X who endorses the bill by simply affixing his signature. This is an endorsement in blank by X. In this case the bill becomes payable to bearer.

- (b) **Special or full endorsement (Sec16):** When the endorsement contains not only the signature of the person who endorsed it but also the name of the person in whose favor the endorsement is made then it is endorsement in full. As per Section 16 If the endorser signs his name only, the endorsement is said to be ‘In blank’, and if he adds a direction to pay the amount mentioned in the instrument to, or to the order of, a specified person, the endorsement is said to be ‘in full’, and the person so specified is called the endorsee of the instrument.

Example: A is the holder of a bill of endorsed by B in blank. A writes over B's signature the words pay to C or order” A is not liable as endorser but the writing operates as an endorsement in full from B to C.

- (c) **Partial endorsement (Sec 56):** A partial endorsement is one which purports to transfer the endorsee a part only of the sum payable on the instrument. Such an endorsement does not operate as a negotiable of the instrument. As per Section 56, no writing on a negotiable instrument is valid for the purpose of negotiation if such writing purports to transfer only a part of the amount appearing to be due on the instrument; but where such amount has been partly paid a note to that effect may be endorsed on the instrument, which, may then be negotiated for the balance.

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

- (d) **Restrictive endorsement (Sec 50):** The endorsement of an instrument may contain terms making it restrictive. Restrictive endorsement is one which is either by express words restricts or prohibits the further negotiation of a bill or which expresses that it is not a complete and unconditional transfer of the instrument but is a mere authority to the endorsee to deal with the bill as directed by such endorsement.
- (e) **Conditional endorsement:** It is open to the endorser to annex some conditions to his own liability on the endorsement. An endorsement where the endorsee limits or negotiates his liability by putting some conditions in the instrument is called a conditional endorsement.

3.2.3.3 Effect of endorsement

The endorsement of a negotiable instrument followed by delivery transfers to the endorsee the property therein with the right of further negotiation, but the endorsement may by express words, restrict or exclude such right, or may merely constitute the endorsee an agent to endorse the instrument, or to receive its contents for the endorser, or for some other specified person.

Illustrations

B signs the following endorsements on different negotiable instruments payable to bearer,

- (a) pay the contents to C only.
- (b) pay C for my use.
- (c) pay C on order for the account to B.



- (d) the amount within must be credited to C. These endorsements exclude the right of further negotiation by C.
- (e) pay C.
- (f) pay C value in account with the Oriental Bank.
- (g) pay the contents to C, bring part of the consideration in a certain deed of assignment executed by C to endorser and others.

These endorsements do not exclude the right of further negotiation by C.

3.2.3.4 Negotiation Back

Where an endorser negotiates an instrument and again becomes its holder, the instrument is said to be negotiated back to that endorser and none of the intermediary endorsees are then liable to him. The rule prevents a circuity of action. For example, A, the holder of a bill endorses it to B. B endorses to C and C to D, and endorses it again to A. A, being a holder in due course of the bill by second endorsement by D, can recover the amount thereof from B, C or D and himself being a prior party is liable to all of them. Therefore, A having been relegated by the second endorsement to his original position, cannot sue B, C and D.

“Where an endorser so excludes his liability and afterwards becomes the holder of the instrument, all the intermediate endorsers are liable to him.” An illustration will make the point clear. A is the payee of a negotiable instrument. He endorses the instrument ‘sans recourse’ to B, B endorses to C, C to D, and D again endorses it to A. In this case, A is not only reinstated in his former rights but has the right of an endorsee against B, C and D.

3.2.3.5 Negotiation of Lost Instrument or that Obtained by Unlawful Means

When a negotiable instrument has been lost or has been obtained from any maker, acceptor or holder thereof by means of an offence or fraud, or for an unlawful consideration, no possessor or endorsee, who claims through the person who found or obtained the instrument is entitled to receive the amount due thereon from such maker, acceptor, or holder from any party prior to such holder unless such possessor or endorsee is, or some person through whom he claims was, a holder in due course.

3.2.3.6 Forged Endorsement

The case of a forged endorsement is worth special notice. If an instrument is endorsed in full, it cannot be negotiated except by an endorsement signed by the person to whom or to whose order the instrument is payable, for the endorsee obtains title only through his endorsement. Thus, if an instrument be negotiated by means of a forged endorsement, the endorsee acquires no title even though he be a purchaser for value and in good faith, for the endorsement is a nullity. Forgery conveys no title. But where the instrument is a bearer instrument or has been endorsed in blank, it can be negotiated by mere delivery, and the holder derives his title independent of the forged endorsement and can claim the amount from any of the parties to the instrument. For example, a bill is endorsed, “Pay A or order”. A endorses it in blank, and it comes into the hands of B, who simply delivers it to C, C forges B’s endorsement and transfer it to D. Here, D, as the holder does not derive his title through the forged endorsement of B, but through the genuine endorsement of A and can claim payment from any of the parties to the instrument in spite of the intervening forged endorsement.

3.3 LIABILITY OF PARTIES

Sections 30 to 32 and 35 to 42 of the Negotiable Instruments Act, 1881 deal with the question of liability of parties to negotiable instruments. These sections are discussed below:

a) Liability of drawer:

The drawer of a bill of exchange or cheque is bound in case of dishonour by the drawee or acceptor thereof, to compensate the holder, provided due notice of dishonour has been given to, or received by, the drawer as hereinafter provide. (Sec 30)

b) Liability of drawee of cheque:

The drawee of a cheque having sufficient funds of the drawer in his hands properly applicable to the payment of such cheque must pay the cheque when duly required so to do, and, in default of such payment, must compensate the drawer for any loss or damage caused by such default. (Sec 31)

c) Liability of maker of note and acceptor of bill:

In the absence of contract to the contrary, the maker of a promissory note and the acceptor before maturity of a bill of exchange are bound to pay the amount thereof at maturity according to the apparent tenor of the note or acceptance respectively, and the acceptor of a bill of exchange at or after maturity is bound to pay the amount thereof to the holder on demand.

In default of such payment as aforesaid, such maker or acceptor is bound to compensate any party to the note or bill for any loss or damage sustained by him and caused by such default. (Sec 32)

d) Liability of endorser:

In the absence of a contract to the contrary, whoever indorses and delivers a negotiable instrument before maturity, without in such endorsement, expressly excluding or making conditional his own liability, is bound thereby to every subsequent holder, in case of dishonour by the drawee, acceptor or maker, to compensate such holder for any loss or damage caused to him by such dishonor, provided due notice of dishonour has been given to, or received by, such endorser as hereinafter provided.

Every endorser after dishonour is liable as upon an instrument payable on demand. (Sec 35)

e) Liability of prior parties to holder in due course:

Every prior party to a negotiable instrument is liable thereon to a holder in due course until the instrument is duly satisfied. (Sec 36)

f) General rules regarding liability- the principle of suretyship:

i) Maker, drawer and acceptor principals

The maker of a promissory note or cheque, the drawer of bill of exchange until acceptance, and the acceptor are, in the absence of a contract to the contrary, respectively liable thereon as principal debtors, and the other parties thereto are liable thereon as sureties for the maker, drawer or acceptor, as the case may be. (Sec 37)

ii) Prior party a principal in respect of each subsequent party

As between the parties so liable as sureties, each prior party is, in the absence of a contract to the contrary, also liable thereon as a principal debtor in respect of each subsequent party. (Sec 38)

Example:

A draws a bill payable to his own order on B, who accepts, A afterwards endorses the bill to C, C to D to E. As between E and B, B is the principal debtor, and A, C and D are his sureties. As between E and A, A is the principal debtor, and C and D are his sureties. As between E and C, C is the principal debtor and D is his surety.

iii) Surety ship

When the holder of an accepted bill of exchange enters into any contract with the acceptor which, under section 134 or 135 of the Indian Contract Act, 1872 (9 of 1872), would discharge the other parties, the holder may expressly reserve his right to charge the other parties, and in such case they are not discharged. (Sec 39)



iv) Discharge of endorser's liability

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

Illustration

A is the holder of a bill of exchange made payable to the order of B, which contains the following endorsements in blank-

First endorsement, "B".

Second endorsement, "C".

Third endorsement, "D".

Fourth endorsement "E".

This bill A puts in suit against E and strikes out, without E's consent, the endorsements by C and D. A is not entitled to recover any thing from E.

g) Acceptor bound, although endorsement forged

An acceptor of a bill of exchange already indorsed is not relieved from liability by reason that such endorsement is forged, if he knew or had reason to believe the endorsement to be forged when he accepted the bill (Sec 41)

h) Acceptance of bill drawn in fictitious name

An acceptor of a bill of exchange drawn in a fictitious name and payable to the drawer's order is not, by reason that such name is fictitious, relieved from liability to any holder in due course claiming under an endorsement by the same hand as the drawer's signature, and purporting to be made by the drawer.

Other rules:

- (i) Where instrument is negotiated to holder in due course, other parties to instrument cannot escape liability on the pretext that delivery of the instrument was conditional or for special purpose only. (Sec 46)
- (ii) A holder of a negotiable instrument who derives title from a holder in due course has the rights thereon of that holder in due course. (Sec 53)
- (iii) When a negotiable instrument has been lost, or has been obtained from any maker, acceptor or holder thereof by means of offence or fraud, or for an unlawful consideration, no possessor or indorsee who claims through the person who found or so obtained the instrument is entitled to receive the amount due thereon from such maker, acceptor or holder, or from any party prior to such holder, unless such possessor or indorsee is, or some person through whom he claims was, a holder thereof in due course. (Sec 58)
- (iv) No maker of a promissory note, and no drawer of a bill of exchange or cheque, and no acceptor of a bill of exchange for the honor of the drawer cannot deny against holder in due course, presume the fact of dishonor, validity of the instrument as originally made or drawn. (Sec 120)
- (v) No maker of a promissory note and no acceptor of a bill of exchange or cheque, and no acceptor of a bill of exchange payable to order shall in suit thereon by a holder in due course, be permitted to deny the payee's capacity, at the rate or the note or bill, to endorse the same. (Sec 121)

3.4 DISHONOUR OF NEGOTIABLE INSTRUMENT

A bill may be dishonoured by non-acceptance or non-payment. A cheque or note is dishonoured by non-payment only. If an instrument is dishonoured, the holder must give notice of dishonour to all prior parties unless the notice is excused, otherwise he loses his right of action against all prior parties.

3.4.1 Object of Notice: Notice of dishonour is necessary to inform the prior parties liable on the instrument about liability which accrues as a result of dishonour of the instrument.

3.4.2 Form of Notice: Notice of dishonour may be oral or written. When written, it may be sent by post. It must be given within reasonable time at the place of business or residence (if there is no place of business) to the party for whom it is intended.

Reasonable time is depends on nature of instrument and usual course of dealing with respect to similar instruments. Public holidays are to be excluded in calculating time.

3.4.3 Notice of dishonour is not necessary in the following circumstances:

- (i) When it is dispensed with by the party entitled thereto.
- (ii) When the party charged could not suffer damage for want of notice.
- (iii) In case of a promissory note which is not negotiable.
- (iv) To charge the drawer when drawer and acceptor are the same person.
- (v) When the party entitled to notice, promises unconditionally to pay the amount due on the instrument.
- (vi) When the party entitled to notice could not be found after due search.
- (vii) To charge the drawee, when he has countermanded payment.

3.4.4 Duties of the holder upon dishonour

- (i) The holder must give notice of dishonour to all prior parties who are liable to pay.
- (ii) Upon dishonour of the instrument, the holder may get the fact of dishonour noted and protested by the Notary Public.
- (iii) After the formality of noting and protesting, the last option available to the holder is to file suit for the amount due against the parties liable for payment.

3.4.5 Instruments acquired after the notice of dishonour/maturity: Holder acquiring the instrument after notice of dishonour or after maturity, as against the other parties, has the rights of his immediate transferor.

3.4.6 Noting: Noting means recording the fact of dishonour noted by Notary Public upon the instrument. Noting must contain the following particulars:

- (i) The fact of dishonour,
- (ii) Date of dishonour
- (iii) Reasons, if any, assigned for dishonour,
- (iv) If the instruments is not expressly dishonoured, reasons why the holder thinks so,
- (v) Notary charges.

3.4.7 Protest: It is a formal notarial certificate attesting the dishonour of a bill or note. A protest must contain the following particulars:

- (i) The instrument or literal transcript of the same;
- (ii) The name of the person for whom or against whom the instrument is protested;
- (iii) The fact of dishonour;
- (iv) Place and time of dishonour;
- (v) Signature of the Notary Public;
- (vi) In case of acceptance/payment for honour, name of the person accepting or paying and the name of the person for whom it is paid or accepted.



3.4.8 Rules as to Compensation

- a) **Compensation to holder:** The holder is entitled to receive -
 - (i) The amount due on the instrument,
 - (ii) Expenses incurred in presenting, noting and protesting the instrument.
- b) **Re-exchange:** Where the person charged resides in a country different from that in which the instrument was payable, the holder is entitled to receive the compensation at current rate of exchange between two countries on the date of dishonour.
- c) **Compensation to endorser:** The endorser, who being liable has paid the amount due on the instrument is entitled to receive the amount along with interest @18%p.a. from the date of payment till realization of the amount together with the incidental expenses.
- d) **Re-draft:** The party entitled to compensation may draw a bill for the amount due along with expenses incurred thereon. Such a bill is called 'redraft'. If redraft is dishonoured, the party dishonouring the same is liable to compensate in the same manner as in case of original bill.

3.4.9 Penalties in case of Dishonour of certain cheques for insufficiency of funds (Section 138 to 142)

Advent of cheques in the market have given a new dimension to the commercial and corporate world, its time when people have preferred to carry and execute a small piece of paper called Cheque than carrying the currency worth the value of cheque. Dealings in cheques are vital and important not only for banking purposes but also for the commerce and industry and the economy of the country. But pursuant to the rise in dealings with cheques also rises the practice of giving cheques without any intention of honoring them. Before 1988 there being no effective legal provision to restrain people from issuing cheques without having sufficient funds in their account or any stringent provision to punish them in the vent of such cheque not being honoured by their bankers and returned unpaid. Of course on dishonour of cheques there is a civil liability accrued. However in reality the processes to seek civil justice becomes notoriously dilatory and recover by way of a civil suit takes an inordinately long time. To ensure promptitude and remedy against defaulters and to ensure credibility of the holders of the negotiable instrument a criminal remedy of penalty was inserted in Negotiable Instruments Act, 1881 in form of the Banking, Public Financial Institutions and Negotiable Instruments Laws (Amendment) Act, 1988 which were further modified by the Negotiable Instruments (Amendment and Miscellaneous Provisions) Act, 2002[3].

a) Dishonour of cheque for insufficiency of funds in the account:

Section 138 creates statutory offence in the matter of dishonour of cheques on the ground of insufficiency of funds in the account maintained by a person with the banker. Section 138 of the Act can be said to be falling either in the acts which are not criminal in real sense, but are acts which in public interest are prohibited under the penalty or those where although the proceeding may be in criminal form, they are really only a summary mode of enforcing a civil right. Normally in criminal law existence of guilty intent is an essential ingredient of a crime. However the Legislature can always create an offence of absolute liability or strict liability where 'mens rea' is not at all necessary.

While elucidating on this aspect the *Kerala High Court in K. S. Auto vs. Union of India* held that:

"Knowledge or reasonable belief, that pre-requisite could be statutorily dispensed with in appropriate cases by creating strict liability offences in the interest of the Nation."

Further the creation of the strict liability is an effective measure by encouraging greater vigilance to prevent usual callous or otherwise attitude of drawers of cheques in discharge of debts or otherwise. The words as appearing in clause (b) of Sec 138 cannot be construed even to imply failure without reasonable cause in view of the explicit language in which the provision is couched, the principle of strict liability incorporated in the main enacting clause.

b) Presumption in favour of the holder (sec 139)

It shall be presumed unless otherwise proved that the holder of a cheque has received the cheque for discharge in whole or in part of any debt or liability.

c) Defence which may not be allowed in any prosecution u/s 138 (sec140)

The drawer cannot pray that at the time of issue of cheque, he had no reason to believe that the cheque will be dishonoured.

d) Offences by Companies (sec.141)

In case the party committing an offence is a company, every person in charge of the company and responsible in carrying out the business, shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly. However the person will not be liable if -

- (i) It is proved that the offence was committed without his knowledge;
- (ii) Where he has exercised all due diligence to prevent occurrence of that offence;
- (iii) Where a person is Director as a Government nominee.

e) Cognizance of offences

- (i) No court inferior to that of a Metropolitan Magistrate or Judicial Magistrate of first class shall try any offence u/s 138.
- (ii) No court shall take cognizance of offences u/s 138 except upon a complaint, in writing made by payee or holder in due course.
- (iii) Such complaint should be made within one month from the date on which cause of action arises.
- (iv) The complainant may satisfy the court that there was sufficient ground for not making the complaint within such period.

Constitutional validity of the provisions

In **B. Mohana Krishna v. Union of India**, the question came up for consideration that whether the presumption raised in section 139 that the holder of the cheque received the cheque of the nature referred to in Section 138, unless the contrary is established is violative of Article 20 (3) of the Constitution of India. The Court while answering negative held that:

"Unless a person is compelled to be a witness against himself, Article 20 (3) has no application. The person charged under Section 138 is not compelled to be a witness against himself. The presumption of the nature incorporated in Section 139 is a common feature in criminal statutes for example section 12 of the Protection of Civil rights Act. The presumption under Section 139 in favour of holder of cheque would not, therefore be violative of Article 20 (3)."

Further such imposition of strict liability was put to judicial scrutiny on grounds of unreasonableness and arbitrariness in **Mayuri Pulse Mills vs. Union of India** where the Bombay High Court held that:

"Normally in Criminal law existence of a guilty intent is an essential ingredient of a crime and the principle is expressed in the maxim 'actus non facit rum nisi mens sit rea'. This is a general principle. However the legislature can always create an offence of absolute liability or strict liability are justified and cannot be said to be unreasonable."

Section 138 was also put to test in **Ramawati Sharma vs. Union of India** in light of Article 21 of the Constitution of India where the court held that:

"Mere taking of loan is not, thus, made punishable under certain circumstances and after following certain conditions. It may not, therefore, be stated that the liberty of a person was being curtailed by an arbitrary procedure or that such a provision is violative of Article 21 of the Constitution".



In **K.S. Anto vs. Union of India** the question of double jeopardy as enshrined in Article 20 (2) in light of section 138 and section 420 of the Indian Penal Code where the court held that :

“Offences under section 138 of the Negotiable Instruments Act and section 420 of the Penal Code are different and the ingredients are different and the ingredients are also different. Convictions for different offences separately is not barred under Article 20 (2). In spite of prosecutions and convictions under section 138, there will be no constitutional bar in prosecution for an offence punishable under Section 420 of the Penal Code and a prosecution will be if such an offence is made out.”

Question of maintainability of criminal charge with a civil liability : There is nothing in law to prevent the criminal courts from taking cognizance of the offence, merely because on the same facts, the person concerned might also be subjected to civil liability or because civil remedy is obtainable. Civil and criminal proceedings are co extensive and not exclusive. If the elements of the offence under Section 138 of the Negotiable Instruments Act are made out on the face of the complaint petition itself, enforcement of the liability through a civil court will not disentitle the aggrieved person from prosecuting the offender for the offence punishable under section 138 of the Act.

3.4.10. Summary Trial and Disposal (Secs. 143 to 147)

a) Power of court to try cases summarily (Sec 143)

- (i) All offences u/s 138 to 147 shall be tried by Metropolitan Magistrate or Judicial Magistrate of first class.

The Magistrate can pass a sentence of imprisonment for a term not exceeding one year and an amount of fine exceeding five thousand rupees.

- (ii) Trial should done in continuous manner on day to day basis. If adjournment is required beyond the following day, the reasons should be recorded in writing.
- (iii) Every effort should be made to conclude trial within 6 months from the date of filing.

b) Mode of service of summons (Sec 144)

Summons may be serviced to the accused or witness at his usual place of residence or business by speed post or courier approved by a court of session.

c) Evidence on affidavit (Sec 145)

- (i) The evidence produced by the plaintiff may be given on affidavit and may be read in evidence of any enquiry, trial or other proceeding under the Code of Criminal Procedure.
- (ii) The court may on application of the prosecution or accused, if it thinks fit, summon any person producing evidence on affidavit as to facts contained therein.

d) Bank's slip acting as prima facie evidence (Sec 146)

The Court shall in respect of every proceeding under Chapter XVII, presume the fact of dishonour on basis of production of bank's slip or memo having thereon the official mark denoting that the cheque has been dishonoured, unless such fact is proved false.

e) Offences to be compoundable (Sec 147)

Notwithstanding anything contained in the Code of Criminal Procedure, 1973, every offence punishable under this Act shall be punishable.

Conclusion

Though insertion of the penal provisions have helped to curtail the issue of cheque lightheartedly or in a playful manner or with a dishonest intention and the trading community now feels more secured in receiving the payment through cheques. However there being no provision for recovery of the

amount covered under the dishonoured cheque, in a case where accused is convicted under section 138 and the accused has served the sentence but, unable to deposit amount of fine, the only option left with the complainant is to file civil suit. The provisions of the Act do not permit any other alternative method of realization of the amount due to the complainant on the cheque being dishonored for the reasons of "insufficient fund" in the drawer's account. The proper course to be adopted by the complainant in such a situation should be by filing a suit before the competent civil court, for realization/ recovery of the amount due to him for the reason of dishonoured cheque which the complainant is at liberty to avail of if so advised in accordance with law.

3.5. DISCHARGE OF A NEGOTIABLE INSTRUMENT

An instrument is said to be discharged when all rights of actions under it are completely extinguished and it ceases to be negotiable. In relation to a Negotiable Instrument, the term is used in two senses:

- (i) Discharge of the instrument, and
- (ii) Discharge of one or parties from liability thereon.

3.5.1. Different modes of discharge are as follows:

- (i) By payment in due course-This is the most obvious mode of discharge of an instrument. The payment should be made by the person primarily liable on the instrument.
- (ii) Party primarily liable on the bill becoming holder of the same.
- (iii) By express waiver by the holder.
- (iv) By cancellation of the instrument by the holder or his authorized agent.
- (v) By discharge as any other simple contract.

3.5.2. Discharge of a party or parties:

- (i) By payment in due course.
- (ii) Holder or his authorized agent cancelling the name of the party on instrument with a view to discharge him results in discharge of the party along other subsequent parties who have right of recourse against the party whose name is cancelled.
- (iii) If holder of a negotiable instrument releases any party to the instrument by any method other than cancellation, the said party is discharged.
- (iv) If holder of a negotiable instrument allows drawee more than 48 hours exclusive of public holidays, to consider whether or not to accept the instrument, all prior parties not consenting to such allowance are thereby discharged from the liability.
- (v) If a cheque is not presented for payment within a reasonable time and the drawer suffers loss due to failure of bank, he is discharged from liability to the extent of such damage.
- (vi) Any party, other than the party primarily liable, to whom notice of dishonour is not given by the holder is discharged from liability against the holder unless notice of dishonour is not required.
- (vii) If a holder agrees to a qualified acceptance, all prior parties who do not consent to such acceptance are discharged from the instrument.
- (viii) By operation of law-This includes discharge:-
 - (a) By order of an Insolvency Court, discharging the insolvent;
 - (b) By merger of the debt under the instrument with judgement debt when a judgement is obtained against the drawer or acceptor;
 - (c) By lapse of time.



- (ix) If an instrument is materially altered, the instrument is void against the persons who were parties before the alteration if they do not consent to the alteration.
- (x) If a bill/note/ cheque is materially altered or a cheque is crossed but does not appear so on face of it and the party liable makes payment otherwise in due course, he is discharged.

3.5.3 Material Alteration of an Instrument Means

- (i) Alteration which changes the character of the instrument;
- (ii) Alteration which changes the rights and liabilities of the parties;
- (iii) Alteration which changes the operation of the instrument.

Examples of material alterations are:

- (i) Date.
- (ii) Time of payment.
- (iii) Place of payment.
- (iv) Sum payable.
- (v) Relationship among parties.
- (vi) Converting an order instrument into bearer one.

Examples of alterations which are not material:

- (i) Filling the blanks of the instrument.
- (ii) Converting blank endorsement to 'full' endorsement.
- (iii) Crossing of cheques.
- (iv) Alteration made with consent of all parties.
- (v) Converting bearer cheque into a cheque payable to order.

3.6 HUNDIS

Hundis are indigenous negotiable instruments written in vernacular language. The term *hundi* is derived from the Sanskrit word '*hund*' which means 'to collect'. There are two main kinds of hundis:

1. Darshni hundi, i.e. hundi payable at sight.
2. Muddati hundi, i.e. hundi payable after a specified period.

Hundis are governed by local usage and customs. The parties may, however, exclude any prevalent custom or usage. In that case the provisions of Negotiable Instruments Act, 1881 shall apply.

A notice of dishonour of a hundi is not given if there is a local custom or usage. The parties may however, exclude any prevalent customs or usage. In such a case and also when there is no customary rule on certain points, the provisions of the Negotiable Instrument will apply.

3.7 BANKER AND CUSTOMER

The law regulating the relations between banker and customer are governed by –

- (i) Indian Contract Act, 1872
- (ii) The Negotiable Instruments Act, 1881.

However, these Acts are not exhaustive. The Courts refer to English Common Law whenever any point not covered by the Indian Acts arises.

3.7.1 Banker

The Banking Regulation Act, 1949 defines 'banking company' as 'a company which transacts business of banking in India,' and the term banking as 'accepting for the purpose of lending or investment, of deposits of money from public repayable on demand or otherwise, and withdrawable by cheque, draft, order or otherwise.'

3.7.2 Customer

A person becomes a customer of a bank when the bank agrees to open an account of him. The term has not been defined by statutes.

3.7.3. Legal relationship between banker and the customer-special features

- (i) A banker, having sufficient funds in the account of the customer, has legal obligation to honour the cheques of the customer. Wrongful refusal on the part of banker makes him liable to customer to claim damages.
- (ii) The banker is also under obligation to maintain proper record of transactions of customer.
- (iii) The banker has to follow the express instructions of the customer provided these are within the scope of banker-customer relationship.
- (iv) The banker may in absence of a contract to the contrary, retain as security for general balance of account, any goods and securities bailed to him by customer.
- (v) The banker has right to claim incidental charges for service provided and interest for money lent to customer as per rules and regulations.
- (vi) The banker has legal obligation to maintain secrecy about state of affairs of customer's accounts.
- (vii) The banker has right to set-off debit balance of one account with credit balance of another account of the same customer.
- (viii) The banker has right of appropriation against the customer.

3.7.4. A banker must dishonour a customer's cheque under following circumstances:

- (i) The customer becomes insolvent.
- (ii) The customer becomes insane.
- (iii) The customer countermands payment.
- (iv) On receiving the notice of death of a customer.
- (v) The customer gives notice of closure of account.
- (vi) The customer gives notice of assignment of credit balance of his account.
- (vii) When the banker has reason to believe that the title of the person presenting the cheque is defective.
- (viii) When the banker receives notice of loss of cheque by customer.

3.8 INTERNATIONAL LAW RELATING TO FOREIGN NEGOTIABLE INSTRUMENTS

- (i) **Liability** – The liability of a drawer /maker is governed by the law of land where the instrument is made.
The liability of the acceptor /endorser is determined by law of the place where the instrument is payable.
This rule is however subject to contract between parties.
- (ii) **Dishonour** – The rules regarding dishonour are governed by the law of the place where the instrument is payable.
- (iii) If an instrument is made/drawn/accepted in a place out of India as per Indian Law, its subsequent acceptance/endorsement in India will not invalidate it even if it is invalid in a foreign country.
- (iv) The law regarding Negotiable Instrument is presumed to be same as that of India unless the contrary is proved.



THE NEGOTIABLE INSTRUMENT ACT, 1881

Multiple Choice Questions

Q1. The Negotiable Instrument Act is applicable to—

- (a) Whole of India
- (b) Whole of India except JK state
- (b) Whole of India except Jammu and Kashmir city
- (d) Whole of India except newly carved out states after 2000

Q2. The Negotiable Instruments Act, 1881 came into force on

- (a) 9th December, 1881
- (b) 19th December, 1881
- (c) 1st March, 1882
- (d) None of the above.

Q3. The term Negotiable instrument is defined in section---of the Negotiable Instrument Act, 1881

- (a) 2
- (b) 13
- (c) 12
- (d) 10

Q4. The undertaking contained in a promissory note, to pay a certain sum of money is----

- (a) Conditional
- (b) Unconditional
- (c) May be conditional or unconditional depending upon the circumstances
- (d) None of the above.

Q5. Which of these is not a negotiable Instrument as per the Negotiable Instrument Act, 1881

- (a) Bill of exchange
- (b) Delivery note
- (c) Bearer Cheque
- (d) Share certificate

Q6. ---- is not a negotiable instrument as per customs and usage

- (a) Delivery note
- (b) Railway Receipt
- (c) Cheque
- (d) Government promissory note

Q7. An instrument incomplete in one way or other is called---

- (a) Inchoate Instrument
- (b) Ambiguous instrument
- (c) Foreign Instrument
- (d) Dishonored Instrument

Q8. A bill of exchange contains a/an--

- (a) unconditional undertaking
- (b) unconditional order
- (c) conditional undertaking
- (d) conditional order.

Q9. Cheque is a---

- (a) promissory note
- (b) bill of exchange
- (c) both (a) and (b) above
- (d) None of the above.

Q10. A Corporation can be party to a Negotiable Instrument if---

- (a) authorized by its article of association
- (b) if special permission of Board of Directors taken
- (c) if special resolution by Share holders is passed
- (d) absolutely without any restrictions

Q11. The grace period for payment of a negotiable instrument other than payable on demand is----- days/months

- (a) 7days
- (b) 3 days
- (c) 1 month
- (d) 15 days

Q12. The term "a cheque in the electronic form" is defined in the Negotiable Instruments Act, 1881 - under

- (a) Section 6(a)
- (b) Section 6(1)(a)
- (c) Explanation 1(a) of Section 6
- (d) Section 6A.

Q13. If a minor draws, indorses, deliver or negotiates an instrument, such instrument binds-

- (a) All parties to the instrument including the minor
- (b) Only the minor and not other parties to the instrument
- (c) All parties to the instrument except the minor
- (d) None of the above.

Q14. How many parties are involved in a Bill of Exchange

- (a) 2
- (b) 3
- (c) 4
- (d) 1



Q15. The Negotiable Instrument Act, 1881 is subject to provision of sections----of RBI Act,

- (a) 36-37
- (b) 40-45
- (c) 30-34
- (d) 31-32

Q16. When a bill of exchange has been noted or protested for non-acceptance or for better security, and any person accepts it supra protest for honor of the drawer or of any one of the endorser, such person is called an---

- (a) acceptor for request
- (b) acceptor for demand
- (c) "acceptor for honour"
- (d) Acceptor in need

Q17. When the bill or in any endorsement thereon the name of any person is given in addition to the drawee to be resorted to in case of need such person is called a "---

- (a) Drawee in time
- (b) Drawee in case of need
- (c) Drawee by default
- (d) Drawee by chance

Q18. A promissory note, bill of exchange or cheque drawn or made in India and made payable in, or drawn upon any person resident in, India is treated as a/an -

- (a) Inland instrument
- (b) Local instrument
- (c) Foreign instrument
- (d) Indigenous instrument

Q19. Hundi's are Indigenous instrument written in-----language

- (a) Vernacular
- (b) Hindi
- (c) English
- (d) Sanskrit

Q20. Darshani hundi are payable on---

- (a) after 3 days
- (b) at sight
- (c) date specified therein
- (d) next day of presentation

Q21. Muddati Hundi are payable –

- (a) on demand
- (b) at sight
- (c) within 24 hours
- (d) after a specified period

Q22. A Banker must dishonor the customer's cheque' when—

- (a) the customer is insane
- (b) the customer has become insolvent
- (c) the customer countermand payment
- (d) in all the above cases

Q23. If an instrument may be construed either as a promissory note or bill of exchange, it is---

- (a) a valid instrument
- (b) an ambiguous instrument
- (c) a returnable instrument
- (d) none of the above.

Q24. If the words "not negotiable" are used with special crossing in a cheque, the cheque is---

- (a) not transferable
- (b) transferable
- (c) negotiable under certain circumstances
- (d) none of the above.

Q25. Crossing of a cheque effects the--

- (a) negotiability of the cheque
- (b) mode of payment on the cheque
- (c) both (a) and (b)
- (d) none of the above.

Q26. When a promise note, bill of exchange or cheque is transferred to any person, so as to continue the person the holder thereof, the instrument is said –

- (a) to be valid
- (b) to be honored
- (d) to be transferred
- (d) to be negotiated.

Q27. The maturity of a promissory note or bill of exchange is the date –

- (a) at which it falls due.
- (b) of its presentation
- (c) of its acceptance
- (d) none of these



Q28. When the day on which a promissory note or bill of exchange is at maturity is a public holiday, the instrument shall be deemed to be due on the—

- (a) Preceding day
- (b) next preceding business day
- (c) same day of next week
- (d) 3rd day following the date holiday

Q29. Writing of a person's name on the face or back of an instrument or on a slip of paper attached to it is known as---

- (a) Endorsement
- (b) Transfer
- (c) Negotiation
- (d) Transmission

Q30. A bearer instrument is negotiated by---

- (a) delivery only
- (b) delivery and endorsement
- (c) endorsement
- (d) stamping and attestation

Q31. A bill of Exchange must be---

- (a) in writing
- (b) unconditional
- (c) properly stamped
- (d) all the three

Q32. A Promissory note must be---

- (a) in writing
- (b) unconditional
- (c) signed by the maker
- (d) all the three

Q33. -----parties are involved in a Bill of exchange.

- (a) 2
- (b) 3
- (c) 4
- (d) 1

Q34. -----parties are involved in a Promissory note.

- (a) 2
- (b) 3
- (c) 4
- (d) 1

Q35. -----parties are involved in a Cheque.

- (a) 2
- (b) 3
- (c) 4
- (d) 1

Q36. A bill of exchange does not require—

- (a) crossing
- (b) acceptance
- (c) both
- (d) either a or b

Q37. When an Instrument is drawn conditionally or for a special purpose as a collateral security and not for the purpose of transferring property therein it is called a—

- (a) Escrow Instrument
- (b) Inchoate Instrument
- (c) Ambiguous Instrument
- (d) None of these

Q38. When a cheque is payable across the counter of a bank it is called—

- (a) OTC Cheque
- (b) Open cheque
- (c) Crossed cheque
- (d) Restricted cheque

Q39.-----days grace period is allowed for payment of a cheque.

- (a) 0
- (b) 3
- (c) 2
- (d) 7

Q40. A cheque is always payable on—

- (a) the date mentioned therein
- (b) on demand
- (c) 3 days after presentation
- (d) within 24 hrs of presentation

Answer

1	(a)	2	(c)	3	(b)	4	(b)	5	(d)	6	(c)	7	(a)	8	(b)	9	(b)	10	(a)
11	(b)	12	(c)	13	(c)	14	(b)	15	(d)	16	(c)	17	(b)	18	(a)	19	(a)	20	(b)
21	(d)	22	(d)	23	(b)	24	(a)	25	(c)	26	(d)	27	(a)	28	(b)	29	(c)	30	(a)
31	(d)	32	(d)	33	(b)	34	(a)	35	(b)	36	(c)	37	(a)	38	(b)	39	(a)	40	(b)

Study Note - 4

THE INDIAN PARTNERSHIP ACT, 1932



This Study Note includes

- 4.1 The Indian Partnership Act, 1932-Nature and Concepts**
- 4.2 Rights and Duties of Partners**
- 4.3 Implied Authority of A Partner**
- 4.4 Dissolution of Firm [Sections 39 to 47]**

4.1. The Indian Partnership Act, 1932-Nature and Concepts

INTRODUCTION

The Indian Partnership Act, 1932 is an act enacted by the Parliament of India to regulate partnership firms in India. It received the assent of the Governor-General on 8th April, 1932 and came into force on 1st October 1932. Before the enactment of this act, partnerships were governed by the provisions of the Indian Contract Act. The act is administered through the Ministry of Corporate Affairs. The act is not applicable to Limited Liability Partnerships, since they are governed by the Limited Liability Partnership Act, 2008.

The Indian Partnership Act, 1932 is based on the English law of Partnership Act, 1890. Section 69 of the Act which relates to effect of non registration of firm came into force with effect from 1st October, 1932. Section 3 of the Act provides that it is branch of general law of contract and the provisions of the Indian Contract Act, 1872 shall continue to apply to partnership, except so far as they are not consistent with the provision of Indian Partnership Act, 1932. This Act contains 74 sections spread over 8 chapters.

The Act extends to whole of India except the State of Jammu and Kashmir.

Section 2 of the act defines,

- (a) an "act of a firm" means any act or omission by all the partners, or by any partner or agent of the firm which gives rise to a right enforceable by or against the firm;
- (b) "business" includes every trade, occupation and profession;
- (c) "prescribed" means prescribed by rules made under this Act;
 - (c-1) "Registrar" means the Registrar of Firms appointed under sub-section (1) of Section 57 and includes the Deputy Registrar of Firms and Assistant Registrar of Firms appointed under sub-section (2) of that section;
- (d) "third party" used in relation to a firm or to a partner therein means any person who is not a partner in the firm; and
- (e) expressions used but not defined in this Act and defined in the Indian Contract Act, 1872, shall have the meanings assigned to them in that Act.

4.1.1 DEFINITION OF PARTNERSHIP

"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. (Sec 4, para 1)

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". (Sec 4, para 2)

It may be noted that partnership firm is not a legal entity like a company, it is a group of individual partners, *Comptroller & Auditor General vs. Kamlesh Vadilal Mehta*(2003) 2 SCC 349.

Similarly in the case of *Malabar Fisheries co vs. IT Commissioner, Kerla AIR 1980 SC 176*, a partnership firm is not a distinct legal entity and the partnership property belongs to all partners constituting the firm.

4.1.2 ESSENTIAL CHARACTERISTICS OF PARTNERSHIP

After having understood the meaning of the term partnership as defined in section 4 of the Act, let us discuss the essential characteristics of a partnership, which are discussed as under;

A. Association of two or more persons:

There must be at least two persons to form a partnership. A person cannot enter into partnership with himself. The maximum number of persons in a partnership should not exceed 10 in case of banking business and 20 in other types of business.

If the number of partners exceeds the prescribed maximum, it would become an illegal association of persons. A firm cannot become a partner of another firm though its partners can join any other firm as partners.

It may, further be noted that the statutory limit on the maximum number of partners does not apply to a Hindu Undivided Family. However, if two or more HUF amalgamate the statutory limit mentioned above will apply.

B. Agreement:

Partnership is the outcome of an agreement between persons. The relation of partnership arises from the formation of a contract and not from status or birth.

If a proprietor gives a share in profits to his employee it will not be called a partnership unless there is an agreement of partnership between the two. The agreement may be oral or in writing but it must satisfy all the essentials of a valid contract.

Section 5 provides that the relation of partnership arises from contract and not *from* status. That is why, a Hindu Undivided Family carrying on a family business is not considered a partnership. The reason is that the coparceners of a Hindu Undivided Family acquire interest in the business because of their status (i.e. birth) in the family and not because of any agreement between them. Thus, partnership is voluntary and contractual in nature.

It may be noted that as per Section 5 the relation of partnership arises from contract and not from status. In particular the members of a HUF carrying on a family business as such are not partners in partnership firm. This will be discussed subsequently also.

C. Lawful business:

A partnership can be formed only for the purpose of carrying on a business. An association of persons who jointly own a house without carrying on a business is not partnership.

Moreover, the business carried on by the partners must be lawful. Illegal acts such as theft, dacoity, smuggling, etc., cannot be called partnership.

An association created for charitable, religious or social purpose cannot be regarded as partnership because there does not exist any business. It may also be noted that an agreement to carry on business at a future time does not result in partnership unless that time arrives and the business is started. [*R R Same, vs. Heuberr*]

Another point which is worth noting is whether business should be temporary or permanent. So long there is a valid agreement to carry on legal business there exist a partnership.

An agreement for Partnership can be for a specified period, specified project or for an undefined period or purpose. This we will discuss subsequently in sub-section duration of partnership.



Example: Two brothers were living together with their father. The father who was a proprietor of a business dies. The sons inherited the business but does not become partners automatically after death of their father unless there is an agreement between them expressed or implied to carry on the business as partners.

D. Sharing of profits:

The agreement between the partners must be to share the profits of business. There can be no partnership without the intention of mutual gain. The profits must be distributed among the partners in an agreed ratio.

The section does not insist upon loss sharing. Thus a, provision for loss sharing is not essential [Walker West Development vs. FJ Emmett(1978)252EG1171]

However, sharing of profits is not a conclusive proof of partnership. For example, a manager may be given a share in profits of the firm.

Example:-

Two persons agreed to produce a film and share the profits of hiring it out, it was held to be sufficient to constitute a partnership [Minck vs. Roshal lal Shorey, AIR 1931 lah390]

An agreement to carry on business at future time does not result in partnership unless that time arrives and business is commenced, as an agreement to agree in future is not an agreement.

E. Mutual agency:

Partnership business can be carried on by all the partners or by any of them acting on behalf of the others. In other words, every partner is an implied agent of the other partners and of the firm. Each partner is liable for acts performed by other partners on behalf of the firm.

The use of the words 'carried on by all or any of them acting for all' in Sec 4 clearly emphasizes the agency relationship.

The partners are agent for each other and principals for themselves. Their relationship is governed by the law of agency. The partners are largely regulated by the law of Principal and agent.

The above mentioned features are the real tests of partnership. In addition, partnership has the following characteristics:

F. Utmost good faith:

The relations between partners are based upon mutual trust and confidence. Every partner is expected to act in the best interests of other partners and of the firm as a whole.

He must observe utmost good faith in all the dealings with his co-partners. He must render true accounts and make no secret profits from the business.

The concept of utmost good faith is stressed in section 9 of the Partnership Act which lays down general duties of a partner. Section 9 lays down that 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 representatives. This we will be discussing in subsequent section dealing with right and duties of partners.

G. Unlimited liability:

Every partner is jointly and severally liable to an unlimited extent for the debts of the partnership firm. In case the assets of the firm are insufficient to pay the debts in full, the personal property of each partner can be attached to pay the creditors of the firm.

H. Restriction on transfer of interest:

No partner can transfer his share in the partnership without the prior consent of all other partners. As per section 29 a partner can not assign his rights and interest in the firm to an outsiders so as to make him the

partners of the firm. He can however, assign his share in the profits and share in the assets of the firm. But the transferee will not be entitled to take part in the business of the firm, but in the share of profit only.

4.1.2.1 TEST OF PARTNERSHIP:

The question whether association of two or more persons constitute a partnership under the Indian Partnership Act, 1932 or not is a difficult question to find ready made answer. In order to decide whether such association of persons constitute a partnership first we must look at the existence of the essential characteristic of a partnership as discussed in para 1.2 A to H. An association of two or more persons entering into an agreement to share profits may not necessarily determine partnership, because such an agreement may not carry on business and may be formed for some charitable purpose only or social objects. Similarly the business may be carried on for profits, but the agreement does not provide for sharing of profits, in such case also there is no partnership at all. The mode of determining existence of partnership is provided in section 6 of the act which read as under;—

As per Section 6, 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, shall be verified in real relation as is prevailing between the parties, as shown by all relevant facts taken together.' Sec 6 is based on case of *Cox v. Hickman*, (1860) H.L.C. 268. Thus test of partnership can be analyzed as under:

- (i) The partnership is determined by real relation among partners and relation must show existence of mutual agency.
- (ii) The sharing of profit is prima facie evidence but not conclusive evidence of Partnership.

Cases where no partnership relation exists:

Sec 6 enumerates in its two Explanations where partnership relation does not exist. These cases are:

- (a) Joint owners of property sharing profits or gross returns arising from the property do not become partners (Ex 1 to Section 6)

Example:

A and B jointly purchased a tea shop, each contributing half of the expenses for purchase of pottery and utensils. They then leased out the shop and shared the rent equally. Held they were co-owners and not partners [*Govind Nair v Moga AIR(1933)Rang120*]. The decision could have been different had they started the business and shared the profit.

- (b) Where a person has lent money to persons engaged or about to engage in business and receive a rate of interest varying with profits.

Example:

A advanced money to two merchants engaged in business subject to control of A in several respects. A was to receive 20% commission on all profits. This was held not to be a partnership because there is no sharing of profit. [*Mollow March & co. vs The court of wards, 1872LR2CP419*]

- (c) Where a servant or agent is engaged in a business and receives his remuneration as a share of profits.

Example:

A a contractor for loading and unloading railway wagons appointed B his servant to manage it. B was to receive 75% of profits and share all the losses if any. Held not to be a partnership as B (servant) was an agent of A and not a partner. No valid partnership is created by simply by the facts servant/agent share the profits. [*Munshi Abdul Latif vs. Gopeshwar AIR(1933)Cal 204*].

- (d) A widow or child of a deceased partner receives a portion of profits.
- (e) Where a person has sold his business along with goodwill and receive a portion of profits in consideration of sale (Explanation 2 to Section 6)



From above discussion and exceptions provided in explanations to Section 6 of the act we can say that the real test of existence of partnership is existence of mutual agency relationship rather than sharing profits. This was also laid down in a famous case of *Cox vs. Hickman*.

Who are not partners? (Sec 5, para 2)

In addition to cases already discussed, the following entities are not partners:

- i) The members of a Hindu undivided family carrying on a family business as such,
- ii) A Burmese Buddhist husband and wife carrying on business as such are not partners in such business.

Who cannot enter into partnership contract?

The answer is who is not competent to enter into a contract under Section 11 of the Indian Contract Act. The following persons for want of capacity can not enter into contract and accordingly cannot be a partner in a firm.

- (a) **Minor:** A minor cannot become a partner in a firm, but with the consent of all the partners, a minor can be admitted to the benefits of partnership.
- (b) **Alien Enemy:** An Alien enemy can not enter into a partnership with an Indian subject. However, a native of Alien friend country can enter into a partnership with Indian citizen.
- (c) **Person of unsound mind:** A person of unsound mind is not competent to enter into a contract of partnership.
- (d) **Corporation:** A Registered company can enter into a contract of partnership as a single individual but not as a group of Individuals comprising it [*Shri Murugan Oil Industries (Pvt.) Ltd vs. AU Suryanarayana Chettiar*(1963)33 Comp. Cas 833(Mad)]. It may be noted that a company can be a partner in a firm only if so authorized by its Memorandum of Associations. You may like to know how a company be a partner in a firm. Answer is very simple. Company is a legal entity, separate from its members, it can enter into any contract subject to the provisions of its Memorandum of Association.

Can two partnership firms enter into a partnership with each other? No, a firm is not a legal person except for income tax, sales tax purpose. A firm is not a person. At best, it is only a collective name of those individuals who constitute the firm. [*Dulichand Laxminarayan vs. CIT*(1956)29ITR-535AIR1956SC354].

Similarly a partnership firm cannot be partners in another firm.

4.1.3 PARTNERSHIP AND OTHER ASSOCIATIONS

4.1.3.1 Partnership and Hindu Undivided Family (HUF):

According to Hindu law, 'Hindu Undivided Family' is a family which consists of all persons generally descended from a common ancestor and includes their wives and unmarried daughters'.

DISTINCTION BETWEEN PARTNERSHIP AND HUF:

I. Regulating law:

A partnership is governed by the provisions of the Indian Partnership Act, 1932. A Joint Hindu Family business is governed by the principles of Hindu law.

II. Mode of creation:

A partnership arises out of a contract, whereas a Joint Hindu Family business arises by the operation of law and is not the result of a contract.

III. Admission of new members:

In a partnership no new partner is admitted without the consent of all the partners, while in the case of a Joint Hindu Family firm a new member is admitted just by birth.

IV. The position of females:

In a partnership women can be full-fledged partners, while in a Joint Hindu Family business membership is restricted to male members only. After the passage of the Hindu Succession Act, 1956, females get only co-sharer's interest at the death of a coparcener and they do not become coparceners themselves.

V. Number of members:

In partnership the maximum limit of partners is 10 for banking business and 20 for any other business but there is no such maximum limit of members in the case of joint Hindu family business.

VI. Authority of members:

In partnership each partner has an implied authority to bind his co-partners by act done in the ordinary course of the business, there being mutual agency between various partners.

In a Joint Hindu Family business all the powers are vested in the 'Karta' and he is the only representative of the family who can contract debts or bind his coparceners by acts done in the ordinary course of business, there being no mutual agency between various coparceners.

But a coparcener other than the 'Karta' of the family may be authorised expressly or by implication to contract debts on behalf of the firm [*Lai Chand vs. Ghanayalal*].

VII. Liability of members:

In partnership, the liability of the partners is joint and several as well as unlimited. In other words, each partner is personally and jointly liable to an unlimited extent and if partnership liabilities cannot be fully discharged out of the partnership property each partner's separate personal property is liable for the debts of the firm.

In a joint Hindu family business only the 'Karta' is personally liable to an unlimited extent, i.e., his self-acquired or other separate property besides his share in the joint family property is liable, for debts contracted on behalf of the family business.

Other coparceners' liability is limited to the extent of their interest in the joint family property and they do not incur any personal liability.

But an adult coparcener can be made personally liable if he is also, expressly or impliedly, a party to the contract or if he has subsequently ratified and accepted the transaction out of which the obligation of the creditor arose [*Lai Chand vs. Ghanayalal*].

VIII. Right of members to share in profits:

In a partnership each partner is entitled to claim his separate share of profits but a member of a joint Hindu family business has no such right. His only remedy lies in a suit for partition.

IX. Effect of death of a member:

A partnership, subject to contract between the partners, is dissolved on the death of a partner, but a joint Hindu family firm is not dissolved on the death of a coparcener [*Baij Nath vs. Ram Gopal*].



4.1.3.2 Partnership and Company:

Distinction between Company and Partnership:

Company	Partnership
i) Company is an artificial legal person.	Partnership is not a legal person.
ii) Company has perpetual succession.	Partnership firm does not have perpetual succession.
iii) Company is created by registration under Companies Act.	For a partnership firm registration is not compulsory. It is guided by Indian Contract Act and Partnership Act.
iv) Private Limited Company shall have at least 2 members and maximum 50 members. Public Ltd Company shall have minimum 7 members and there is no maximum limit.	Partnership firm shall have at least 2 members and maximum 20 members and for banking business, maximum 10 members.
v) A member is not an agent of company or of other members.	Partner is an agent of firm and other partners.
vi) Member cannot bind the company by his act.	Partner can bind the firm by his act.
vii) Ordinary members cannot take part in management of a company. Only director members can take part in management	Partners can take part in management of a firm.
viii) Private limited company shall have a minimum paid up capital of ₹ 1,00,000/- (Rupees One Lakh Only) and public limited company of ₹ 5,00,000/- (Rupees Five Lakh Only).	There is no minimum paid up capital for a partnership firm.
ix) Shares of a private limited company can be transferred with ease.	Partners can transfer his share but the assignee does not become a partner. He is only entitled to share of Profits.
x) A company is an entity distinct from its members. It may own property, make contracts, sue and be sued in its own name.	The property of a firm is owned by the partners. It can also sue and be sued in the firm's name and partners can also be sued individually.
xi) A single member cannot wind up a company.	A partnership may be dissolved by any partner at any time.
xii) Liability of a member is limited by shares or guaranty.	Liability of partners is unlimited.

4.1.3.3 Partnership and Club:

Distinction between Partnership and Club:

Partnership	Club
i) Business oriented objects aimed at profit sharing.	Not aimed at profit sharing.
ii) Membership limited to 10 in case of banking business, 20 in case of other business.	No limit to number of members.

iii) Change in membership affects its existence.	Change in membership does not affect its existence.
iv) Based on agency relationship.	No agency relationship among members.

4.1.4 DURATION OF PARTNERSHIP

At the time of entering into a partnership agreement the partners may fix the duration, venture for which partnership formed or may be silent about the duration or venture. The former where the duration of the partnership is fixed in the agreement is called **partnership for a fixed term**, the second type of partnership is called **particular partnership** and third type of partnership is called **partnership at will**.

Example:

ABC entered into a partnership to carry on the business of real estate consultancy for five years. Here in the partnership deed or agreement the duration of the partnership is fixed as five years. So this type of partnership is called Partnership for a fixed duration. On the other hand if the partnership deed or agreement is silent, it will be treated as partnership at will.

Particular partnership: A person may become a partner with another person in particular adventures or undertakings. Such partnership is known as **particular partnership** (Sec 8) If the partnership is for a particular venture like Construction of Stadium for Olympic games, this partnership will be called **Particular Partnership**.

4.1.5 TYPES OF PARTNERS

There are various types of partners in a partnership firm. They are as follows:

a) Active Partner:

Partner taking an active part in the management of the business is called an active partner. He may also be called 'actual' or 'ostensible' partner. He is an agent of the other partners in the ordinary course of business of the firm and considered a full fledged partner in the real sense of the term.

b) Sleeping or Dormant Partner:

A sleeping or dormant partner does not take any active part in the management of the business. He contributes capital and shares the profits which is usually less than that of the active partners. He is liable for all the deals of the firm but his relationship with the firm is not disclosed to the general public.

c) Nominal Partner:

A nominal partner who simply lends his name to the firm. He neither contributes any capital nor shares in the profits or take part the management of the business. But he is liable to third parties like other partners. A nominal partner must be distinguished from the sleeping partner. While the nominal partner is known to the outsiders and does not share in the profits, the sleeping partner shares in the profit, his relationship is kept secret.

d) Partner in Profits:

A partner who shares in the profits only without being liable of the losses is known as partner in profits. He does not take part in the management of the business but he is liable to third parties for all the debts of the firm.

e) Sub-partner:

When a stranger share the profits derived from the firm by a partner he is regarded as a sub-partner. A sub-partner is in no way connected with the firm or he not a partner of the firm. He is simply a



partners' partner. Therefore, he has no rights against the firm nor he is liable for the debts of the firm. He only shares profits from a partner.

f) Partner by Estoppel or Holding out:

When a partner is not a partner but represent to the outside world that he is a partner in a firm, he is stopped or prevented from denying the truth. He is considered as a partner in the eyes of law.

Similarly, if a person is declared to be a partner by a partner of a firm and such a person remained silent without denying it, he is also considered a partner by holding out. Thus, such persons are liable to outsiders as partners on the principle of estoppel or holding out because on faith of their representation action outsiders have granted credit to the firm.

It may be noted that this kind of partnership is not real one and becomes partner of the firm by words spoken or written or by conduct. Such person automatically becomes liable as a partner in that firm to anyone who gives credit to the firm on the faith of such a representation.

When a retiring partner does not give public notice of his retirement from the firm and the remaining partner still continues to use his name as a partner, he will be personally liable on the ground of holding out to third parties. However, this is not applicable to a deceased partner.

g) Minor Partner:

Partnership arises from contract and a minor is not competent to enter into contract. Therefore, strictly speaking, a minor cannot be a full-fledged partners. But with the consent of all the partners he can be admitted into partnership for benefits only. He is not personally liable to third parties for the debts of the firm. On attaining majority, if he continues as a partner, his liability will become unlimited with effect from the date of his original admission into the firm.

As per Section 11 of the Indian Contract Act and the decision of the privy council in *Mohini Bibi vs. Dharmdas Ghosh* a minor's agreement is altogether void and unenforceable. The relation of partnership arises from contract, accordingly a partnership can not be started with a minor person but a minor can be admitted into an existing partnership for benefits only. During minority a minor has right to receive agreed share of profit, right to have access and copy of the account of the firm. His liability extent to only his share of profit and his share in the property of the firm. He is not personally liable for any act of the firm.

Formation of a partnership firm is the easiest one simply requiring existence of agreement between two or more competent persons. Even there is no mandatory requirement of compulsory registration of the partnership deed with the registrar of firms. Prior to passing of Indian Partnership Act, 1932 there was no provision for the registration of firms in India.

4.1.6 FORMATION OF A PARTNERSHIP FIRM

As we have discussed earlier that partnership form of business organization is the simplest form of business organization requiring the least formalities. Any two or more person after making an agreement can start the business even without getting the partnership deed registered with the Registrar of firms. Prior to enactment of Partnership Act in India there was no provision for registration of partnership in India. Even after enactment of the Act, Section 69 dealing with effect of non registration of partnership was made effective only after one year i.e. with effect from 1st October, 1933. Even today registration of partnership firm is not mandatory. However a non registered firm is subject to some disadvantages as provided in Section 69 which we shall discuss subsequently as a result of which most of the firms go for registration of partnership firm. No duration or time limit for registration of firm is provided in the Act. A firm may register itself any time during the life time of the partnership firm. Registration is simply a formality of getting the details of the firms like its name, address, name and address of the partners, nature of business etc. to be recorded in the Register of firms kept in the office of Registrar of firms. A Partnership Deed which contains the agreement between the partners setting out their mutual relations, duties and rights etc is necessary under Section 58(1) at the time of registration of any firm. Though, there is no

requirement of having any instrument in writing at the time of admission and/or retirement or dissolution of firm, under Rule 16 of Indian Partnership Rules, 1989, the Registrar of Firms (who is a registering authority to register the firm) is empowered to take on record the evidence in support of registering any partnership. Therefore, the Deed is necessary to be executed to place on record the relationship of partners at the time of registration and at subsequent changes to register such changes.

Various forms are required to be filled up and filed with the Registrar as he needs certain information. Therefore, it is necessary to have that information incorporated in the deed which Registrar can verify while scrutinizing the forms and ultimately register the firm. Names and Addresses of Partners are to be mentioned in the beginning paras. Partnership Deed should, therefore, contain following clauses.

- (i) Name of the firm.
- (ii) Date of commencement of Business of the firm.
- (iii) Address including address of the additional place/s of Business of the firm.
- (iv) Nature of Business.
- (v) Duration.
- (vi) Sharing of Profit & Loss between Partners.
- (vii) Capital of the firm.

The above clauses are necessary in all deeds, since the entry on record which is furnished by the Registrar to the Firm gives the above information as recorded in the Register. If for any reason, any of the above clauses are missing from the deed, the registration procedure cannot be completed. As regards Point No. (vii) above, it should be noted that to be a valid document, partnership deed should necessarily be on a stamp paper of requisite value and this value is determined by the amount of capital.

As per Section 58 the registration of a firm may be effected at any time by sending by post or delivering to the Registrar of the area in which any place of business of the firm is situated or proposed to be situated, a statement in the prescribed form and accompanied by the prescribed fee, stating-

- (a) the firm name,
- (b) the place or principal place of business of the firm,
- (c) the names of any other places where, the firm carries on business,
- (d) the date when each partner joined the firm,
- (e) the names in full and permanent addresses of the partners, and
- (f) the duration of the firm. The statement shall be signed by all the partners, or by their agents specially authorized in this behalf.

Every person signing the statement is required to verify it in the manner prescribed. While deciding the firm's name care should be taken to ensure that the firm's name does not contain any of the following words, namely:- "Crown", "Emperor", "Empress", "Empire", "Imperial", "King", "Queen", "Royal", or words expressing or implying the sanction, approval or patronage of Government.

As per Section 59 when the Registrar is satisfied that the provisions of Section 58 have been duly complied with, he is required to record an entry of the statement in a register called the Register of Firms, and shall file the statement. The Registrar of firms is appointed by the State Government who is deemed to be a public servant with the meaning of Section 51 of the Indian Penal code. Any alternation in the firm's name and its principal place of business is also required to be intimated to the Registrar of firms who is required to amend the entry relating to the firm in the Register of firms in accordance with the statement, and shall file it along with the statement relating to the firm filed under Section 59.

Further more as per Section 61 when a registered firm discontinues business at any place or begins to carry on business at any other place, such place not being its principal place of business, any partner or



agent of the firm may send intimation thereof to the Registrar, who shall make a note of such intimation in the entry relating to the firm in the Register of Firms, and shall file the intimation along with the statement relating to the firm filed under Section 59.

As per Section 62 when any partner in a registered firm alters his name or permanent address, an intimation of the alteration may be sent by any partner or agent of the firm to the Registrar, who shall deal with it in the manner provided in Section 61. Various other facts like change in the constitution of the firm due to admission, retirement, dissolution, minor electing to becoming or not becoming partner after attaining the age of majority etc are also required to be intimated to the Registrar of firms.

As per Section 66 the register of firms is open to inspection by any person on payment of such fee as may be prescribed. All statements, notices and intimations filed are also open to inspection, subject to such conditions and on payment of such fee as may be prescribed. Any person can get a certified copy of any entry of portion thereof in the Register of firms on payment of prescribed fee.

Any statement, intimation or notice recorded or noted in the Register of Firms shall, as against any person by whom or on whose behalf such statement, intimation or notice was signed, has evidential value and is a conclusive proof of any fact therein stated.

4.1.7 EFFECT OF NON-REGISTRATION

As stated earlier in this section registration of partnership firm is not mandatory in India but Section 69 of the Act place an unregistered firm under some disadvantages as a result of which firms go for compulsory registration. The consequences of non registration of a firm are as under;

- (1) No suit to enforce a right arising from a contract or conferred by this Act shall be instituted in any Court by or on behalf of any person suing as a partner in a firm against the firm or any person alleged to be or to have been a partner in the firm unless the firm is registered and the person suing is or has been shown in the Register of Firms as a partner in the firm.
- (2) No suit to enforce a right arising from a contract shall be instituted in any Court by or on behalf of a firm against any third party unless the firm is registered and the persons suing are or have been shown in the Register of Firms as partners in the firm.
- (3) The provisions of sub-sections (1) and (2) shall apply also to claim of set-off or other proceeding to enforce a right arising from contract, but shall not affect-
 - (a) the enforcement of any right to sue for the dissolution of a firm or for accounts of a dissolved firm, or any right or power to realise the property of a dissolved firm, or
 - (b) the powers of an official assignee, receiver or Court under the Presidency- towns Insolvency Act, 1909 or the Provincial Insolvency Act, 1920. to realise the property of an insolvent partner.

However, non-registration does not affect the following:-

- (a) firms or partners in firms which have no place of business in the territories to which this Act extends, or whose places of business in the said territories are situated in areas to which, by notification under section 56 the Chapter 7 does not apply, or
- (b) any suit or claim of set-off not exceeding one hundred rupees in value which, in the Presidency- towns, is not of a kind specified in Section 19 of the Presidency Small Cause Courts Act, 1882 or, outside the Presidency- towns, is not of a kind specified in the Second Schedule to the Provincial Small Cause Courts Act, 1887 or to any proceeding in execution or other proceeding incidental to or arising from any such suit or claim.

4.2 RIGHTS AND DUTIES OF PARTNERS

The Partnership Deed contains the mutual rights, duties and obligations of the partners, in certain cases, the Partnership Act also makes a mandatory provision as regards to the rights and obligations of partners.

When there is no Deed or the Deed is silent on any point, the rights and obligations are governed by Sections 9 to 17 of Partnership Act .

A) Rights of a Partner:

- i. A partner has right to take part in the day-to-day management of the firm.[Sec 12(a)]
- ii. A partner has right to be consulted and heard while taking any decision regarding the business. [Sec 12(c)]
- iii. A partner has right of access to books of accounts and call for the copy of the same.[Sec 12(d)]
- iv. A partner has right to share the profits equally or as agreed upon by the partners.[Sec 13(b)]
- v. A partner has right to get interest on capital contributed by the partners to the firm.[Sec 13(c)]
- vi. A partner has right to avail interest on advances paid by the partners for business purpose. [Sec 13(d)]
- vii. A partner has right to be indemnified in respect of payment made or liabilities incurred or for protecting the firm from losses.[Sec 13(e)]
- viii. A partner has right to the use of partnership property exclusively for partnership business only not himself.[Sec 15]
- ix. A partner has right as agent of the firm and implied authority to bind the firm for any act done in carrying the business.[Sec 18]
- x. A partner has right to prevent admission of new partners/expulsion of existing partners.[Sec 31(1)]
- xi. A partner has right to continue unless and otherwise he himself cease to become a partner. [Sec 33(1)]
- xii. A partner has right to retire with the consent of other partners and according to the terms and conditions of deed. [Sec 32(1)]
- xiii. A partner has right of outgoing partner/legal heirs of deceased partner.[Sec 37]

B) Duties of a Partner:

- i. To carry on the business to the greatest common advantage. Every partner is bound to carry on the business of the firm to the greatest common advantage. In other words, the partner must use his knowledge and skill in the conduct of business to secure maximum benefits for the firm.
- ii. To be just and faithful to each other. Partnership is a fiduciary relation. Every partner must be just and faithful to other partners of the firm. Every partner must observe utmost good faith and fairness towards other partners in business activity.
- iii. To render true accounts. Every partner must render true and proper accounts to his co-partners. Each and every entry in the books must be supported by vouchers and give explanations if demanded by other partners.
- iv. To provide full information. Every partner must provide full information of all activities affecting the firm to the other co-partners. No information should be concealed, kept secret.
- v. To attend diligently to his duties. Every partner is bound to attend diligently to duties in the conduct of the business of the firm.[Sec 12(b)]
- vi. To work without remuneration. A partner is not entitled to receive any kind remuneration for taking part in the conduct of the business. But in practice, the working partners are generally paid remuneration as per agreement, so also commission in some case.[Sec 13(a)]



- vii. To indemnify for loss caused by fraud or willful neglect. If any loss is caused to the firm because of a partner's willful neglect in the conduct of the business or fraud committed by him against a third party then such partner must indemnify the firm for the loss. [Sec 10]
- viii. To hold and use partnership property exclusively for the firm. The partners must hold and use the partnership property exclusively for the purpose of business of the firm not for their personal benefit.
- ix. To account for personal profits. If a partner derives any personal profit from partnership transactions or from the use of the property of the firm or business connection with the firm or the firm's name, he must account for such profit and pay it to the firm.
- x. Not to carry on any competing business. A partner must not carry on competing business to that of the firm. If he carries on and earns any profit then he must account for the profit made and pay it to the firm.
- xi. To share losses. [Sec 13(b)]. It is the duty of the partners to bear the losses of the firm. 'Partners share the losses equally when there is no agreement or as per their profit share ratio.
- xii. To act within authority. [Sec 19(1)]. Every partner is bound to act within the scope of authority. If he exceeds his authority and the firm suffers from any loss, he shall have to compensate the firm for such loss.
- xiii. Duty to be liable jointly and severally [Sec 25]. Every partner is jointly and individually liable to the third parties for all acts of the firm done while he is a partner.
- xiv. Duty not to assign his interest [Sec 29]. A partner cannot assign or transfer his partner interest to an outsider so as to make him the partner of the firm without the consent of other partners. However, he can assign his share of the profit and his share in the assets of the firm where the assignee shall not be entitled to interfere in the conduct of the business.

C) Liabilities of a Partner to Third Parties:

i. Liability of a partner for acts of the firm:

Every partner is jointly and severally liable for all acts of the firm done while he is a partner. Because of this liability, the creditor of the firm can sue all the partners jointly or individually.

ii. Liability of the firm for wrongful act of a partner:

If any loss or injury is caused to any third party or any penalty is imposed because of wrongful act or omission of a partner, the firm is liable to the same extent as the partner. However, the partner must act in the ordinary course of business of the firm or with authority of his partners.

iii. Liability of the firm for misutilisation by partners:

Where a partner acting within his apparent authority receives money or property from a third party and misutilises it or a firm receives money or property from a third party in the course of its business and any of the partners misutilises such money or property, then the firm is liable to make good the loss.

iv. Liability of an incoming partner:

An incoming partner is liable for the debts and acts of the firm from the date of his admission into the firm. However, the incoming partner may agree to be liable for debts prior to his admission. Such agreeing will not empower the prior creditor to sue the incoming partner. He will be liable only to the other co-partners.

v. **Liability of a retiring partner:**

A retiring partner is liable for the acts of the firm done before his retirement. But a retiring partner may not be liable for the debts incurred before his retirement if an agreement is reached between the third parties and the remaining partners of the firm discharging the retiring partner from all liabilities. After retirement the retiring partner shall be liable unless a public notice of his retirement is given. No such notice is required in case of retirement of a sleeping or dormant partner.

As already stated in earlier sections of this study note that a partner both an agent as well principal. In order to discharge the duty of both an agent as well as principal he has some implied authority cast upon him by the Act. The kind of implied authority may be derived either from usage, customs of trade, conduct of the partners or from the statute. It can be inferred from the circumstances of the case. Section 19 of the Partnership Act deals with implied authority of a partner which reads as under.

4.3. IMPLIED AUTHORITY OF A PARTNER

Implied authority of partner as agent of the firm.(Sec 19)

- (1) Subject to the provisions of section 22, the act of a partner which is done to carry on, in the usual way, business of the kind carried on by the firm, binds the firm. The authority of a partner to bind the firm conferred by this section is called his "implied authority".

Under the implied authority of a partner the firm will be liable only if the following conditions are satisfied:-

- (a) The act done by the partner relates to the normal business of the firm;
- (b) The act must be as is done within the scope of the business of the firm in the usual way;
- (c) Act done must be in name of the firm or in any manner expressing or implying an intention to bind the firm;
- (d) The act done must state that it has been done in the capacity of an agent of other partners.

The following acts of a partner can be treated as covered under the implied authority of a partner.

- (a) To purchase goods of the kind that are used in the business of the firm;
- (b) To sell goods on behalf of the firm;
- (c) To engage servants to perform the business of the firm;
- (d) To receive payment of the debt due to the firm and give receipt thereof;
- (e) To settle account with the person dealing with the firm;
- (f) To draw, accept, endorse bill of exchange or any other negotiable instrument.
- (g) To pledge the firms property as security for loans etc.

Certain restrictions are imposed on the implied authority of a partner Section 19(2) lays down certain statutory and Partnership deed imposed restrictions on the implied authority of a partner which are reproduced as under:

- (2) In the absence of any usage or custom of trade to the contrary, the implied authority of a partner does not empower him to –
 - (a) submit a dispute relating to the business of the firm to arbitration,
 - (b) open a banking account on behalf of the firm in his own name,



- (c) compromise or relinquish any claim or portion of a claim by the firm,
- (d) withdraw a suit or proceeding filed on behalf of the firm,
- (e) admit any liability in a suit or proceeding against the firm,
- (f) acquire immovable property on behalf of the firm,
- (g) transfer immovable property belonging to the firm, or
- (h) enter into partnership on behalf of the firm.

Extension and restriction of partner's implied authority(Sec 20) The partners in a firm may, by contract between the partners, extend or restrict the implied authority of any partner.

Notwithstanding any such restriction, any act done by a partner on behalf of the firm which falls within his implied authority binds the firm, unless the person with whom he is dealing knows of the restriction or does not know or believe that partner to be a partner.

Partners authority in emergency(Sec 21)

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

As per Section 22 of the Act an admission or representation made by a partner concerning the affairs of the firm is evidence against the firm, if it is made in the ordinary course of business. Similarly a notice given to a partner who habitually acts in the business of the firm in any manner relating to the affairs of the firm operates as a notice to the firm except in the case of fraud on the firm committed by or with the consent of that partner. In other words a notice to an active partner of the firm is the sufficient notice to the firm. Once a notice is served upon the active partner of the firm other partners can not ignore the same.

4.4 DISSOLUTION OF FIRM [SECTIONS 39 TO 47]

The dissolution of a partnership between all the partners of a firm is called the "dissolution of the firm". There is a difference between dissolution of partnership and dissolution of firm.

Dissolution of Partnership: Dissolution of partnership refers to the change in the existing relations of the partners. The firm continues its business after being reconstituted. This may happen on admission, retirement or death of a partner or change in profit sharing ratio in the firm:

Example 1:

X,Y and Z are three partners in a firm. X retires. The partnership between X Y Z comes to an end and new partnership between Y and Z comes into existence. This new partnership between Y and Z shall be known as 'reconstituted firm'. Thus, on retirement of partner, the old partnership stands dissolved but the firm continues its business with remaining partners YZ. This is a case of dissolution of partnership.

Example 2:

X,Y are two partners in a firm. Z is admitted in the firm with 1/3rd share of profit. The partnership between X Y comes to an end and new partnership between X,Y and Z comes into existence. This new partnership between X,Y and Z shall be known as 'reconstituted firm'. Thus, on admission of new partner, the old partnership stands dissolved but the firm continues its business with new partners XYZ This is also a case of dissolution of partnership.

Dissolution of Firm : Dissolution of a firm means the dissolution of partnership between all the partners of a firm. In such a situation, the business of the firm is discontinued, its assets are realised, the liabilities are paid off and the surplus (if any) is distributed among the partners according to their rights.

4.4.1 Difference between Dissolution of Partnership and Dissolution of Firm:

Dissolution of partnership and Dissolution of firm are two different terms. *Dissolution of partnership* means termination of existing partnership agreement and the formation of a new agreement which can be due to any reason like admission of a new partner or death or retirement of an old partner. In the case of dissolution of partnership the remaining partners may agree to carry on the business under a new agreement.

Whereas *Dissolution of Partnership firm* means that the firm is closing down its business. In the case of dissolution of firm the Assets of the business are sold, Liabilities are paid off and the accounts of the partners are settled out of the remaining amount.

Dissolution of partnership

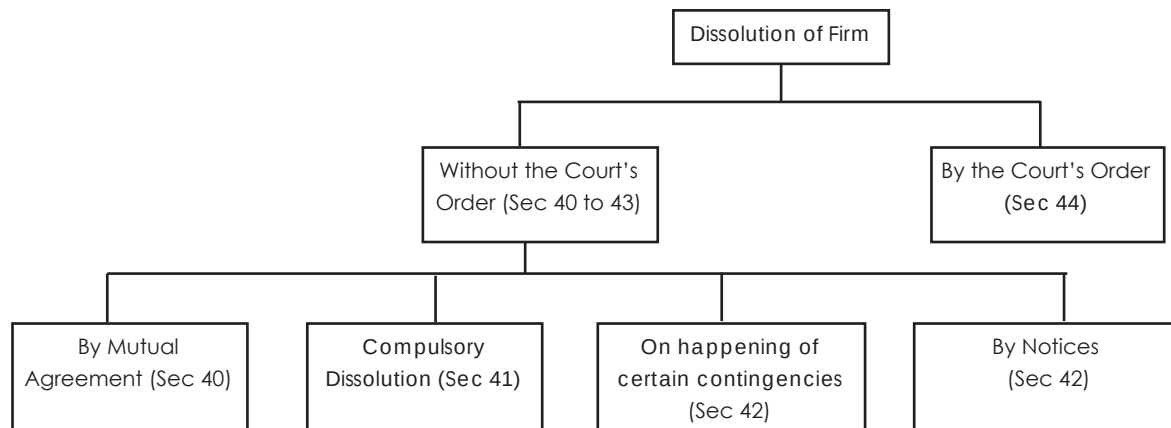
Partnership may be dissolved in the following circumstances:

- At the time of admission of a new partner;
- On the retirement/death of an old partner;
- At the time of change in profit sharing ratio among existing partners;
- If any partner is declared insolvent;
- On the expulsion of any partner;
- On the expiry of the period of partnership.

Thus this is clear from the above discussion that in the case of *dissolution of the partnership* the firm may continue under a new agreement whereas in the case of *dissolution of partnership firm* the business of the firm comes to an end.

4.4.2 Modes of Dissolution of Firm

A partnership firm can be dissolved in any of the two ways: A) By the order of the court; B) without the intervention of the court.



A) By the order of the court:

A partner may apply to the court for getting the firm dissolved. On getting such application by any of the partner the court may proceed to order the dissolution of the firm in the following circumstances: (Sec 44)

- If any of the partner becomes of unsound mind.[Sec 44(a)]
- If a partner, other than the partner filing the suit has become disabled to perform his duties as a partner. [Sec 44(b)]



- iii) If a partner, other than the partner filing the suit is guilty of misconduct. [Sec 44(c)]
- iv) If a partner, other than the partner filing the suit is guilty of intentionally and persistently committing a breach of the partnership agreement. [Sec 44(d)]
- v) If a partner, other than the partner filing the suit has transferred whole of his interest in the firm to a third party without the consent of the other partners.[Sec 44(e)]
- vi) If the court is satisfied that the business of the firm cannot be carried on except with a loss. [Sec 44(e)]
- vii) If the court considers it just and equitable to dissolve the firm due to some other reasons. [Sec 44(f)]

B) Without the intervention of the court.

i) Dissolution by agreement:

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

ii) Compulsory dissolution: (Sec 41)

A firm is dissolved:

- (a) by the adjudication of all the partners or of all the partners but one as insolvent, or
- (b) by the happening of any event which makes it unlawful for the business of the firm to be carried on or for the partners to carry it on in partnership:

Provided that, where more than one separate adventure or undertaking is carried on by the firm, the illegality of one or more shall not of itself cause the dissolution of the firm in respect of its lawful adventures and undertakings

C) Dissolution on the happening of certain contingencies. (Sec 42)

Subject to contract between the partners a firm is dissolved:

- (a) if constituted for a fixed term, by the expiry of that term;
- (b) if constituted to carry out one or more adventures or undertakings, by the completion thereof;
- (c) by the death of a partner; and
- (d) by the adjudication of a partner as an insolvent.

D) Dissolution by notice of partnership at will. (Sec 43)

- (1) Where the partnership is at will, the firm may be dissolved by any partner giving notice in writing to all the other partners of his intention to dissolve the firm.
- (2) The firm is dissolved as from the date mentioned in the notice as the date of dissolution or, if no date is so mentioned, as from the date of the communication of the notice.

4.4.3 Penalty for Furnishing False Statement

Under section 70 any person who signs any statement, amending statement, notice or intimation under chapter 7 (which deals with registration) containing any particular which he knows to be false or does not believe to be true, or containing particulars which he knows to be incomplete or does not believe to be complete, shall be punishable with imprisonment which may extend to three months, or with fine or with both.

4.4.4 POWER TO MAKE RULES

Section 71 of the Act empowers the State Government by notification in the official Gazette to make rules prescribing the fees which shall accompany documents sent to the Registrar of Firms, or which shall be payable for the inspection of documents in the custody of the Registrar of Firms, or for copies from the Registrar of Firms: Provided that such fees shall not exceed the maximum fees specified in Schedule 1. The rules may provide for-

- (a) prescribing the form of statement submitted under Section 58, and of the verification thereof;
 - (b) requiring statements, intimations and notices under Sections 60, 61, 62 and 63 to be in prescribed form, and pre-scribing the form thereof;
 - (c) prescribing the form of the Register of Firms, and the mode in which entries relating to firms are to be made therein, and the mode in which such entries are to be amended or notes made therein;
 - (d) regulating the procedure of the Registrar when disputes arise;
 - (e) regulating the filing of documents received by the Registrar;
 - (f) prescribing conditions for the inspection of original documents;
 - (g) regulating the grant of copies;
 - (h) regulating the elimination of registers and documents;
 - (i) providing for the maintenance and form of an index to the Register of Firms; and
 - (j) generally, to carry out the purposes of this Chapter.
- (3) All rules made under this Section shall be subject to the condition of previous publication.
- (4) Every rule made by the State Government under this section shall be laid, as soon as it is made before the State Legislature.

4.4.5 Mode of Giving Public Notice

As and when a partner retires or a minor partner elects to be or not to be a partner after attaining the age of majority etc public notice thereof is required to be given in the manner provided in Section 72. The rules regarding mode of giving public notice as provided in Section 72 are given as under:

- (a) where it relates to the retirement or expulsion of a partner from a registered firm, or to the dissolution of a registered firm, or to the election to become or not to become a partner in a registered firm by a person attaining majority who was admitted as a minor to the benefits of partnership, by notice to the Registrar of Firms under Section 63, and by publication in the Official Gazette and in at least one vernacular newspaper circulating in the district where the firm to which it relates has its place or principal place of business, and
- (b) in any other case, by publication in the Official Gazette and in at least one vernacular newspaper circulating in the district where the firm to which it relates has its place or principal place.



THE INDIAN PARTNERSHIP ACT, 1932

Multiple choice questions

Q1. The Partnership Act, 1932 came into force with effect from-----

- (a) 1st October, 1933
- (b) 1st October, 1932
- (c) 1st November, 1935
- (d) 1st April, 1934

Q2. Indian Partnership Act, 1932 received assent of Governor General on---

- (a) 1st January, 1932
- (b) 8th April, 1932
- (c) 15th August, 1933
- (d) 1st October, 1932

Q3. Prior to enactment of Indian Partnership Act, 1932, the laws relating to Partnership were embodied in---

- (a) English Partnership Act, 1890
- (b) Section 239 to 266 of Indian Contract Act, 1872
- (c) Companies Act
- (d) Hindu law

Q4. Indian Partnership Act, 1932 is administered by---

- (a) Central Government
- (b) State Governments
- (c) Local Governments
- (d) All of these

Q5. Indian Partnership Act, 1932 is not applicable to ---

- (a) Jammu & Kashmir
- (b) Jharkhand
- (c) Uttarakhand
- (d) Punjab

Q6. A partnership firm can be formed with a maximum number of----- partners.

- (a) 10
- (b) 20
- (c) 30
- (d) no such limit prescribed

Q7. As per section 11 of the Companies Act, a partnership firm consisting of more than 20 persons (10 in case of a banking company) unless registered as a company or formed in pursuance of some other law becomes----

- (a) Illegal Association
- (b) Defunct firm
- (c) Banned firm
- (d) Offender firm

Q8. Partnership is defined as a relationship between persons who have agreed to share the profits of a business carried on by-----or any one of them acting for----

- (a) all, all
- (b) senior most, all
- (c) Managing partner, all
- (d) All, Managing partner

Q9. The term persons for the purpose of partnership agreement does not include---

- (a) firm
- (b) Senior citizen
- (c) Pardanashin women
- (d) Non-Aadhar Kard holders

Q10. When a partnership firm is continued even after the expiry of fixed term it is called.....

- (a) Partnership at will
- (b) Contract partnership
- (c) Perpetual partnership
- (d) Fixed partnership

Q11. Particular partnership is defined in- section ----of the Partnership Act, 1932

- (a) 7
- (b) 8
- (c) 11
- (d) 13

Q12. -----formed either to carry out a particular venture or for a fixed period.

- (a) Limited Partnership
- (b) Partnership at will
- (c) Particular partnership
- (d) Joint venture

Q13. To hold a person a partner by holding out under Section 28 of the Partnership Act----

- (a) The person must have by his conduct or words represented him or knowingly permitted him to be represented as a partner
- (b) Credit must have been given to the firm on the faith of representation made by the person
- (c) Both
- (d) None



Q14. A Partnership at Will is created when—

- (a) The duration of the partnership is not fixed
- (b) There is no provision as to when and how the partnership will come to an end
- (c) Both (a) and (b)
- (d) Either (a) or (b)

Q15. How many persons are required to form a partnership--

- (a) just two
- (b) atleast two
- (c) more than two
- (d) Only one

Q16. A partnership firm can be formed with a minimum share capital of ₹—

- (a) ₹ 50,000
- (b) ₹ 5,00,000
- (c) ₹ 1,00,000
- (d) Not fixed

Q17. Which of these pair of relations can not make a valid partnership.

- (a) Husband and wife
- (b) Father in law and Son in law.
- (c) father and his minor son.
- (d) Grand father and major grand son

Q18. A company can be a partner in firm if----

- (a) authorized by its Memorandum of Association
- (b) authorized by Article of Association.
- (c) authorized by Central Government
- (d) none of the cases.

Q19. ---- cannot be admitted as a partner in a firm

- (a) Married
- (b) Person of unsound mind
- (c) Widower
- (d) Bachelor

Q20. Which of these is/are not found in a partnership firm but found in a company.

- (a) limited liability
- (b) perpetual existence
- (c) legal entity
- (d) all the three

Q21. Which of these is found in a partnership firm but not in a company.

- (a) Partners
- (b) Share capital
- (c) Business
- (d) Profit/Loss

Q22. ----- can not be a member of a HUF.

- (a) Minor
- (b) Female member
- (c) Person aged more than 66
- (d) Person aged less than 21

Q23. ---can be admitted as a partner in firm but not in HUF

- (a) Minor
- (b) Female
- (c) Unmarried male person
- (d) Illiterate person

Q24. The word “.....” cannot be used as a part of firms name---

- (a) Modern
- (b) Excellent
- (c) Popular
- (d) Royal

Q25. Words like Royal, Crown, Emperor, King, Queen etc. can be used as a part of firms name only

- (a) With the approval of State Government
- (b) With the approval of Central Government
- (c) With the approval of Court
- (d) Any of the above three

Q26. The document containing agreement between the partners is called---

- (a) Partnership deed
- (b) Partnership folder
- (c) Statutory documents
- (d) Mandatory documents.

Q27. Which of these is necessary for a partnership deed.

- (a) Registration
- (b) To be stamped as per Indian Stamp Act, 1889
- (c) Is required to be notarized.
- (d) Must be duly authenticated by First Class Magistrate



Q28. Which of this statement is true about Registration of a firm.

- (a) Registration of firm is Mandatory
- (b) Non-registration of a firm is a criminal offence
- (c) Registration is not mandatory but non registered firms are subject to certain disadvantages.
- (d) Registration of firm ease availability of funds.

Q29. Which of these rights are affected if a firm is not registered?

- (a) Suit against third parties, other partners and firms
- (b) Right of third party against the firm
- (c) Rights of the partners to sue for the dissolution of the firm
- (d) Powers of the official receiver to bring suit or action on behalf of the insolvent

Q30. Right to manage the affairs of a firm vest with----

- (a) Senior most partner
- (b) Managing partner
- (c) Every partner
- (d) Partner having BBA/MBA degree

Q31. ----- is available to a partner under the Partnership Act

- (a) Salary for taking part in business
- (b) Interest on Capital
- (c) Right to share profits
- (d) Drawing

Q32. Under which of these circumstances interest on capital is allowed

- (a) When partnership deed provides for it
- (b) As per Partnership Act in all circumstances
- (c) Under none of these circumstances
- (d) Under both the circumstances

Q33. In the absence of specific provision in the partnership deed at what rate interest on advances given by the partners would be allowed

- (a) @8%
- (b) @10%
- (c) @6%
- (d) Nil

Q34. In the absence of specific provision in the partnership deed at what rate salary and remuneration would be paid to the partners

- (a) @₹ 15, 000 per month
- (b) @₹ 20,000
- (c) @₹ Nil
- (d) @₹ 10,000

Q35. -----is not conferred upon a partner under the Partnership Act

- (a) Right to take part in the business
- (b) Right to be consulted
- (c) Right to indemnity
- (d) Right to take remuneration

Q36. Property of a partnership firm is held jointly by all the partners on behalf of---

- (a) partnership firm
- (b) Senior partner
- (c) Managing partner
- (d) Founding partner

Q37. ---- is not the property of a partnership firm----

- (a) Stock in trade
- (b) Ancestral property of a partner
- (c) Plant & Machinery
- (d) All rights, liabilities originally brought into the stock of the firm

Q38. A minor person----

- (a) Can be admitted into the firm for benefit in an existing firm
- (b) Can be the initial member of a new partnership firm
- (c) Cannot be a partner
- (d) Can be a partner for sharing profits and losses also

Q39. The provisions regarding admission of a minor person as a partner are contained in---of the partnership Act.

- (a) Section 31
- (b) Section 33
- (c) Section 30(1)
- (d) Section 12

Q40. A partner can retire from the firm with the---

- (a) Majority decision
- (b) Consent of all partners
- (c) Approval of Company Law Board
- (d) Approval of Managing partner.

Q41. X is a partner of XUZ associates, as per the agreement any partner can retire from the firm by giving 30 days advance notice. A intends to retire from the firm. What obligations are cast upon A to retire from the firm.

- (a) take consent of all the partners.
- (b) take consent of majority of partners.



- (c) past resignation letter on the door of the firm.
- (d) give thirty days notice and give public notice thereof.

Q42. Which of these rights is available to a retiring partner?

- (a) To carry on any business
- (b) To use firm's name
- (c) Represent him as carrying on business of the firm
- (d) To solicit the customer from the persons who were dealing with the firm before his retirement

Q43. A firm can change its business with the.....

- (a) Consent of all the partners
- (b) Consent of its Banker
- (c) Consent of senior partner only
- (d) Consent of its CA

Q44. ----- does not cause reconstitution of the firm

- (a) Admission of a partner
- (b) Death
- (c) Retirement of partner
- (d) Illness of a partner

Q45. A Partner can be expelled from the firm by majority decision in--

- (a) to inject new blood in the firm.
- (b) order to maximize profit of remaining partners.
- (c) In good faith.
- (d) for all the reasons.

Q46. The position of a expelled partner is as that of a--

- (a) retired partner
- (b) deceased partner
- (c) disgruntled partner.
- (d) minor partner.

Q47. The tests of expulsion in good faith are---

- (a) expulsion in the interest of the firm
- (b) notice of expulsion given to the partner
- (c) expelled partner given opportunity to be heard
- (d) all the three

Q48. Application to court for dissolution of a firm can be made----

- (a) where the partnership is at will
- (b) where the partnership is not at will

- (c) where the partnership is for a fixed duration
- (d) in all cases

Q49. Under Section 44 of the Partnership Act, on which of these grounds a partner of a firm may sue for dissolution of the firm

- (a) Insanity of a partner
- (b) Misconduct of a partner
- (c) In both the cases
- (d) None of these

Q50. A and B formed a partnership to undertake construction of a Shopping Complex in Punjab. On completion of the Shopping Complex-----

- (a) The firm stands dissolved
- (b) Firm is reconstituted
- (c) Partnership is renewed
- (d) Firm continues

Q51. ABC are three partners. On death of C, his son D is admitted into the partnership. This is a case of---

- (a) Reformation of firm
- (b) Dissolution of partnership
- (c) Extension of partnership
- (d) Refurbishing of partnership

Q52. Dissolution of partnership between all the partners of the firm is called-----

- (a) Dissolution of the firm
- (b) Dissolution of partnership
- (c) Winding up of firm
- (d) Termination of firm

Q53. ---- can be ground for dissolution of a firm under section 44 of the partnership Act.

- (a) A partner getting married without consent of other partners..
- (b) One partner transferring whole of his interest to another partner.
- (c) One partner transferring whole of his interest to third party
- (d) One partner transferring part of his interest to another partner.

Q54. Firm is deemed to be wound up on----

- (a) elapse of six month from the date of filing application.
- (b) settlement of accounts
- (c) immediately on serving notice of dissolution
- (d) 31st March of the next year



Q55. A partner has no implied authority to---

- (a) acquire immovable property for the firm
- (b) to take part in day to day affairs of the firm
- (c) to take payment and give receipt thereof on behalf of the firm
- (d) to engage staff for the affair of the firm

Q56. Difference of opinion of ordinary matters of the firm can be resolved by—

- (a) consensus
- (b) majority decision
- (c) court orders
- (d) subject to intervention of Registrar of firms

Q57. -----is key test of existence of partnership.

- (a) Mutual agency
- (b) Profit sharing
- (c) Capital contribution
- (d) Existence of long term business

Q58. Partners are ----of each other

- (a) friends
- (b) colleague
- (c) agent
- (d) master-servant

Q59. A new partner can be admitted---

- (a) with majority decision
- (b) with the consent of managing partner
- (c) with the approval of Registrar of firms
- (d) with the consent of all partners

Q60. A Joint Hindu Family business arise out of—

- (a) contractual relationship
- (b) God's blessing
- (c) operation of law
- (d) non of these

Q61. An act, to be called on 'act of a firm', within the meaning of Section 2(a) of the Indian Partnership Act, 1932 is

- (a) every act of the partners
- (b) only such acts which give rise to a right enforceable by or against the firm
- (c) such acts which do not give rise to a right enforceable by or against the firm
- (d) either (a) or (b) or (c).

Q62. A partnership firm is--

- (a) a distinct legal entity from its partners
- (b) not a distinct legal entity from its partners
- (c) a juristic person
- (d) either (a) or (c).

Q63. For the purposes of income-tax, a partnership firm

- (a) can be assessed as an entity distinct and separate from its partners
- (b) cannot be assessed as an entity separate and distinct from its partners
- (c) can be assessed as an entity distinct and separate from its partners only with the permission of the court
- (d) can be assessed as an entity distinct and separate from its partners only if all the partners agree for the same.

Q64. Which of the following is not an essential requisite for creating a partnership as per Section 4

- (a) an agreement to carry on a business
- (b) sharing of profits
- (c) sharing of losses
- (d) business to be carried by all or any of them acting for all.

Q65. Under Section 7 of the Indian Partnership Act, 1932, partnership at will is subject to

- (a) one exception
- (b) two exceptions
- (c) three exceptions
- (d) five exceptions.

Q66. Where a partner is entitled to interest on the capital subscribed, such interest is payable

- (a) out of profits only
- (b) out of capital if no profits
- (c) out of fund provided by Central Government
- (d) either (a) or (b) or (c).

Q67. When the property is purchased out of the partnership funds but in the name of an individual partner, it

- (a) becomes an estate of the partner
- (b) becomes a disputed property
- (c) is a question of fact to be determined with reference to the intention of the partners
- (d) is a question of law to be decided on legal principles.

Q68. A partner has a right to indemnity for the acts done in

- (a) the ordinary & proper conduct of the business
- (b) an emergency



- (c) both (a) and (b)
- (d) in all cases

Q69. The maximum number of partners in a partnership, has been provided under

- (a) the Indian Partnership Act, 1932
- (b) the Indian Companies Act, 1956
- (c) the Indian Contract Act, 1872
- (d) the Penal code.

Q70. The rights and duties of a partner contained in Section 12 of the Indian Partnership Act, 1932 are

- (a) subject to the provision of the Indian Partnership Act, 1932
- (b) subject to a contrary arrangement between the partners
- (c) subject to the provisions of the Indian Contract Act, 1872
- (d) subject to the provisions of the Companies Act.

Q71. An agreement in restraint of trade in a partnership under section 11 of the Act is

- (a) valid
- (b) voidable
- (c) void
- (d) illegal

Q72. XYZ formed a partnership for construction of a Sports Complex for Common Wealth Games in Delhi, after completion of the project they took up another project of developing housing complex for slum dwellers. This partnership is now---

- (a) Partnership at will
- (b) Particular partnership
- (c) partnership with undefined mission
- (d) Unlimited partnership

Q73. Formed a partnership for construction of a Sports Complex for Common Wealth Games in Delhi. This partnership is called---

- (a) Partnership at will
- (b) Particular partnership
- (c) partnership with undefined mission
- (d) Unlimited partnership

Q74. In settling the accounts of a firm after dissolution the goodwill-----is included in the assets.

- (a) always
- (b) seldom
- (c) subject to contract between the partners
- (d) not necessarily

Q75. Transfer of a part or whole of share by a partner to third person---

- (a) is permitted by majority decision

- (b) can be done if other partners are suitably compensated
- (c) can be made if so allowed by Registrar of firms
- (d) not permitted at all unless otherwise agreed

Q76. Just and equitable ground for court ordering dissolution of firm includes---

- (a) dead lock in management
- (b) disappearance of the substratum of business
- (c) Partners not in talking terms
- (d) all the three

Q77. On settlement of accounts of a firm after dissolution the goodwill the firm may be sold---

- (a) separately
- (b) along with other assets
- (c) either a or b
- (d) compulsorily separately only

Q78. The limitation period for a suit for accounts of dissolution of a firm is---

- (a) as defined in the partnership deed
- (b) five years
- (c) not defined
- (d) three years

Q79. In case of dissolution of firm, the available assets are distributed as per---

- (a) Garner v Murry decision
- (b) profit sharing ratio
- (c) as per fixed capital ratio
- (d) as per paying capacity of the partners

Q80. ----is the real test of existence of partnership.

- (a) Mutual agency relationship
- (b) Sharing of profit and loss
- (c) Carrying on business by all
- (d) Legality of business

Q81. ----partner does not take part in management of the firm

- (a) Senior
- (b) Active
- (c) Sleeping
- (d) Managing partner

Q82. To get a share in the profit of the firm, a new partner compensates the old partner by--

- (a) obeying their orders and seniority
- (b) not claiming salary for the time devoted in the firm



- (c) bringing his share of goodwill
- (d) all the three

Q83. A new partner can be admitted----

- (a) with majority decision
- (b) by opinion poll
- (c) with the approval of Registrar of firms
- (d) with the consent of all partners

Q84. On dissolution of the firm, it is necessary to---

- (a) wind up the affairs of the firm
- (b) appoint administrator to oversee winding up affairs
- (c) dispose off the stock in trade immediately
- (d) to block the firm's bank a/c

Q85. A partnership is dissolved on death of a partner--

- (a) compulsorily
- (b) compulsorily unless there is a contract to the contrary
- (c) is so declared by the deceased partner in his dying statement
- (d) if managing partner decides to do so

Q86. A retiring partner can be discharged from liability for all acts of the firm done before retirement if---

- (a) there is an implied agreement to that effect
- (b) there is an agreement to that effect by him between the partners and third party
- (c) both the cases
- (d) can not be discharged at all.

Q87. A person lending his name and credit to the firm without capital contribution is called--

- (a) Dormant partner
- (b) sleeping partner
- (c) Sub-partner
- (d) Nominal partner

Q88. Retiring partner is called---

- (a) outgoing partner
- (b) minority partner
- (c) disgruntled partner
- (d) Ceased to be partner

Q89. A firm can not be registered with name having -----as a part of its name.

- (a) Modern
- (b) Crown

- (c) Mahan
- (d) Standard

Q90. Third parties of an unregistered firm can file suit against--

- (a) the firm
- (b) partners
- (c) both
- (d) none

Q91. The penalit for non-registration a firm are provides in---

- (a) Section 68
- (b) Section 70
- (c) Section 81
- (d) None of these

Q92. The laibilith of a parter is---

- (a) unlimited
- (b) limited
- (c) uncertain
- (d) unqualified

Q93. In case of HUF--- has unlimited liability.

- (a) female member
- (b) Karta
- (c) minor
- (d) unmarreid

Q94. An unregistered firm can not file suit agianst---

- (a) its partner
- (b) outsiders
- (c) both
- (d) eitehr a or b

Q95. The maximum penalty for non-registration of a firm is--

- (a) 6 months imprisonment
- (b) fine of ₹10,000 plus 6 months imprisonment
- (c) fine of ₹10,000
- (d) none of these

Q96. ---can not become member of a HUF

- (a) female member
- (b) minor



- (c) unmarried person
- (d) all the three

Q97. Audit of a partnership firm is done under ---

- (a) Partnership Act
- (b) Under the companies Act
- (c) Under Limited Partnership Act
- (d) not mandatory

Q98. If the number of partners exceed the limit as per Section 11 of the Companies Act, the firm becomes--

- (a) unregistered firm
- (b) banned firm
- (c) illegal association
- (d) Prohibited firm

Q99. A partner has executed an agreement for sale of the immovable property of the firm without knowledge of other partner. On what ground the firm disown liability to third party---

- (a) lack of consent
- (b) challenge the adequacy of price settled
- (c) being outside implied authority of a partner
- (d) lack of contractual capacity of the buyer

Q100. A partnership agreement can be---

- (a) written
- (b) oral
- (c) implied from the conduct
- (d) all the three

Answers

1	(b)	2	(b)	3	(b)	4	(b)	5	(a)	6	(b)	7	(a)	8	(a)	9	(a)	10	(a)
11	(b)	12	(c)	13	(c)	14	(c)	15	(b)	16	(d)	17	(c)	18	(a)	19	(b)	20	(d)
21	(a)	22	(b)	23	(b)	24	(d)	25	(a)	26	(a)	27	(b)	28	(c)	29	(a)	30	(c)
31	(c)	32	(a)	33	(c)	34	(c)	35	(d)	36	(a)	37	(b)	38	(a)	39	(c)	40	(b)
41	(d)	42	(a)	43	(a)	44	(d)	45	(c)	46	(a)	47	(d)	48	(b)	49	(d)	50	(a)
51	(b)	52	(a)	53	(c)	54	(b)	55	(a)	56	(b)	57	(a)	58	(c)	59	(d)	60	(c)
61	(b)	62	(b)	63	(a)	64	(c)	65	(b)	66	(a)	67	(c)	68	(a)	69	(b)	70	(b)
71	(a)	72	(a)	73	(b)	74	(c)	75	(d)	76	(d)	77	(c)	78	(d)	79	(a)	80	(a)
81	(c)	82	(c)	83	(d)	84	(a)	85	(b)	86	(c)	87	(d)	88	(a)	89	(b)	90	(c)
91	(d)	92	(a)	93	(b)	94	(c)	95	(d)	96	(a)	97	(d)	98	(c)	99	(c)	100	(d)



Section B

Fundamentals of Industrial Laws





Study Note - 5

THE FACTORIES ACT, 1948



This Study Note includes

- 5.1 The Factories Act, 1948 - concepts, Definition, Scope and Objectives**
- 5.2 Definitions**
- 5.3 References to Time of Day**
- 5.4 General Duties of the Occupier**
- 5.5 Inspectors**
- 5.6 Certifying Surgeons**
- 5.7 Health**
- 5.8 Safety**
- 5.9 Provisions Relating to Hazardous Processes**
- 5.10 Welfare**
- 5.11 Working Hours of Adults**
- 5.12 Penalties**

5.1 THE FACTORIES ACT, 1948-CONCEPTS, DEFINITION, SCOPE AND OBJECTIVES

INTRODUCTION

Factories Act, 1948 is one of the major Central Act aimed to regulate the working conditions in the factories. It lays down all essential provisions relating to proper working conditions, working hours, holidays, overtime, employment of children, women and young person, safety, health and welfare of the workers employed in a factory etc. The main objective of the Act is not only to ensure adequate safety measure but also to promote health and welfare of the workers employed in a factory as well to prevent haphazard growth of factories through the provisions relating to approval of plans before creation of a factory. The Act has been enacted primarily with the object of protecting workers employed in factories against industrial and occupational hazards. Toward that objective, it imposes upon the owner or occupier certain obligations to protect the workers and secure for them employment in conditions conducive for their health and safety. This Act was enacted in 1948 and came into force with effect from-1st April, 1949. Prior to the present Act, first time Indian Factories Act, 1881 was enacted. The then existing law relating to the regulation of labor employed in Factories were embodied in the Factories Act, 1934. It was amended several times but its general framework remained unchanged. Application of this Act revealed a number of defects and weaknesses which hampered effective administration. The provisions for safety, health and welfare of workers were generally found to be inadequate and unsatisfactory and even such protection as was provided did not extend to a large number of workers employed in work places not covered by the Act. Accordingly the need for a fresh legislation was felt. Therefore, the Factories Act, 1948 consolidating and amending the law relating to labors in factories, was passed by the Constitutional Assembly on 28th August 1948 and received the assent of the Governor General of India on 23rd September 1948.

Factory is a concurrent subject included in List III of 7th schedule to Constitution - entry no. 36. Both the Central Government and State Government can make legislation regulating the working of Factories.

The Act has been amended several times but major amendments were in 1976 and in 1987 wherein emphasis has been laid on safety measures. The Act extends to whole of India.

This Act contains 120 sections and 3 schedules.

The important concepts and sections are discussed below:

Constitutional provisions:

Entry no. 36 List III to Constitution. Being in the concurrent list both State and Central Government has power to make enactment.

Objective:

It is one of the social enactments intended to achieve social reforms by regulating the working conditions, working hours of the workers employed in a factory wherein ten or more workers are employed if manufacturing process is being carried on with the aid of power and twenty or more workers without the aid of power.

Applicability: The Factories Act, 1948 came into force on the 1st day of April, 1949. Its object is to regulate the conditions of work in manufacturing establishments which come within the definition of the term 'factory' as used in the Act.

The Act extends to the whole of India including the State of Jammu and Kashmir. Unless otherwise provided, it also applies to factories belonging to the Central or any State Government (Sec. 116) The Factories Act, 1948 is applicable to factories wherein ten or more workers are or were working on any day of the preceding twelve months and in which manufacturing process is being carried on with the aid of power or twenty or more workers without the aid of power.

5.2 DEFINITIONS

First we must understand, what is a FACTORY?

According to Sec 2(m), "factory" means any premises including the precincts thereof—

- (i) whereon ten or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on with the aid of power, or is ordinarily so carried on, or
- (ii) whereon twenty or more workers are working, or were working on any day of the preceding twelve months, and in any part of which a manufacturing process is being carried on without the aid of power, or is ordinarily so carried on,—

but does not include a mine subject to the operation of [the Mines Act, 1952 (35 of 1952)], or [a mobile unit belonging to the armed forces of the Union, railway running shed or a hotel, restaurant or eating place].

Explanation I: For computing the number of workers for the purposes of this clause all the workers in different groups and relays in a day shall be taken into account;

Explanation II: For the purposes of this clause, the mere fact that an Electronic Data Processing Unit or a Computer Unit is installed in any premises or part thereof, shall not be construed to make it a factory if no manufacturing process is being carried on in such premises or part thereof;

Explanation III: Precincts' means a space enclosed by walls. What will come under precincts of a particular premises will depend on the circumstances of each case.

Comments:- i) The establishment of hotel would not fall for classification as a factory under section 2(m) of the Act, [*Lal Bovta Hotel Aur Bakery Mazdoor Union vs Ritz Private Ltd 2007 (113)FLR568*]

- ii) All the workers employed by the construction company would squarely attract the definition of the term "workmen" as found in Section 2(l) of the Act as they are working for remuneration in manufacturing process carried out by the project [*Lal Mohammad v Indian Railway Construction Co Ltd AIR 1999SC355*]
- iii) Commercial establishment receiving the products in bulk and other unpacking such bulk products pack them according to the customer's requirements and dispatch such products to customers.



Such an act is manufacturing process within the meaning of section 2(k). [Parry co Lt, Presiding Officer, II Additional Labor Court, Madras, 1998] ILLJ406]

Other definitions are also given in Section 2 of the Act as follows:

In this Act, unless there is anything repugnant in the subject or context, —

- (a) “Adult” means a person who has completed his eighteenth year of age;
- (b) “Adolescent” means a person who has completed his fifteen year of age but has not completed his eighteenth year;
 - (bb) “Calendar year “ means the period of twelve months beginning with the first day of January in any year;
- (c) “Child” means a person who has not completed his fifteenth year of age;
 - (ca) “Competent person”, in relation to any provision of this Act, means a person or an institution recognised as such by the Chief Inspector for the purposes of carrying out tests, examinations and inspections required to be done in a factory under the provisions of this Act having regard to—
 - (i) The qualifications and experience of the person and facilities available at his disposal; or
 - (ii) The qualifications and experience of the persons employed in such institution and facilities available therein, with regard to the conduct of such test, examinations and inspections, and more than one person or institution can be recognised as a competent person in relation to a factory;
 - (cb) “Hazardous process” means any process or activity in relation to an industry specified to the First Schedule where, unless special care is taken, raw materials used therein or the intermediate or finished products, bye-products, wastes or effluents thereof would—
 - (i) Cause material impairment to the health of the persons engaged in or connected therewith, or
(Result in the pollution of the general environment: Provided that the State Government may, by notification in the Official Gazette, amend the First Schedule by way of addition, omission or variation of any industry specified in the said Schedule;
- (d) “Young person” means a person who is either a child or an adolescent
- (e) “Day” means a period of twenty-four hours beginning at midnight;
- (f) “Week” means a period of seven days beginning at midnight on Saturday night or such other night as may be approved in writing for a particular area by the Chief Inspector of factories;
- (g) “Power “ means electrical energy, or any other form of energy which is mechanically transmitted and is not generated by human or animal agency;
- (h) “Prime mover “ means any engine, motor or other appliance which generates or otherwise provides power;
- (i) “Transmission machinery” means any shaft, wheel drum, pulley, system of pulleys, coupling, clutch, driving belt or other appliance or device by which the motion of a prime mover is transmitted to or received by any machinery or appliance;
- (j) “Machinery” includes prime movers, transmission machinery and all other appliances whereby power is generated, transformed, transmitted or applied;
- (k) “Manufacturing process” means any process for—
 - (i) Making, altering, repairing, ornamenting, finishing, packing, oiling, washing, cleaning, breaking up, demolishing, or otherwise treating or adapting any article or substance with a view to its use, sale, transport, delivery or disposal, or

- (ii) Pumping oil, water, sewage or any other substance; or;
- (iii) Generating, transforming or transmitting power; or
- (iv) Composing types for printing, printing by letter press, lithography, photogravure or other similar process or book binding; [ra-6] [ra-7 or ra-7]
- (v) Constructing, reconstructing, repairing, refitting, finishing or breaking up ships or vessels; (Inserted by the Factories (Amendment) Act, 1976, w.e.f. 26-10-1976.)
- (vi) Preserving or storing any article in cold storage;
- (l) “worker” means a person employed, directly or by or through any agency (including a contractor) with or without the knowledge of the principal employer, whether for remuneration or not, in any manufacturing process, or in cleaning any part of the machinery or premises used for a manufacturing process, or in any other kind of work incidental to, or connected with, the manufacturing process, or the subject of the manufacturing process but does not include any member of the armed forces of the union;
- (n) “Occupier” of a factory means the person who has ultimate control over the affairs of the factory:

Provided that:

- (i) In the case of a firm or other association of individuals, any one of the individual partners or members thereof shall be deemed to be the occupier;
- (ii) In the case of a company, any one of the directors shall be deemed to be the occupier;
- (iii) In the case of a factory owned or controlled by the Central Government or any State Government, or any local authority, the person or persons appointed to manage the affairs of the factory by the Central Government, the State Government or the local authority, as the case may be, shall be deemed to be the occupier:

Provided further that in the case of a ship which is being repaired, or on which maintenance work is being carried out, in a dry dock which is available for hire, - (1) the owner of the dock shall be deemed to be the occupier for the purposes of any matter provided for by or under—

- (a) Section 6, Section 7, Section 7A, Section 7B, Section 11 or Section 12;
- (b) Section 17, in so far as it relates to the providing and maintenance of sufficient and suitable lighting in or around the dock;
- (c) Section 18, Section 19, Section 42, Section 46, Section 47 or Section 49, in relation to the workers employed on such repair or maintenance;

(2) The owner of the ship or his agent or master or other officer-in-charge of the ship or any person who contracts with such owner, agent or master or other officer-in-charge to carry out the repair or maintenance work shall be deemed to be the occupier for the purposes of any matter provided for by or under Section 13, Section 14, Section 16 or Section 17 (save as otherwise provided in this proviso) or Chapter IV (except Section 27) or Section 43, Section 44 or Section 45, Chapter VI, Chapter VII, Chapter VIII or Chapter IX or Section 108, Section 109 or Section 110, in relation to—

- (a) The workers employed directly by him, or by or through any agency; and
- (b) The machinery, plant or premises in use for the purpose of carrying out such repair or maintenance work by such owner, agent, master or other officer-in-charge or person;
- (r) Shift means where work of the same kind is carried out by two or more sets of workers working during different periods of the day, each of such sets is called a “group” or “relay” and each of such periods is called a “shift”.



5.3 REFERENCES TO TIME OF DAY (Section 3)

In this Act references to time of day are references to Indian Standard Time, being five and a half hours ahead of Greenwich Mean Time: Provided that for any area in which Indian Standard Time is not ordinarily observed the State Government may make rules—

- (a) Specifying the area,
- (b) Defining the local mean time ordinarily observed therein, and
- (c) Permitting such time to be observed in all or any of the factories situated in the area.

POWER TO DECLARE DIFFERENT DEPARTMENTS TO BE SEPARATE FACTORIES OR TWO OR MORE FACTORIES TO BE A SINGLE FACTORY (Section 4)

The State Government may, on its own or on an application made in this behalf by an occupier, direct, by an order in writing, and subject to such conditions as it may deem fit, that for all or any of the purposes of this Act different departments or branches of a factory of the occupier specified in the application shall be treated as separate factories or that two or more factories of the occupier specified in the application shall be treated as a single factory:

Provided that no order under this section shall be made by the State Government on its own motion unless an opportunity of being heard is given to the occupier.

POWER TO EXEMPT DURING PUBLIC EMERGENCY (Section 5)

In any case of public emergency the State Government may, by notification in the Official Gazette, exempt any factory or class or description of factories from all or any of the provisions of this Act except Section 67 for such period and subject to such conditions as it may think fit: Provided that no such notification shall be made for a period exceeding three months at a time.

Explanation: For the purposes of this section “public emergency” means a grave emergency whereby the security of India or of any part of the territory thereof is threatened, whether by war or external aggression or internal disturbance.

5.4 GENERAL DUTIES OF THE OCCUPIER (Section 7A)

1. Every occupier shall ensure, so far as is reasonably practicable, the health, safety and welfare of all workers while they are at work in the factory.
2. Without prejudice to the generality of the provisions of sub-section (1), the matters to which such duty extends, shall include—
 - (a) The provision and maintenance of plant and systems of work in the factory that are safe and without risks to health;
 - (b) The arrangements in the factory for ensuring safety and absence of risks to health in connection with the use, handling, storage and transport of articles and substances;
 - (c) The provision of such information, instruction, training and supervision as are necessary to ensure the health and safety, of all workers at work;
 - (d) The maintenance of all places of work in the factory in a condition that is safe and without risks to health and the provision and maintenance of such means of access to, and egress from, such places as are safe and without such risks;
 - (e) The provision, maintenance or monitoring of such working environment in the factory for the workers that is safe, without risks to health and adequate as regards facilities and arrangements for their welfare at work.
3. Except in such cases as may be prescribed, every occupier shall prepare, and, as often as may be appropriate, revise, a written statement of his general policy with respect to the health and safety of the workers at work and the organisation and arrangements for the time being in

force for carrying out that policy, and to bring the statement and any revision thereof to the notice of all the workers in such manner as may be prescribed.

GENERAL DUTIES OF MANUFACTURERS, ETC., AS REGARDS ARTICLES AND SUBSTANCES FOR USE IN FACTORIES (Sec 7-B):

Introduced by Amendment Act, 1987. The provisions are as follows:-

1. Every person who designs, manufactures, imports or supplies any article for use in any factory shall —
 - (a) Ensure, so far as is reasonably practicable, that the article is so designed and constructed as to be safe and without risks to the health of the workers when properly used;
 - (b) Carry out or arrange for the carrying out of such tests and examination as may be considered necessary for the effective implementation of the provisions of clause (a);
 - (c) Take such steps as may be necessary to ensure that adequate information will be available —
 - (i) in connection with the use of the article in any factory;
 - (ii) About the use for which it is designed and tested; and
 - (iii) about any conditions necessary to ensure that the article, when put to such use, will be safe, and without risks to the health of the workers : Provided that where an article is designed or manufactured outside India, it shall be obligatory on the part of the importer to see -
 - (a) That the article conforms to the same standards if such article is manufactured in India, or
 - (b) If the standards adopted in the country outside for the manufacture of such article is above the standards adopted in India that the article conforms to such standards.
2. Every person, who undertakes to design or manufacture any article for use in any factory, may carry out or arrange for the carrying out of necessary research with a view to the discovery and, so far as is reasonably practicable, the elimination or minimization of any risks to the health or safety of the workers to which the design or article may give rise.
3. Nothing contained in sub-sections (1) and (2) shall be construed to require a person to repeat the testing, examination or research which has been carried out otherwise than by him or at his instance in so far as it is reasonable for him to rely on the results thereof for the purposes of the said sub-sections.
4. Any duty imposed on any person by sub-sections (1) and (2) shall extend only to things done in the course of business carried on by him and to matters within his control.
5. Where a person designs, manufactures, imports or supplies an article on the basis of a written undertaking by the user of such article to take the steps specified in such undertaking to ensure, so far as is reasonably practicable, that the article will be safe and without risks to the health of the workers when properly used, the undertaking shall have the effect of relieving the person designing, manufacturing, importing or supplying the article from the duty imposed by clause (a) of sub-section (1) to such extent as is reasonable having regard to the terms of the undertaking.
6. For the purposes of this section, an article is not to be regarded as properly used if it is used without regard to any information or advice relating to its use which has been made available by the person who has designed, manufactured, imported or supplied the article.

Explanation: For the purposes of this section, “article” shall include plant and machinery.

5.5 INSPECTORS (Section 8)

- (1) The State Government may, by notification in the Official Gazette, appoint such persons as possess the prescribed qualification to be Inspectors for the purposes of this Act and may assign to them such local limits as it may think fit.

>5.6 I FUNDAMENTALS OF LAWS AND ETHICS



- (2) The State Government may, by notification in the Official Gazette, appoint any person to be a Chief Inspector who shall, in addition to the powers conferred on a Chief Inspector under this Act, exercise the powers of an Inspector throughout the State.
- (2A) The State Government may, by notification in the Official Gazette, appoint as many Additional Chief Inspectors, Joint Chief Inspectors and Deputy Chief Inspectors and as many other officers as it thinks fit to assist the Chief Inspector and to exercise such of the powers of the Chief Inspector as may be specified in such notification.
- (2B) Every Additional Chief Inspector, Joint Chief Inspector, Deputy Chief Inspector and every other officer appointed under sub-section (2A) shall, in addition to the powers of a Chief Inspector specified in the notification by which he is appointed, exercise the powers of an Inspector throughout the State.
- (3) No person shall be appointed under sub-section (1), sub-section (2) sub-section (2A) [ra-38] or sub- section (5), or having been so appointed, shall continue to hold office, who is or becomes directly or indirectly interested in a factory or in any process or business carried on therein or in any patent or machinery connected therewith.
- (4) Every District Magistrate shall be an Inspector for his district.
- (5) The State Government may also, by notification as aforesaid, appoint such public officers as it thinks fit to be additional Inspectors for all or any of the purposes of this Act, within such local limits as it may assign to them respectively.
- (6) In any area where there are more Inspectors than one the State Government may, by notification as aforesaid, declare the powers, which such Inspectors shall respectively exercise and the Inspector to whom the prescribed notices are to be sent.
- (7) Every Chief Inspector, Additional Chief Inspector, Joint Chief Inspector, Deputy Chief Inspector, Inspector and every other officer appointed under this section shall be deemed to be a public servant within the meaning of the Indian Penal Code (45 of 1860), and shall be officially subordinate to such authority as the State Government may specify in this behalf.

POWERS OF INSPECTORS (Section 9)

Subject to any rules made in this behalf, an Inspector may, within the local limits for which he is appointed, —

- (a) Enter, with such assistants being persons in the service of the Government, or any local or other public authority, or with an expert as he thinks fit, any place which is used, or which he has reason to believe is used, as a factory;
- (b) Make examination of the premises, plant, machinery, article or substance;
- (c) Inquire into any accident or dangerous occurrence, whether resulting in bodily injury, disability or not, and take on the spot or otherwise statements of any person which he may consider necessary for such inquiry;
- (d) Require the production of any prescribed register or any other document relating to the factory;
- (e) Seize, or take copies of, any register, record or other document or any portion thereof, as he may consider necessary in respect of any offence under this Act, which he has reason to believe, has been committed;
- (f) Direct the occupier that any premises or any part thereof, or anything lying therein, shall be left undisturbed (whether generally or in particular respects) for so long as is necessary for the purpose of any examination under clause (b);
- (g) Take measurements and photographs and make such recordings as he considers necessary for the purpose of any examination under clause (b), taking with him any necessary instrument or equipment;

(h) In case of any article or substance found in any premises, being an article or substance which appears to him as having caused or is likely to cause danger to the health or safety of the workers, direct it to be dismantled or subject it to any process or test (but not so as to damage or destroy it unless the same is, in the circumstances necessary, for carrying out the purposes of this Act), and take possession of any such article of substance or a part thereof, and detain it for so long as is necessary for such examination; (i) exercise such other powers as may be prescribed:

Provided that no person shall be compelled under this section to answer any question or give any evidence tending to incriminate himself.

5.6 CERTIFYING SURGEONS (Section 10)

- (1) The State Government may appoint qualified medical practitioners to be certifying surgeons for the purposes of this Act within such local limits or for such factory or class or description of factories as it may assign to them respectively.
- (2) A certifying surgeon may, with the approval of the State Government, authorize any qualified medical practitioner to exercise any of his powers under this Act for such period as the certifying surgeon may specify and subject to such conditions as the State Government may think fit to impose, and references in this Act to a certifying surgeon shall be deemed to include references to any qualified medical practitioner when so authorized.
- (3) No person shall be appointed to be, or authorized to exercise the powers of, a certifying surgeon, or having been so appointed or authorized, continue to exercise such powers, who is, or becomes the occupier of a factory or is or becomes directly or indirectly interested therein or in any process or business carried on therein or in any patent or machinery connected therewith or is otherwise in the employ of the factory:

Provided that the State Government may, by order in writing and subject to such conditions as may be specified in the order, exempt any person or class of persons from the provisions of this sub-section in respect of any factory or class or description of factories.

- (4) The certifying surgeon shall carry out such duties as may be prescribed in connection with—
 - (a) The examination and certification of young persons under this Act;
 - (b) The examination of persons engaged in factories in such dangerous occupations or processes as may be prescribed;
 - (c) The exercising of such medical supervision as may be prescribed for any factory or class or description of factories where—
 - (i) cases of illness have occurred which it is reasonable to believe are due to the nature of the manufacturing process carried on, or other conditions of work prevailing, therein;
 - (ii) By reason of any change in the manufacturing process carried on or in the substances used therein or by reason of the adoption of any new manufacturing process or of any new substance for use in a manufacturing process, there is a likelihood of injury to the health of workers employed in that manufacturing process;
 - (iii) Young persons are, or are about to be, employed in any work which is likely to cause injury to their health. Explanation : In this section "qualified medical practitioner" means a person holding a qualification granted by an authority specified in the Schedule to the Indian Medical Degrees Act, 1916 (7 of 1916) or in the Schedules to the Indian Medical Council Act, 1933 (27 of 1933).



5.7 HEALTH

Sec. 11 to 20 deals with provisions ensuring health, safety and welfare of workers.

I. CLEANLINESS (Section 11)

- (1) Every factory shall be kept clean and free from effluvia arising from any drain, privy or other, nuisance, and in particular—
 - (a) Accumulations of dirt and refuse shall be removed daily by sweeping or by any other effective method from the floors and benches of workrooms and from staircases and passages, and disposed of in a suitable manner;
 - (b) The floor of every workroom shall be cleaned at least once in every week by washing, using disinfectant, where necessary, or by some other effective method;
 - (c) Where a floor is liable to become wet in the course of any manufacturing process to such extent as is capable of being drained, effective means of drainage shall be provided and maintained;
 - (d) All inside walls and partitions, all ceilings or tops of rooms and all walls, sides and tops of passages and staircases shall—
 - (i) Where they are painted otherwise than with washable water-paint or varnished, be repainted or revarnished least once in every period of five years;
 - (ii) Where they are painted with washable water paint, be repainted with at least one coat of such paint at least once in every period of three years and washed at least once in every period of six months;
 - (iii) Where they are painted or varnished or where they have smooth impervious surfaces, be cleaned at least once in every period of fourteen months by such method as may be prescribed;
 - (iv) In any other case, be kept whitewashed or colourwashed, and the whitewashing or colourwashing shall be carried out at least once in every period of fourteen months;
 - (dd) all doors and window frames and other wooden or metallic frame work and shutters shall be kept painted or varnished and the painting or varnishing shall be carried out at least once in every period of five years;
 - (e) The dates on which the processes required by clause (d) are carried out shall be entered in the prescribed register.
- (2) If, in view of the nature of the operations carried on in a factory or class or description of factories or any part of a factory or class or description of factories, it is not possible for the occupier to comply with all or any of the provisions of sub-section (1), the State Government may by order exempt such factory or class or description of factories or part from any of the provisions of that sub-section and specify alternative methods for keeping the factory in a clean state.

II. DISPOSAL OF WASTES AND EFFLUENTS (Section 12)

- (1) Effective arrangements shall be made in every factory for the treatment of wastes and effluents due to the manufacturing process carried on therein, so as to render them innocuous, and for their disposal.
- (2) The State Government may make rules prescribing the arrangements to be made under sub-section (1) or requiring that the arrangements made in accordance with sub-section (1) shall be approved by such Authority as may be prescribed.

III. VENTILATION AND TEMPERATURE (Section 13)

- (1) Effective and suitable provision shall be made in every factory for securing and maintaining in every workroom—
 - (a) Adequate ventilation by the circulation of fresh air, and
 - (b) Such a temperature as will secure to workers therein reasonable conditions of comfort and prevent injury to health; and in particular,—
 - (i) Walls and roofs shall be of such material and so designed that such temperature shall not be exceeded but kept as low as practicable;
 - (ii) Where the nature of the work carried on in the factory involves, or is likely to involve, the production of excessively high temperatures such adequate measures as are practicable shall be taken to protect the workers therefrom, by separating the process which produces such temperatures from the workroom, by insulating the hot parts or by other effective means.
- (2) The State Government may prescribe a standard of adequate ventilation and reasonable temperature for any factory or class or description of factories or parts thereof and direct that [Ira-48 proper measuring instruments, at such places and in such position as may be specified, shall be provided and such records, as may be prescribed, shall be maintained;
- (3) If it appears to the Chief Inspector that excessively high temperatures in any factory can be reduced by the adoption of suitable measures, he may, without prejudice to the rules made under sub-section (2), serve on the occupier, an order in writing specifying the measures which, in his opinion, should be adopted, and requiring them to be carried out before a specified date.

IV. DUST AND FUME (Section 14)

- (1) In every factory in which, by reason of the manufacturing process carried on, there is given off any dust or fume or other impurity of such a nature and to such an extent as is likely to be injurious or offensive to the workers employed therein, or any dust in substantial quantities, effective measures shall be taken to prevent its inhalation and accumulation in any workroom, and if any exhaust appliance is necessary for this purpose, it shall be applied as near as possible to the point of origin of the dust, fume or other impurity, and such point shall be enclosed so far as possible.
- (2) In any factory no stationary internal combustion engine shall be operated unless the exhaust is conducted into the open air, and no other internal combustion engine shall be operated in any room unless effective measures have been taken to prevent such accumulation of fumes therefrom as are likely to be injurious to workers employed in the room.

V. ARTIFICIAL HUMIDIFICATION (Section 15)

- (1) In respect of all factories in which the humidity of the air is artificially increased, the State Government may make rules,—
 - (a) Prescribing standards of humidification;
 - (b) Regulating the methods used for artificially increasing the humidity of the air,
 - (c) Directing prescribed tests for determining the humidity of the air to be correctly carried out and recorded;
 - (d) Prescribing methods to be adopted for securing adequate ventilation and cooling of the air in the workrooms.
- (2) In any factory in which the humidity of the air is artificially increased, the water used for the purpose shall be taken from a public supply, or other source of drinking water, or shall be effectively purified before it is so used.



- (3) If it appears to an Inspector that the water used in a factory for increasing humidity which is required to be effectively purified under sub-section (2) is not effectively purified he may serve on the manager of the factory an order in writing, specifying the measures which in his opinion should be adopted, and requiring them to be carried out before specified date.

VI. OVERCROWDING (Section 16)

- (1) No room in any factory shall be overcrowded to an extent injurious to the health of the workers employed therein.
- (2) Without prejudice to the generality of sub-section (1), there shall be in every workroom of a factory in existence on the date of the commencement of this Act at least 9.9 cubic metres and of a factory built after the commencement of this Act at least 14.2 cubic metres or space for every worker employed therein, and for the purposes of this sub-section no account shall be taken of any space which is more than 4.2 metres above the level of the floor of the room.
- (3) If the Chief Inspector by order in writing so requires, there shall be posted in each workroom of a factory a notice specifying the maximum number of workers who may, in compliance with the provisions of this section, be employed in the room.
- (4) The Chief Inspector may by order in writing exempt, subject to such conditions, if any, as he may think fit to impose, any workroom from the provisions of this section, if he is satisfied that compliance therewith in respect of the room is unnecessary in the interest of the health of the workers employed therein.

VII. LIGHTING (Section 17)

- (1) In every part of a factory where workers are working or passing there shall be provided and maintained sufficient and suitable lighting, natural or artificial, or both.
- (2) In every factory all glazed windows and skylights used for the lighting of the workroom shall be kept clean on both the inner and outer surfaces and, so far as compliance with the provisions of any rules made, under sub-section (3) of section 13 will allow, free from obstruction.
- (3) In every factory effective provision shall, so far as is practicable, be made for the prevention of — (a) glare, either directly from a source of light or by reflection from a smooth or polished surface;
- (b) The formation of shadows to such an extent as to cause eye-strain or the risk of accident to any worker.
- (4) The State Government may prescribe standards of sufficient and suitable lighting for factories or for any class or description of factories or for any manufacturing process.

VIII. DRINKING WATER (Section 18)

- (1) In every factory effective arrangements shall be made to provide and maintain at suitable points conveniently situated for all workers employed therein a sufficient supply of wholesome drinking water.
- (2) All such points shall be legibly marked “drinking water” in a language understood by a majority of the workers employed in the factory, and no such point shall be situated within six metres of any washing place, urinal, latrine, spittoon, open drain carrying sullage or effluent or any other source of contamination unless a shorter distance is approved in writing by the Chief Inspector.
- (3) In every factory wherein more than two hundred and fifty workers are ordinarily employed, provisions shall be made for cooling drinking water during hot weather by effective means and for distribution thereof.
- (4) In respect of all factories or any class or description of factories the State Government may make rules for securing compliance with the provisions of sub-sections (1), (2) and (3) and for

the examination by prescribed Authorities of the supply and distribution of drinking water in factories.

IX. LATRINES AND URINALS (Section 19)

- (1) In every factory—
 - (a) Sufficient latrine and urinal accommodation of prescribed types shall be provided conveniently situated and accessible to workers at all times while they are at the factory;
 - (b) Separate enclosed accommodation shall be provided for male and female workers;
 - (c) Such accommodation shall be adequately lighted and ventilated, and no latrine or urinal shall, unless specially exempted in writing by the Chief Inspector, communicate with any workroom except through an intervening open space or ventilated passage;
 - (d) All such accommodation shall be maintained in a clean and sanitary condition at all times;
 - (e) Sweepers shall be employed whose primary duty would be to keep clean latrines, urinals and washing places.
- (2) In every factory wherein more than two hundred and fifty workers are ordinarily employed—
 - (a) All latrine and urinal accommodation shall be of prescribed sanitary types;
 - (b) The floors and internal walls, up to a height of ninety centimeters, of the latrines and urinals and the sanitary blocks shall be laid in glazed tiles or otherwise finished to provide a smooth polished impervious surface;
 - (c) Without prejudice to the provisions of clauses (d) and (e) of sub-section (1), the floors, portions of the walls and blocks so laid or finished and the sanitary pans of latrines and urinals shall be thoroughly washed and cleaned at least once in every seven days with suitable detergents or disinfectants or with both.
- (3) The State Government may prescribe the number of latrines and urinals to be provided in any factory in proportion to the numbers of male and female workers ordinarily employed therein, and provide for such further matters in respect of sanitation in factories, including the obligation of workers in this regard, as it considers necessary in the interest of the health of the workers employed therein.

X. SPITTOONS (Section 20)

- (1) In every factory there shall be provided a sufficient number of spittoons in convenient places and they shall be maintained in a clean and hygienic condition.
- (2) The State Government may make rules prescribing the type and the number of spittoons to be provided and their location in any factory and provide for such further matters relating to their maintenance in a clean and hygienic condition.
- (3) No person shall spit within the premises of a factory except in the spittoons provided for the purpose and a notice containing this provision and the penalty for its violation shall be prominently displayed at suitable places in the premises.
- (4) Whoever spits in contravention of sub-section (3) shall be punishable with fine not exceeding five rupees.

5.8 SAFETY (Section 21)

1. FENCING OF MACHINERY

- (1) In every factory the following, namely,—
 - (i) Every moving part of a prime mover and every flywheel connected to a prime mover,



whether the prime mover or flywheel is in the engine house or not;

- (ii) The headrace and tailrace of every water-wheel and water turbine;
- (iii) Any part of a stock-bar which projects beyond the head stock of a lathe; and
- (iv) Unless they are in such position or of such construction as to be safe to every person employed in the factory as they would be if they were securely fenced, the following, namely—
 - (a) Every part of an electric generator, a motor or rotary converter;
 - (b) Every part of transmission machinery; and
 - (c) Every dangerous part of any other machinery, shall be securely fenced by safeguards of substantial construction which shall be constantly maintained and kept in position while the parts of machinery they are fencing are in motion or in use :

Provided that for the purpose of determining whether any part of machinery is in such position or is of such construction as to be safe as aforesaid, account shall not be taken of any occasion when—

- (i) It is necessary to make an examination of any part of the machinery aforesaid while it is in motion or, as a result of such examination, to carry out lubrication or other adjusting operation while the machinery is in motion, being an examination or operation which it is necessary to be carried out while that part of the machinery is in motion, or
 - (ii) In the case of any part of a transmission machinery used in such process as may be prescribed (being a process of a continuous nature the carrying on of which shall be, or is likely to be, substantially interfered with by the stoppage of that part of the machinery), it is necessary to make an examination of such part of the machinery while it is in motion or, as a result of such examination, to carry out any mounting or shipping of belts or lubrication or other adjusting operation while the machinery is in motion, and such examination or operation is made or carried out in accordance with the provisions of sub-section (1) of section 22.
- (2) The State Government may by rules prescribe such further precautions as it may consider necessary in respect of any particular machinery or part thereof, or exempt, subject to such condition as may be prescribed, for securing the safety of the workers, any particular machinery or part thereof from the provisions of this section.

2. WORK ON OR NEAR MACHINERY IN MOTION (Section 22)

- (1) Where in any factory it becomes necessary to examine any part of machinery referred to in section 21, while the machinery is in motion, or, as a result of such examination, to carry out –
- (a) In a case referred to in clause (i) of the proviso to sub-section (1) of Section 21, lubrication or other adjusting operation; or
 - (b) In a case referred to in clause (ii) of the proviso aforesaid, any mounting or shipping of belts or lubrication or other adjusting operation, while the machinery is in motion such examination or operation shall be made or carried out only by a specially trained adult male worker wearing tight fitting clothing (which shall be supplied by the occupier) whose name has been recorded in the register prescribed in this behalf and who has been furnished with a certificate of his appointment, and while he is so engaged, - (a) such worker shall not handle a belt at a moving pulley unless—
 - (i) The belt is not more than fifteen centimeters in width;
 - (ii) The pulley is normally for the purpose of drive and not merely a fly-wheel or balance wheel (in which case a belt is not permissible);
 - (iii) The belt joint is either laced or flush with the belt;
 - (iv) The belt, including the joint and the pulley rim, are in good repair;

- (v) There is reasonable clearance between the pulley and any fixed plant or structure;
- (vi) Secure foothold and, where necessary, secure handhold, are provided for the operator; and
- (vii) Any ladder in use for carrying out any examination or operation aforesaid is securely fixed or lashed or is firmly held by a second person.
- (b) Without prejudice to any other provision of this Act relating to the fencing of machinery, every set screw, bolt and key on any revolving shaft, spindle, wheel or pinion, and all spur, worm and other toothed or friction gearing in motion with which such worker would otherwise be liable to come into contact, shall be securely fenced to prevent such contact.
- (2) No woman or young person shall be allowed to clean, lubricate or adjust any part of a prime mover or of any transmission machinery while the prime mover or transmission machinery is in motion, or to clean, lubricate or adjust any part of any machine if the cleaning, lubrication or adjustment thereof would expose the woman or young person to risk of injury from any moving part either of that machine or of any adjacent machinery.
- (3) The State Government may, by notification in the official Gazette, prohibit, in any specified factory or class or description of factories, the cleaning, lubricating or adjusting by any person of specified parts of machinery when those parts are in motion.

3. EMPLOYMENT OF YOUNG PERSONS ON DANGEROUS MACHINES (Section 23)

- (1) No young person shall be required or allowed to work at any machine to which this section applies, unless he has been fully instructed as to the dangers arising in connection with the machine and the precautions to be observed and—
 - (a) Has received sufficient training in work at the machine, or
 - (b) Is under adequate supervision by a person who has a thorough knowledge and experience of the machine. (2) Sub-section (1) shall apply to such machines as may be prescribed by the State Government, being machines which in its opinion are of such a dangerous character that young persons ought not to work at them unless the foregoing requirements are complied with.

4. STRIKING GEAR AND DEVICES FOR CUTTING OFF POWER (Section 24)

- (1) In every factory—
 - (a) Suitable striking gear or other efficient mechanical appliance shall be provided and maintained and used to move driving belts to and from fast and loose pulleys which form part of the transmission machinery, such gear or appliances shall be so constructed, placed and maintained as to prevent the belt from creeping back on to the fast pulley;
 - (b) Driving belts when not in use shall not be allowed to rest or ride upon shafting in motion.
- (2) In every factory suitable devices for cutting off power in emergencies from running machinery shall be provided and maintained in every work-room:

Provided that in respect of factories in operation before the commencement of this Act, the provisions of this sub-section shall apply only to work-rooms in which electricity is used as power.
- (3) When a device, which can inadvertently shift from “off” to “on” position, is provided in a factory to cut off power, arrangements shall be provided for locking the device in safe position to prevent accidental starting of the transmission machinery or other machines to which the device is fitted.



5. SELF-ACTING MACHINES (Section 25)

No traversing part of a self-acting machine in any factory and no material carried thereon shall, if the space over which it runs is a space over which any person is liable to pass, whether in the course of his employment or otherwise, be allowed to run on its outward or inward traverse within a distance of forty-five centimeters from any fixed structure which is not part of the machine:

Provided that the Chief Inspector may permit the continued use of a machine installed before the commencement of this Act which does not comply with the requirements of this section on such conditions for ensuring safety as he may think fit to impose.

6. CASING OF NEW MACHINERY (Section 26)

- (1) In all machinery driven by power and installed in any factory after the commencement of this Act,—
 - (a) Every set screw, bolt or key on any revolving shaft, spindle, wheel pinion shall be so sunk, encased or otherwise effectively guarded as to prevent danger;
 - (b) All spur, worm and other toothed or friction gearing which does not require frequent adjustment while in motion shall be completely encased, unless it is so situated as to be as safe as it would be if it were completely encased.
- (2) Whoever sells or lets on hire or, as agent of a seller or hirer, causes or procures to be sold on let or hire, for use in a factory any machinery driven by power which does not comply with the provisions of Sub-section (1) or any rules made under sub-section (3), shall be punishable with imprisonment for a term which may extend to three months or with fine which may extend to five hundred rupees or with both.
- (3) The State Government may make rules specifying further safeguards to be provided in respect of any other dangerous part of any particular machine or class or description of machines.

7. PROHIBITION OF EMPLOYMENT OF WOMEN AND CHILDREN NEAR COTTON-OPENERS (Section 27)

No woman or child shall be employed in any part of a factory for pressing cotton in which a cotton-opener is at work:

Provided that if the feed-end of a cotton-opener is in a room separated from the delivery end by a partition extending to the roof or to such height as the Inspector may in any particular case specify in writing, women and children may be employed on the side of the partition where the feed-end is situated.

8. HOISTS AND LIFTS (Section 28)

- (1) In every factory—
 - (a) Every hoist and lift shall be—
 - (i) Of good mechanical construction, sound material and adequate strength;
 - (ii) Properly maintained, and shall be thoroughly examined by a competent person at least once in every period of six months, and a register shall be kept containing the prescribed particulars of every such examination;
 - (b) Every hoistway and liftway shall be sufficiently protected by an enclosure fitted with gates, and the hoist or lift and every such enclosure shall be so constructed as to prevent any person or thing from being trapped between any part of the hoist or lift and any fixed structure or moving part;
 - (c) The maximum safe working load shall be plainly marked on every hoist or lift, and no load greater than such load shall be carried thereon;

- (d) The cage of every hoist or lift used for carrying persons shall be fitted with a gate on each side from which access is afforded to a landing;
 - (e) Every gate referred to in clause (b) or clause (a) shall be fitted with interlocking or other efficient device to secure that the gate cannot be opened except when the cage is at the landing and that the cage cannot be moved unless the gate is closed.
- (2) The following additional requirements shall apply to hoists and lifts used for carrying persons and installed or reconstructed in a factory after the commencement of this Act, namely:
- (a) Where the cage is supported by rope or chain, there shall be at least two ropes or chains separately connected with the cage and balance weight, and each rope or chain with its attachments shall be capable of carrying the whole weight of the cage together with its maximum load;
 - (b) Efficient devices shall be provided and maintained capable of supporting the cage together with its maximum load in the event of breakage of the ropes, chains or attachments;
 - (c) An efficient automatic device shall be provided and maintained to prevent the cage from over- running.
- (3) The Chief Inspector may permit the continued use of a hoist or lift installed in a factory before the commencement of this Act which does not fully comply with the provisions of sub-section (1) upon such conditions for ensuring safety as he may think fit to impose.
- (4) The State Government may, if in respect of any class or description of hoist or lift, it is of opinion that it would be unreasonable to enforce any requirement of sub-sections (1) and (2), by order direct that such requirement shall not apply to such class or description of hoist or lift.

Explanation: For the purposes of this section, no lifting machine or appliance shall be deemed to be a hoist or lift unless it has a platform or cage, the direction or movement of which is restricted by a guide or guides.

9. LIFTING MACHINES, CHAINS, ROPES AND LIFTING TACKLES (Section 29)

- (1) In any factory the following provisions shall be complied with in respect of every lifting machine (other than a hoist and lift) and every chain, rope and lifting tackle for the purpose of raising or lowering persons, goods or materials:-
- (a) All parts, including the working gear, whether fixed or movable, of every lifting machine and every chain, rope or lifting tackle shall be—
 - (i) of good construction, sound material and adequate strength and free from defects;
 - (ii) properly maintained; and
 - (iii) thoroughly examined by a competent person at least once in every period of twelve months, or at such intervals as the Chief Inspector may specify in writing, and a register shall be kept containing the prescribed particulars of every such examination;
 - (b) No lifting machine and no chain, rope or lifting tackle shall, except for the purpose of test, be loaded beyond the safe working load which shall be plainly marked thereon together with an identification mark and duly entered in the prescribed register, and where this is not practicable, a table showing the safe working loads of every kind and size of lifting machine or, chain, rope or lifting tackle in use shall be displayed in prominent positions on the premises;
 - (c) While any person is employed or working on or near the wheel track of a travelling crane in any place where he would be liable to be struck by the crane, effective measures shall be taken to ensure that the crane does not approach within [1ra-66 six metres 1ra-66] of that place.



- (2) The State Government may make rules in respect of any lifting machine or any chain, rope or lifting tackle used in factories—
 - (a) Prescribing further requirements to be complied with in addition to those set out in this section;
 - (b) Providing for exemption from compliance with all or any of the requirements of this section, where in its opinion, such compliance is unnecessary or impracticable.
- (3) For the purposes of this section a lifting machine or a chain, rope or lifting tackle shall be deemed to have been thoroughly examined if a visual examination supplemented, if necessary, by other means and by the dismantling of parts of the gear, has been carried out as carefully as the conditions permit in order to arrive at a reliable conclusion as to the safety of the parts examined.
Explanation: In this section,—
 - (a) “Lifting machine” means a crane, crab, winch, teagle, pulley block, gin wheel, transporter or runway; (b) “lifting tackle” means any chain, sling, rope sling, hook, shackle, swivel, coupling, socket, clamp, tray or similar appliance, whether fixed or movable, used in connection with the raising or lowering of persons, or loads by use of lifting machines.

10. REVOLVING MACHINERY (Section 30)

- (1) In every factory in which the process of grinding is carried on there shall be permanently affixed to or placed near each machine in use a notice indicating the maximum safe working peripheral speed of every grindstone or abrasive wheel, the speed of the shaft or spindle upon which the wheel is mounted, and the diameter of the pulley upon such shaft or spindle necessary to secure such safe working peripheral speed.
- (2) The speeds indicated in notices under sub-section (1) shall not be exceeded.
- (3) Effective measures shall be taken in every factory to ensure that the safe working peripheral speed of every revolving vessel, cage, basket, flywheel, pulley, disc or similar appliance driven by power is not exceeded.

11. PRESSURE PLANT (Section 31)

- (1) If in any factory, any plant or machinery or any part thereof is operated at a pressure above atmospheric pressure, effective measures shall be taken to ensure that the safe working pressure of such plant or machinery or part is not exceeded.
- (2) The State Government may make rules providing for the examination and testing of any plant or machinery such as is referred to in sub-section (1) and prescribing such other safety measures in relation thereto as may in its opinion is necessary in any factory or class or description of factories.
- (3) The State Government may, by rules, exempt, subject to such conditions as may be specified therein, any part of any plant or machinery referred to in sub-section (1) from the provisions of this section.

12. FLOORS, STAIRS AND MEANS OF ACCESS (Section 32)

In every factory—

- (a) All floors, steps, stairs, passages and gangways shall be of sound construction and properly maintained and shall be kept free from obstructions and substances likely to cause persons to slip, and where it is necessary to ensure safety, steps, stairs, passages and gangways shall be provided with substantial handrails;
- (b) There shall, so far as is reasonably practicable, be provided and maintained safe means of access to every place at which any person is at any time required to work,

- (c) When any person has to work at a height from where he is likely to fall, provision shall be made, so far as is reasonably practicable, by fencing or otherwise, to ensure the safety of the person so working.

13. PITS, SUMPS, OPENINGS IN FLOORS, ETC (Section 33)

- (1) In every factory fixed vessel, sump, tank, pit or opening in the ground or in a floor which, by reasons of its depth, situation, construction or contents, is or may be a source of danger, shall be either securely covered or securely fenced.
- (2) The State Government may, by order in writing, exempt, subject to such conditions as may be prescribed, any factory or class or description of factories in respect of any vessel, sump, tank, pit or opening from compliance with the provisions of this section.

14. EXCESSIVE WEIGHTS (Section 34)

- (1) No person shall be employed in any factory to lift, carry or move any load so heavy as to be likely to cause him injury.
- (2) The State Government may make rules prescribing the maximum weights which may be lifted, carried or moved by adult men, adult women, adolescents and children employed in factories or in any class or description of factories or in carrying on any specified process.

15. PROTECTION OF EYES (Section 35)

In respect of any such manufacturing process carried on in any factory as may be prescribed, being a process which involves—

- (a) Risk of injury to the eyes from particles or fragments thrown off in the course of the process, or
- (b) Risk to the eyes by reason of exposure to excessive light, the State Government may by rules require that effective screens or suitable goggles shall be provided for the protection of persons employed on, or in the immediate vicinity of, the process.

16. PRECAUTIONS AGAINST DANGEROUS FUMES, GASES, ETC (Section 36)

- (1) No person shall be required or allowed to enter any chamber, tank, vat, pit, pipe, flue or other confined space in any factory in which any gas, fume, vapour or dust is likely to be present to such an extent as to involve risk to persons being overcome thereby, unless it is provided with a manhole of adequate size or other effective means of egress.
- (2) No person shall be required or allowed to enter any confined space as is referred to in sub-section (1), until all practicable measures have been taken to remove any gas, fume, vapour or dust, which may be present so as to bring its level within the permissible limits and to prevent any ingress of such gas, fume, vapour or dust and unless—
 - (a) A certificate in writing has been given by a competent person, based on a test carried out by himself that the space is reasonably free from dangerous gas, fume, vapour or dust; or
 - (b) Such person is wearing suitable breathing apparatus and a belt securely attached to a rope the free end of which is held by a person outside the confined space.

17. PRECAUTIONS REGARDING THE USE OF PORTABLE ELECTRIC LIGHT (Section 36A)

In any factory —

- (a) no portable electric light or any other electric appliance of voltage exceeding twenty-four volts shall be permitted for use inside any chamber, tank, vat, pit, pipe, flue or other confined space unless adequate safety devices are provided; and



- (b) if any inflammable gas, fume or dust is likely to be present in such chamber, tank, vat, pit, pipe, flue or other confined space, no lamp or light other than that of flame-proof construction shall be permitted to be used therein.

18. EXPLOSIVE OR INFLAMMABLE DUST, GAS, ETC (Section 37)

- (1) Where in any factory any manufacturing process produces dust, gas, fume or vapour of such character and to such extent as to be likely to explode to ignition, all practicable measures shall be taken to prevent any such explosion by—
 - (a) Effective enclosure of the plant or machinery used in the process;
 - (b) Removal or prevention of the accumulation of such dust, gas, fume or vapour;
 - (c) exclusion or effective enclosure of all possible sources of ignition.
- (2) Where in any factory the plant or machinery used in a process such as is referred to in sub-section (1) is not so constructed as to withstand the probable pressure which such an explosion as aforesaid would produce, all practicable measures shall be taken to restrict the spread and effects of the explosion by the provisions in the plant or machinery of chokes, baffles, vents or other effective appliances.
- (3) Where any part of the plant or machinery in a factory contains any explosive or inflammable gas or vapour under pressure greater than atmospheric pressure, that part shall not be opened except in accordance with the following provisions, namely :-
 - (a) Before the fastening of any joint of any pipe connected with the part of the fastening of the cover of any opening into the part is loosened, any flow of the gas or vapour into the part of any such pipe shall be effectively stopped by a stop valve or other means;
 - (b) Before any such fastening as aforesaid is removed, all practicable measures shall be taken to reduce the pressure of the gas or vapour in the part or pipe to atmospheric pressure;
 - (c) Where any such fastening as aforesaid has been loosened or removed effective measures shall be taken to prevent any explosive or inflammable gas or vapour from entering the part of pipe until the fastening has been secured, or, as the case may be, securely replaced: Provided that the provisions of this sub-section shall not apply in the case of plant or machinery installed in the open air.
- (4) No plant, tank or vessel which contains or has contained any explosive or inflammable substance shall be subjected in any factory to any welding, brazing, soldering or cutting operation which involves the application of heat unless adequate measures have first been taken to remove such substance and any fumes arising therefrom or to render such substance and fumes non-explosive or non-inflammable, and no such substance shall be allowed to enter such plant, tank or vessel after any such operation until the metal has cooled sufficiently to prevent any risk of igniting the substance.
- (5) The State Government may by rules exempt, subject to such conditions as may be prescribed, any factory or class or description of factories from compliance with all or any of the provisions of this section.

19. PRECAUTIONS IN CASE OF FIRE (Section 38)

- (1) In every factory, all practicable measures shall be taken to prevent outbreak of fire and its spread, both internally and externally, and to provide and maintain - (a) safe means of escape for all persons in the event of a fire, and (b) the necessary equipment and facilities for extinguishing fire.
- (2) Effective measures shall be taken to ensure that in every factory all the workers are familiar with the means of escape in case of fire and have been adequately trained in the routine to be followed in such cases.

- (3) The State Government may make rules, in respect of any factory or class or description of factories, requiring the measures to be adopted to give effect to the provisions of sub-sections (1) and (2).
- (4) Notwithstanding anything contained in clause (a) of sub-section (1) or sub-section (2), if the Chief Inspector, having regard to the nature of the work carried on in any factory, the construction of such factory, special risk to life or safety, or any other circumstances, is of the opinion that the measures provided in the factory, whether as prescribed or not, for the purposes of clause (a) of sub-section (1) or sub-section (2), are inadequate, he may, by order in writing, require that such additional measures as he may consider reasonable and necessary, be provided in the factory before such date as is specified in the order.

20. POWER TO REQUIRE SPECIFICATIONS OF DEFECTIVE PARTS OR TESTS OF STABILITY (Section 39)

If it appears to the Inspector that any building or part of a building or any part of the ways, machinery or plant in a factory is in such a condition that it may be dangerous to human life or safety, he may serve on the occupier or manager or both of the factory an order in writing requiring him before a specified date—

- (a) To furnish such drawings, specifications and other particulars as may be necessary to determine whether such building, ways, machinery or plant can be used with safety, or
- (b) To carry out such test in such manner as may be specified in the order, and to inform the Inspector of the results thereof.

21. SAFETY OF BUILDINGS AND MACHINERY (Section 40)

- (1) If it appears to the Inspector that any building or part of a building or any part of the ways, machinery or plant in a factory is in such a condition that it is dangerous to human life or safety, he may serve on the occupier or manager or both of the factory an order in writing specifying the measures which in his opinion should be adopted, and requiring them to be carried out before a specified date.
- (2) If it appears to the Inspector that the use of any building or part of a building or any part of the ways, machinery or plant in a factory involves imminent danger to human life or safety, he may serve on the occupier or manager or both of the factory an order in writing prohibiting its use until it has been properly repaired or altered.

22. MAINTENANCE OF BUILDINGS (Section 40A)

If it appears to the Inspector that any building or part of a building in a factory is in such a state of disrepair as is likely to lead to conditions detrimental to the health and welfare of the workers, he may serve on the occupier or manager or both of the factory an order in writing specifying the measures which in his opinion should be taken and requiring the same to be carried out before such date as is specified in the order.

23. SAFETY OFFICERS (Section 40B)

- (1) In every factory,—
 - (i) Wherein one thousand or more workers are ordinarily employed, or
 - (ii) Wherein, in the opinion of the State Government, any manufacturing process or operation is carried on, which process or operation involves any risk of bodily injury, poisoning or disease, or any other hazard to health, to the persons employed in the factory, the occupier shall, if so required by the State Government by notification in the Official Gazette, employ such number of Safety Officers as may be specified in that notification.
- (2) The duties, qualifications and conditions of service of Safety Officers shall be such as may be prescribed by the State Government.



Power to make rule to supplement the above listed provisions (Sec. 41)

The State Government may make rules requiring the provision in any factory or in any class or description of factories of such further devices and measures for securing the safety of persons employed therein as it may deem necessary.

5.9 PROVISIONS RELATING TO HAZARDOUS PROCESSES

(Sec. 41A to 41H, as introduced by Amendment Act, 1987)

COMPULSORY DISCLOSURE OF INFORMATION BY THE OCCUPIER (Sec 41-B)

- (1) The occupier of every factory involving a hazardous process shall disclose in the manner prescribed, all information regarding dangers, including health hazards and the measures to overcome such hazards arising from the exposure to or handling of the materials or substances in the manufacture, transportation, storage and other processes, to the workers employed in the factory, the Chief Inspector, the local authority within whose jurisdiction the factory is situate and the general public in the vicinity.
- (2) The occupier shall, at the time of registering the factory involving a hazardous process, lay down a detailed policy with respect to the health and safety of the workers employed therein and intimate such policy to the Chief Inspector and the local Authority and, thereafter, at such intervals as may be prescribed, inform the Chief Inspector and the local Authority of any change made in the said policy.
- (3) The information furnished under sub-section (1) shall include accurate information as to the quantity, specifications and other characteristics of wastes and the manner of their disposal.
- (4) Every occupier shall, with the approval of the Chief Inspector, draw up an on-site emergency plan and detailed disaster control measures for his factory and make known to the workers employed therein and to the general public living in the vicinity of the factory the safety measures required to be taken in the event of an accident taking place.
- (5) Every occupier of a factory shall, - (a) if such factory engaged in a hazardous process on the commencement of the Factories (Amendment) Act, 1987 (2 of 1987), within a period of thirty days of such commencement; and (b) if such factory proposes to engage in a hazardous process at any time after such commencement, within a period of thirty days before the commencement of such process, inform the Chief Inspector of the nature and details of the process in such form and in such manner as may be prescribed.
- (6) Where any occupier of a factory contravenes the provisions of sub-section (5), the licence issued under section 6 to such factory shall, notwithstanding any penalty to which the occupier of factory shall be subjected to under the provisions of this Act, be liable for cancellation.
- (7) The occupier of a factory involving a hazardous process shall, with the previous approval of the Chief

Inspector, lay down measures for the handling, usage, transportation and storage of hazardous substances inside the factory premises and the disposal of such substances outside the factory premises and publicise them in the manner prescribed among the workers and the general public living in the vicinity.

SPECIFIC RESPONSIBILITY OF THE OCCUPIER IN RELATION TO HAZARDOUS PROCESSES (Sec 41-C)

Every occupier of a factory involving any hazardous process shall—

- (a) Maintain accurate and up-to-date health records or, as the case may be, medical records, of the workers in the factory who are exposed to any chemical, toxic or any other harmful substances which are manufactured, stored, handled or transported and such records shall be accessible to the workers subject to such conditions as may be prescribed;

- (b) Appoint persons who possess qualifications and experience in handling hazardous substances and are competent to supervise such handling within the factory and to provide at the working place all the necessary facilities for protecting the workers in the manner prescribed: Provided that where any question arises as to the qualifications and experience of a person so appointed, the decision of the Chief Inspector shall be final;
- (c) Provide for medical examination of every worker -
 - (i) Before such worker is assigned to a job involving the handling of, or working with, a hazardous substance, and
 - (ii) While continuing in such job, and after he has ceased to work in such job, at intervals not exceeding twelve months, in such manner as may be prescribed.

POWER OF CENTRAL GOVERNMENT TO APPOINT INQUIRY COMMITTEE (Sec-41D)

- (1) The Central Government may, in the event of the occurrence of an extraordinary situation involving a factory engaged in a hazardous process, appoint an Inquiry Committee to inquire into the standards of health and safety observed in the factory with a view to finding out the causes of any failure or neglect in the adoption of any measures or standards prescribed for the health and safety of the workers employed in the factory or the general public affected, or likely to be affected, due to such failure or neglect and for the prevention and recurrence of such extraordinary situations in future in such factory or elsewhere.
- (2) The Committee appointed under sub-section (1) shall consist of a chairman and two other members and the terms of reference of the Committee and the tenure of office of its members shall be such as may be determined by the Central Government according to the requirements of the situation.
- (3) The recommendations of the Committee shall be advisory in nature.

WORKERS' PARTICIPATION IN SAFETY MANAGEMENT (Sec 41-G)

- (1) The occupier shall, in every factory where a hazardous process takes place, or where hazardous substances are used or handled, set up a Safety Committee consisting of equal number of representatives of workers and management to promote cooperation between the workers and the management in maintaining proper safety and health at work and to review periodically the measures taken in that behalf: Provided that the State Government may, by order in writing and for reasons to be recorded, exempt the occupier of any factory or class of factories from setting up such committee.
- (2) The composition of the Safety Committee, the tenure of office of its members and their rights and duties shall be such as may be prescribed.

RIGHT OF WORKERS TO WARN ABOUT IMMINENT DANGER (Sec 41H)

- (1) Where the workers employed in any factory engaged in a hazardous process have reasonable apprehension that there is a likelihood of imminent danger to their lives or health due to any accident, they may bring the same to the notice of the occupier, agent, manager or any other person who is in-charge of the factory or the process concerned directly or through their representatives in the Safety Committee and simultaneously bring the same to the notice of the Inspector.
- (2) It shall be the duty of such occupier, agent, manager or the person incharge of the factory or process to take immediate remedial action if he is satisfied about the existence of such imminent danger and send a report forthwith of the action taken to the nearest Inspector.
- (3) If the occupier, agent, manager or the person incharge referred to in sub-section (2) is not satisfied about the existence of any imminent danger as apprehended by the workers, he shall,



nevertheless, refer the matter forthwith to the nearest Inspector whose decision on the question of the existence of such imminent danger shall be final.

5.10 WELFARE (Section 42-50)

WASHING FACILITIES (Sec 42)

- (1) In every factory—
 - (a) Adequate and suitable facilities for washing shall be provided and maintained for the use of the workers therein;
 - (b) Separate and adequately screened facilities shall be provided for the use of male and female workers; (c) such facilities shall be conveniently accessible and shall be kept clean.
- (2) The State Government may, in respect of any factory or class or description of factories or of any manufacturing process, prescribe standards of adequate and suitable facilities for washing.

FACILITIES FOR STORING AND DRYING CLOTHING (Sec 43)

The State Government may, in respect of any factory or class or description of factories, make rules requiring the provision therein of suitable places for keeping clothing not worn during working hours and for the drying of wet clothing.

FACILITIES FOR SITTING (Sec 44)

- (1) In every factory suitable arrangements for sitting shall be provided and maintained for all workers obliged to work in a standing position, in order that they may take advantage of any opportunities for rest which may occur in the course of their work.
- (2) If, in the opinion of the Chief Inspector, the workers in any factory engaged in a particular manufacturing process or working in a particular room are able to do their work efficiently in a sitting position, he may, by order in writing, require the occupier of the factory to provide before a specified date such seating arrangements as may be practicable for all workers so engaged or working.
- (3) The State Government may, by notification in the Official Gazette, declare that the provisions of sub-section (1) shall not apply to any specified factory or class or description of factories or to any specified manufacturing process.

FIRST AID APPLIANCES (Sec 45)

- (1) There shall in every factory be provided and maintained so as to be readily accessible during all working hours first-aid boxes or cupboards equipped with the prescribed contents, and the number of such boxes or cupboards to be provided and maintained shall not be less than one for every one hundred and fifty workers ordinarily employed at any one time in the factory.
- (2) Nothing except the prescribed contents shall be kept in a first-aid box or cupboard.
- (3) Each first-aid box or cupboard shall be kept in the charge of a separate responsible person who holds a certificate in first-aid treatment recognized by State Government and who shall always be readily available during the working hours of the factory.
- (4) In every factory wherein more than five hundred workers are ordinarily employed there shall be provided and maintained an ambulance room of the prescribed size, containing the prescribed equipment and in the charge of such medical and nursing staff as may be prescribed and those facilities shall always be made readily available during the working hours of the factory.

CANTEENS (Sec 46)

- (1) The State Government may make rules requiring that in any specified factory wherein more than two hundred and, fifty workers are ordinarily employed, a canteen or canteens shall be provided and maintained by the occupier for the use of the workers.
- (2) Without prejudice to the generality of the foregoing power, such rules may provide for— (a) The date by which such canteen shall be provided;
 - (a) The standards in respect of construction, accommodation, furniture and other equipment of the canteen;
 - (b) The foodstuffs to be served therein and the charges which may be made therefore;
 - (c) The constitution of a managing committee for the canteen and representation of the workers in the management of the canteen;
 - (d) The items of expenditure in the running of the canteen which are not to be taken into account in fixing the cost of foodstuffs and which shall be borne by the employer;
 - (e) The delegation to the Chief Inspector, subject to such conditions as may be prescribed, of the power to make rules under clause (c).

SHELTERS, REST ROOMS AND LUNCH ROOMS (Sec 47)

- (1) In every factory wherein more than one hundred and fifty workers are ordinarily employed, adequate and suitable shelters or rest rooms and a suitable lunch room, with provision for drinking water, where workers can eat meals brought by them, shall be provided and maintained for the use of the workers : Provided that any canteen maintained in accordance with the provisions of Section 46 shall be regarded as part of the requirements of this sub-section : Provided further that where a lunch room exists no workers shall eat any food in the work room.
- (2) The shelters or rest rooms or lunch rooms to be provided under sub-section (1) shall be sufficiently lighted and ventilated and shall be maintained in a cool and clean condition.
- (3) The State Government may—
 - (a) Prescribe the standards in respect of construction, accommodation, furniture and other equipment of shelters, rest rooms and lunch rooms to be provided under this section;
 - (b) By notification in the Official Gazette, exempt any factory or class or description of factories from the requirements of this section.

CRECHES (Sec 48)

- (1) In every factory wherein more than thirty women workers are ordinarily employed there shall be provided and maintained a suitable room or rooms for the use of children under the age of six years of such women.
- (2) Such rooms shall provide adequate accommodation, shall be adequately lighted and ventilated, shall be maintained in a clean and sanitary condition and shall be under the charge of women trained in the care of children and infants.
- (3) The State Government may make rules—
 - (a) Prescribing the location and the standards in respect of construction, accommodation, furniture and other equipment of rooms to be provided, under this section;
 - (b) Requiring the provision in factories to which this section applies of additional facilities for the care of children belonging to women workers, including suitable provision of facilities for washing and changing their clothing;
 - (c) Requiring the provision in any factory of free milk or refreshment or both for such children;
 - (d) Requiring that facilities shall be given in any factory for the mothers of such children to feed them at the necessary intervals.



WELFARE OFFICERS (Sec 49)

- (1) In every factory wherein five hundred or more workers are ordinarily employed the occupier shall employ in the factory such number of Welfare officers as may be prescribed.
- (2) The State Government may prescribe the duties, qualifications and Conditions of service of officers employed under sub-section (1).

POWER TO MAKE RULES (Sec 50)

The State Government may make rules—

- (a) Exempting, subject to compliance with such alternative arrangements for the welfare of workers as may be prescribed, any factory or class or description of factories from compliance with any of the provisions of this Chapter;
- (b) Requiring in any factory or class or description of factories that representatives of the workers employed in the factory shall be associated with the management of the welfare arrangements of the workers.

5.11 WORKING HOURS OF ADULTS

WEEKLY HOURS (Sec 51)

No adult workers shall be required or allowed to work in a factory for more than forty-eight hours in any week.

HOLIDAYS

WEEKLY HOLIDAYS (Sec 52)

- (1) No adult worker shall be required or allowed to work in a factory on the first day of the week (hereinafter referred to as the said day), unless—
 - (a) He has or will have a holiday for a whole day on one of the three days immediately before or after the said day, and
 - (b) The manager of the factory has, before the said day or the substituted day under clause (a), whichever is earlier,—
 - (i) Delivered a notice at the office of the Inspector of his intention to require the worker to work on the said day and of the day which is to be substituted, and
 - (ii) Displayed a notice to that effect in the factory: Provided that no substitution shall be made which will result in any worker working for more than ten days consecutively without a holiday for a whole day.
- (2) Notices given under sub-section (1) may be cancelled by a notice delivered at the office of the Inspector and a notice displayed in the factory not later than the day before the said day or the holiday to be cancelled, whichever is earlier.
- (3) Where, in accordance with the provisions of sub-section (1), any worker works on the said day and has had a holiday on one of the three days immediately before it, that said day shall, for the purpose of calculating his weekly hours of work, be included in the preceding week.

COMPENSATORY HOLIDAYS (Sec 53)

- (1) Where, as a result of the passing of an order or the making of a rule under the provisions of this Act exempting a factory or the workers therein from the provisions of section 52, a worker is deprived of any of the weekly holidays for which provision is made in sub-section (1) of that section, he shall be allowed, within the month in which the holidays were due to him or within the two months immediately following that month, compensatory holidays of equal number to the holidays so lost.

- (2) The State Government may prescribe the manner in which the holidays for which provision is made in sub-section (1) shall be allowed.

DAILY HOURS (Sec 54)

Subject to the provisions of section 51, no adult worker shall be required or allowed to work in a factory for more than nine hours in any day:

Provided that, subject to the previous approval of the Chief inspector, the daily maximum hours specified in this section may be exceeded in order to facilitate the change of shifts.

INTERVALS FOR REST (Sec 55)

- (1) The periods of work of adult workers in a factory each day shall be so fixed that no period shall exceed five hours and that no worker shall work for more than five hours before he has had an interval for rest of at least half an hour.
- (2) The State Government or, subject to the control of the State Government, the Chief Inspector, may, by written order and for the reasons specified therein, exempt any factory from the provisions of sub-section (1) so however that the total number of hours worked by a worker without an interval does not exceed six.

SPREADOVER (Sec 56)

The periods of work of an adult worker in a factory shall be so arranged that inclusive of his intervals for rest under section 55, they shall not spreadover more than ten and a half hours in any day : Provided that the Chief Inspector may, for reasons to be specified in in writing, increase the spreadover up to twelve hours.

NIGHT SHIFTS (Sec 57)

Where a worker in a factory works on a shift which extends beyond midnight,—

- (a) For the purposes of Sections 52 and 53, a holiday for a whole day shall mean in his case a period of twenty-four consecutive hours beginning when his shift ends;
- (b) The following day for him shall be deemed to be the period of twenty-four hours beginning when such shift ends, and the hours he has worked after midnight shall be counted in the previous day.

PROHIBITION OF OVERLAPPING SHIFTS (Sec 58)

- (1) Work shall not be carried on in any factory by means of a system of shifts so arranged that more than one relay of workers is engaged, in work of the same kind at the same time.
- (2) The State Government or subject to the control of the State Government, the Chief Inspector, may, by written order and for the reasons specified therein, exempt on such conditions as may be deemed expedient, any factory or class or description of factories or any department or section of a factory or any category or description of workers therein from the provisions of sub-section(1).

EXTRA WAGES FOR OVERTIME (Sec 59)

- (1) Where a worker works in a factory for more than nine hours in any day or for more than forty-eight hours in any week, he shall, in respect of overtime work, be entitled to wages at the rate of twice his ordinary rate of wages.
- (2) For the purposes of sub-section (1), “ordinary rate of wages” means the basic wages plus such allowances, including the cash equivalent of the advantage accruing through the concessional sale to workers of food grains and other articles, as the worker is for the time being entitled to, but does not include a bonus and wages for overtime work.
- (3) Where any workers in a factory are paid on a piece-rate basis, the time rate shall be



deemed to be equivalent to the daily average of their full-time earnings for the days on which they actually worked on the same or identical job during the month immediately preceding the calendar month during which the overtime work was done, and such time rates shall be deemed to be the ordinary rates of wages of those workers:

Provided that in the case of a worker who has not worked in the immediately preceding calendar month on the same or identical job, the time rate shall be deemed to be equivalent to the daily average of the earnings of the worker for the days on which he actually worked in the week in which the overtime work was done.

Explanation: For the purposes of this sub-section, in computing the earnings for the days on which the worker actually worked such allowances, including the cash equivalent of the advantage accruing through the concessional sale to workers of food grains and other articles, as the worker is for the time being entitled to, shall be included but any bonus or wages for overtime work payable in relation to the period with reference to which the earnings are being computed shall be excluded.

- (4) The cash equivalent of the advantage accruing through the concessional sale to a worker of food grains and other articles shall be computed as often as may be prescribed on the basis of the maximum quantity of food grains and other articles admissible to a standard family.

Explanation 1: Standard family means a family consisting of the worker, his or her spouse and two children below the age of fourteen years requiring in all three adult consumption units.

Explanation 2: Adult consumption unit means the consumption unit of a male above the age of fourteen years; and the consumption unit of a female above the age of fourteen years and that of a child below the age of fourteen years shall be calculated at the rates of 0.8 and 0.6 respectively of one adult consumption unit.

- (5) The State Government may make rules prescribing -
- (a) The manner in which the cash equivalent of the advantage accruing through the concessional sale to a worker of food grains and other articles shall be computed; and
 - (b) The registers that shall be maintained in a factory for the purpose of securing compliance with the provisions of this section.

RESTRICTION ON DOUBLE EMPLOYMENT (Sec 60)

No adult worker shall be required or allowed to work in any factory on any day on which he has already been working in any other factory, save in such circumstances as may be prescribed.

NOTICE OF PERIODS OF WORK FOR ADULTS (Sec 61)

- (1) There shall be displayed and correctly maintained in every factory in accordance with the provisions of sub-section (2) of Section 108, a notice of periods of work for adults, showing clearly for every day the periods during which adult workers may be required to work.
- (2) The periods shown in the notice required by sub-section (1) shall be fixed beforehand in accordance with the following provisions of this section, and shall be such that workers working for those periods would not be working in contravention of any of the provisions of sections 51, 52, 53, 54, 55, 56 and 58.
- (3) Where all the adult workers in a factory are required to work during the same periods, the manager of the factory shall fix those periods for such workers generally.
- (4) Where all the adult workers in a factory are not required to work during the same periods, the manager of the factory shall classify them into groups according to the nature of their work indicating the number of workers in each group.

- (5) For each group which is not required to work on a system of shifts, the manager of the factory shall fix the periods during which the group may be required to work.
- (6) Where any group is required to work on a system of shifts and the relays are not to be subject to predetermined periodical changes of shifts, the manager of the factory shall fix the periods during which each relay of the group may be required to work.
- (7) Where any group is to work on a system of shifts and the relays are to be subject to predetermined periodical changes of shifts, the manager of the factory shall draw up a scheme of shifts where under the periods during which any relay of the group may be required to work and the relay which will be working at any time of the day shall be known for any day.
- (8) The State Government may prescribe forms of the notice required by sub-section (1) and the manner in which it shall be maintained.
- (9) In the case of a factory beginning work after the commencement of this Act, a copy of the notice referred to in sub-section (1) shall be sent in duplicate to the Inspector before the day on which work is begun in the factory.
- (10) Any proposed change in the system of work in any factory which will necessitate a change in the notice referred to in sub-section (1) shall be notified to the Inspector in duplicate before the change is made, and except with the previous sanction of the Inspector, no such change shall be made until one week has elapsed since the last change.

FURTHER RESTRICTIONS ON EMPLOYMENT OF WOMEN (Sec 66)

- (1) The provisions of this Chapter shall, in their application to women in factories, be supplemented by the following further restrictions, namely —
 - (a) No exemption from the provisions of section 54 may be granted in respect of any women;
 - (b) No women shall be required or allowed to work in any factory except between the hours of 6 A.M. and 7 P.M.

Provided that the State Government may, by notification in the Official Gazette, in respect of any factory or group or class or description of factories, vary the limits laid down in clause (b), but so that no such variation shall authorize the employment of any woman between the hours of 10 P.M. and 5 A.M.;

[Ira-114 (c) there shall be no change of shifts except, after a weekly holiday or any other holiday.

- (2) The State Government may make rules providing for the exemption from the restrictions set out in sub-section (1), to such extent and subject to such conditions as it may prescribe, of women working in fish curing or fish-canning factories, where the employment of women beyond the hours specified in the said restrictions is necessary to prevent damage to or deterioration in, any raw material.
- (3) The rules made under sub-section (2) shall remain in force for not more than three years at a time.

PROHIBITION OF EMPLOYMENT OF YOUNG CHILDREN (Sec 67)

No child who has not completed his fourteenth year shall be required or allowed to work in any factory.

NON-ADULT WORKERS TO CARRY TOKENS (Sec 68)

A child who has completed his fourteenth year or an adolescent shall not be required or allowed to work in any factory unless—



- (a) A certificate of fitness granted with reference to him under section 69 is in the custody of the manager of the factory; and
- (b) Such child or adolescent carries while he is at work a token giving a reference to such certificate.

CERTIFICATES OF FITNESS (Sec 69)

- (1) A certifying surgeon shall, on the application of any young person or his parent or guardian accompanied by a document signed by the manager of a factory that such person will be employed therein if certified to be fit for work in a factory, or on the application of the manager of the factory in which any young person wishes to work, examine such person and ascertain his fitness for work in a factory.
- (2) The certifying surgeon, after examination, may grant to such young person, in the prescribed form, or may renew –
 - (a) A certificate of fitness to work in a factory as a child, if he is satisfied that the young person has completed his fourteenth year, that he has attained the prescribed physical standards and that he is fit for such work;
 - (b) A certificate of fitness to work in a factory as an adult, if he is satisfied that the young person has completed his fifteenth year, and is fit for a full day's work in a factory :

Provided that unless the certifying surgeon has personal knowledge of the place where the young person proposes to work and of the manufacturing process in which he will be employed, he shall not grant or renew a certificate under this sub-section until he has examined such place.

- (3) A certificate of fitness granted or renewed under sub-section (2) –
 - (a) Shall be valid only for a period of twelve months from the date thereof;
 - (b) May be made subject to conditions in regard to the nature of the work in which the young person may be employed, or requiring re-examination of the young person before the expiry of the period of twelve months.
- (4) A certifying surgeon shall revoke any certificate granted or renewed under sub-section (2) if in his opinion the holder of it is no longer fit to work in the capacity stated therein in a factory.
- (5) Where a certifying surgeon refuses to grant or renew a certificate or a certificate of the kind requested or revokes a certificate, he shall, if so requested by any person who could have applied for the certificate or the renewal thereof, state his reasons in writing for so doing.
- (6) Where a certificate under this section with reference to any young person is granted or renewed subject to such conditions as are referred to in clause (b) of sub-section (3), the young person shall not be required or allowed to work in any factory except in accordance with those conditions.
- (7) Any fee payable for a certificate under this section shall be paid by the occupier and shall not be recoverable from the young person, his parents or guardian.

WORKING HOURS FOR CHILDREN (Section 71)

- (1) No child shall be employed or permitted to work, in any factory –
 - (a) For more than four and a half hours in any day;
 - (b) During the night. Explanation: For the purposes of this sub-section “night” shall mean a period of at least twelve consecutive hours which shall include the interval between 10 P.M. and 6 A.M.
- (2) The period of work of all children employed in a factory shall be limited to two shifts which shall not overlap or spread over more than five hours each; and each child shall be employed

in only one of the relays which shall not, except with the previous permission in writing of the Chief Inspector, be changed more frequently than once in a period of thirty days.

- (3) The provisions of section 52 shall apply also to child workers and no exemption from the provisions of that section may be granted in respect of any child.
- (4) No child shall be required or allowed to work in any factory on any day on which he has already been working in another factory.
- (5) No female child shall be required or allowed to work in any factory except between 8 A.M. and 7 P.M.

NOTICE OF PERIODS OF WORK FOR CHILDREN (Section 72)

- (1) There shall be displayed and correctly maintained in every factory in which children are employed, in accordance with the provisions of sub-section (2) of section 108 a notice of period of work for children, showing clearly for every day the periods during which children may be required or allowed to work.
- (2) The periods shown in the notice required by sub-section (1) shall be fixed beforehand in accordance with the method laid down for adult workers in section 61, and shall be such that children working for those periods would not be working in contravention of any of the provisions of section 71.
- (3) The provisions of sub-sections (8), (9) and (10) of section 61 shall apply also to the notice required by sub-section (1) of this section.

REGISTER OF CHILD WORKERS (Section 73)

- (1) The manager of every factory in which children are employed shall maintain a register of child workers, to be available to the Inspector at all times during working hours or when any work is being carried on in a factory, showing—
 - (a) The name of each child worker in the factory, (b) the nature of his work,
 - (c) The group, if any, in which he is included,
 - (d) Where his group works in shifts, the relay to which he is allotted, and
 - (e) The number of his certificate of fitness granted under section 69.
- (1A) No child worker shall be required or allowed to work in any factory unless his name and other particulars have been entered in the register of child workers.
- (2) The State Government may prescribe the form of the register of child workers, the manner in which it shall be maintained and the period for which it shall be preserved.

HOURS OF WORK TO CORRESPOND WITH NOTICE UNDER SECTION 72 AND REGISTER UNDER SECTION 73 (Section 74)

No child shall be employed in any factory otherwise than in accordance with the notice of periods of work for children displayed in the factory and the entries made beforehand against his name in the register of child workers of the factory.

5.12 PENALTIES

GENERAL PENALTY FOR OFFENCES (Section 92)

Save as is otherwise expressly provided in this Act and subject to the provisions of section 93, if in, or in respect of, any factory there is any contravention of any of the provisions of this Act or of any rules made thereunder or of any order in writing given thereunder, the occupier and manager of the factory shall each be guilty of an offence and punishable with imprisonment for a term which may extend to two years or with fine which may extend to one lakh rupees or with both, and if the contravention is



continued after conviction, with a further fine which may extend to one thousand rupees for each day on which the contravention is so continued:

Provided that where contravention of any of the provisions of Chapter IV or any rule made thereunder or under Section 87 has resulted in an accident causing death or serious bodily injury, the fine shall not be less than twenty-five thousand rupees in the case of an accident causing death, and five thousand rupees in the case of an accident causing serious bodily injury. Explanation: In this section and in Section 94 “serious bodily injury” means an injury which involves, or in all probability will involve, the permanent loss of the use of, or permanent injury to, any limb or the permanent loss of, or injury to, sight or hearing, or the fracture of any bone, but shall not include, the fracture of bone or joint (not being fracture of more than one bone or joint) of any phalanges of the hand or foot.

LIABILITY OF OWNER OF PREMISES IN CERTAIN CIRCUMSTANCES (Section 93)

- (1) Where in any premises separate buildings are leased to different occupiers for use as separate factories, the owner of the premises shall be responsible for the provision and maintenance of common facilities and services, such as approach roads, drainage, water supply, lighting and sanitation.
- (2) The Chief Inspector shall have, subject to the control of the State Government, power to issue orders to the owner of the premises in respect of the carrying out of the provisions of sub-section (1).
- (3) Where in any premises, independent or self-contained, floors or flats are leased to different occupiers for use as separate factories; the owner of the premises shall be liable as if he were the occupier or manager of a factory, for any contravention of the provisions of this Act in respect of—
 - (i) Latrines, urinals and washing facilities in so far as the maintenance of the common supply of water for these purposes is concerned;
 - (ii) Fencing of machinery and plant belonging to the owner and not specifically entrusted to the custody or use of an occupier;
 - (iii) Safe means of access to the floors or flats and maintenance and cleanliness of staircases and common passages;
 - (iv) Precautions in case of fire;
 - (v) Maintenance of hoists and lifts; and
 - (vi) Maintenance of any other common facilities provided in the premises.
- (4) The Chief Inspector shall have, subject to the control of the State Government, power to issue orders to the owner of the premises in respect of the carrying out the provisions of sub-section (3).
- (5) The provisions of sub-section (3) relating to the liability of the owner shall apply where in any premises independent rooms with common latrines, urinals and washing facilities are leased to different occupiers for use as separate factories:

Provided that the owner shall be responsible also for complying with the requirements relating to the provisions and maintenance of latrines, urinals and washing facilities.
- (6) The Chief Inspector shall have, subject to the control of the State Government, the power to issue orders to the owner of the premises referred to in sub-section (5) in respect of the carrying out of the provisions of Section 46 or Section 48.
- (7) Where in any premises portions of a room or a shed are leased to different occupiers for use as separate factories, the owner of the premises shall be liable for any contravention of the provisions of—

- (i) Chapter III, except sections 14 and 15;
- (ii) Chapter IV, except sections 22, 23, 27, 34, 35 and 36:

Provided that in respect of the provisions of sections 21, 24 and 32 the owners liability shall be only in so far as such provisions relate to things under his control : Provided further that the occupier shall be responsible for complying with the provisions of Chapter IV in respect of plant and machinery belonging to or supplied by him;

- (iii) Section 42.

- (8) The Chief Inspector shall have, subject to the control of the State Government, power to issue orders to the owner of the premises in respect of the carrying out of the provisions of sub-section (7).
- (9) In respect of sub-sections (5) and (7), while computing for the purposes of any of the provisions of this Act the total number of workers employed, the whole of the premises shall be deemed to be a single factory.

ENHANCED PENALTY AFTER PREVIOUS CONVICTION (Section 94)

- (1) If any person who has been convicted of any offence punishable under section 92 is again guilty of an offence involving a contravention of the same provision, he shall be punishable on a subsequent conviction with imprisonment for a term which may extend to three years or with fine which shall not less than ten thousand rupees but which may extend to two lakh rupees or with both:

Provided that the court may, for any adequate and special reasons to be mentioned in the judgment, impose a fine of less than ten thousand rupees:

Provided further that where contravention of any of the provisions of Chapter IV or any rule made thereunder or under Section 87 has resulted in an accident causing death or serious bodily injury, the fine shall not be less than thirty five thousand rupees in the case of an accident causing death and ten thousand rupees in the case of an accident causing serious bodily injury.

- (2) For the purposes of sub-section (1), no cognizance shall be taken of any conviction made more than two years before the commission of the offence for which the person is subsequently being convicted.

PENALTY FOR OBSTRUCTING INSPECTOR (Section 95)

Whoever wilfully obstructs an Inspector in the exercise of any power conferred on him by or under this Act, or fails to produce on demand by an Inspector any registers or other documents in his custody kept in pursuance of this Act or of any rules made thereunder, or conceals or prevents any worker in a factory from appearing before, or being examined by, an Inspector, shall be punishable with imprisonment for a term which may extend to six months or with fine which may extend to ten thousand rupees or with both.

PENALTY FOR WRONGFULLY DISCLOSING RESULTS OF ANALYSIS UNDER SECTION 91 (Section 96)

Whoever, except in so far as it may be necessary for the purposes of a prosecution for any offence punishable under this Act, publishes or discloses to any person the results of an analysis made under section 91, shall be punishable with imprisonment for a term which may extend to six months or with fine which may extend to ten thousand rupees or with both.

PENALTY FOR CONTRAVENTION OF THE PROVISIONS OF SECTIONS 41B, 41C AND 41H (Section 96A)

- (1) Whoever fails to comply with or contravenes any of the provisions of Sections 41B, 41C or 41H or the rules made thereunder, shall, in respect of such failure or contravention, be punishable with imprisonment for a term which may extend to seven years and with fine which may extend to two lakh rupees, and in case the failure or contravention continues, with additional fine which



may extend to five thousand rupees for every day during which such failure or contravention continues after the conviction for the first such failure or contravention.

- (2) If the failure or contravention referred to in sub-section (1) continues beyond a period of one year after the date of conviction, the offender shall be punishable with imprisonment for a term which may extend to ten years.

OFFENCES BY WORKERS (Section 97)

- (1) Subject to the provisions of Section 111, if any worker employed in a factory contravenes any provision of this Act or any rules or orders made thereunder, imposing any duty or liability on workers, he shall be punishable with fine which may extend to five hundred rupees.
- (2) Where a worker is convicted of an offence punishable under sub-section (1), the occupier or manager of the factory shall not be deemed to be guilty of an offence in respect of that contravention, unless it is proved that he failed to take all reasonable measures for its prevention.

PENALTY FOR USING FALSE CERTIFICATE OF FITNESS (Section 98)

Whoever knowingly uses or attempts to use, as a certificate of fitness granted to himself under Section 70, a certificate granted to another person under that section, or who, having procured such a certificate, knowingly allows it to be used, or an attempt to use to be made, by another person, shall be punishable with imprisonment for a term which may extend to two months or with fine which may extend to one thousand rupees or with both.

PENALTY FOR PERMITTING DOUBLE EMPLOYMENT OF CHILD (Section 99)

If a child works in a factory on any day on which he has already been working in another factory, the parent or guardian of the child or the person having custody of or control over him or obtaining any direct benefit from his wages, shall be punishable with fine which may extend to one thousand rupees unless it appears to the Court that the child so worked without the consent or connivance of such parent, guardian or person.

EXEMPTION OF OCCUPIER OR MANAGER FROM LIABILITY IN CERTAIN CASES (Section 101)

Where the occupier or manager of a factory is charged with an offence punishable under this Act, he shall be entitled, upon complaint duly made by him and on giving to the prosecutor not less than three clear days notice in writing of his intention so to do, to have any other person whom he charges as the actual offender brought before the Court at the time appointed for hearing the charge; and if, after the commission of the offence has been proved, the occupier or manager of the factory, as the case may be, proves to the satisfaction of the court—

- (a) That he has used due diligence to enforce the execution of this Act, and
- (b) That the said other person committed the offence in question without his knowledge, consent or connivance,

- That other person shall be convicted of the offence and shall be liable to the like punishment as if he were the occupier or manager of the factory, and the occupier or manager, as the case may be, shall be discharged from any liability under this Act in respect of such offence:

Provided that in seeking to prove as aforesaid, the occupier or manager of the factory, as the case may be, may be examined on oath, and his evidence and that of any witness whom he calls in his support shall be subject to cross-examination on behalf of the person he charges as the actual offender and by the prosecutor:

Provided further that, if the person charged as the actual offender by the occupier or manager cannot be brought before the Court at the time appointed for hearing the charge, the Court shall adjourn the hearing from time to time for a period not exceeding three months and if by the end

of the said period the person charged as the actual offender cannot still be brought before the Court, the Court shall proceed to hear the charge against the occupier or manager and shall, if the offence be proved, convict the occupier or manager.

POWER OF COURT TO MAKE ORDERS (Section 102)

- (1) Where the occupier or manager of a factory is convicted of an offence punishable under this Act the Court may, in addition to awarding any punishment, by order in writing require him, within a period specified in the order (which the Court may, if it thinks fit and on application in such behalf, from time to time extend) to take such measures as may be so specified for remedying the matters in respect of which the offence was committed.
- (2) Where an order is made under sub-section (1), the occupier or manager of the factory, as the case may be, shall not be liable under this Act in respect of the continuation of the offence during the period or extended period, if any, allowed by the Court, but if, on the expiry of such period or extended period, as the case may be, the order of the Court has not been fully complied with, the occupier or manager, as the case may be, shall be deemed to have committed a further offence, and may be sentenced therefor by the Court to undergo imprisonment for a term which may extend to six months or to pay a fine which may extend to one hundred rupees for every day after such expiry on which the order has not been complied with, or both to undergo such imprisonment and to pay such fine, as aforesaid.

PRESUMPTION AS TO EMPLOYMENT (Section 103)

If a person is found in a factory at any time, except during intervals for meals or rest, when work is going on or the machinery is in motion, he shall until the contrary is proved, be deemed for the purposes of this Act and the rules made thereunder to have been at that time employed in the factory.

ONUS AS TO AGE (Section 104)

- (1) When any act or omission would, if a person were under a certain age, be an offence punishable under this Act, and such person is in the opinion of the Court prima facie under such age, the burden shall be on the accused to prove that such person is not under such age.
- (2) A declaration in writing by a certifying surgeon relating to a worker that he has personally examined him and believes him to be under the age stated in such declaration shall, for the purposes of this Act and the rules made thereunder, be admissible as evidence of the age of that worker.

ONUS OF PROVING LIMITS OF WHAT IS PRACTICABLE, ETC. (Section 104A)

In any proceeding for an offence for the contravention of any provision of this Act or rules made thereunder consisting of a failure to comply with a duty or requirement to do something, it shall be for the person who is alleged to have failed to comply with such duty or requirement, to prove that it was not reasonably practicable, or, as the case may be, all practicable measures were taken to satisfy the duty or requirement.

COGNIZANCE OF OFFENCES (Section 105)

- (1) No Court shall take cognizance of any offence under this Act except on complaint by, or with the previous sanction in writing of, an Inspector.
- (2) No Court below that of a Presidency Magistrate or of a Magistrate of the first class shall try any offence punishable under this Act.

LIMITATION OF PROSECUTIONS (Section 106)

No Court shall take cognizance of any offence punishable under this Act unless complaint thereof is made within three months of the date on which the alleged commission of the offence came to the knowledge of an Inspector:



Provided that where the offence consists of disobeying a written order made by an Inspector, complaint thereof may be made within six months of the date on which the offence is alleged to have been committed.

Explanation: For the purposes of this section,—

- (a) In the case of a continuing offence, the period of limitation shall be computed with reference to every point of time during which the offence continues;
- (b) Where for the performance of any act time, is granted or extended on an application made by the occupier or manager of a factory, the period of limitation shall be computed from the date on which the time so granted or extended, expired.

JURISDICTION OF A COURT FOR ENTERTAINING PROCEED-INGS, ETC., FOR OFFENCE (Section 106A)

For the purposes of conferring jurisdiction on any court in relation to an offence under this Act or the rules made thereunder in connection with the operation of any plant, the place where the plant is for the time being situate shall be deemed to be the place where such offence has been committed.

APPEAL (Section 107)

- (1) The manager of a factory on whom an order in writing by an Inspector has been served under the provisions of this Act or the occupier of the factory may, within thirty days of the service of the order, appeal against it to the prescribed authority, and such authority may, subject to rules made in this behalf by the State Government, confirm, modify or reverse the order.
- (2) Subject to rules made in this behalf by the State Government (which may prescribe classes of appeals which shall not be heard with the aid of assessors), the appellate authority may, or if so required in the petition of appeal shall, hear the appeal with the aid of assessors, one of whom shall be appointed by the appellate authority and the other by such body representing the industry concerned as may be prescribed:

Provided that if no assessor is appointed by such body before the time fixed for hearing the appeal, or if the assessor so appointed fails to attend the hearing at such time, the appellate authority may, unless satisfied that the failure to attend is due to sufficient cause, proceed to hear the appeal without the aid of such assessor or, if it thinks fit, without the aid of any assessor.

- (3) Subject to such rules as the State Government may make in this behalf and subject to such conditions as to partial compliance or the adoption of temporary measures as the appellate authority may in any case think fit to impose, the appellate authority may, if it thinks fit, suspend the order appealed against pending the decision of the appeal.

OBLIGATIONS OF WORKER (Section 111)

- (1) No worker in a factory—
 - (a) Shall willfully interfere with or misuse any appliance, convenience or other thing provided in a factory for the purposes of securing the health, safety or welfare of the workers therein;
 - (b) Shall willfully and without reasonable cause do anything likely to endanger himself or others; and
 - (c) Shall willfully neglect to make use of any appliance or other thing provided in the factory for the purposes of securing the health or safety of the workers therein.
- (2) If any worker employed in a factory contravenes any of the provisions of this section or of any rule or order made there under, he shall be punishable with imprisonment for a term which may extend to three months, or with fine which may extend to one hundred rupees, or with both.

RIGHT OF WORKERS, ETC. (Section 111A)

Every worker shall have the right to—

- (i) Obtain from the occupier, information relating to workers' health and safety at work;
- (ii) Get trained within the factory wherever possible, or, to get himself sponsored by the occupier for getting trained at a training centre or institute, duly approved by the Chief Inspector, where training is imparted for workers' health and safety at work;
- (iii) Represent to the Inspector directly or through his representative in the matter of inadequate provision for protection of his health or safety in the factory.

ACT TO HAVE EFFECT NOTWITHSTANDING ANYTHING CONTAINED IN ACT 37 OF 1970. (Sec 119) The provisions of this Act shall have effect notwithstanding anything inconsistent therewith contained in the Contract Labour (Regulation and Abolition) Act, 1970 [or any other law for the time being in force].



THE FACTORIES ACT, 1948

Multiple Choice Questions (MCQs)

Q1. The act relating to Factories is called Factories Act, ____?

- (a) 1956
- (b) 1857
- (c) 1948
- (d) 1936

Q2. XYZ Ltd. has a factory where manufacturing process is being carried out with the aid of power, Factories Act, 1948 will be applicable if –

- (a) Twenty or more workers are or were working on any day of the preceding twelve months
- (b) Ten or more workers are or were working on any day of the preceding twelve months
- (c) Hundred or more workers are or were working on any day of the preceding twelve months
- (d) Ten or more workers are or were working on any day of the preceding ten months

Q3. ABC Ltd. has a factory where manufacturing process is being carried out without the aid of power, Factories Act, 1948 will be applicable if –

- (a) Twenty or more workers are or were working on any day of the preceding twelve months
- (b) Ten or more workers are or were working on any day of the preceding twelve months
- (c) Hundred or more workers are or were working on any day of the preceding twelve months
- (d) Twenty or more workers are or were working on any day of the preceding ten months

Q4. According to Sec 2(n) “Occupier” of a factory means –

- (a) The person who has established the factory
- (b) The person who has highest profit share in the factory
- (c) The person who has ultimate control over the affairs of the factory
- (d) The person who has ultimate control over the employees of the factory

Q5. According to Sec 4, the state government may, on its own or on an application made in this behalf by an occupier, direct that –

- (a) Different departments of a factory shall be treated as separate factories
- (b) Two or more factories shall be treated as a single factory
- (c) Different branches of a factory shall be treated as separate factories
- (d) All of the above

Q6. The power to exempt any factory or class of factories from all or any provisions of factories act except Sec 67, shall be made for a period not exceeding –

- (a) 5 months
- (b) 12 months
- (c) 9 months
- (d) 3 months

Q7. The state government may appoint qualified _____ to be “Certifying Surgeons” for the purpose of factories act.

- (a) Medical assistants
- (b) Medical patients
- (c) Medical practitioners
- (d) Medical surgeons

Q8. A person who is or becomes directly or indirectly interested in a factory or in any process or business carried on therein, shall not be appointed as a

- (a) Inspector
- (b) Chief inspector
- (c) Certifying surgeon
- (d) All of the above

Q9. For every district, ____ shall be an Inspector for the Factories Act, 1948.

- (a) District Judge
- (b) District Magistrate
- (c) District Collector
- (d) District Inspector General

Q10. PQR Manufacturing Ltd. needs to ensure provisions for cooling drinking water during hot weather, if more than ____ workers are ordinarily employed –

- (a) Two hundred and fifty
- (b) Ten
- (c) One hundred and fifty
- (d) Twenty

Q11. To avoid overcrowding, there shall be posted in each workroom of a factory a notice specifying the ____ number of workers who may be employed.

- (a) Minimum
- (b) Maximum
- (c) Average
- (d) None of the above

Q12. A factory in Himachal has painted its walls, partitions, ceilings, staircases etc. with washable water paint, they need to be repainted in every period of ____ and washed at least once in every period of ____

- (a) Three years; one month
- (b) Three years; three months
- (c) Three years; six months
- (d) Three years; nine months

Q13. A Industries Ltd. has more than five hundred workers ordinarily employed, one of the employee got injured while performing his duties, there should be provided by the management

- (a) An ambulance room
- (b) A first-aid box
- (c) A doctor
- (d) An ambulance van

Q14. A factory in Sivakasi has more than thundred women workers ordinarily employed having children, the cost and management accountant of the factory raised the requirement of crèches for the use of children, please advised whether he is correct or not –

- (a) Incorrect
- (b) Correct
- (c) Insufficient information
- (d) None of the above



- Q15. J & K Manufacturing Ltd. is manufacturing apricot products in Jammu & Kashmir, what provisions of the Factories Act, 1948 are not applicable to them –**
- (a) Sec 67
 - (b) Sec 42 to Sec 50
 - (c) All the provisions
 - (d) Sec 102
- Q16. Raju is joining a factory in Gurgaon having one hundred and fifty workers ordinarily employed before his employment, as a worker, please advise as a cost and management accountant of the factory whether shelters or rest rooms have to be provided–**
- (a) After raju has joined the factory
 - (b) Before Raju has joined the factory
 - (c) With the establishment of the factory
 - (d) After more than one hundred workers are employed
- Q17. X Ltd. has a morning shift of 7 am to 6 pm , state whether the working hours is correct as per provisions of the Factories Act, 1948 –**
- (a) Correct – daily working hours should not be more than 11 hours in any day
 - (b) Incorrect – daily working hours should not be more than 8 hours in any day
 - (c) Incorrect – daily working hours should not be more than 9 hours in any day
 - (d) Incorrect – daily working hours should not be more than 10 hours in any day
- Q18. Shyam was doing overtime in a factory, he is entitled to ₹ 5000 as basic wages, how much he will get for overtime work –**
- (a) ₹ 10,000
 - (b) ₹ 5000
 - (c) ₹ 15,000
 - (d) ₹ 7000
- Q19. Workers will be entitled to overtime wages if they have worked for more than –**
- (a) Forty-eight hours in any four week
 - (b) Forty-eight hours in any three week
 - (c) Forty-eight hours in any two week
 - (d) Forty-eight hours in any week
- Q20. Penalty for obstructing an inspector from discharge of his power will be –**
- (a) Imprisonment for twelve months or fine of ₹ 20,000 or both
 - (b) Imprisonment for six months or fine of ₹ 10,000 or both
 - (c) Imprisonment for twelve months or fine of ₹ 200,000 or both
 - (d) Imprisonment for six months or fine of ₹ 100,000 or both
- Q21. Any person wilfully obstructs an Inspector in the exercise of any power conferred upon him or fails to produce on demand any document or register shall be punishable with---**
- (a) imprisonment for a term which may extend to six month
 - (b) with fine which may extend to rupees ten thousand
 - (c) both a and b
 - (d) either of a and b or both

Q22. Penalty for permitting double employment of child in a factory is—

- (a) fine which may extend to one thousand rupees
- (b) imprisonment of six month
- (c) both
- (d) either a or b

Q23. If any worker employed in a factory contravene any provisions of the Factory Act or any rules or orders made there under he shall be punishable ---

- (a) with imprisonment of three months
- (b) with fine of one hundred rupees
- (c) both
- (d) either a or b or c

Q24. The form of Register of child workers is provided by---

- (a) Central Government
- (b) Appropriate Government
- (c) State Government
- (d) Chief Labor Commissioner

Q25. Certificate of fitness is granted by---

- (a) The Certifying Surgeon
- (b) Chief Medical officer of the State
- (c) occupier of the factory
- (d) Inspector of the Factory

Q26. The number of latrines and Urinals to be in a factory is prescribed by--

- (a) State Government
- (b) Central Government
- (c) Local administrator
- (d) State labor Commissioner

Q27. Factory is included in list III entry no---

- (a) 30
- (b) 36
- (c) 39
- (d) 40

Q28. Precinct means an space---

- (a) accompanying a building
- (b) adjoining a factory
- (c) enclosed by walls
- (d) surrounded by buildings

Q29. Day means a period-----hours

- (a) 18 hours
- (b) normal working hours of 9 hours



- (c) period of 12 hours
- (d) period of 24 hours

Q30. For the purpose of computing the number of working all workers working in ---

- (a) different groups and relay on a day are taken into account
- (b) only day shift and single relay on a day are taken into account
- (c) two shifts and same group on last day of the year are taken into account
- (d) different groups and relay on the last day of the year

Q31. Day means a period 24-hours beginning at--

- (a) 6 oclock morning
- (b) mid night
- (c) 12 hours of noon
- (d) Sun rise

Q32. The power to appoint Chief Inspector lies with----

- (a) Central Government
- (b) Local Government
- (c) State Government
- (d) District Magistrate of the District

Q33. The standards of sufficient and suitable lighting are provided by-----

- (a) Central Government
- (b) Local Government
- (c) City Magistrate
- (d) State Government

Q34. In every factory where-----workers are ordinary employed, suitable provision for cold and hot water is made.

- (a) 250
- (b) 200
- (c) 240
- (d) 320

Q35. A young person can be employed on a dangerous machine only when--

- (a) he has been instructed of dangerous nature of the operation and precaution to be taken
- (b) he has received sufficient training in work at machine
- (c) he is under the supervision of a person having knowledge and experience of the machine
- (d) all the three conditions to be satisfied

Q36. To maintain proper cooperation between the workers and management in maintaining proper safety and health at workplace-----is constituted by the occupier

- (a) Industrial dispute resolution committee
- (a) Management-workers consultative committee
- (c) Safety committee
- (d) Goodwill committee

Q37. Safety Committee is required to be set up by the occupier of a factory where--

- (a) a hazardous process takes place

- (b) a hazardous substances are used
- (c) hazardous substances are handled
- (d) either of these three

Q38. For overtime worker is entiteld wages---

- (a) twice the normal wages
- (b) normal wages
- (c) normal wages plus compensatroy holiday
- (d) normal wages plus bonus

Q39. No adult worker shall be required to work-more than-----hours in a day

- (a) 8
- (b) 9
- (c) 10
- (d) 12

Q40. Workers right includes--

- (a) obtain information relating to workers health, safety of work
- (b) get training
- (c) represent to the inspector directly or through his representative in the matter of inadequate provision for protection of his health or safety in the factory
- (d) all the three

Answers

1	(c)	2	(b)	3	(a)	4	(c)	5	(d)	6	(d)	7	(c)	8	(d)	9	(b)	10	(a)
11	(b)	12	(c)	13	(a)	14	(b)	15	(c)	16	(a)	17	(c)	18	(a)	19	(d)	20	(b)
21	(d)	22	(a)	23	(a)	24	(c)	25	(a)	26	(a)	27	(b)	28	(c)	29	(d)	30	(a)
31	(b)	32	(c)	33	(d)	34	(a)	35	(d)	36	(c)	37	(d)	38	(a)	39	(b)	40	(d)

Study Note - 6

THE PAYMENT OF WAGES ACT, 1936 & THE MINIMUM WAGES ACT, 1948



This Study Note includes

- 6.1 *The Payment of Wages Act, 1936 Definitions, Scope and Objectives*
- 6.2 *The Minimum Wages Act, 1948 – Basic Concepts, Definitions, Scope and Objectives*

6.1 THE PAYMENT OF WAGES ACT, 1936

INTRODUCTION

The Payment of Wages Act, 1936 is based on the recommendation of the Royal Committee on labor which was initially introduced in the Legislative Assembly in 1933 but could not take the shape of the Act because of dissolution of Assembly. It was finally passed in 1936 and came into force with effect from 21st March, 1937.

The objective of the Act is to regulate the payment of wages to certain classes of employed persons. It is essentially meant for the benefit of industrial employees not getting very high salaries and the provision of the Act was to safeguard their interest. The regulation contemplated by the Act is two fold. First the date of payment of wages i.e. wages must be paid within the time period prescribed in the Act. Secondly regulate the amount of deductions from wages whether fines or otherwise. Thus it ensures payment of wages in a particular form and at regular intervals without unauthorized deductions.

The Act extends to whole of India [Section 1(2)] It was extended to Jammu and Kashmir by the Central Labour Laws (Extension to Jammu and Kashmir) Act, 1970.

The Act came into effect from 28th March, 1937.

6.1.1 APPLICABILITY OF THE ACT

- (i) In the first instance the payment of wages is applicable to (i) persons employed in any factory (ii) persons employed (otherwise than a factory) upon any railway by railway administration, or either directly or through sub contractor, by a railway person fulfilling a contract with railway administration and (iii) persons, employed in an industrial or other establishment specified in sub-clause (a) to (g) clause (ii) of Section 2 of the Act.
- (ii) Appropriate Government can extend the application of the whole or part of the Act to payment of wages to any class of persons employed in the establishment or class of establishments specified by the appropriate Government under sub-clause (h) of clause (ii) of Section 2.
- (iii) The Parliament of India widened the scope of the Payment of Wages Act, which would cover those drawing wages up to ₹ 6,500/- a month against ₹ 1600/- earlier with government assuring that it would soon come forward with a measure aimed at welfare of workers in the unorganised sector.

Note: The Ministry of Labour and Employment, Government of India vide SO 1380(E) dated 08.08.2007 specified the wage ceiling ₹10,000 based on the figure of the consumer expenditure survey published by the National sample survey organisation.

6.1.2 BASIC CONCEPTS:

Section 2 of the Act defines various terms and concepts used in the section at various places. These are discussed below:

- (i) "Appropriate Government" means in relation to railways, air transport service, mines and oilfields the Central Government and in relation to all other cases, the State Government
 - (ia) "Employed person" includes the legal representative of a deceased employed person;
 - (ib) "Employer" includes the legal representative of a deceased employer;
 - (ic) "Factory" means a factory as defined in clause (m) of section 2 of the Factories Act, 1948 (63 of 1948) and includes any place to which the provisions of that Act have been applied under sub-section (1) of section 85 thereof;
- (ii) "Industrial or other establishment" means any—
 - (a) Tramway service or motor transport service engaged in carrying passengers or goods or both by road for hire or reward;
 - (aa) Air transport service other than such service belonging to or exclusively employed in the military, naval or air forces of the Union or the Civil Aviation Department of the Government of India;
 - (b) Dock wharf or jetty;
 - (c) Inland vessel, mechanically propelled;
 - (d) Mine, quarry or oil-field;
 - (e) Plantation;
 - (f) Workshop or other establishment, in which articles are produced, adapted or manufactured with a view to their use, transport or sale;
 - (g) Establishment in which any work relating to the construction, development or maintenance of buildings, roads, bridges or canals, or relating to operations connected with navigation, irrigation or to the supply of water or relating to the generation, transmission and distribution of electricity or any other form of power is being carried on;
 - (h) Any other establishment or class of establishments which the Central Government or a State Government may, having regard to the nature thereof, the need for protection of persons employed therein and other relevant circumstances, specify, by notification in the Official Gazette.
- (ii a) "Mine" has the meaning assigned to it in clause (j) of sub-section (1) of Section 2 of the Mines Act, 1952 (35 of 1952);
- (iii) "Plantation" has the meaning assigned to it in clause (f) of Section 2 of the Plantations Labour Act, 1951 (69 of 1951);
- (iv) "Prescribed" means prescribed by rules made under this Act;
- (v) "Railway administration" has the meaning assigned to it in clause (32) of Section 2 of the Indian Railways Act, 1889 (24 of 1889); and
- (vi) "Wages" means all remuneration (whether by way of salary allowances or otherwise) expressed in terms of money or capable of being so expressed which would, if the terms of employment, express or implied, were fulfilled, be payable to a person employed in respect of his employment, or of work done in such employment and includes—
 - (a) Any remuneration payable under any award or settlement between the parties or order of a court;
 - (b) Any remuneration to which the person employed is entitled in respect of overtime work or holidays or any leave period;



- (c) Any additional remuneration payable under the terms of employment (whether called a bonus or by any other name);
- (d) Any sum which by reason of the termination of employment of the person employed is payable under any law, contract or instrument which provides for the payment of such sum, whether with or without deductions, but does not provide for the time within which the payment is to be made;
- (e) Any sum to which the person employed is entitled under any scheme framed under any law for the time being in force, but does not include -
 - (1) Any bonus (whether under a scheme of profit sharing or otherwise) which does not form part of the remuneration payable under the terms of employment or which is not payable under any award or settlement between the parties or order of a court;
 - (2) The value of any house-accommodation, or of the supply of light, water, medical attendance or other amenity or of any service excluded from the computation of wages by a general or special order of the State Government;
 - (3) Any contribution paid by the employer to any pension or provident fund and the interest which may have accrued thereon;
 - (4) Any travelling allowance or the value of any travelling concession;
 - (5) Any sum paid to the employed person to defray special expenses entailed on him by the nature of his employment; or
 - (6) Any gratuity payable on the termination of employment in cases other than those specified in sub - clause (d).

6.1.3 RULES FOR PAYMENT OF WAGES (Section 3-6)

RESPONSIBILITY FOR PAYMENT OF WAGES (Section 3)

Every employer shall be responsible for the payment of all wages required to be paid under this Act to person employed by him and in case of persons employed

- (a) in factories if a person has been named as the manager of the factory under clause (f) of sub Section 7 of the Factories Act, 1948
- (b) in industrial or other establishments if there is a person responsible to the employer for the supervision and control of the industrial or other establishments;
- (c) upon railways (otherwise than in factories) if the employer is the railway administration and the railway administration has nominated a person in this behalf for the local area concerned;
- (d) in the case of contractor a person designated by such contractor who is directly under his charge and
- (e) in any other case a person designated by the employer as a person responsible for complying with the provision of the Act

The person so named the person so responsible to the employer or the person so nominated as the case may be shall also be responsible for such payment.

- (2) Notwithstanding anything contained in sub - section (1) it shall be the responsibility of the employer to make payment of all wages required to be made under this Act in case the contractor or the person designated by the employer fails to make such payment.

FIXATION OF WAGE-PERIODS (Section 4)

- (1) Every person responsible for the payment of wages under Section 3 shall fix periods (in this Act referred to as wage-periods) in respect of which such wages shall be payable;
- (2) No wage-period shall exceed one month.

TIME OF PAYMENT OF WAGES (Section 5)

- (1) The wages of every person employed upon or in—
 - (a) Any railway, factory or industrial or other establishment upon or in which less than one thousand persons are employed, shall be paid before the expiry of the seventh day,
 - (b) Any other railway, factory or industrial or other establishment shall be paid before the expiry of the tenth day, after the last day of the wage-period in respect of which the wages are payable:

Provided that in the case of persons employed on a dock, wharf or jetty or in a mine, the balance of wages found due on completion of the final tonnage account of the ship or wagons loaded or unloaded, as the case may be, shall be paid before the expiry of the seventh day from the day of such completion.

- (2) Where the employment of any person is terminated by or on behalf of the employer, the wages earned by him shall be paid before the expiry of the second working day from the day on which his employment is terminated:

Provided that where the employment of any person in an establishment is terminated due to the closure of the establishment for any reason other than a weekly or other recognised holiday, the wages earned by him shall be paid before the expiry of the second day from the day on which his employment is so terminated.

- (3) The Appropriate Government may, by general or special order, exempt to such extent and subject to such conditions as may be specified in the order the person responsible for the payment of wages to persons employed upon any railway (otherwise than in a factory) or to persons employed as daily-rated workers in the Public Works Department of the Central Government or the State Government from the operation of this section in respect of wages of any such persons or class of such persons:

Provided that in the case of persons employed as daily-rated workers as aforesaid no such order shall be except in consultation with the Central Government.

- (4) Save as otherwise provided in sub-section (2) all payments of wages shall be made on a working day.

WAGES TO BE PAID IN CURRENT COIN OR CURRENCY NOTES (Section 6)

All wages shall be in current coin or currency notes or in both - wages cannot be paid in kind. Provided that the employer may after obtaining the written authorisation of the employed person pay him the wages either by cheque or by crediting the wages in his bank account.

6.1.4 DEDUCTIONS WHICH MAY BE MADE FROM WAGES (Section 7)

- (1) Notwithstanding the provisions of Railway Act, 1989 (24 of 1989) the wages of an employed person shall be paid to him without deductions of any kind except those authorised by or under this Act.

Explanation I: Every payment made by the employed person to the employer or his agent shall for the purposes of this Act be deemed to be a deduction from wages.

Explanation II: Any loss of wages resulting from the imposition, for good and sufficient cause upon a person employed of any of the following penalties namely:



- (i) The withholding of increment or promotion (including the stoppage of increment at an efficiency bar);
 - (ii) The reduction to a lower post or time scale or to a lower stage in a time scale; or
 - (iii) Suspension: Shall not be deemed to be a deduction from wages in any case where the rules framed by the employer for the imposition of any such penalty are in conformity with the requirements, if any, which may be specified in this behalf by the State Government by notification in the Official Gazette.
- (2) Deductions from the wages of an employed person shall be made only in accordance with the provisions of this Act and may be of the following kinds only namely:
- (a) Fines;
 - (b) Deductions for absence from duty;
 - (c) Deductions for damage to or loss of goods expressly entrusted to the employed person for custody or for loss of money for which he is required to account where such damage or loss is directly attributable to his neglect or default;
 - (d) Deductions for house-accommodation supplied by the employer or by Government or any housing board set up under any law for the time being in force (whether the Government or the Board is the employer or not) or any other Authority engaged in the business of subsidising house-accommodation which may be specified in this behalf by the Appropriate Government by notification in the Official Gazette;
 - (e) Deductions for such amenities, services supplied by the employer as the Appropriate Government or any officer specified by it in this behalf may by general or special order authorise.

Explanation: The word “services” in this clause does not include the supply of tools and raw materials required for the purposes of employment;

- (f) Deductions for recovery of advances of whatever nature (including advances for travelling allowance or conveyance allowance) and the interest due in respect thereof or for adjustment of over-payments of wages;
- (ff) Deductions for recovery of loans made from any fund constituted for the welfare of labour in accordance with the rules approved by the Appropriate Government and the interest due in respect thereof;
- (fff) Deductions for recovery of loans granted for house-building or other purposes approved by the Appropriate Government and the interest due in respect thereof;
- (g) Deductions of income-tax payable by the employed person; [Section 7(2)g]
- (h) Deductions required to be made by order of a court or other authority competent to make such order;
- (i) Deductions for subscriptions to and for repayment of advances from any provident fund to which the Provident Funds Act 1952 (19 of 1952) applies or any recognised provident funds as defined in Section 38 of Section 2 of the Indian Income Tax Act, 1961 (43 of 1961) or any provident fund approved in this behalf by the Appropriate Government during the continuance of such approval;
- (j) Deductions for payments to co-operative societies approved by the Appropriate Government or any officer specified by it in this behalf or to a scheme of insurance maintained by the Indian Post Office and

- (k) Deductions made with the written authorisation of the person employed for payment of any premium on his life insurance policy to the Life Insurance Corporation Act of India established under the Life Insurance Corporation 1956 (31 of 1956) or for the purchase of securities of the Government of India or of any State Government or for being deposited in any Post Office Saving Bank in furtherance of any savings scheme of any such government.
- (kk) Deductions made with the written authorisation of the employed person for the payment of his contribution to any fund constituted by the employer or a trade union registered under the Trade Union Act, 1926 (16 of 1926) for the welfare of the employed persons or the members of their families or both and approved by the Appropriate Government or any officer specified by it in this behalf during the continuance of such approval;
- (kkk) Deductions made with the written authorisation of the employed person for payment of the fees payable by him for the membership of any trade union registered under the Trade Union Act, 1926 (16 of 1926);
- (l) Deductions for payment of insurance premia on Fidelity Guarantee Bonds;
- (m) Deductions for recovery of losses sustained by a railway administration on account of acceptance by the employed person of counterfeit or base coins or mutilated or forged currency notes;
- (n) Deductions for recovery of losses sustained by a railway administration on account of the failure of the employed person to invoice to bill to collect or to account for the appropriate charges due to that administration whether in respect of fares freight demurrage wharfage and crantage or in respect of sale of food in catering establishments or in respect of sale of commodities in grain shops or otherwise;
- (o) Deductions for recovery of losses sustained by a railway administration on account of any rebates or refunds incorrectly granted by the employed person where such loss is directly attributable to his neglect or default;
- (p) Deductions made with the written authorisation of the employed person for contribution to the Prime Minister's National Relief Fund or to such other Fund as the Central Government may by notification in the Official Gazette specify;
- (q) Deductions for contributions to any insurance scheme framed by the Central Government for the benefit of its employees.

Limit on deductions [Section 7(3)]

- (3) Notwithstanding anything contained in this Act, the total amount of deductions which may be made under sub-section (2) in any wage-period from the wages of any employed person shall not exceed—
 - (i) In cases where such deductions are wholly or partly made for payments to co-operative societies under clause (j) of sub-section (2) seventy-five per cent of such wages and
 - (ii) In any other case fifty per cent of such wages:

Provided that where the total deductions authorised under sub-section (2) exceed seventy five per cent or as the case may be, fifty per cent of the wages the excess may be recovered in such manner as may be prescribed.

- (4) Nothing contained in this section shall be construed as precluding the employer from recovering from the wages of the employed person or otherwise any amount payable by such person under any law for the time being in force other than the Railways Act, 1889 (24 of 1889).

FINES (Section 8)

- (1) No fine shall be imposed on any employed person save in respect of such acts and omissions on his part as the employer with the previous approval of the State Government or of the prescribed authority may have specified by notice under sub-section (2).



- (2) A notice specifying such acts and omissions shall be exhibited in the prescribed manner on the premises in which the employment carried on or in the case of persons employed upon a railway (otherwise than in a factory) at the prescribed place or places.
- (3) No fine shall be imposed on any employed person until he has been given an opportunity of showing cause against the fine or otherwise than in accordance with such procedure as may be prescribed for the imposition of fines.
- (4) The total amount of fine which may be imposed in any one wage-period on any employed person shall not exceed an amount equal to three per cent of the wages payable to him in respect of that wage-period.
- (5) No fine shall be imposed on any employed person who is under the age of fifteen years.
- (6) No fine imposed on any employed person shall be recovered from him by installments or after the expiry of ninety days from the day on which it was imposed.
- (7) Every fine shall be deemed to have been imposed on the day of the act or omission in respect of which it was imposed.
- (8) All fines and all realisations thereof shall be recorded in a register to be kept by the person responsible for the payment of wages under Section 3, in such form as may be prescribed; and all such realisations shall be applied only to such purposes beneficial to the persons employed in the factory or establishment as are approved by the prescribed authority.

Explanation: When the persons employed upon or in any railway, factory or industrial or other establishment are part only of a staff employed under the same management all such realisations may be credited to a common fund maintained for the staff as a whole provided that the fund shall be applied only to such purposes as are approved by the prescribed authority.

DEDUCTIONS FOR ABSENCE FROM DUTY (Section 9)

- (1) Deductions may be made under clause (b) of sub-section (2) of section 7 only on account of the absence of an employed person from the place or places where by the terms of his employment, he is required to work such absence being for the whole or any part of the period during which he is so required to work.
- (2) The amount of such deduction shall in no case bear to the wages payable to the employed person in respect of the wage-period for which the deduction is made in a larger proportion than the period for which he was absent bears to the total period within such wage-period during which by the terms of his employments he was required to work:

Provided that subject to any rules made in this behalf by the Appropriate Government if ten or more employed persons acting in concert absent themselves without due notice (that is to say without giving the notice which is required under the terms of their contracts of employment) and without reasonable cause such deduction from any such person may include such amount not exceeding his wages for eight days as may by any such terms be due to the employer in lieu of due notice.

Explanation: For the purposes of this section an employed person shall be deemed to be absent from the place where he is required to work if although present in such place he refuses in pursuance of a stay-in strike or for any other cause which is not reasonable in the circumstances to carry out his work.

DEDUCTIONS FOR DAMAGE OR LOSS (Section 10)

- (1) A deduction under clause (c) or clause (o) of sub-section (2) of section 7 shall not exceed the amount of the damage or loss caused to the employer by the neglect or default of the employed person.

- 1A) A deduction shall not be made under clause (c) or clause (m) or clause (n) or clause (o) of sub-section (2) of Section 7 until the employed person has been given an opportunity of showing cause against the deduction or otherwise than in accordance with such procedure as may be prescribed for the making of such deductions.
- (2) All such deductions and all realisations thereof shall be recorded in a register to be kept by the person responsible for the payment of wages under Section 3 in such form as may be prescribed.

DEDUCTIONS FOR SERVICES RENDERED (Section 11)

A deduction under clause (d) or clause (e) of sub-section (2) of section 7 shall not be made from the wages of an employed person, unless the house-accommodation amenity or service has been accepted by him as a term of employment or otherwise and such deduction shall not exceed an amount equivalent to the value of the house-accommodation amenity or service supplied and in the case of deduction under the said clause (e) shall be subject to such conditions as the Appropriate Government may impose.

DEDUCTIONS FOR RECOVERY OF ADVANCES (Section 12)

Deductions under clause (f) of sub-section (2) of Section 7 shall be subject to the following conditions namely:

- (a) Recovery of an advance of money given before employment began shall be made from the first payment of wages in respect of a complete wage-period, but no recovery shall be made of such advances given for traveling-expenses;
- (aa) Recovery of an advance of money given after employment began shall be subject to such conditions as the Appropriate Government may impose;
- (b) Recovery of advances of wages not already earned shall be subject to any rules made by the Appropriate Government regulating the extent to which such advances may be given and the installments by which they may be recovered.

DEDUCTIONS FOR RECOVERY OF LOANS (Section 12A)

Deductions for recovery of loans granted under clause (fff) of sub-section (2) of Section 7 shall be subject to any rules made by the Appropriate Government regulating the extent to which such loans may be granted and the rate of interest payable thereon.

DEDUCTIONS FOR PAYMENTS TO CO-OPERATIVE SOCIETIES AND INSURANCE SCHEMES (Section 13)

Deductions under clause (j) and clause (k) of sub-section (2) of Section 7 shall be subject to such conditions as the Appropriate Government may impose.

6.1.5 MAINTENANCE OF REGISTERS AND RECORDS (Section 13A)

- (1) Every employer shall maintain such registers and records giving such particulars of persons employed by him the work performed by them the wages paid to them the deductions made from their wages the receipts given by them and such other particulars and in such form as may be prescribed.
- (2) Every register and record required to be maintained under this section shall for the purposes of this Act be preserved for a period of three years after the date of the last entry made therein.

6.1.6 INSPECTORS (Section 14)

- (1) An Inspector of Factories appointed under sub-section (1) of section 8 of the Factories Act, 1948 (63 of 1948) shall be an Inspector for the purposes of this Act in respect of all factories within the local limits assigned to him.



- (2) The Appropriate Government may appoint Inspectors for the purposes of this Act in respect of all persons employed upon a railway (otherwise than in a factory) to whom this Act applies.
- (3) The Appropriate Government may, by notification in the Official Gazette, appoint such other persons as it thinks fit to be Inspectors for the purposes of this Act and may define the local limits within which and the class of factories and industrial or other establishments in respect of which they shall exercise their functions.
- (4) An Inspector may,
 - (a) Make such examination and inquiry as he thinks fit in order to ascertain whether the provision of this Act or rules made there under are being observed;
 - (b) With such assistance, if any, as he thinks fit enter inspect and search any premises of any railway factory or industrial or other establishment at any reasonable time for the purpose of carrying out the objects of this Act;
 - (c) Supervise the payment of wages to persons employed upon any railway or in any factory or industrial or other establishment;
 - (d) Require by a written order the production at such place, as may be prescribed, of any register maintained in pursuance of this Act and taken on the spot or otherwise statements of any persons which he may consider necessary for carrying out the purposes of this Act;
 - (e) Seize or take copies of such registers or documents or portions thereof as he may consider relevant in respect of an offence under this Act which he has reason to believe has been committed by an employer;
 - (f) Exercise such other powers as may be prescribed:
Provided that no person shall be compelled under this sub-section to answer any question or make any statement tending to incriminate himself.
- (4A) The provisions of the Code of Criminal Procedure, 1973 (2 of 1974) shall, so far as may be, apply to any search or seizure under this sub-section as they apply to any search or seizure made under the authority of a warrant issued under section 94 of the said Code.
- (5) Every Inspector shall be deemed to be a public servant within the meaning of the Indian Penal Code (45 of 1860).

FACILITIES TO BE AFFORDED TO INSPECTORS (Section 14A)

Every employer shall afford an Inspector all reasonable facilities for making any entry inspection supervision examination or inquiry under this Act.

6.1.7 CLAIMS ARISING OUT OF DEDUCTIONS FROM WAGES OR DELAY IN PAYMENT OF WAGES AND PENALTY FOR MALICIOUS OR VEXATIOUS CLAIMS (Section 15)

- (1) The Appropriate Government may, by notification in the Official Gazette, appoint
 - (a) Any commissioner for workmen's compensation or
 - (b) Any officer of the Central Government exercising function as (i) Regional Labor commissioner or ii) Assistant Labour commissioner with at least two years experience or
 - (c) Any officer of the State Government not below the rank of Assistant Labor commissioner with at least two years experience or
 - (d) A presiding officer of any labor court or industrial tribunal constituted under the Industrial Dispute Act, 1947 or under any corresponding law relating to the investigation and settlement of industrial disputes in force in the state or
 - (e) Any other officer with experience as a judge of civil court or a judicial Magistrate as the authority to hear and decide for any specified area all claims arising out of deductions from

the wages or delay in payment of wages of persons employed or paid in that area including all matters incidental to such claims.

Provided that where the appropriate Government considers it necessary so to do it may appoint more than one authority for any specified area and may by general or special order provide for the distribution or allocation of work to be performed by them under this Act.

- (2) Where contrary to the provisions of this Act any deduction has been made from the wages of an employed person or any payment of wages has been delayed such person himself or any legal practitioner or any official of a registered trade union authorised in writing to act on his behalf or any Inspector under this Act or any other person acting with the permission of the authority appointed under sub-section (1) may apply to such authority for a direction under sub-section (3):

Provided that every such application shall be presented within twelve months from the date on which the deduction from the wages was made or from the date on which the payment of the wages was due to be made as the case may be:

Provided further that any application may be admitted after the said period of twelve months when the applicant satisfies the authority that he had sufficient cause for not making the application within such period.

- (3) When any application under sub-section (2) is entertained the authority shall hear the applicant and the employer or other person responsible for the payment of wages under Section 3, or give them an opportunity of being heard and after such further inquiry (if any), as may be necessary, may without prejudice to any other penalty to which such employer or other person is liable under this Act direct the refund to the employed person of the amount deducted or the payment of the delayed wages together with the payment of such compensation as the authority may think fit not exceeding ten times the amount deducted in the former case and not exceeding three thousand rupees but not less than one thousand five hundred rupees in the latter and even if the amount deducted or the delayed wages are paid before the disposal of the application direct the payment of such compensation as the authority may think fit not exceeding two thousand rupees:

Provided that the claim under this Act shall be disposed of as far as practicable within a period of three months from the date of registration of the claim by the authority.

Provided further that the period of three months may be extended if both the parties to the dispute agree for any bonafide reason to be recorded by the authority that the said period of three months may be extended to such period as may be necessary to dispose of the application in a just manner.

Provided also that no direction for the payment of compensation shall be made in the case of delayed wages if the authority is satisfied that the delay was due to-

- (a) A bona fide error or bonafide dispute as to the amount payable to the employed person or
 - (b) The occurrence of an emergency or the existence of exceptional circumstances such that the person responsible for the payment of the wages was unable though exercising reasonable diligence to make prompt payment or
 - (c) The failure of the employed person to apply for or accept payment.
- (4) If the Authority hearing an application under this section is satisfied—
- (a) That the application was either malicious or vexatious the authority may direct that a penalty not exceeding three hundred seventy five rupees be paid to the employer



or other person responsible for the payment of wages by the person presenting the application; or

- (b) That in any case in which compensation is directed to be paid under sub-section (3) the applicant ought not to have been compelled to seek redress under this section the authority may direct that a penalty not exceeding fifty rupees be paid to the Appropriate Government by the employer or other person responsible for the payment of wages.
- (4A) Where there is any dispute as to the person or persons being the legal representative or representatives of the employer or of the employed person the decision of the authority on such dispute shall be final.
- (4B) Any inquiry under this section shall be deemed to be a judicial proceeding within the meaning of Sections 193 219 and 228 of the Indian Penal Code (45 of 1860).
- (5) Any amount directed to be paid under this section may be recovered—
- (a) If the authority is a Magistrate by the authority as if it were a fine imposed by him as Magistrate and
 - (b) If the authority is not a Magistrate by any Magistrate to whom the authority makes application in this behalf as if it were a fine imposed by such Magistrate.

SINGLE APPLICATION IN RESPECT OF CLAIMS FROM UNPAID GROUP (Section 16)

- (1) Employed persons are said to belong to the same unpaid group if they are borne on the same establishment, and if deductions have been made from their wages in contravention of this Act for the same cause and during the same wage-period or periods, or if their wages for the same wage-period or periods have remained unpaid after the day fixed by Section 5.
- (2) A single application may be presented under section 15 on behalf or in respect of any number of employed persons belonging to the same unpaid group and in such case every person on whose behalf such application is presented may be awarded maximum compensation to the extent specified in sub-section (3) of Section 15.
- (3) The Authority may deal with any number of separate pending applications, presented under section 15 in respect of persons belonging to the same unpaid group, as a single application presented under sub-section (2) of this section and the provisions of that sub-section shall apply accordingly.

APPEAL (Sec 17)

- (1) An appeal against an order dismissing either wholly or in part an application made under sub-Section (2) of section 15, or against a direction made under sub-section (3) or sub-section (4) of that section, may be preferred within thirty days of the date on which the order or direction was made in a Presidency-town before the Court of Small Causes and elsewhere before the District Court—
 - (a) By the employer or other person responsible for the payment of wages under section 3 if the total sum directed to be paid by way of wages and compensation exceeds three hundred rupees or such direction has the effect of imposing on the employer or the other person a financial liability exceeding one thousand rupees, or
 - (b) By an employed person or any legal practitioner or any official of a registered trade union authorised in writing to act on his behalf or any Inspector under this Act or any other person permitted by the authority to make an application under sub-section (2) of Section 15, if the total amount of wages claimed to have been withheld from the employed person exceeds twenty rupees or from the unpaid group to which the employed person belongs or belonged exceeds fifty rupees, or

- (c) By any person directed to pay a penalty under sub-section (4) of Section 15.
- (1A) No appeal under clause (a) of sub-section (1) shall lie unless the memorandum of appeal is accompanied by a certificate by the authority to the effect that the appellant has deposited the amount payable under the direction appealed against.
- (2) Save as provided in sub-section (1) any order dismissing either wholly or in part an application made under sub-section (2) of Section 15 or a direction made under sub-section (3) or sub-section (4) of that section shall be final.
- (3) Where an employer prefers an appeal under this section the authority against whose decision the appeal has been preferred may and if so directed by the court referred to in sub-section (1) shall pending the decision of the appeal withhold payment of any sum in deposit with it.
- (4) The court referred to in sub-section (1) may if it thinks fit submit any question of law for the decision of the High Court and if it so does shall decide the question in conformity with such decision.

CONDITIONAL ATTACHMENT OF PROPERTY OF EMPLOYER OR OTHER PERSON RESPONSIBLE FOR PAYMENT OF WAGES (Section 17A)

- (1) Where at any time after an application has been made under sub-section (2) of section 15 the Authority or where at any time after an appeal has been filed under section 17 by an employed person or any legal practitioner or any official of a registered trade union authorised in writing to act on his behalf or any Inspector under this Act or any other person permitted by the Authority to make an application under sub-section (2) of section 15, the Court referred to in that section is satisfied that the employer or other person responsible for the payment of wages under section 3 is likely to evade payment of any amount that may be directed to be paid under section 15 or Section 17, the Authority or the Court as the case may be except in cases where the Authority or Court is of opinion that the ends of justice would be defeated by the delay after giving the employer or other person an opportunity of being heard may direct the attachment of so much of the property of the employer or other person responsible for the payment of wages as is in the opinion of the Authority or Court sufficient to satisfy the amount which may be payable under the direction.
- (2) The provisions of the Code of Civil Procedure, 1908 (5 of 1908) relating to attachment before judgment under that Code shall so far as may be apply to any order for attachment under sub-section (1).

POWERS OF AUTHORITIES APPOINTED UNDER SECTION 15 (Section 18)

Every Authority appointed under sub-section (1) of Section 15, shall have all the powers of a civil court under the Code of Civil Procedure, 1908 (5 of 1908) for the purpose of taking evidence and of enforcing the attendance of witnesses and compelling the production of documents and every such Authority shall be deemed to be a Civil Court for all the purposes of Section 195 and of Chapter XXVI of the Code of Criminal Procedure, 1973 (2 of 1974).

6.1.8 PENALTY FOR OFFENCES UNDER THE ACT (Sec 20)

- (1) Whoever being responsible for the payment of wages to an employed person contravenes any of the provisions of any of the following sections namely section 5 except sub-section (4) thereof Section 7 Section 8 except sub-section (8) thereof, Section 9 Section 10 except sub-Section (2) thereof and section 11 to 13 both inclusive shall be punishable with fine which shall not be less than one thousand five hundred rupees but which may extend to seven thousand five hundred rupees.
- (2) Whoever contravenes the provisions of Section 4 sub-Section (4) of Section 5 Section 6 sub-Section (8) of Section 8 sub-section (2) of Section 10 or Section 25 shall be punishable with fine which may extend to three thousand seven hundred fifty rupees.



- (2A) Whoever being required to nominate or designate a person under section 3 fails to do so such person shall be punishable with fine which shall not be less than three thousand rupees.
- (3) Whoever being required under this Act to maintain any records or registers or to furnish any information or return—
- (a) Fails to maintain such register or record; or
 - (b) Willfully refuses or without lawful excuse neglects to furnish such information or return; or
 - (c) Willfully furnishes or causes to be furnished any information or return which he knows to be false; or
 - (d) Refuses to answer or willfully gives a false answer to any question necessary for obtaining any information required to be furnished under this Act shall for each such offence be punishable with fine which shall not be less than One thousand five hundred rupees but which may extend to seven thousand five hundred rupees.
- (4) Whoever—
- (a) Willfully obstructs an Inspector in the discharge of his duties under this Act; or
 - (b) Refuse or willfully neglects to afford an Inspector any reasonable facility for making any entry, inspection, examination, supervision, or inquiry authorised by or under this Act in relation to any railway, factory or industrial or other establishment; or
 - (c) Willfully refuses to produce on the demand of an Inspector any register or other document kept in pursuance of this Act; or
 - (d) Prevents or attempts to prevent or does anything which he has any reason to believe is likely to prevent any person from appearing before or being examined by an Inspector acting in pursuance of his duties under this Act; shall be punishable with fine which shall not be less than one thousand five hundred rupees but which may extend to seven thousand five hundred rupees.
- (5) If any person who has been convicted of any offence punishable under this Act is again guilty of an offence involving contravention of the same provision he shall be punishable on a subsequent conviction with imprisonment for a term which shall not be less than one month but which may extend to six months and with fine which shall not be less than three thousand seven hundred fifty rupees but which may extend to twenty two thousand five hundred rupees.

Provided that for the purpose of this sub-section no cognizance shall be taken of any conviction made more than two years before the date on which the commission of the offence which is being punished came to the knowledge of the Inspector.

- (6) If any person fails or willfully neglects to pay the wages of any employed person by the date fixed by the Authority in this behalf, he shall without prejudice to any other action that may be taken against him be punishable with an additional fine which may extend to seven hundred fifty rupees for each day for which such failure or neglect continues.

PROCEDURE IN TRIAL OF OFFENCES (Section 21)

- (1) No court shall take cognizance of a complaint against any person for an offence under sub-section (1) of section 20 unless an application in respect of the facts constituting the offence has been presented under Section 15 and has been granted wholly or in part and the authority empowered under the latter section or the appellate Court granting such application has sanctioned the making of the complaint.

- (2) Before sanctioning the making of a complaint against any person for an offence under sub-section (1) of Section 20 the Authority empowered under Section 15 or the Appellate Court as the case may be shall give such person an opportunity of showing cause against the granting of such sanction and the sanction shall not be granted if such person satisfies the Authority or Court that his default was due to –
 - (a) A bonafide error or bona fide dispute as to the amount payable to the employed person or
 - (b) The occurrence of an emergency or the existence of exceptional circumstances such that the person responsible for the payment of the wages was unable though exercising reasonable diligence to make prompt payment or
 - (c) The failure of the employed person to apply for or accept payment.
- (3) No Court shall take cognizance of a contravention of Section 4 or of Section 6 or of a contravention of any rule made under Section 26 except on a complaint made by or with the sanction of an Inspector under this Act.
- (3A) No Court shall take cognizance of any offence punishable under sub-Section (3) or sub-Section (4) of Section 20 except on a complaint made by or with the sanction of an Inspector under this Act.
- (4) In imposing any fine for an offence under sub-Section (1) of Section 20 the court shall take into consideration the amount of any compensation already awarded against the accused in any proceedings taken under Section 15.

BAR OF SUITS (Section 22)

No Court shall entertain any suit for the recovery of wages or of any deduction from wages in so far as the sum so claimed—

- (a) Forms the subject of an application under Section 15 which has been presented by the plaintiff and which is pending before the authority appointed under that Section or of an appeal under Section 17; or
- (b) Has formed the subject of a direction under Section 15 in favour of the plaintiff; or
- (c) Has been adjudged in any proceeding under Section 15 not to be owed to the plaintiff; or
- (d) Could have been recovered by an application under Section 15.

PROTECTION OF ACTION TAKEN IN GOOD FAITH (Section 22A)

No suit prosecution or other legal proceeding shall lie against the government or any officer of the Government for anything which is in good faith done or intended to be done under this Act.

CONTRACTING OUT (Section 23)

Any contract or agreement whether made before or after the commencement of this Act whereby an employed person relinquishes any right conferred by this Act shall be null and void in so far as it purports to deprive him of such right.

DELEGATION OF POWERS (Section 24)

The appropriate Government may by notification in the official gazette direct that any power exercisable by it under this Act shall in relation to such matters and subject to such condition if any as may be specified in the direction be also exercisable-

- (a) Where the appropriate Government is the Central Government by such officer or authority subordinate to the Central Government or by the State Government or by such officer or authority subordinate to the State Government as may be specified in the notification
- (b) Where the appropriate Government is a state Government by such officer or authority



subordinate to the State Government as may be specified in the notification.

DISPLAY BY NOTICE OF ABSTRACTS OF THE ACT (Section 25)

The person responsible for the payment of wages of persons employed in a factory or an industrial or other establishment shall cause to be displayed in such factory or industrial or other establishment a notice containing such abstracts of this Act and of the rules made there under in English and in the language of the majority of the persons employed in the factory, or industrial or other establishment as may be prescribed.

PAYMENT OF UNDISBURSED WAGES IN CASE OF DEATH OF EMPLOYED PERSON (Section 25A)

- (1) Subject to the other provisions of the Act all amounts payable to an employed person as wages shall if such amounts could not or cannot be paid on account of his death before payment or on account of his whereabouts not being known –
 - (a) Be paid to the person nominated by him in this behalf in accordance with the rules made under this Act; or
 - (b) Where no such nomination has been made or where for any reasons such amounts cannot be paid to the person so nominated be deposited with the prescribed authority who shall deal with the amounts so deposited in such manner as may be prescribed.
- (2) Where in accordance with the provisions of sub-section (1) all amounts payable to an employed person as wages—
 - (a) Are paid by the employer to the person nominated by the employer person; or
 - (b) Are deposited by the employer with the prescribed authority, the employer shall be discharged of his liability to pay those wages

6.1.9 RULE-MAKING POWER (Section 26)

- (1) The Appropriate Government may make rules to regulate the procedure to be followed by the authorities and courts referred to in Sections 15 and 17.
- (2) The Appropriate Government may, by notification in the Official Gazette make, rules for the purpose of carrying into effect the provisions of this Act.
- (3) In particular and without prejudice to the generality of the foregoing power rules made under sub-section (2) may—
 - (a) Require the maintenance of such records registers returns and notice as are necessary for the enforcement of the Act prescribe the form thereof and the particulars to be entered in such registers or records;
 - (b) Require the display in a conspicuous place on premises where employment is carried on of notices specifying rates of wages payable to persons employed on such premises;
 - (c) Provide for the regulate inspection of the weights measures and weighing machines used by employers in checking or ascertaining the wages of persons employed by them;
 - (d) Prescribe the manner of giving notice of the days on which wages will be paid;
 - (e) Prescribe the Authority competent to approve under sub-section (1) of Section 8 acts and omissions in respect of which fines may be imposed;
 - (f) Prescribe the procedure for the imposition of fines under section 8 and for making of the deductions referred to in Section 10;
 - (g) Prescribe the conditions subject to which deductions may be made under the proviso the sub-section (2) of Section 9;

- (h) Prescribe the authority competent to approve the purposes on which the proceeds of fines shall be expended;
 - (i) Prescribe the extent to which advances may be made and the installments by which they may be recovered with reference to clause (b) of Section 12;
 - (ia) Prescribe the extent to which loans may be granted and the rate of interest payable thereon with reference to Section 12A;
 - (ib) Prescribe the powers of Inspectors for the purposes of this Act;
 - (j) Regulate the scales of costs which may allowed in proceedings under this Act;
 - (k) Prescribe the amount of court-fees payable in respect of any proceedings under this Act
 - (l) Prescribe the abstracts to be contained in the notices required by Section 25;
 - (la) Prescribe the form and manner in which nominations may be made for the purposes of sub- section (1) of section 25A the cancellation or variation of any such nomination or the making of any fresh nomination in the event of the nominee predeceasing the person making nomination and other matters connected with such nominations;
 - (lb) Specify the authority with whom amounts required to be deposited under clause (b) of sub- section (1) of Section 25A shall be deposited and the manner in which such authority shall deal with the amounts deposited with it under that clause;
 - (m) Provide for any other matter which is to be or may be prescribed.
- (4) In making any rule under this section the State Government may provide that a contravention of the rule shall be punishable with fine which shall not be less than seven hundred fifty rupees but which may extend to one thousand five hundred rupees.
- (5) All rules made under this section shall be subject to the condition of previous publication and the date to be specified under clause (3) of Section 23 of the General Clauses Act 1897 (10 of 1897) shall not be less than three months from the date on which the draft of the proposed rules was published.
- (6) Every rule made by the Central Government under this section shall be laid as soon as may be after it is made before each House of Parliament while it is in session for a total period of thirty days which may be comprised in one session or in two or more successive sessions and if before the expiry of the session immediately following the session or the successive sessions aforesaid both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made the rule shall thereafter have effect only in such modified form or be of no effect as the case may be; so however that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.
- (7) All rules made under this section by the State Government shall as soon as possible after they are made be laid before the State legislature.

Note: In terms of power conferred under sub section 1 of Section 26" The Payment of Wages (Procedure) Rules 1937" has been notified which has been amended from time to time.



6.2 THE MINIMUM WAGES ACT, 1948

INTRODUCTION

The Minimum wages Act, was passed for the welfare of labors and has been enacted to secure the welfare of the workers in a competitive market by providing for a minimum limit of wages in certain employment. Legislative protection for workers to receive a minimum wage, can be considered as the hall mark of any progressive nation. It is one of the fundamental premises of decent work. In India, the **Minimum Wages Act, 1948** provides for fixation and enforcement of minimum wages in respect of scheduled employments.

6.2.1 OBJECTIVE

The Act aims to prevent sweating or exploitation of labour. The Act also requires the appropriate government (both at Centre and States) to fix minimum rates of wages in respect of employments specified in the schedule.

Since the respective state governments have been empowered to independently fix minimum wages, disparities between wages in neighboring states are common.

The Act applies to whole of India.

6.2.2 BASIC CONCEPTS (Section 2)

In this Act unless there is anything repugnant in the subject or context—

- (a) “Adolescent” means a person who has completed his fourteenth year of age but has not completed his eighteenth year;
- (aa) “Adult” means a person who has completed his eighteenth year of age;
- (b) “Appropriate government” means –
 - (i) In relation to any scheduled employment carried on by or under the authority of the Central Government or a railway administration, or in relation to a mine, oilfield or major port, or any corporation established by a Central Act, the Central Government and
 - (ii) In relation to any other scheduled employment, the State Government;
- (bb) “Child” means a person who has not completed his fourteenth year of age;
- (c) “Competent authority” means the authority appointed by the appropriate government by notification in its Official Gazette to ascertain from time to time the cost of living index number applicable to the employees employed in the scheduled employments specified in such notification;
- (d) “Cost of living index number” in relation to employees in any scheduled employment in respect of which minimum rates of wages have been fixed. Means the index number ascertained and declared by the competent authority by notification in the Official Gazette to be the cost of living index number applicable to employee in such employment;
- (e) “Employer” means any person who employs, whether directly or through another person, or whether on behalf of himself or any other person, one or more employees, in any scheduled employment in respect of which minimum rates of wages have been fixed under this Act and includes except in sub-section (3) of Section 26 –
 - (i) In a factory where there is carried on any scheduled employment in respect of which minimum rates of wages have been fixed under this Act, any person named under clause (f) of sub-section (1) of Section 7 of the Factories Act 1948 (63 of 1948) as manager of the factory;

- (ii) In any scheduled employment under the control of any government in India in respect of which minimum rates of wages have been fixed under this Act, the person or Authority appointed by such Government for the supervision and control of employees or where no person or authority is so appointed, the head of the department;
 - (iii) In any scheduled employment under any local authority in respect of which minimum rates of wages have been fixed under this Act, the person appointed by such authority for the supervision and control of employees or where no person is so appointed, the chief executive officer of the local Authority;
 - (iv) In any other case where there is carried on any scheduled employment in respect of which minimum rates of wages have been fixed under this Act, any person responsible to the owner for the supervision and control of the employees or for the payment of wages;
- (f) “Prescribed” means prescribed by rules made under this Act;
- (g) “Schedule employment” means an employment specified in the Schedule or any process or branch of work forming part of such employment;
- (h) “Wages” means all remuneration, capable of being expressed in terms of money, which would, if the terms of the contract of employment, express or implied, were fulfilled be payable to a person employed in respect of his employment or work done in such employment and includes house rent allowance but does not include –
- (i) The value of—
 - (a) Any house accommodation, supply of light, water, medical attendance, or
 - (b) Any other amenity or any service excluded by general or special order of the appropriate government;
 - (ii) Any contribution paid by the employer to any person fund or provident fund or under any scheme of social insurance;
 - (iii) Any traveling allowance or the value of any traveling concession;
 - (iv) Any sum paid to the person employed to defray special expenses entailed on him by the nature of his employment; or
 - (v) Any gratuity payable on discharge;
- (i) “Employee” means any person who is employed for hire or reward to do any work, skilled or unskilled, manual or clerical, in a scheduled employment in respect of which minimum rates of wages have been fixed; and includes an out-worker to whom any articles or materials are given out by another person to be made up, cleaned, washed, altered, ornamented, finished, repaired, adapted or otherwise processed for sale for the purposes of the trade or business of that other person where the process is to be carried out either in the home of the out-worker or in some other premises not being premises under the control and management of that other person; and also includes an employee declared to be an employee by the appropriate Government, but does not include any member of the Armed Forces of the Union.
- (j) An “unskilled” employee is one who does operations that involve the performance of simple duties, which require the experience of little or no independent judgment or previous experience although familiarity with the occupational environment is necessary. His work may thus require in addition to physical exertion familiarity with variety of articles or goods.
- (k) A “semi-skilled” worker is one who does work generally of defined routine nature wherein the major requirement is not so much of the judgement, skill and but for proper discharge of duties assigned to him or relatively narrow job and where important decisions made by others. His work is thus limited to the performance of routine operations of limited scope.



- (l) A "skilled" employee is one who is capable of working efficiently of exercising considerable independent judgement and of discharging his duties with responsibility. He must possess a thorough and comprehensive knowledge of the trade, craft or industry in which he is employed.
- (m) A "highly skilled" worker is one who is capable of working efficiently and supervises efficiently the work of skilled employees.

6.2.3 FIXING OF MINIMUM RATES OF WAGES (Section 3)

The responsibility of fixing minimum wages lies with appropriate govt.

The appropriate government shall in the manner hereinafter provided -

- (a) Fix the minimum rates of wages payable to employees employed in an employment specified in Part I or Part II of the Schedule and in an employment added to either Part by notification under Section 27:

Provided that the appropriate government may in respect of employees employed in an employment specified in Part II of the Schedule instead of fixing minimum rates of wages under this clause for the whole State fix such rates for a part of the State or for any specified class or classes of such employment in the whole State or part thereof;

- (b) Review at such intervals as it may think fit such intervals not exceeding five years the minimum rates of wages so fixed and revise the minimum rates if necessary:

Provided that where for any reason the appropriate government has not reviewed the minimum rates of wages fixed by it in respect of any scheduled employment within any interval of five years nothing contained in this clause shall be deemed to prevent it from reviewing the minimum rates after the expiry of the said period of five years and revising them if necessary and until they are so revised the minimum rates in force immediately before the expiry of the said period of five years shall continue in force.

6.2.4 MINIMUM NUMBER OF EMPLOYEES [Section 3(1A)]

Notwithstanding anything contained in sub-section (1) the appropriate government may refrain from fixing minimum rates of wages in respect of any scheduled employment in which there are in the whole State less than one thousand employees engaged in such employment but if at any time the appropriate government comes to a finding after such inquiry as it may make or cause to be made in this behalf that the number of employees in any scheduled employment in respect of which it has refrained from fixing minimum rates of wages has risen to one thousand or more it shall fix minimum rates of wages payable to employees in such employment as soon as may be after such finding.

6.2.5 MINIMUM RATES [Section 3(2)]

The appropriate government may fix

- (a) A minimum rate of wages for time work (hereinafter referred to as "a minimum time rate");
- (b) A minimum rates of wages for piece work (hereinafter referred to as "a minimum piece rate");
- (c) A minimum rate of remuneration to apply in the case of employees employed on piece work for the purpose of securing to such employees a minimum rate of wages on a time work basis (hereinafter referred to as "a guaranteed time rate");
- (d) A minimum rate (whether a time rate or a piece rate) to apply in substitution for the minimum rate which would otherwise be applicable in respect of overtime work done by employees (hereinafter referred to as "overtime rate").

Where in respect of an industrial dispute relating to the rates of wages payable to any of the employees employed in a scheduled employment any proceeding is pending before a Tribunal or National Tribunal under the Industrial Disputes Act, 1947 (14 of 1947) or before any like authority under any other law

for the time being in force or an award made by any Tribunal National Tribunal or such authority is in operation and a notification fixing or revising the minimum rates of wages in respect of the scheduled employment is issued during the pendency of such proceeding or the operation of the award then notwithstanding anything contained in this Act the minimum rates of wages so fixed or so revised shall not apply to those employees during the period in which the proceeding is pending and the award made therein is in operation or as the case may be where the notification is issued during the period of operation of an award during that period; and where such proceeding or award relates to the rates of wages payable to all the employees in the scheduled employment no minimum rates of wages shall be fixed or revised in respect of that employment during the said period.

In fixing or revising minimum rates of wages under this section—

- (a) Different minimum rates of wages may be fixed for—
 - (i) Different scheduled employments;
 - (ii) Different classes of work in the same scheduled employment;
 - (iii) Adults, adolescents, children and apprentices;
 - (iv) Different localities;
- (b) Minimum rates of wages may be fixed by any one or more of the following wage periods; namely:
 - (i) By the hour
 - (ii) By the day
 - (iii) By the month, or
 - (iv) By such other larger wage-period as may be prescribed; and, where such rates are fixed by the day or by the month the manner of calculating wages for a month, or for a day, as the case may be may be, indicated :

Provided that where any wage-periods have been fixed under section 4 of the Payment of Wages Act, 1936 (4 of 1936) minimum wages shall be fixed in accordance therewith.

6.2.6 MINIMUM RATE OF WAGES (Section 4)

- (1) Any minimum rate of wages fixed or revised by the appropriate government in respect of scheduled employments under section 3 may consist of –
 - (i) A basic rate of wages and a special allowance at a rate to be adjusted at such intervals and in such manner as the appropriate government may direct to accord as nearly as practicable with the variation in the cost of living index number applicable to such workers (hereinafter referred to as the “cost of living allowance”); or
 - (ii) A basic rate of wages with or without the cost of living allowance, and the cash value of the concessions in respect of supplies of essential commodities at concession rates, where so authorised; or
 - (iii) An all-inclusive rate allowing for the basic rate, the cost of living allowance and the cash value of the concessions, if any.
- (2) The cost of living allowance and the cash value of the concessions in respect of supplies of essential commodities at concession rate shall be computed by the competent authority at such intervals and in accordance with such directions as may be specified or given by the appropriate government.

6.2.7 PROCEDURE FOR FIXING AND REVISING MINIMUM WAGES (Section 5)

- (1) In fixing minimum rates of wages in respect of any scheduled employment for the first time under



this Act or in revising minimum rates of wages so fixed the appropriate government shall either—

- (a) Appoint as many committees and sub-committees as it considers necessary to hold enquiries and advise it in respect of such fixation or revision as the case may be, or
 - (b) By notification in the Official Gazette, publish its proposals for the information of persons likely to be affected thereby and specify a date not less than two months from the date of the notification on which the proposals will be taken into consideration.
- (2) After considering the advice of the committee or committee appointed under clause (a) of sub-section (1) or as the case may be, all representations received by it before the date specified in the notification under clause (b) of that sub-section, the appropriate government shall by notification in the Official Gazette, fix or as the case may be revise the minimum rates of wages in respect of each scheduled employment and unless such notification otherwise provides it shall come into force on the expiry of three months from the date of its issue:

Provided that where the appropriate government proposes to revise the minimum rates of wages by the mode specified in clause (b) of sub-section (1) the appropriate government shall consult the Advisory Board also.

6.2.8 ADVISORY BOARD (Section 7)

For the purpose of co-ordinating work of committees and sub-committees appointed under section 5 and advising the appropriate government generally in the matter of fixing and revising minimum rates of wages, the Appropriate Government shall appoint an Advisory Board.

U/s 8 Central Advisory Board—

- (1) For the purpose of advising the Central and State Governments in the matters of the fixation and revision of minimum rates of wages and other matters under this Act, and for co-ordinating the work of the Advisory Boards the Central Government shall appoint a Central Advisory Board.
- (2) The Central Advisory Board shall consist of persons to be nominated by the Central Government representing employers and employees in the scheduled employments, who shall be equal in number, and independent persons not exceeding one-third of its total number of members; one of such independent persons shall be appointed the Chairman of the Board by the Central Government.

U/s 9 Composition of committees etc.—

Each of the committees, sub-committees and the Advisory Board shall consist of persons to be nominated by the appropriate government representing employers and employees in the scheduled employments, who shall be equal in number, and independent persons not exceeding one-third of its total number of members; one of such independent persons shall be appointed the Chairman by the Appropriate Government.

CORRECTION OF ERRORS (Section 10)

- (1) The appropriate government may at any time by notification in the Official Gazette correct clerical or arithmetical mistakes in any order fixing or revising minimum rates of wages under this Act, or errors arising therein from any accidental slip or omission.
- (2) Every such notification shall as soon as may be after it is issued be placed before the Advisory Board for information.

6.2.9 WAGES IN KIND (Section 11)

- (1) Minimum wages payable under this Act shall be paid in cash.
- (2) Where it has been the custom to pay wages wholly or partly in kind, the Appropriate Government being of the opinion that it is necessary in the circumstances of the case may by notification in the Official Gazette authorise the payment of minimum wages either wholly or partly in kind.
- (3) If appropriate government is of the opinion that provision should be made for the supply of essential commodities at concession rates the appropriate government may by notification in the Official Gazette authorise the provision of such supplies at concessional rates.
- (4) The cash value of wages in kind and of concessions in respect of supplies of essential commodities at concessional rates authorised under sub-sections (2) and (3) shall be estimated in the prescribed manner.

6.2.10 PAYMENT OF MINIMUM RATE OF WAGES (Section 12)

- (1) Where in respect of any scheduled employment a notification under section 5 is in force, the employer shall pay to every employee engaged in a scheduled employment under him, wages at a rate not less than the minimum rate of wages fixed by such notification for that class of employees in that employment without any deductions except as may be authorised within such time and subject to such conditions as may be prescribed.
- (2) Nothing contained in this section shall affect the provisions of the Payment of Wages Act, 1936 (4 of 1936).

6.2.11 FIXING HOURS FOR NORMAL WORKING DAY ETC (Section 13)

- (1) In regard to any scheduled employment minimum rates of wages in respect of which have been fixed under this Act, the Appropriate Government may -
 - (a) Fix the number of hours of work which shall constitute a normal working day, inclusive of one or more specified intervals;
 - (b) Provide for a day of rest in every period of seven days which shall be allowed to all employees or to any specified class of employees and for the payment of remuneration in respect of such days of rest;
 - (c) Provide for payment for work on a day of rest at a rate not less than the overtime rate.
- (2) The provisions of sub-section (1) shall in relation to the following classes of employees apply only to such extent and subject to such conditions as may be prescribed :-
 - (a) Employees engaged on urgent work or in any emergency which could not have been foreseen or prevented;
 - (b) Employees engaged in work in the nature of preparatory or complementary work which must necessarily be carried on outside the limits laid down for the general working in the employment concerned;
 - (c) Employees whose employment is essentially intermittent;
 - (d) Employees engaged in any work which for technical reasons has to be completed before the duty is over;
 - (e) Employees engaged in a work which could not be carried on except at times dependent on the irregular action of natural forces.
- (3) For the purposes of clause (c) of sub-section (2) employment of an employee is essentially intermittent when it is declared to be so by the appropriate government on the ground that the daily hours of duty of the employee or if there be no daily hours of duty as such for the employee



the hours of duty normally include periods of inaction during which the employee may be on duty but is not called upon to display either physical activity or sustained attention.

OVERTIME (Section 14)

- (1) Where an employee, whose minimum rate of wages is fixed under this Act, by the hour by the day or by such a longer wage-period as may be prescribed, works on any day in excess of the number of hours constituting a normal working day, the employer shall pay him for every hour or for part of an hour so worked in excess, at the overtime rate fixed under this Act or under any law of the appropriate government for the time being in force, whichever is higher.
- (2) Nothing in this Act shall prejudice the operation of the provisions of Section 59 of the Factories Act, 1948 (63 of 1948) in any case where those provisions are applicable.

WAGES OF WORKER WHO WORKS FOR LESS THAN NORMAL WORKING DAY (Section 15)

If an employee whose minimum rate of wages has been fixed under this Act by the day works on any day on which he was employed for a period less than the requisite number of hours constituting a normal working day he shall save as otherwise hereinafter provided be entitled to receive wages in respect of work done by him on that day as if he had worked for a full normal working day:

Provided however that he shall not be entitled to receive wages for a full normal working day—

- (i) In any case where his failure to work is caused by his unwillingness to work and not by omission of the employer to provide him with work and
- (ii) In such other cases and circumstances as may be prescribed.

6.2.12 WAGES FOR TWO OR MORE CLASSES OF WORK (Section 16)

Where an employee does two or more classes of work to each of which a different minimum rate of wages is applicable, the employer shall pay to such employee in respect of the time respectively occupied in each such class of work, wages at not less than the minimum rate in force in respect of each such class.

MINIMUM TIME RATE WAGES FOR PIECE WORK (Section 17)

Where an employee is employed on piece work for which minimum time rate and not a minimum piece rate has been fixed under this Act, the employer shall pay to such employee wages at not less than the minimum time rate.

6.2.13 MAINTENANCE OF REGISTERS AND RECORDS (Section 18)

- (1) Every employer shall maintain such registers and records giving such particulars of employees employed by him, the work performed by them, the wages paid to them, the receipts given by them and such other particulars and in such form as may be prescribed.
- (2) Every employer shall keep exhibited notices in such manner as may be prescribed in the factory, workshop or place where the employees in the scheduled employment may be employed, or in the case of out-workers in such factory workshop or place as may be used for giving out work to them notices in the prescribed form containing prescribed particulars.
- (3) The appropriate government may, by rules made under this Act, provide for the issue of wage books or wage slips to employees employed in any scheduled employment in respect of which minimum rates of wages have been fixed, and prescribed the manner in which entries shall be made and authenticated in such wage books or wage slips by the employer or his agent.

6.2.14 INSPECTORS (Section 19)

- (1) The appropriate government may, by notification in the Official Gazette, appoint such persons as it thinks fit to be Inspectors for the purposes of this Act, and define the local limits within which they shall exercise their functions.
- (2) Subject to any rules made in this behalf an Inspector may within the local limits for which he is appointed—
 - (a) Enter at all reasonable hours with such assistants (if any) being persons in the service of the government or any local or other public authority as he thinks fit, any premises or place where employees are employed or work is given out to out-workers in any scheduled employment in respect of which minimum rates of wages have been fixed under this Act, for the purpose of examining any register, record of wages or notices required to be kept or exhibited by or under this Act or rules made thereunder, and require the production thereof for inspection;
 - (b) Examine any person whom he finds in any such premises or place and who, he has reasonable cause to believe, is an employee employed therein or an employee to whom work is given out therein;
 - (c) Require any person giving out-work and any out-workers, to give any information, which is in his power to give, with respect to the names and addresses of the persons to for and from whom the work is given out or received, and with respect to the payments to be made for the work;
 - (d) Seize or take copies of such register, record of wages or notices or portions thereof as he may consider relevant in respect of an offence under this Act which he has reason to believe has been committed by an employer; and
 - (e) Exercise such other powers as may be prescribed.
- (3) Every Inspector shall be deemed to be a public servant within the meaning of the Indian Penal Code, (45 of 1860).
- (4) Any person required to produce any document or thing or to give any information by an Inspector under sub-section (2) shall be deemed to be legally bound to do so within the meaning of section 175 and Section 176 of the Indian Penal Code, (45 of 1860).

6.2.15 CLAIMS (Section 20)

- (1) The appropriate government may by notification in the Official Gazette appoint any Commissioner for Workmen's Compensation or any officer of the Central Government exercising functions as a Labour Commissioner for any region or any officer of the State Government not below the rank of Labour Commissioner or any other officer with experience as a judge for a civil court or as a Stipendiary Magistrate to be the Authority to hear and decide for any specified area all claims arising out of payment of less than the minimum rates of wages, or in respect of the payment of remuneration for days of rest or for work done on such days under clause (b) or clause (c) of sub-section (1) of Section 13 or of wages at the overtime rate under section 14 to employees employed or paid in that area.
- (2) Where an employee has any claim of the nature referred to in sub-section (1) the employee himself or any legal practitioner or any official of a registered trade union authorised in writing to act on his behalf or any Inspector or any person acting with the permission of the authority appointed under sub-section (1) may apply to such authority for a direction under sub-section (3):
Provided that every such application shall be presented within six months from the date on which the minimum wages or other amount became payable:

Provided further that any application may be admitted after the said period of six months when



the applicant satisfies the authority that he had sufficient cause for not making the application within such period.

- (3) When any application under sub-section (2) is entertained the authority shall hear the applicant and the employer or give them an opportunity of being heard, and after such further inquiry, if any, as it may consider necessary may without prejudice to any other penalty to which the employer may be liable under this Act direct —
 - (i) In the case of a claim arising out of payment of less than the minimum rates of wages, the payment to the employee of the amount by which the minimum wages payable to him exceed the amount actually paid, together with the payment of such compensation as the authority may think fit, not exceeding ten times the amount of such excess;
 - (ii) In any other case, the payment of the amount due to the employee, together with the payment of such compensation as the authority may think fit, not exceeding ten rupees; and the authority may direct payment of such compensation in cases where the excess or the amount due is paid by the employer to the employee before the disposal of the application.
- (4) If the authority hearing any application under this section is satisfied that it was either malicious or vexatious it may direct that a penalty not exceeding fifty rupees be paid to be employer by the person presenting the application.
- (5) Any amount directed to be paid under this section may be recovered—
 - (a) If the authority is a Magistrate by the authority as if it were a fine imposed by the authority as a Magistrate or
 - (b) If the authority is not a Magistrate by any Magistrate to whom the authority makes application in this behalf as if it were a fine imposed by such Magistrate.
- (6) Every direction of the authority under this section shall be final.
- (7) Every authority appointed under sub-section (1) shall have all the powers of a civil court under the Code of Civil Procedure, 1908 (5 of 1908) for the purpose of taking evidence and of enforcing the attendance of witnesses and compelling the production of documents and every such authority shall be deemed to be a civil court for all the purposes of Section 195 and Chapter XXXV of the Code of Criminal Procedure, 1898 (5 of 1898).

6.2.16 SINGLE APPLICATION IN RESPECT OF A NUMBER OF EMPLOYEES (Section 21)

- (1) Subject to such rules as may be prescribed, a single application may be presented under section 20 on behalf or in respect of any number of employees employed in the scheduled employment in respect of which minimum rates of wages have been fixed, and in such cases the maximum compensation which may be awarded under sub-section (3) of Section 20 shall not exceed ten times the aggregate amount of such excess or ten rupees per head, as the case may be.
- (2) The authority may deal with any number of separate pending applications presented under Section 20 in respect of employees in the scheduled employments in respect of which minimum rates of wages have been fixed as a single application presented under sub-section (1) of this section and the provisions of that sub-section shall apply accordingly.

6.2.17 PENALTIES FOR CERTAIN OFFENCES (Section 22)

Any employer who:

- (a) pays to any employee less than the minimum rates of wages fixed for that employee's class of work, or less than the amount due to him under the provisions of this Act, or

- (b) contravenes any rule or order made under Section 13; shall be punishable with imprisonment for a term which may extend to six months or with fine which may extend to five hundred rupees, or with both : Provided that in imposing any fine for an offence under this section the court shall take into consideration the amount of any compensation already awarded against the accused in any proceedings taken under Section 20.

GENERAL PROVISION FOR PUNISHMENT OF OTHER OFFENCES (Section 22A)

Any employer who contravenes any provision of this Act or of any rule or order made there under shall, if no other penalty is provided for, such contravention by this Act, be punishable with fine which may extend to five hundred rupees.

COGNIZANCE OF OFFENCES (Section 22B)

- (1) No court shall take cognizance of a complaint against any person for an offence—
 - (a) Under clause (a) of Section 22 unless an application in respect of the facts constituting such offence has been presented under Section 20 and has been granted wholly or in part and the appropriate government or an officer authorised by it in this behalf has sanctioned the making of the complaint;
 - (b) Under clause (b) of Section 22 or under Section 22A except on a complaint made by or with the sanction of an Inspector.
- (2) No court shall take cognizance of an offence—
 - (a) Under clause (a) or clause (b) of Section 22 unless complaint thereof is made within one month of the grant of sanction under this section;
 - (b) Under Section 22A unless complaint thereof is made within six months of the date on which the offence is alleged to have been committed.

OFFENCES BY COMPANIES (Section 22C)

- (1) If the person committing any offence under this Act is a company, every person who, at the time the offence was committed, was in charge of, and was responsible to the company for the conduct of the business of the company as well as the company shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly:

Provided that nothing contained in this sub-section shall render any such person liable to any punishment provided in this Act if he proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commission of such offence.

- (2) Notwithstanding anything contained in sub-section (1) where any offence under this Act has been committed by a company and it is proved that the offence has been committed with the consent or connivance of, or is attributable to any neglect on the part of, any director, manager, secretary or other officer of the company, such director, manager, secretary or other officer of the company shall also be deemed to be guilty of that offence and shall be liable to be proceeded against and punished accordingly.

Explanation: For the purposes of this section—

- (a) "Company" means any body corporate and includes a firm or other association of individuals, and
- (b) "Director" in relation to a firm means a partner in the firm.

PAYMENT OF UNDISBURSED AMOUNTS DUE TO EMPLOYEES (Section 22D)

All amounts payable by an employer to an employee as the amount of minimum wages of the employee under this Act or otherwise due to the employee under this Act or any rule or order made thereunder shall if such amounts could not or cannot be paid to the employee on account of his death before



payment or on account of his whereabouts not being known be deposited with the prescribed authority who shall deal with the money so deposited in such manner as may be prescribed.

PROTECTION AGAINST ATTACHMENT OF ASSETS OF EMPLOYER WITH GOVERNMENT (Section 22E)

Any amount deposited with the appropriate Government by an employer to secure the due performance of a contract with that Government and any other amount due to such employer from that Government in respect of such contract shall not be liable to attachment under any decree or order of any Court in respect of any debt or liability incurred by the employer other than any debt or liability incurred by the employer towards any employee employed in connection with the contract aforesaid.

APPLICATION OF PAYMENT OF WAGES ACT 1936 TO SCHEDULED EMPLOYMENTS (Section 22F)

- (1) Notwithstanding anything contained in the Payment of Wages Act 1936 (4 of 1936) the appropriate Government may, by notification in the Official Gazette direct that subject to the provisions of sub-section (2), all or any of the provisions of the said Act shall with such modifications, if any, as may be specified in the notification apply to wages payable to employees in such scheduled employments as may be specified in the notification.
- (2) Where all or any of the provisions of the said Act are applied to wages payable to employees in any scheduled employment under sub-section (1), the Inspector appointed under this Act shall be deemed to be the Inspector for the purpose of enforcement of the provisions so applied within the local limits of his jurisdiction.

6.2.18 EXEMPTION OF EMPLOYER FROM LIABILITY IN CERTAIN CASES (Section 23)

Where an employer is charged with an offence against this Act, he shall be entitled upon complaint duly made by him to have any other person whom he charges as the actual offender brought before the court at the time appointed for hearing the charge; and if after the commission of the offence has been proved the employer proves to the satisfaction of the court—

- (a) That he has used due diligence to enforce the execution of this Act and
- (b) That the said other person committed the offence in question without his knowledge consent or connivance.

That other person shall be convicted of the offence and shall be liable to the like punishment as if he were the employer and the employer shall be discharged:

Provided that in seeking to prove as aforesaid the employer may be examined on oath and the evidence of the employer or his witness if any shall be subject to cross-examination by or on behalf of the person whom the employer charges as the actual offender and by the prosecution.

6.2.19 BAR OF SUITS (Section 24)

No court shall entertain any suit for the recovery of wages in so far as the sum so claimed—

- (a) Forms the subject of an application under Section 20 which has been presented by or on behalf of the plaintiff, or
- (b) Has formed the subject of a direction under that section in favour of the plaintiff, or
- (c) Has been adjudged in any proceeding under that section not to be due to the plaintiff, or
- (d) Could have been recovered by an application under that section.

6.2.20 CONTRACTING OUT (Section 25)

Any contract or agreement, whether made before or after the commencement of this Act, whereby an employee either relinquishes or reduces his right to a minimum rate of wages or any privilege or

concession accruing to him under this Act shall be null and void in so far as it purports to reduce the minimum rate of wages fixed under this Act.

6.2.21 EXEMPTION AND EXCEPTIONS (Section 26)

- (1) The appropriate Government may be subject to such conditions if any as it may think fit to impose direct that the provisions of this Act shall not apply in relation to the wages payable to disabled employees.
- (2) The appropriate Government if for special reasons it thinks so fit, by notification in the Official Gazette, direct that subject to such conditions and for such period as it may specify the provisions of this Act or any of them shall not apply to all or any class of employees employed in any scheduled employment or to any locality where there is carried on a scheduled employment.
- (2A) The appropriate Government may if it is of opinion that having regard to the terms and conditions of service applicable to any class of employees in a scheduled employment generally or in a scheduled employment in a local area or to any establishment or a part of any establishment in a scheduled employment it is not necessary to fix minimum wages in respect of such employees of that class or in respect of employees in such establishment or such part of any establishment as are in receipt of wages exceeding such limit as may be prescribed in this behalf direct, by notification in the Official Gazette, and subject to such conditions, if any, as it may think fit to impose that the provisions of this Act or any of them shall not apply in relation to such employees.
- (3) Nothing in this Act shall apply to the wages payable by an employer to a member of his family who is living with him and is dependent on him.

Explanation: In this sub-section a member of the employer's family shall be deemed to include his or her spouse or child or parent or brother or sister.

6.2.22 POWER OF STATE GOVERNMENT TO ADD TO SCHEDULE (Section 27)

The appropriate Government after giving by notification in the Official Gazette not less than three months' notice of its intention so to do may by like notification add to either Part of the Schedule any employment in respect of which it is of opinion that minimum rates of wages should be fixed under this Act and thereupon the Schedule shall in its application to the State be deemed to be amended accordingly.

POWER OF CENTRAL GOVERNMENT TO GIVE DIRECTIONS (Section 28)

The Central Government may give directions to a State Government as to the carrying into execution of this Act in the State.

POWER OF CENTRAL GOVERNMENT TO MAKE RULES (Section 29)

The Central Government may, subject to the condition of previous publication, by notification in the Official Gazette, make rules prescribing the term of office of the members, the procedure to be followed in the conduct of business, the method of voting the manner of filling up casual vacancies in membership and the quorum necessary for the transaction of business of the Central Advisory Board.

POWER OF APPROPRIATE GOVERNMENT TO MAKE RULE (Section 30)

- (1) The appropriate Government may subject to the condition of previous publication, by notification in the Official Gazette, make rules for carrying out the purposes of this Act.
- (2) Without prejudice to the generality of the foregoing power such rules may -
 - (a) Prescribe the term of office of the members the procedure to be followed in the conduct of business the method of voting the manner of filling up casual vacancies in membership and



the quorum necessary for the transaction of business of the committees sub-committees and the Advisory Board;

- (b) Prescribe the method of summoning witnesses production of documents relevant to the subject - matter of the enquiry before the committees, sub-committees and the Advisory Board;
- (c) Prescribe the mode of computation of the cash value of wages in kind and of concessions in respect of supplies of essential commodities at concession rates;
- (d) Prescribe the time and conditions of payment of and the deductions permissible from wages; (e) Provide for giving adequate publicity to the minimum rates of wages fixed under this Act;
- (f) Provide for a day of rest in every period of seven days and for the particulars to be entered in such registers and records;
- (g) Prescribe the number of hours of work which shall constitute a normal working day;
- (h) Prescribe the cases and circumstance in which an employee employed for a period of less than the requisite number of hours constituting a normal working day shall not be entitled to receive wages for a full normal working day;
- (i) Prescribe the form of registers and records to be maintained and the particulars to be entered in such registers and records;
- (j) Provide for the issue of wage book and wage slips and prescribe the manner of making and authenticating entries in wage books and wage slips;
- (k) Prescribe the powers of Inspectors for purposes of this Act;
- (l) Regulate the scale of costs that may be allowed in proceedings under Section 20 and
- (m) Prescribe the amount of court-fees payable in respect of proceedings under Section 20; and
- (n) Provide for any other matter which is to be or may be prescribed.

RULES MADE BY CENTRAL GOVERNMENT TO BE LAID BEFORE PARLIAMENT (Section 30A)

Every rule made by the Central Government under this Act shall be laid as soon as may be after it is made before each House of Parliament while it is in session for a total period of thirty days which may be comprised in one session or two successive sessions and if before the expiry of the session in which it is so laid or the session immediately following both Houses agree in making any modification in the rule or both Houses agree that the rule should not be made the rule shall thereafter have effect only in such modified form or be of no effect as the case may be so however that any such modification or annulment shall be without prejudice to the validity of anything previously done under that rule.

Every recommendation by the state Government under this Act shall be said as soon as may be after it is made, before state legislature

6.2.23 VALIDATION OF FIXATION OF CERTAIN MINIMUM RATES OF WAGES (Section 31)

Where during the period

- (a) Commencing on the 1st day of April 1952 and ending with the date of the commencement of the Minimum Wages (Amendment) Act 1954 (26 of 1954); or
- (b) Commencing on the 31st day of December 1954 and ending with the date of the commencement of the Minimum Wages (Amendment) Act 1957 (30 of 1957); or

- (c) Commencing on the 31st day of December 1959 and ending with the date of the commencement of the Minimum Wages (Amendment) Act, 1961 (31 of 1961) minimum rate of wages have been fixed by an appropriate government as being payable to employees employed in any employment specified in the Schedule in the belief or purported belief that such rates were being fixed under clause (a) of sub-section (1) of Section 3 as in force immediately before the commencement of the Minimum Wages (Amendment) Act, 1954 (26 of 1954) or the Minimum Wages (Amendment) Act 1957 (30 of 1957) or the Minimum (Amendment) Act, 1961 (31 of 1961) as the case may be such rates shall be deemed to have been fixed in accordance with law and shall not be called in question in any court on the ground merely that the relevant date specified for the purpose in that clause had expired at the time the rates were fixed:

Provided that nothing contained in this section shall extend or be construed to extend to affect any person with any punishment or penalty whatsoever by reason of the payment by him by way of wages to any of his employees during any period specified in this section of an amount which is less than the minimum rates of wages referred to in this section or by reason of non-compliance during the period aforesaid with any order or the rule issued under Section 13.



THE PAYMENT OF WAGES ACT, 1936

Multiple Choice Questions (MCQs)

Q1. The act relating to payment of Wages is known as Payment of Wages Act, --, ____?

- (a) 1936
- (b) 1937
- (c) 1938
- (d) 1930

Q2. The Payment of Wages Act, 1936, is based on the recommendation of---

- (a) Sacchar Committee
- (b) The Royal Committee on labor
- (c) Ministry of Women & Child Development
- (d) International Labor Organisation

Q3. The payment of wages is applicable to---

- (a) Whole of India
- (b) Whole of India except Jammu & Kashmir
- (c) Whole of India excluding JK, NEFA and Goa
- (d) only of Northern India

Q4. The Payment of Wages Act, 1936 came into effect with effect from—

- (a) 1st April, 1936
- (b) 1st March, 1937
- (c) 28th March, 1937
- (d) 1st May, 1937

Q5. The term factory used in the Payment of wages Act, 1936 has the same meaning as in—

- (a) Industrial Dispute Act
- (b) The Company Act
- (c) Equal Remuneration Act
- (d) Section 2(m) of the Factories Act, 1948

Q6. Wages as per the Payment of Wages Act can not be paid in—

- (a) Currency notes
- (b) Coins
- (c) Kinds
- (d) Cheques

Q7. As per the Payment of Wages Act, 1936 wages can be paid ---

- (a) In current coins
- (b) In currency notes

- (c) Either a or b or both
- (d) Kind only

Q8. XYZ Ltd to which the payment of Wages Act, 1936 is applicable, fixes the wages period of 36 days. You as a Cost and Management Accountant of the Company, how would advice the company.

- (a) There is no problem in the above act of the Company
- (b) As per Section 4(2) of the Act, no wage period can exceed 30 days. So the company would be advised accordingly
- (c) The wages period can be more than 30 days subject to approval of appropriate Government.
- (d) The company should take permission of Inspector of the factory

Q9. The term Employed person includes---

- (a) Legal representative of the deceased employees
- (b) Next best friend of the employed person
- (c) Wife and minor child of the employed person
- (d) None of these

Q10. The term Employer includes---

- (a) Person holding GPA on behalf of the owner of the factory
- (b) Manager of the company
- (c) Chief executive officer
- (d) Legal Representative of the Employer

Q11. XYZ is factory to which Payment of Wages Act is applicable and employing 700 employees. The factory has the practice paying wages only after 15th of following month. As a Cost and Management Accountant of the factory, do you have any advice to the factory

- (a) No the factory can pay any wages time
- (b) Advice the factory to pay wages by 10th of the following month
- (c) Wages must be paid before the close of month
- (d) As per Section 5(1)(a) the wages must be paid before the expiry of 7th day of the following month

Q12. XYZ is factory to which payment of Wages Act is applicable and employing 1500 employees, the factory has the practice paying wages only after 15th of following month. As a Cost and Management Accountant of the factory, do you have any advice to the factory

- (a) No the factory can pay wages any time
- (b) As per Section 5(1)(b) wages must be paid before the expiry of 10th day of the following month.
- (c) Wages must be paid before the close of month
- (d) As per Section 5(1)(a) the wages must be paid before the expiry of 7th day of the following month



Q13.-----has power to make rules under the Payment of Wages Act,1936

- (a) Appropriate Government
- (b) Central Government
- (c) State Government
- (d) Local Administrator

Q14. No fine can be imposed on any employed person who is under the age of—

- (a) 14
- (b) 15
- (c) 18
- (d) 12

Q15. Appropriate Government in case of a Mines is---

- (a) Central Government
- (b) State Government
- (c) Local municipal corporation
- (d) Any of the above three

Q16. Appropriate Government in case of a Railways is---

- (a) Central Government
- (b) State Government
- (c) Local municipal corporation
- (d) Any of the above three

Q17. The total amount of fine which may be imposed in any one wage period on any employed person shall not exceed an amount equal to----- of the wages payable to him in respect of that wage period

- (a) 10%
- (b) 3%
- (c) 22%
- (d) 30%

Q18. Every Inspector appointed under the Factory Act or Payment of Wages Act is deemed to be a—

- (a) Controlling officer
- (b) Labor Welfare officer
- (c) A public servant
- (d) Honorary Magistrate

Q19. ----has power to appoint Inspector for the purpose of Payment of Wages Act

- (a) Central Government
- (b) State Government
- (c) Local Government
- (d) Appropriate Government

- Q20. Penalties for various offences under the Payment of Wages Act,1936 are provided in section—of the Act.**
- (a) 10
 - (b) 23
 - (c) 17
 - (d) 20

Answers

1	(a)	2	(b)	3	(a)	4	(c)	5	(d)	6	(c)	7	(c)	8	(b)	9	(a)	10	(d)
11	(d)	12	(b)	13	(a)	14	(b)	15	(a)	16	(a)	17	(b)	18	(c)	19	(d)	20	(d)



THE MINIMUM WAGES ACT, 1948

Multiple Choice Questions (MCQs)

Q1. The Minimum Wages Act, 1948 is applicable to---

- (a) Whole of India
- (b) Whole of India except Jammu and Kashmir State
- (c) Whole of India except the State of JK and Goa, Delhi
- (d) Whole of India except Punjab, Haryana

Q2. There are ---schedule to the Minimum Wages Act

- (a) 3
- (b) 1
- (c) 2
- (d) 4

Q3. How many parts are to schedule 1 of the Minimum wages Act, 1948

- (a) 1
- (b) 4
- (c) 2
- (d) 3

Q4. How many employment are contained in part 1 to Schedule 1 of the Minimum Wages Act, 1948

- (a) 10
- (b) 15
- (c) 18
- (d) 21

Q5. How many employment are contained in part 2 to Schedule 1 of the Minimum Wages Act, 1948

- (a) 1
- (b) 5
- (c) 10
- (d) 18

Q6. As per the Minimum Wages Act, Child means a person who has not completed the age of---

- (a) 15
- (b) 14
- (c) 18
- (d) 21

Q7. As per the Minimum Wages Act, Adult means a person who has completed the age of---

- (a) 15
- (b) 14
- (c) 18
- (d) 21

Q8. As per the Minimum Wages Act, Adolsent means a person who has completed the age of 14 years but not completed age of-----

- (a) 15
- (b) 14
- (c) 21
- (d) 18

Q9. The responsibility for fixing minimum rates of wages lies with---

- (a) Appropriate Government
- (b) Central Government
- (c) Union parliament
- (d) Labor commissioner

Q10. The term wages under the Minimum wages Act,1948 excludes—

- (a) Basic wages
- (b) House rent allowance
- (c) Dearness alliance
- (d) Non of these

Q11. Who has power to add to schedule 1 to the Minimum wages Act,1948

- (a) State Government
- (b) Central Government
- (c) Appropriate Government
- (d) Labor Commissioner

Q12. General provision for punishment of offences under the Minimum Wages Act are provided in section—of the Act.

- (a) 21
- (b) 20
- (c) 18
- (d) 22A

Q13. For the purpose of fixation of Minimum wages the Appropriate Government is advised by---

- (a) Central Advisory Board
- (b) Labor Commissioner
- (c) Ministry of Social Justice and Welfare
- (d) all the three

Q14. ---appoints Inspector for the purpose of administration of the Minimum Wages Act,1948

- (a) Central Government
- (b) Appropriate Government
- (c) State Government
- (d) local Government

Answers :

1	(a)	2	(b)	3	(c)	4	(d)	5	(a)	6	(b)	7	(c)	8	(d)	9	(a)	10	(b)	11	(c)	12	(d)	13	(a)	14	(b)

Study Note - 7

THE EMPLOYEES' STATE INSURANCE ACT, 1948



This Study Note includes

- 7.1** *The Employees' State Insurance Act, 1948 – Concepts & Applicability*
- 7.2** *Definitions*
- 7.3** *Registration of Factories and Establishments*
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7.1 THE EMPLOYEES STATE INSURANCE ACT, 1948 – CONCEPT & APPLICABILITY

INTRODUCTION

The Employees State Insurance Act is a social welfare legislation aimed at bringing about social and economic justice to workers employed in the factories and establishment to which this Act applies. It aims at securing maximum labor welfare through various welfare schemes like providing certain benefits to employees in case of sickness, maternity and employment injury and to make provisions for certain other matters in relation thereto. The Act is a landmark in the history of social security in India. The Act is one of the compulsory State insurance benefits. These benefits are secured by financial contributions to the Scheme by both employers and employees.

The Act extends to the whole of India including the State of Jammu and Kashmir. [Sec 1(2)]

It came with effect from 19th April 1948 though Central Government may appoint different dates for different provisions of the Act and for different States or for different part thereof.

Applicability of the Act

In the first instance, to all factories (including factories belonging to the government) other than seasonal factories. [Sec 1(4)]

However this act is not applicable to a factory or establishment belonging to or under the control of the government whose employees are otherwise in receipt of benefits substantially similar or superior to the benefits provided under this Act.

Constitutional provision:

The subject Employees' insurance is included in list III at entry no. 23 Schedule 7 of Constitution of India. Both State Government and State Governments have power to make legislative enactment for this purpose.

In order to have a general overview of the important provisions of the Act, we try to find answer to some of the questions which are very pertinent to the Act.

The 1st question that may crop up is: Can the provisions of this Act be extended to any other establishment or class of establishment etc.

The answer is yes. The appropriate government, in consultation with the Corporation and where the appropriate government is a State Government, with the approval of the Central Government, after

giving one months' notice can extend the provisions of this Act or any of them, to any other establishment or class of establishments, industrial, commercial, agricultural or otherwise.

So both the appropriate government and Central Government can extend the applicability of this Act to any other establishment or class of establishments.

Next question which may be raised is what happens when the number of employee falls below 10? Can the factory or establishment escape from the application of this Act?

During the operation of the provision of this Act in a factory or establishment to which this Act applies, if the number of persons employed therein at any time falls below the limit specified by or under this Act or the manufacturing process therein ceases to be carried on with the aid of power, the provision of this Act continues to be applicable. Accordingly in the instant case the factory or establishment will continue to comply with the provision of this Act, despite the number of employees falling below 10.

7.2 DEFINITIONS

Terms and expressions used in this act have been defined in section 2. In this Act, unless there is anything repugnant in the subject or context-

- (1) "Appropriate government" means, in respect of establishments under the control of the Central Government or [a railway administration] or a major port or a mine or oilfield, the Central Government, and in all other cases, the ⁸[State] Government;
- [(2) ***] Omitted (w.e.f 1.2.1991)
- (3) "Confinement" means labour resulting in the issue of a living child or labour after twenty-six weeks of pregnancy resulting in the issue of a child whether alive or dead;
- (4) "Contribution" means the sum of money payable to the Corporation by the principal employer in respect of an employee and includes any amount payable by or on behalf of the employee in accordance with the provisions of this Act;
- (5) Omitted (w.e.f 1.2.1991);
- (6) "Corporation" means the Employees' State Insurance Corporation set up under this Act;
- [(6A) "dependant" means any of the following relatives of a deceased insured person, namely,-
 - (i) A widow a legitimate or adopted son, who has not attained the age of 25 yrs, an unmarried legitimate or adopted daughter
[(ia) a widowed mother];
 - (ii) If wholly dependent on the earnings of the insured person at the time of his death, a legitimate or adopted son or daughter who has attained the age of twenty five years and is infirm;
 - (iii) If wholly or in part dependent on the earnings of the insured person at the time of his death-
 - (a) Parent other than a widowed mother,
 - (b) A minor illegitimate son, an unmarried illegitimate daughter or a daughter legitimate or adopted or illegitimate if married and a minor or if widowed and a minor,
 - (c) A minor brother or an unmarried sister or a widowed sister if a minor,
 - (d) A widowed daughter-in-law,
 - (e) A minor child of a pre-deceased son,
 - (f) A minor child of a pre-deceased daughter where no parent of the child is alive, or
 - (g) A paternal grand-parent if no parent of the insured person is alive,]
- (7) "Duly appointed" means appointed in accordance with the provisions of this Act or with the rules or regulations made there under;
- [(8) "Employment injury" means a personal injury to an employee caused by accident or an occupational



disease arising out of and in the course of his employment, being an insurable employment, whether the accident occurs or the occupational disease is contracted within or outside the territorial limits of India;]

(9) “Employee” means any person employed for wages in or in connection with the work of a factory or establishment to which this Act applies and-

- (i) Who is directly employed by the principal employer on any work of, or incidental or preliminary to or connected with the work of, the factory or establishment whether such work is done by the employee in the factory or establishment or elsewhere; or
- (ii) Who is employed by or through an immediate employer on the premises of the factory or establishment or under the supervision of the principal employer or his agent on work which is ordinarily part of the work of the factory or establishment or which is preliminary to the work carried on in or incidental to the purpose of the factory or establishment; or
- (iii) Whose services are temporarily lent or let on hire to the principal employer by the person with whom the person whose services are so lent or let on hire has entered into a contract of service; [and includes any person employed for wages on any work connected with the administration of the factory or establishment or any part, department or branch thereof or with the purchase of raw materials for, or the distribution or sale of the products of, the factory or establishment [or any person engaged as an apprentice, not being an apprentice engaged under the Apprentices Act, 1961, or under the standing orders of the establishment; but does not include]]-

(a) Any member of [the Indian] naval, military or air forces; or

[(b) Any person so employed whose wages (excluding remuneration for overtime work) exceed [such wages as may be prescribed by the Central Government]]:

Provided that an employee whose wages (excluding remuneration for overtime work) exceed [such wages as may be prescribed by the Central Government] at any time after (and not before) the beginning of the contribution period, shall continue to be an employee until the end of that period;]

(10) “Exempted employee” means an employee who is not liable under this Act to pay the employee’s contribution;

[(11) “Family” means all or any of the following relatives of an insured person, namely -

- (i) A spouse;
- (ii) A minor legitimate or adopted child dependent upon the insured person;
- (iii) A child who is wholly dependent on the earnings of the insured person and who is-
 - (a) Receiving education, till he or she attains the age of twenty-one years,
 - (b) An unmarried daughter;
- (iv) A child who is infirm by reason of any physical or mental abnormality or injury and is wholly dependent on the earnings of the insured person, so long as the infirmity continues;
- (v) Dependent parents; whose income from all source does not exceed such income as may be prescribed by the Central Government.
- (vi) in case of the insured person is unmarried and his or her parents are not alive, a minor brother or sister wholly dependent upon the earnings of the insured person.

(12) “Factory” means any premises including the precincts thereof-

- (a) Whereon ten or more persons are employed or were employed or on any day of the preceding twelve months and in any part of which a manufacturing process is being carried on or is ordinarily so carried out, but does not include a mine subject to the operation of the Mines Act, 1952 or Railway Running shed.

- (13) "immediate employer", in relation to employees employed by or through him, means a person who has undertaken the execution, on the premises of a factory, or an establishment to which this Act applies or under the supervision of the principal employer or his agent, of the whole or any part of any work which is ordinarily part of the work of the factory or establishment of the principal employer or is preliminary to the work carried on in, or incidental to the purpose of, any such factory or establishment, and includes a person by whom the services of an employee who has entered into a contract of service with him are temporarily lent or let on hire to the principal employer [and includes a contractor];

[(13A) "insurable employment" means an employment in a factory or establishment to which this Act applies;]

- (14) "Insured person" means a person who is or was an employee in respect of whom contributions are or were payable under this Act and who is, by reason thereof, entitled to any of the benefits provided by this Act;

[(14A) "managing agent" means any person appointed or acting as the representative of another person for the purpose of carrying on such other person's trade or business, but does not include an individual manager subordinate to an employer;]

[(14AA) "manufacturing process" shall have the meaning assigned to it in the Factories Act, 1948;]

(14B) "mis-carriage" means expulsion of the contents of a pregnant uterus at any period prior to or during the twenty-sixth week of pregnancy but does not include any mis-carriage, the causing of which is punishable under the Indian Penal Code;]

- (15) "Occupier" of the factory shall have the meaning assigned to it in the Factories Act, 1948];

[(15A) "permanent partial disablement" means such disablement of a permanent nature, as reduces the earning capacity of an employee in every employment which he was capable of undertaking at the time of the accident resulting in the disablement:

Provided that every injury specified in Part II of the Second Schedule shall be deemed to result in permanent partial disablement;

(15B) "permanent total disablement" means such disablement of a permanent nature as incapacitates an employee for all work which he was capable of performing at the time of the accident resulting in such disablement:

Provided that permanent total disablement shall be deemed to result from every injury specified in Part I of the Second Schedule or from any combination of injuries specified in Part II thereof where the aggregate percentage of the loss of earning capacity, as specified in the said Part II against those injuries, amounts to one hundred per cent or more;]

[(15C) "Power" shall have the meaning assigned to it in the Factories Act, 1948;]

- (16) "Prescribed" means prescribed by rules under this Act;

- (17) "Principal employer" means-

- (i) In a factory, the owner or occupier of the factory, and includes the managing agent of such owner or occupier, the legal representative of a deceased owner or occupier, and where a person has been named as the manager of the factory under [the Factories Act, 1948]; the person so named;
- (ii) In any establishment under the control of any department of any government in India, the authority appointed by such government in this behalf or where no authority is so appointed, the head of the department;



- (iii) In any other establishment, any person responsible for the supervision and control of the establishment;
- (18) "Regulation" means a regulation by the Corporation;
- (19) "Schedule" means a Schedule to this Act;
- [(19A) "Seasonal factory" means a factory which is exclusively engaged in one or more of the following manufacturing processes, namely, cotton ginning, cotton or jute pressing, decortications of groundnuts, the manufacture of coffee, indigo, lac, rubber, sugar (including gur) or tea or any manufacturing process which is incidental to or connected with any of the aforesaid processes and includes a factory which is engaged for a period not exceeding seven months in a year-
- (a) In any process of blending, packing or repacking of tea or coffee; or
- (b) In such other manufacturing process as the Central Government may, by notification in the Official Gazette, specify;]
- (20) "Sickness" means a condition which requires medical treatment and attendance and necessitates abstention from work on medical grounds;
- (21) "Temporary disablement" means a condition resulting from an employment injury which requires medical treatment and renders an employee, as a result of such injury, temporarily incapable of [doing the work which he was doing prior to or at the time of the injury];
- (22) "Wages" means all remuneration paid or payable, in cash to an employee, if the terms of the contract of employment, express or implied, were fulfilled and includes [any payment to an employee in respect of any period of authorised leave, lock-out, strike which is not illegal or lay-off and] other additional remuneration, if any, [paid at intervals not exceeding two months], but does not include-
- (a) Any contribution paid by the employer to any pension fund or provident fund, or under this Act;
- (b) Any travelling allowance or the value of any travelling concession;
- (c) Any sum paid to the person employed to defray special expenses entailed on him by the nature of his employment; or
- (d) Any gratuity payable on discharge.
- [(23) "Wage period" in relation to an employee means the period in respect of which wages are ordinarily payable to him whether in terms of the contract of employment, express or implied or otherwise.]
- [(24) all other words and expressions used but not defined in this Act and defined in the Industrial Disputes Act, 1947, shall have the meanings respectively assigned to them in that Act.]

7. 3 REGISTRATION OF FACTORIES AND ESTABLISHMENTS (Section 2A)

It is necessary for every factory or establishment to which this Act applies to be registered within such time and in such manner as may be specified in the regulations made in this behalf.

It is compulsory to get all the employees in a factory or establishment to which this Act apply insured in the manner provided by this Act.

Who is an insurable employee?

Every employee of a factory or establishment to which the Act applies is an insurable person. Section 38 states that subject to provisions of the Act, all employees in factories or establishments to which this Act applies shall be insured in manner as provided in Act. However the following persons are not insurable and Act does not provide any benefit to them:

Workers in mines subject to Mines Act, 1952[Sec 2(12)]

Workers in a railway running shed[Sec 2(12)]

- (c) Any member of [the Indian] naval, military or air forces [Sec 2 (9)]
- (d) Any person so employed whose wages (excluding remuneration for overtime work) exceed [such wages as may be prescribed by the Central Government]:

7.4 ADMINISTRATION OF THE SCHEME OF INSURANCE

The provisions of this Act are administered through appointment of a corporation known as the Employees' State Insurance Corporation which is established by Central Government [Sec 3]. It is a body corporate and has common seal and perpetual existence.

A Standing Committee is constituted from among the members of the ESI Corporation to act as an executive body for administration of the scheme under general supervision of ESI corporation [Sec 8 and 18]. A Medical Benefit Council is also set up to advise the corporation on medical matters. [Sec 10 and 22]. The ESI Corporation also has power to appoint Regional Boards, Local Committees and Regional and Local Medical Benefit Councils in such areas and in such manner as provided by regulations. It may also appoint Inspectors for purposes of the Act.

7.5 EMPLOYEES STATE INSURANCE CORPORATION

7.5.1 Constitution of the ESI Corporation :(Sec 4)

The Corporation shall consist of the following members, namely: —

- (a) A Chairman to be appointed by the Central Government;
- (b) A Vice-Chairman to be appointed by the Central Government;
- (c) Not more than five persons to be appointed by the Central Government;
- (d) One person each representing each of the States in which this Act is in force to be appointed by the State Government concerned;
- (e) One person to be appointed by the Central Government to represent the Union territories;
- (f) Ten persons representing employers to be appointed by the Central Government in consultation with such organisations of employers as may be recognised for the purpose by the Central Government ;
- (g) Ten persons representing employees to be appointed by the Central Government in consultation with such organisations of employees as may be recognised for the purpose by the Central Government ;
- (h) Two persons representing the medical profession to be appointed by the Central Government in consultation with such organisations of medical practitioners as may be recognised for the purpose by the Central Government ;
- (i) Three members of Parliament of whom two shall be members of the House of the People (Lok Sabha) and one shall be a member of the Council of States (Rajya Sabha) elected respectively by the members of the House of the People and the members of the Council of States ; and
- (j) The Director-General of the Corporation, *ex-officio*.

7.5.2 Term of Office of Members:

- 1) Save as otherwise expressly provided in this Act, the term of office of members of the Corporation, other than the members referred to in clauses (a), (b), (c), (d) and (e) of section 4 and the *ex-officio* member, shall be four years commencing from the date on which their appointment or election is notified.

Provided that a member of the Corporation shall notwithstanding the expiry of the said period of four years, continue to hold office until the appointment or election of his successor is notified.



- (2) The member of the Corporation referred to in clauses (a), (b), (c), (d) and (e) of section 4 shall hold office during the pleasure of the Government appointing them.
- (3) An outgoing member of the Corporation, the Standing Committee, or the Medical Benefit Council shall be eligible for re-appointment or re-election as the case may be.

7.5.3 Powers of the ESI Corporations:

- 1) The Corporation may employ such other staff of officers as may be necessary for the efficient transaction of its business. (Sec 17)
- 2) The Corporation may, in addition to the scheme of benefits specified in this Act, promote measures for the improvement of the health and welfare of insured persons and for the rehabilitation and re-employment of insured persons who have been disabled or injured and may incur in respect of such measures expenditure from the funds of the Corporation within such limits as may be prescribed by the Central Government. (Sec 19)
- 3) The Corporation may, subject to such conditions as may be prescribed by the Central Government, acquire and hold, sell or transfer both movable and immovable property [Sec 29(1)]
- 4) Subject to such conditions as may be prescribed by the Central Government, the Corporation may from time to time invest any moneys which are not immediately required [Sec 29(2)]
- 5) The Corporation may, with the previous sanction of the Central Government and on such terms as may be prescribed by it, raise loans and take measures for discharging such loans.[Sec 29(3)]
- 6) The Corporation may constitute for the benefit of its staff or any class of them, such provident or other benefit fund as it may think fit.[Sec 29(4)]
- 7) The Corporation may appoint such persons as Social Security Officers, as it thinks fit, for the purposes of this Act, within such local limits as it may assign to them.[Sec 45(1)]
- 8) The Corporation may, on the basis of information available to it, by order, determine the amount of contributions payable in respect of the employees of that factory or establishment.[Sec 45-A]

All orders and decisions of the Corporation shall be authenticated by the signature of the Director-General of the Corporation and all other instruments issued by the Corporation shall be authenticated by the signature of the Director-General or such other officer of the Corporation as may be authorised by him. [Sec 7]

7.5.4 Duties of the Corporation:

- 1) The Corporation shall in each year frame a budget showing the probable receipts and the expenditure which it proposes to incur during the following year and shall submit a copy of the budget for the approval of the Central Government before such date as may be fixed by it in that behalf[Sec 32]
- 2) The Corporation shall maintain correct accounts of its income and expenditure in such form and in such manner as may be prescribed by the Central Government.[Sec 33] The accounts of the Corporation shall be audited annually by the Comptroller and Auditor-General of India [Sec 34(1)]
- 3) The Corporation shall submit to the Central Government an annual report of its work and activities. [Sec 35]
- 4) The Corporation shall, at intervals of three years, have a valuation of its assets and liabilities made by a valuer appointed with the approval of the Central Government [Sec 37]

The annual report, the audited accounts of the Corporation, together with the report of the Comptroller and Auditor-General of India thereon and the comments of the Corporation on such report under section 34 and the budget as finally adopted by the Corporation shall be placed before Parliament.

All employees to be insured : As per section 38 of the Act subject to the provisions of this Act, all employees in factories or establishment to which this Act applies shall be insured in the manner provided by this Act.

7.6 CONTRIBUTIONS

Rules regarding contributions

(1) The contribution payable under this Act in respect of an employee shall comprise contribution payable by the employer (hereinafter referred to as the employer's contribution) and contribution payable by the employee (hereinafter referred to as the employee's contribution) and shall be paid to the Corporation.[Sec 39(1)]. The contributions shall be paid at such rates as may be prescribed by the Central Government [Sec 39(2)].

(2) The wage period in relation to an employee shall be the unit in respect of which all contributions shall be payable under this Act.[Sec 39(3)] The contributions payable in respect of each [wage period] shall ordinarily fall due on the last day of the wage period, and where an employee is employed for part of the wage period, or is employed under two or more employers during the same wage period the contributions shall fall due on such days as may be specified in the regulations.[Sec 39(4)]

In case of default : If any contribution payable under this Act is not paid by the principal employer on the date on which such contribution has become due, he shall be liable to pay simple interest at the rate of twelve per cent. per annum or at such higher rate as may be specified in the regulations till the date of its actual payment :[Sec 39(5)]

Provided that higher interest specified in the regulations shall not exceed the lending rate of interest charged by any scheduled bank.

Any interest recoverable under clause (a) may be recovered as an arrear of land revenue or under section 45-C to section 45-I.

Explanation — In this sub-section “ scheduled bank ” means a bank for the time being included in the Second Schedule to the Reserve Bank of India Act, 1934 (2 of 1934).

(3) The principal employer shall pay in respect of every employee, whether directly employed by him or by or through an immediate employer, both the employer's contribution and the employee's contribution.[Sec 40(1)]

The principal employer shall, in the case of an employee directly employed by him (not being an exempted employee), be entitled to recover from the employee the employee's contribution by reduction from his wages and not otherwise [Sec 40(2)]

Provided that no such deduction shall be made from any wages other than such as relate to the period or part of the period in respect of which the contribution is payable] or in excess of the sum representing the employee's contribution for the period.[Sec 40(2)]

Notwithstanding any contract to the contrary, neither the principal employer nor the immediate employer shall be entitled to deduct the employer's contribution from any wages payable to an employee or otherwise to recover it from him.[Sec 40(3)]

Any sum deducted by the principal employer from wages under this Act shall be deemed to have been entrusted to him by the employee for the purpose of paying the contribution in respect of which it was deducted. [Sec 40(4)]

The principal employer shall bear the expenses of remitting the contributions to the Corporation.[Sec 40(5)]

(4) Recovery of contributions from immediate employer (Sec 41). (a) A principal employer, who has paid contribution in respect of an employee employed by or through an immediate employer, shall be entitled to recover the amount of the contribution so paid (that is to say the employer's contribution as well as the employee's contribution, if any,) from the immediate employer, either by deduction from any amount payable to him by the principal employer under any contract, or as a debt payable by the immediate employer. [Sec 41(1)]



The immediate employer shall maintain a register of employees employed by or through him as provided in the regulations and submit the same to the principal employer before the settlement of any amount payable under sub-section. (Sec 41(1A))

(b) In the case referred to in sub-section (1), the immediate employer shall be entitled to recover the employee's contribution from the employee employed by or through him by deduction from wages and not otherwise, subject to the conditions specified in the proviso to sub-section (2) of section 40. [Sec 41(2)]

(5) General provisions as to payment of contributions (Sec 42). — (a) No employee's contribution shall be payable by or on behalf of an employee whose average daily wages during a wage period are below such wages as may be prescribed by the Central Government [Sec 42(1)]

Explanation — The average daily wages of an employee shall be calculated in such manner as may be prescribed by the Central Government.

(b) Contribution (both the employer's contribution and the employee's contribution) shall be payable by the principal employer for each wage period in respect of the whole or part of which wages are payable to the employee and not otherwise. [Sec 42(2)]

(6) Method of payment of contribution. (Sec 43) Subject to the provisions of this Act, the Corporation may make regulations for any matter relating or incidental to the payment and collection of contributions payable under this Act and without prejudice to the generality of the foregoing power, such regulations may provide for —

- (a) The manner and time of payment of contributions;
- (b) The payment of contributions by means of adhesive or other stamp affixed to or impressed upon books, cards or otherwise and regulating the manner, times and conditions in, at and under which, such stamps are to be affixed or impressed ;
- (bb) The date by which evidence of contributions having been paid is to be received by the Corporation;
- (c) The entry in or upon books or cards of particular of contributions paid and benefits distributed in the case of the insured persons to whom such books or cards relate ; and
- (d) The issue, sale custody, production, inspection and delivery of books or cards and the replacement of books or cards which have been lost, destroyed or defaced.

(7) Returns and Registers [Sec 44]

- (a) Every principal and immediate employer shall submit to the Corporation or to such officer of the Corporation as it may direct such returns in such form and containing such particulars relating to persons employed by him or to any factory or establishment in respect of which he is the principal or immediate employer as may be specified in regulations made in this behalf. [Sec 44(1)]
- (b) Where in respect of any factory or establishment the Corporation has reason to believe that a return should have been submitted under sub-section (1) but has not been submitted, the Corporation may require any person in charge of the factory or establishment to furnish such particulars as it may consider necessary for the purpose of enabling the Corporation to decide whether the factory or establishment is a factory or establishment to which this Act applies. [Sec 44(2)]
- (c) Every principal and immediate employer shall maintain such registers or records in respect of his factory or establishment as may be required by regulations made in this behalf. [Sec 44(3)]

(8) Determination of contributions in certain cases: Normal method for determination of contributions is provided in Sec 39(2). Sec 45- A provides for exceptions only if-

- (a) No returns, particulars, registers or records are submitted, furnished or maintained in accordance with the provisions of section 44 ; or

- (b) Any Social Security Officer or other official of the Corporation referred to in sub-section (2) of section 45 is prevented in any manner by the principal or immediate employer or any other person, in exercising his functions or discharging his duties under section 45. The Corporation may on the basis of the information available to it, by order, determine the amount of contribution payable in respect of the employees of that factory or establishment.

(9) Recovery of contributions. Any contribution payable under this Act may be recovered as an arrear of land revenue.[Sec 45 B]

Rate of Contributions:

The employee's contribution rate (w.e.f. 1.1.97) is 1.75% of the wages and that of employer's is 4.75% of the wages paid/payable in respect of the employees in every wage period. Employees in receipt of a daily average wage upto ₹100/- are exempted from payment of contribution. Employers will however contribute their own share in respect of these employees.

7.7 ESI BENEFITS

The section 46 of the Act envisages following six social security benefits :-

- (a) **Medical Benefit** : Full medical care is provided to an Insured person and his family members from the day he enters insurable employment. There is no ceiling on expenditure on the treatment of an Insured Person or his family member. Medical care is also provided to retired and permanently disabled insured persons and their spouses on payment of a token annual premium of ₹120/- .
- (b) **Sickness Benefit (SB)** : Sickness Benefit in the form of cash compensation at the rate of 70 per cent of wages is payable to insured workers during the periods of certified sickness for a maximum of 91 days in a year. In order to qualify for sickness benefit the insured worker is required to contribute for 78 days in a contribution period of 6 months.

Extended Sickness Benefit (ESB) : SB extendable upto two years in the case of 34 malignant and long-term diseases at an enhanced rate of 80 per cent of wages.

Enhanced Sickness Benefit : Enhanced Sickness Benefit equal to full wage is payable to insured persons undergoing sterilization for 7 days/14 days for male and female workers respectively.

- (c) **Maternity Benefit (MB)** : Maternity Benefit for confinement/pregnancy is payable for three months, which is extendable by further one month on medical advice at the rate of full wage subject to contribution for 70 days in the preceding year.

- (d) **Disablement Benefit**

Temporary disablement benefit (TDB) : From day one of entering insurable employment & irrespective of having paid any contribution in case of employment injury. Temporary Disablement Benefit at the rate of 90% of wage is payable so long as disability continues.

Permanent disablement benefit (PDB) : The benefit is paid at the rate of 90% of wage in the form of monthly payment depending upon the extent of loss of earning capacity as certified by a Medical Board.

- (e) **Dependants' Benefit (DB)** : DB paid at the rate of 90% of wage in the form of monthly payment to the dependants of a deceased Insured person in cases where death occurs due to employment injury or occupational hazards.

- (f) **Other Benefits:**

- **Funeral Expenses:** An amount of ₹10, 000/- is payable to the dependents or to the person who performs last rites from day one of entering insurable employment.
- **Confinement Expenses:** An Insured Women or an I.P. in respect of his wife in case confinement occurs at a place where necessary medical facilities under ESI Scheme are not available.



In addition, the scheme also provides some other need based benefits to insured workers.

- **Vocational Rehabilitation:** To permanently disabled Insured Person for undergoing VR Training at VRS.
- **Physical Rehabilitation:** In case of physical disablement due to employment injury.
- **Old Age Medical Care:** For Insured Person retiring on attaining the age of superannuation or under VRS/ERS and person having to leave service due to permanent disability insured person & spouse on payment of ₹ 120/- per annum.
- **Rajiv Gandhi Shramik Kalyan Yojana** - This scheme of Unemployment allowance was introduced w.e.f. 01-04-2005. An Insured Person who become unemployed after being insured three or more years, due to closure of factory/establishment, retrenchment or permanent invalidity are entitled to :-

Unemployment Allowance equal to 50% of wage for a maximum period of upto one year.

Medical care for self and family from ESI Hospitals/Dispensaries during the period IP receives unemployment allowance.

Vocational Training provided for upgrading skills - Expenditure on fee/travelling allowance borne by ESIC.

An interesting feature of the ESI Scheme is that the contributions are related to the paying capacity as a fixed percentage of the workers wages, whereas, they are provided social security benefits according to individual needs without distinction.

Cash Benefits are disbursed by the Corporation through its Branch Offices (BOs) / Pay Offices (POs), subject to certain contributory conditions.

7.8 PENAL PROVISIONS UNDER SECTION 84 TO 86 OF ESI ACT, 1948

Section - 84: This section deals with penalties for making wrong / false statements made by the Insured Persons with a view to take any benefit which is not admissible to him under the Act. Such Act is an offence punishable under Act with imprisonment for a term which may extent to six months or with fine which may extend to Two thousand rupees or with both.

It is also provided under this section that if an Insured Person is convicted by the Court for an offence committed by him under this section, he shall not be entitled to any cash benefits available under the Act for such a period as may be prescribed by the Central Government.

Section - 85: This section deals with penalties for non – compliance with the various provisions of the ESI Act and Regulations made there under, such as non-payment of contribution, non-submission of Returns, non-Production of records, non-submission of Declaration Forms in respect of their employees, obstruction of Inspector or any other official of the corporation in discharging his duties etc. Such non-compliance with any of the provisions of the Act constitutes an offence committed by the employer of a covered Factory / Establishment which is punishable under Section 85(a) to 85(g) of the Act.

Section - 85(a): Envisages that if an employer fails to pay any contribution payable under the Act within the prescribed time-limit, he thus commit an offence u/s 85(a) of the Act, which is punishable with imprisonment for a term which may extent to three years u/s 85(i) of the Act, provided it shall not be less than One year and fine of Ten thousand rupees u/s 85(i) (a) of the Act where employees' share of contribution is deducted by the employer from their wages but not paid. In other case where term of imprisonment shall not be less than 6 months and fine of Five thousand rupees u/s 85(i) (b).

Section 85(b) to 85(g): Says that if an employer commits an offence under this section for non-compliance with any other provisions of the Act, which is punishable with imprisonment for a term which may extends to One year or with fine up to Four thousand rupees or with both.

Section 85 - A: This section deals with enhanced punishment in certain cases after previous conviction. If any employer convicted by a Court for an offence punishable under the Act, committing the same offence, shall, for every such subsequent offence, be punished with imprisonment for a term which may extend to Two years and with fine of Five thousand rupees.

It is provided that if such subsequent offence is for failure to pay contribution payable under the Act, the employer shall, for every such subsequent offence, be punished with imprisonment for a term which may extend to Five years but which shall not be less than Two years and shall be liable to pay fine of Twenty five thousand rupees.

Section 85 - B: Provides that the corporation may recover damages from the employer by way of penalty under this section if any employer fails to pay contribution payable under the Act within the specified time-limit or pays contribution belatedly provided that before recovering such damages, the employer shall be given a reasonable opportunity of being heard.

The amount of damages may not exceed the amount of contribution paid / payable.

There is also a provision to reduce or waive damages recoverable under this section in respect of a Factory / Establishment which is a Sick industrial Unit and in respect of which Rehabilitation Scheme has been sanctioned by BIFR, under Regulation 31-C. of ESI (General) Regulations, 1950.

1. In case of change of Management including transfer of undertaking to worker's Co-operative or in case of merger or amalgamation of Sick Industrial Unit with a healthy company, Damages levied / leviable can be waived completely.
2. In other cases, depending on merits, damages levied / leviable can be waived up to 50 %.
3. In exceptional hard cases, the damages levied / leviable can be waived either partially / totally.

It is further provided that any damages recoverable may be recovered as an arrear of Land Revenue under section 45-C to 45-I of the Act.

Section-85-C:3 Provides that where an employer is convicted for an offence of non-payment of contribution under this Act, the Court in addition to giving any punishment by order, direct him to pay the amount of contribution for which he was convicted within a time period. The Court can also extend the time given periodically.

If the employer still fails to pay the contribution and submit returns within the time given by the court or within the extended time period given, the employer is deemed to have committed a further offence and shall be punishable with imprisonment under Section-85 and is also liable to pay a fine which may extend to one thousand rupees for every day of default.

Section-86: Provides that no prosecution under this Act shall be instituted without previous sanction of the Insurance Commissioner or of such other officer of the corporation as may be authorized in this behalf by the Director General of the Corporation.

It is also provided that No Court inferior to that of a Metropolitan Magistrate or Judicial Magistrate of the First Class shall try any offence under this Act.

And No Court shall take cognizance of any offence under this Act except on a complaint made in writing in respect thereof.

Section-86-A (Offences by Companies):

If the person being a company committing an offence, every person, who at the time the offence was committed was in-charge of, and was responsible to, the company for the conduct of business of the company, as well as the company shall be deemed to be guilty of the offence and shall be liable to be proceeded against and punished accordingly.



Provided further that if the person proceeded against proves that the offence was committed without his knowledge or that he exercised all due diligence to prevent the commissions of such offence he shall not be liable for any punishment.

Not with standing anything contained in Sub-Section (1) where an offence under the Act is committed with the consent or connivance or neglect on the part of any Director, Manager, and Secretary or any officer of the company, they are deemed to be guilty of that offence and can be punished accordingly.

Section-75: Deals with provisions for Adjudication of Disputes & claims: If any employer or employee under the Act has any disputes / questions that may be settled by E.I. Court after adjudicating the matter if made before it, subject to the condition that 50 % security deposit is required to be made u/s 75 (2B) (unless it is waived/reduced for the reasons recorded by the Ld. Court)

Penal Action u/s 138 of N.I. Act:

If employer submits a cheque to the corporation towards payment of contribution, interest, damages or any other amount due, which is bounced subsequently by the Bank for the reasons of Insufficient Fund he thereby commits an offence under this section and shall be punished with imprisonment for a term upto One year or with fine which may extend to twice the amount of cheque or with both.

Penal Action u/s 405/406/409 of I.P.C:

If an employer deducts employees' share of contribution from their wages but does not pay the said contribution, he thereby commits an offence of criminal Breach of Trust which is punishable under this section with imprisonment which may extend to 3 years or with fine or with both.

THE EMPLOYEES' STATE INSURANCE ACT, 1948

Multiple Choice Questions

Q1. The Employees State Insurance Act, 1948 is applicable to—

- (a) Whole of India except the state of JK
- (b) The whole of India
- (c) The whole of India except JK, Goa and Chandigarh
- (d) The whole of India except the states carved out after 2002

Q2. The ESI Act, 1948 provides certain benefits to the employees in case of--

- (a) case of sickness
- (b) maternity
- (c) employment injury
- (d) All the three

Q3. The Central Government has power to appoint different dates for--

- (a) different provisions of this Act
- (b) for different States
- (c) for different parts of state
- (d) all the three.

Q4. The ESI Act, 1948 in first instance is applicable to—

- (a) to all factories [including factories belonging to the Government] other than seasonal factories
- (b) to all factories specified in schedule 1 of the Factories Act
- (c) to all shops, establishment, factories to which Industrial dispute is applicable
- (d) all factories having at least 20 employees on any day in the financial year

Q5. -----has power to extend the provision of this Act to any other establishment or class of establishment, industrial, commercial, agricultural or otherwise

- (a) Central Government
- (b) Appropriate Government
- (c) State Government
- (d) ESI Corporation

Q6. In order to extend the provision of ESI Act, 1948 to any other establishments, ----months/days notice is required to be given by notification in official Gazette.

- (a) 60 days
- (b) 3 months
- (c) 1 months
- (d) 45 days



- Q7. Before extending the provision of this Act to any other establishment the appropriate Government is required to consult----**
- (a) Attorney General of India
 - (b) ESI Corporation
 - (c) Central Labor/Trade Unions
 - (d) Ministry of social justice and employment
- Q8. The Appropriate Government in respect of establishments under the control of the Central Government or [a railway administration or a major port or a mine or oil-field is]—**
- (a) The Central Government
 - (b) The State Government
 - (c) Local Administration
 - (d) Union Parliament
- Q9. The Appropriate Government in respect of establishments other than under the control of the Central Government or a railway administration or a major port or a mine or oil-field is---**
- (a) Central Government
 - (b) The State Government
 - (c) Local Administration
 - (d) Union Parliament
- Q10. "Occupier " of the factory shall have the meaning assigned to it—**
- (a) The Payment of Wages Act
 - (b) The Employees Compensation Act
 - (c) The Factories Act, 1948
 - (d) The Industrial Dispute Act, 1923
- Q11. For the purpose of defining " manufacturing process " under the ESI Act, 1948, reference is made to---**
- (a) The Factories Act, 1948
 - (b) The Industrial Dispute Act
 - (c) The Employees Compensation Act
 - (d) The Equal Remuneration Act
- Q12. " Temporary disablement " means a condition resulting from an employment injury which requires medical treatment and renders an employee, as a result of such injury temporarily incapable of 2—**
- (a) doing all the work he was capable of doing at the time of injury
 - (b) doing the work which he was doing prior to or at the time of the injury
 - (c) all the work he will be capable of doing at the time of injury
 - (d) all the work he was capable of doing during his life time

Q13. ESI Corporation is established by---

- (a) The Central Government
- (b) The State Government
- (c) Ministry of Social Justice and Welfare
- (d) Local Government

Q14. The primary liability of paying employee's and employer's contribution is of—

- (a) Immediate employer
- (b) The principal employer
- (c) Central Government
- (d) Appropriate Government

Q15. The types of expenses which may be termed as administrative expenses and the percentage of the income of the ESI Corporation which may be spent for such expenses are prescribed by—

- (a) The Central Government
- (b) The State Government
- (c) Governing body of the Corporation
- (d) Local Government

Q16. The Corporation is required to maintain correct accounts of its income and expenditure in such form and in such manner as may be prescribed –

- (a) CAG of India
- (b) by the Central Government
- (c) State Government
- (d) by the Institute of Chartered Accountants of India

Q17. The accounts of the Corporation are audited annually by –

- (a) Controller General of Accounts
- (b) Internal auditor of the Corporation
- (c) The Comptroller and Auditor-General of India
- (d) Auditor appointed under the Companies Act, 1956

Q18. Any expenses on Audit of the accounts of the Corporation are borne by-

- (a) ESI Corporation itself
- (b) Central Government
- (c) State Government
- (d) Auditor itself

Q19. The Annual report on the working of the Corporation are submitted to---

- (a) Central Government
- (b) State Government
- (c) Appropriate Government
- (d) CAG of India



Q20. The Chairman of the ESI Corporation is appointed by---

- (a) Corporation itself
- (b) State Government
- (c) Appropriate Government
- (d) Central Government

Q21. The term wages for the purpose of ESI Act does not includes-

- (a) any contribution paid by the employer to any pension fund or provident fund, or under this Act ;
- (b) any traveling allowance or the value of any travelling concession ;
- (c) any sum paid to the person employed to defray special expenses entailed on him by the nature of his employment, gratuity payable on discharge.
- (d) all the three

Q22. Every injury specified -- shall be deemed to result in permanent partial disablement

- (a) in Part II of the Second Schedule
- (b) in part 1 of the Second schedule
- (c) in part II of First schedule
- (d) Part 1 of First schedule

Q23. The Employee's share of contribution to ESI fund is----

- (a) 1.75% of wages
- (b) 4.75% of wages
- (c) 10% of wages
- (d) 11% of wages

Q24. The Employer's share of contribution to ESI fund is----

- (a) 1.75% of wages
- (b) 4.75% of wages
- (c) 10% of wages
- (d) 11% of wages

Q25. The sickness benefit in the form of cash compensation is paid at the rate of----% of wages of during the period of certified sickness.

- (a) 100%
- (b) 60%
- (c) 70%
- (d) 50%

Q26. Sickness benefit is paid upto a maximum day of-----in a year.

- (a) 45 days
- (b) 91 days

(c) 60 days

(d) 78 days

Q27. Maternity benefit is payable for a period of-----months

(a) 3 months

(b) 6 months

(c) 9 months

(d) 12 months

Q28. Dependants benefit is paid at the rate of-----% of wages.

(a) 100

(b) 90

(c) 85

(d) 66

Q29. Temporary disablement benefit is paid at the rate of----of wages.

(a) 100

(b) 75

(c) 90%

(d) 66

Q30. Permanent disablement benefit is paid at the rate of----of wages.

(a) 120

(b) 100

(c) 79

(d) 90%

Answers

Q1	(b)	2	(d)	3	(d)	4	(a)	5	(b)	6	(c)	7	(b)	8	(a)	9	(b)	10	(c)
11	(a)	12	(b)	13	(a)	14	(b)	15	(a)	16	(b)	17	(c)	18	(a)	19	(a)	20	(d)
21	(d)	22	(a)	23	(a)	24	(b)	25	(c)	26	(b)	27	(a)	28	(b)	29	(c)	30	(d)

Study Note - 8

THE CHILD LABOUR (PROHIBITION AND REGULATION) ACT, 1986



This Study Note includes

- 8.1** *The Child Labour (Prohibition and Regulation) Act, 1986- Concepts, Definition, Scope and Objectives.*
- 8.2** *Prohibition of Children in certain Occupations and Processes*
- 8.3** *Regulation of Conditions of Works of Children*
- 8.4** *Penalties (Section 14)*
- 8.5** *Power of Central / Appropriate Government*
- 8.6** *Where to make Complaint*
- 8.7** *Prohibited Occupations*
- 8.8** *Prohibited Processes*

8.1 THE CHILD LABOUR (PROHIBITION AND REGULATION) ACT, 1986

INTRODUCTION

Due to poverty, illiteracy, unawareness and lack of adequate stringent legal provisions Child labour has been subject to exploitation and inhuman treatment since long. Ideally employment of a child in any form of employment whether hazardous or non-hazardous occupations/process should be prohibited but considering the ground reality of unemployment, poverty, illiteracy, practical difficulties etc child labours are allowed to work in the occupations and processes other than included in Part A and Part B of schedule 1 subject to some conditions laid down in part III of the Act. Though, some provisions do exist in Chapter VII of the Factories Act, 1948 prescribing the working hours, working conditions for child labour, but these provisions are not adequate to ameliorate the conditions of child labours working in unorganized sector not falling within the ambit of Factories Act.

Various Committees, Commissions, social organizations from time to time raised their voice to the Central Government to make necessary legislative provisions to prohibit and regulate the working of child labour.

Child labour (Prohibition & Regulation) Act, 1986 was enacted on the recommendations of various committees on child labour like National Commission on labour, Gurupadaswamy Committee on child labour, Sarat Mehta Committee and many others.

Objective:

The basic objective of the Child labour (Prohibition & Regulation) Act, 1986 is to prohibit the engagement of children in certain employments and to regulate the conditions of work or children in certain other employments.

Applicability:

The Act extends to the whole of India. The Act contains 4 parts and one schedule which again is in two parts A and B. Provisions contained in Part III of the Act for regulating conditions of work of Children came into effect with effect from 26th May 1993, whereas for other provisions of the Act, the central Government has power to appoint different dates for different states and for different class of establishments,

DEFINITIONS

Various terms and expressions used in this Act have been defined in section 2. The expressions used and

so defined in the Act are as under:

In this Act, unless the context otherwise requires, -

- (i) "Appropriate Government" means, in relation to an establishment under the control of the Central Government or a railway administration or a major port or a mine or oilfield, the Central Government, and in all other cases, the State Government;
- (ii) "Child" means a person who has not completed his fourteenth year of age;
- (iii) "Day" means a period of twenty-four hours beginning at midnight;
- (iv) "Establishment" includes a shop, commercial establishment, workshop, farm, residential hotel, restaurant, eating-house, theatre or other place of public amusement or entertainment;
- (v) "Family", in relation to an occupier, means the individual, the wife or husband, as the case may be, of such individual, and their children, brother or sister of such individual;
- (vi) "Occupier", in relation to an establishment or a workshop, means the person who has the ultimate control over the affairs of the establishment or workshop;
- (vii) "Port authority" means any authority administering a port;
- (viii) "Prescribed" means prescribed by rules made under Sec. 18;
- (ix) "Week" means a period of seven days beginning at midnight on Saturday night or such other night as may be approved in writing for a particular area by the Inspector;
- (x) "Workshop" means any premises (including the precincts thereof) wherein any industrial process is carried on, but does not include any premises to which the provisions of Sec. 67 of the Factories Act, 1948 (63 of 1948), for the time being, apply.

8.2 PROHIBITION OF CHILDREN IN CERTAIN OCCUPATIONS AND PROCESSES (SEC 3)

The Act prohibits the employment of children in specified occupations and processes. No child can be employed or permitted to work in any of the occupations set forth in Part A of the Schedule or in any workshop wherein any of the processes set forth in Part B of the Schedule is carried on.

Provided that nothing in this section shall apply to any workshop wherein any process is carried on by the occupier with the aid of his family or to any school established by, or receiving assistance or recognition from, Government.

Prohibited occupations and processes are appended at the end of the study note.

8.3 REGULATION OF CONDITIONS OF WORK OF CHILDREN

A) Hours and period of work (Section 7)

- (1) No child shall be required or permitted to work in any establishment in excess of such number of hours, as may be prescribed for such establishment or class of establishments.
- (2) The period of work on each day shall be so fixed that no period shall exceed three hours and that no child shall work for more than three hours before he has had an interval for rest for at least one hour.
- (3) The period of work of a child shall be so arranged that inclusive of his interval for rest, under sub-section (2), it shall not be spread over more than six hours, including the time spent in waiting for work on any day.
- (4) No child shall be permitted or required to work between 7 p.m. and 8 a.m.
- (5) No child shall be required or permitted to work overtime.
- (6) No child shall be required or permitted to work in, any establishment on any day on which he has already been working in another establishment.



Comments:

This section stipulates that no child shall work for more than 3 hours before he has had an interval for rest for at least one hour. The double employment of a child is banned.

B) Weekly holidays (Sec 8)

Every child employed in an establishment shall be allowed in each week, a holiday of one whole day, which day shall be specified by the occupier in a notice permanently exhibited in a conspicuous place in the establishment and the day so specified shall not be altered by the occupier more than once in three months.

Comments:

The child employed in an establishment is entitled for a holiday of one whole day in each week.

C) Health and Safety (Sec 13)

- (1) The appropriate Government may, by notification in the official Gazette, make rules for the health and safety of the children employed or permitted to work in any establishment or class of establishments.
- (2) Without prejudice to the generality of the foregoing provisions, the said rules may provide for all or any of the following matters, namely:
 - (a) Cleanliness in the place of work and its freedom from nuisance;
 - (b) Disposal of wastes and effluents;
 - (c) Ventilation and temperature;
 - (d) Dust and fume;
 - (e) Artificial humidification;
 - (f) Lighting;
 - (g) Drinking water;
 - (h) Latrine and urinals;
 - (i) Spittoons;
 - (j) Fencing of machinery;
 - (k) Work at or near machinery in motion;
 - (l) Employment of children on dangerous machines;
 - (m) Instructions, training and supervision in relation to employment of children on dangerous machines;
 - (n) Device for cutting off power;
 - (o) Self-acting machines;
 - (p) Easing of new machinery;
 - (q) Floor, stairs and means of access;
 - (r) Pits, sumps, openings in floors, etc.;
 - (s) Excessive weights;
 - (t) Protection of eyes;
 - (u) Explosive or inflammable dust, gas, etc.;
 - (v) Precautions in case of fire;
 - (w) Maintenance of buildings; and
 - (x) Safety of buildings and machinery.

Comments:

The appropriate Government is empowered to make rules in such matters as cleanliness, disposal of wastes, dust, lighting, precaution against fire, protection of eyes, spittoons and ventilations, etc., in any establishment for the health and safety of the children employed or permitted to work.

8.4 PENALTIES (SECTION 14)

- (1) Whoever employs any child or permits any child to work in contravention of the provisions of Sec. 3 shall be punishable with imprisonment for a term which shall not be less than, three months but which may extend to one year or with fine which shall not be less than ten thousand rupees but which may extend to twenty thousand rupees or with both.
- (2) Whoever, having been convicted of an offence under Sec. 3, commits a like offence afterwards, he shall be punishable with imprisonment for a term which shall not be less than six months but which may extend to two years.
- (3) Whoever -
 - (a) Fails to give notice as required by Sec. 9, or
 - (b) Fails to maintain a register as required by Sec. 11 or makes any false entry in any such register; or
 - (c) Fails to display a notice containing an abstract of Sec. 3 and this section as required by Sec. 12; or
 - (d) Fails to comply with or contravenes any other provisions of this Act or the rules made there under shall be punishable with simple imprisonment which may extend to one month or with fine which may extend to ten thousand rupees or with both.

In order to prosecute an employer under section 14 of the Act, the age of the child must be proved to be less than 14 years of age and onus lies upon the prosecution. In *Ram Chander V State of UP* (2002) 1 LLJ907 (All) the petitioner was prosecuted under this Act for having employed a person below 12 years in his carpet loom.

8.5 POWER OF CENTRAL/APPROPRIATE GOVERNMENT

Central Government has power to add any occupation or process to schedule 1 prohibiting employment of a child labour therein. In pursuance of the power conferred upon central Government by section 4, employment of children as domestic workers or servant, employment of children in Dhabas, restaurants, hotels, motels etc has been prohibited with effect from 10th October 2006.

Central Government has been empowered to constitute a child labour technical advisory committee to advise it for the purpose of addition of banned occupations to the schedule of the Act. As on date there are 18 occupations in part A of schedule 1 and 65 process in part B where employment of a child labour is prohibited.

Appropriate Governments have been empowered to make rules for the health and safety of the children employed or permitted to work in any establishment or class of establishment.

Appropriate Government has power to make rules for carrying into effect the provisions of the Act.

8.6 WHERE TO MAKE COMPLAINT

Any person can make a complaint for the commission of any offence under this Act. All offences under this Act are tried by a court not inferior to that of a Metropolitan Magistrate or a Magistrate of first Class.



8.7 PROHIBITED OCCUPATIONS

Occupations listed in Part A of Schedule I are prohibited occupations. Detail of such occupation is as under

- (1) Transport of passengers, goods; or mails by railway.
- (2) Cinder picking, clearing of an ash pit or building operation in the railway premise.
- (3) Work in a catering establishment at a railway station, involving the movement of vendor or any other employee of the establishment from one platform to another or into or out of a moving train.
- (4) Work relating to the construction of railway station or with any other work where such work is done in close proximity to or between the railway lines.
- (5) The port authority within the limits of any port.
- (6) Work relating to selling of crackers and fireworks in shops with temporary licenses.
- (7) Abattoirs/slaughter Houses.
- (8) Automobile workshops and garages.
- (9) Foundries
- (10) Handling of toxics or inflammable substance or explosives.
- (11) Handloom and powerloom industry.
- (12) Mines (Under ground and under water) and collieries.
- (13) Plastic units and Fiber glass workshop.
- (14) Employment of children as domestic workers or servant.
- (15) Employment of children in dhabas, restaurants, hotels, motels, tea shops, resorts, spas or other recreational centres.
- (16) Diving
- (17) Circus
- (18) Caring of Elephants

8.8 PROHIBITED PROCESSES

Process included in part B of schedule 1 are prohibited process Details of Processes mentioned in Part B are as under :

In any workshop wherein any of the following processes is carried on.

- (1) Beedi making
- (2) Carpet Weaving
- (3) Cement manufacture including bagging of cement
- (4) Cloth printing, dying and weaving
- (5) Manufacture of matches, explosive and fire works
- (6) Mica cutting and splitting
- (7) Shellac manufacture
- (8) Soap manufacture
- (9) Tanning.
- (10) Wool cleaning

- (11) Building and construction industry
- (12) Manufacture of slate pencils (including packing)
- (13) Manufacture of products of agate
- (14) Manufacturing processes using toxic metals and substances such as lead, mercury, manganese, chromium, cadmium, benzene, pesticides and asbestos (Section-3)
- (15) All hazardous process as defined in section 2(cb) and dangerous operations as notified in rule made under section 87 of the factories Act 1948
- (16) Printing (as defined in section 2(k) of the factories Act 1948)
- (17) Cashew and cashew nut descaling and processing
- (18) Soldering process in electronic industries
- (19) Agarbathi manufacturing
- (20) Automobile repairs and maintenance (namely welding lather work, dent beating and printing)
- (21) Brick kilns and Roof files units
- (22) Cotton ginning and processing and production of hosiery goods
- (23) Detergent manufacturing
- (24) Fabrication workshop (ferrous and non-ferrous)
- (25) Gem cutting and polishing
- (26) Handling of chromites and manganese ores
- (27) Jute textile manufacture and of coir making
- (28) Lime kilns and manufacture of lime
- (29) Lock making
- (30) Manufacturing process having exposure to lead such as primary and secondary smelting, welding etc.
- (31) Manufacturing of cement pipes, cement products, and other related work.
- (32) Manufacturing of glass, glass ware including bangles fluorescent tubes bulbs and other similar glass products
- (33) Manufacture of dyes and dye stuff
- (34) Manufacturing or handling of pesticides and insecticides
- (35) Manufacturing or processing and handling of corrosive and toxic substances, metal cleaning and photo enlarging and soldering processes in electronic industry
- (36) Manufacturing of burning coal and coal briquette
- (37) Manufacturing of sports goods involving to synthetic materials, chemicals and leather
- (38) Moulding and processing of fiberglass and plastics
- (39) Oil expelling and refinery
- (40) Paper making
- (41) Potteries and ceramic industry
- (42) Polishing, moulding, cutting welding and manufacture of brass goods in all forms.



- (43) Process in agriculture where tractors, threshing and harvesting machines are used and chaff cutting
- (44) Saw mill all process
- (45) Sericulture processing
- (46) Skinning, dyeing and process for manufacturing of leather and leather products
- (47) Stone breaking and stone crushing
- (48) Tobacco processing including manufacturing of tobacco, tobacco paste and handling of tobacco in any form
- (49) Tyre making, repairing, re-trading and graphite beneficiation
- (50) Utensils making polishing and metal buffing
- (51) Zari Making (all process)
- (52) Electroplating
- (53) Graphite powdering and incidental processing.
- (54) Grinding or glazing of metals
- (55) Diamond cutting and polishing
- (56) Extraction of slate from mines
- (57) Rag picking and scavenging
- (58) Processes involving exposure to excessive heat and cold
- (59) Mechanised finishing
- (60) Food processing
- (61) Beverage Industry
- (62) Timber handling and loading
- (63) Mechanical lumbering
- (64) Warehousing
- (65) Processes involving exposure to free silica such as slate, pencil industry, stone grinding, slate stone mining, stone quarries, agate industry.

THE CHILD LABOUR (PROHIBITION AND REGULATION) ACT, 1986

Multiple Choice Questions on

Q1. The Child Labour (Prohibition and Regulation) Act, 1986 extends to

- (a) The whole of India
- (b) The whole of India except the state of J&K
- (c) The whole of India except the state of Arunachal Pradesh
- (d) The whole of India except JK and Punjab

Q2. Various terms and expressions used in this Act are defined in---

- (a) Preamble to the Act
- (b) section 2
- (c) section 1
- (d) section 5

Q3. Appropriate Government in relation to an establishment under the control of the Central Government or a railway administration or a major port or a mine or oilfield,

- (a) the Central Government,
- (b) State Government
- (c) Local Municipality
- (d) Metropolitan Magistrate

Q4. Appropriate Government in relation to an establishment other than under the control of the Central Government or a railway administration or a major port or a mine or oilfield, is the—

- (a) Central Government
- (b) Local Administration
- (c) the State Government
- (d) Chief Administrator of the State

Q5. A person who has not completed the age of----is treated as child

- (a) 14
- (b) 16
- (c) 18
- (d) 12

Q6. Which of these are included in the definition of an establishment

- (a) a shop, commercial establishment, workshop,
- (b) farm, residential hotel, restaurant, eating house, theatre or
- (c) other place of public amusement or entertainment;
- (d) all the three

Q7. In relation to an occupier, family means the individual

- (a) and the wife or husband, as the case may be, of such individual,
- (b) and their children,
- (c) and brother or sister of such individual;
- (d) All the three



Q8. Occupier means a person the person who has---over the affairs of the establishment or workshop

- (a) held key position
- (b) general power of attorney in his favour
- (c) ultimate control
- (d) majority shareholding

Q9. THE CHILD LABOUR (PROHIBITION AND REGULATION) ACT, 1986 list out the prohibited occupations.

- (a) Part A of schedule 1
- (b) Part 1 of the schedule 2
- (c) Part B of schedule 2
- (d) Part 2 of schedule 1

Q10. section --- of the THE CHILD LABOUR (PROHIBITION AND REGULATION) ACT, 1986 prohibit employment of child in certain process or occupations.

- (a) 4
- (b) 5
- (c) 3
- (d) 8

Q11.-----has power to amend the schedule to THE CHILD LABOUR (PROHIBITION AND REGULATION) ACT, 1986

- (a) State Government
- (b) Central Government
- (c) Local Administrator
- (d) City Magistrate

Q12.-----months/days notice is required to add any occupation or process to the schedule to THE CHILD LABOUR (PROHIBITION AND REGULATION) ACT, 1986

- (a) 30 days
- (b) Just 90 days
- (c) At least three months
- (d) One month

Q13. Child Labour Technical Advisory Committee is appointed by---

- (a) Central Government
- (b) Ministry of Child and Women development
- (c) State Government
- (d) Appropriate Government

Q14. -----is constituted to advise the Central Government for the purpose of addition of occupation and processes to the schedule.

- (a) Labor Welfare Officer
- (b) Chief Labour Inspector
- (c) Child Labour Technical Advisory Committee
- (d) Child Specialist

Q15. Child Labour Technical Advisory committee consist of one chairman and — members

- (a) 8
- (b) 11
- (c) not more than 10
- (d) 10

Q16. No child is required or permitted to work between---

- (a) 7 PM to 8 AM
- (b) 8 AM to 7 PM
- (c) 6 PM to 10 AM
- (d) 5 PM to 8 AM

Q17. The period of work of a child labour can not spread over---

- (a) more than 7 hours
- (b) more than 5 hours
- (c) more than six hours
- (d) four hours

Q18. Rules for safety and health of child labour are prescribed by—

- (a) Central Government
- (b) State Government
- (c) Appropriate Government
- (d) Local Government

Q19. Inspector is appointed by the---

- (a) State Government
- (b) Metropolitan Magistrate
- (c) Central Government
- (d) Appropriate Government

Q20. The responsibility for maintenance of register of a child worker lies upon---

- (a) Executive officer
- (b) The occupier
- (c) Manager
- (d) Controlling officer

Q21. Rule making powers under this Act lies with the---

- (a) Appropriate Government
- (b) Central Government
- (c) State Government
- (d) Ministry of Labour

Q22. No child worker shall be required to work more than----hours before he has had an interval for rest for at least one hour

- (a) 3
- (b) 4
- (c) 5
- (d) 3 and half hour



Q23. No court inferior to that of-----or----can try any offence under the Child Labour(Prohibition and Regulation) Act,1986

- (a) District Magistrate or City Magistrate
- (b) Metropolitan Magistrate or a Magistrate of the first class
- (c) Chief Metropolitan Magistrate or judge of High court
- (d) District Magistrate or City Magistrate

Q24. Certificate of age granted by a prescribed medical authority is-----as to the age of a child

- (a) corroborative evidence
- (b) substantive evidence
- (c) conclusive evidence
- (d) none of these

Q25. Any dispute between the occupier and the Inspector as to the age of a child labour, the matter is referred to-prescribed medical authority by---

- (a) occupier
- (b) Manager of the factor
- (c) Chief Medical Authority
- (d) Inspector

Q26. Any dispute between the occupier and the Inspector as to the age of a child labour, the dispute is settled by-----

- (a) occupier
- (b) Prescribed medical authority
- (c) Chief Medical Authority
- (d) Chief Inspector

Q27. Day means a period of-----hours

- (a) 12
- (b) 24
- (c) 18
- (d) 10

Q28. The Child labour (Prohibition and Regulation) Act, 1986 repealed -----Act.

- (a) Child Protection Act
- (b) Equal Remuneration Act
- (c) The Employment of Children Act,1938
- (d) The Child Labour Abolition Act

Q29. If any difficulty arises in giving effect to the provisions of this Act,-----will take necessary action to remove the difficulties.

- (a) State Government
- (b) Child Labor Advisory Committee

- (c) State Child Welfare Department
- (d) Central Government

Q30. Every Inspector appointed by the Central Government is treated as---

- (a) Public servant
- (b) Responsible person
- (c) Responsible citizen
- (d) Public authority

Answer

1	(a)	2	(b)	3	(a)	4	(c)	5	(a)	6	(d)	7	(d)	8	(c)	9	(a)	10	(c)
11	(c)	12	(c)	13	(a)	14	(c)	15	(c)	16	(a)	17	(c)	18	(a)	19	(c)	20	(b)
21	(a)	22	(a)	23	(b)	24	(c)	25	(d)	26	(a)	27	(b)	28	(c)	29	(d)	30	(a)



Section - C

Fundamentals of Ethics



Study Note - 9

ETHICS AND BUSINESS



This Study Note includes

9.1 Ethics and Moral

9.2 Business Ethics

9.3 Nature of Ethics as Moral Value

INTRODUCTION

The study of ethics is a systematic science. Its scope encompasses all human relationships in a society. Ethics also known as moral philosophy is a branch of philosophy that involves systematizing, defending and recommending concepts of right and wrong conduct. The study of ethics can be divided into four operational areas namely – meta ethics, normative ethics, descriptive ethics and applied ethics.

In this chapter, we will deal exclusively with the concept of ethics. A concept is a mental model or a mental construct. With the mental model of ethics, we can understand the various other concepts that go into its making. Once the complex structure of this model is ready, we can execute it just the way architectural engineers execute blueprints. The task of business ethics is to enable managers to execute these mental models consistently, contingent on business management situations. The consistency must be such that it becomes a universal principle or a point of reference for right or wrong business actions.

Ethics fundamentally comprises of two elements:

Firstly, ethics refers to well founded standards of right and wrong that describe what humans ought to do in terms of rights, obligations, benefits to society, etc.

Secondly, ethics refers to the study and development of one's ethical standards.

So, it is necessary to constantly examine one's standards to ensure that they are reasonable and well founded.

9.1 ETHICS AND MORALS

Let us first try to analyse the key terms 'ethics' and 'morals'. Note the linguistic use of the terms—they seem as if they are in the plural form, just as 'economics' or 'politics', but we treat them as singular. Generally, ethics and morals are used as synonyms. There is nothing wrong in such a usage, for after all, the meanings of all words depend on their common usage. However, in formal study, we need to understand the meaning of the terms in a qualified way so as to make our subject of study precise and well defined.

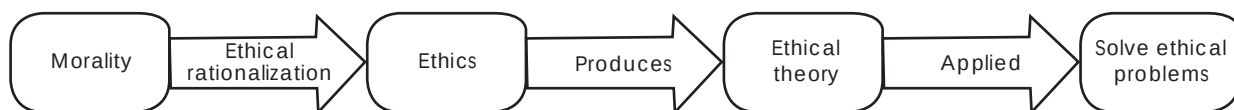


Fig. 9.1

Meaning

The terms 'ethics' and 'morals' are etymologically, that is, from their very roots or terms, different. The word moral(s) is derived from the Latin root mora/is, which implies custom. In other words, it refers to a behaviour that is accepted or rejected due to an accepted social custom. The word ethics stems from

the Greek word *ethike*, which attributes to a social environment, referred to as *ethos* or social milieu. This latter meaning embraces much more than mere custom. It refers to everything that is part and parcel of society and not just what is allowed or forbidden. Morality is more concerned with the norms, values and beliefs embedded in social processes which define what is right or wrong for an individual or community.

Another point of difference between the two refers to their usage in ordinary language. For instance, a lawyer defending an alleged rapist would accuse the victim as 'morally fallen' and not as 'ethically fallen'. On the other hand, a committee that is formed to probe the behaviour of the members of Parliament would be called 'ethics committee', not 'moral committee'. The meaning of the word is in its usage. Thus, both these terms have their unique characteristics and applications.

Usage

However, the terms are intrinsically not different. Both of them refer to the same reality of human actions, which may be characterized as morally or ethically positive or negative as the case may be. It may be true that the terms (ethics and morals) sound different but they refer to the same social reality wherein a certain body of accepted norms forms a code of conduct in society. The actions of the members are described as 'moral' or 'ethical' depending on the linguistic nuances of the meaning in a particular case as well as on the conventional use of the terms. It is in the use of the words in a given context that the meaning becomes clear.

In academic usage, however, moral behaviour refers to a concrete behaviour such as showing respect to elders. Ethics, on the other hand, is used to mean a discipline or a systematic study of moral behaviour such as justice. People's behaviour in a society can be morally characterized in their day-to-day actions. It is in the classroom that we analyse the ethical significance of these actions.

These terms are generally interchanged with one and the same meaning, that is, to determine whether some human action is right or wrong. They deal with the application of a socially accepted code of conduct. This conduct may be termed as either moral conduct or ethical conduct.

EVOLUTION OF ETHICS

Social conduct has evolved along with the evolution of society. When your elders tell you 'Do not cheat', they are referring to a social code of conduct. Social conduct has developed in society over hundreds of years. The codes of conduct have been passed down from generation to generation, and there is a pattern to the evolution of such codes. Acceptable behaviour is promoted and elevated as a social value, and unacceptable behaviour is rejected and condemned. In ancient India, there was no moral problem with the custom of sati-immolating the wife on the funeral pyre or the deceased husband. But society has evolved humanely and has condemned the act as unacceptable and morally reprehensible.

The laws of a country are based on the customs or moral codes of its society. Penalties are prescribed for bad actions—actions that contradict the established laws. The laws are a measure against those people who cross the limits of the code of social conduct, and ensure that good citizens are protected from the negative consequences of the law-breakers.

The object of the social codes of conduct is to maintain, promote, and elevate harmonious relationships. 'Honour your parents' is one such code. It maintains a peaceful relationship between parents and children and promotes respect for each other in the family. It is because of its salutary effects, it is considered as one of the fundamental values to be cultivated.

APPLICATION

The relevance of ethics is in its application. Just as when we study the theory of relativity in physics, we ensure that the laws or principles of relativity are applied to the factors and elements being considered, so too in our study of ethics, the universal principles have to be applied to individual contexts and situations. We have to abandon the absolutism of universal principles. For instance, killing a man is wrong. But we approve the killing of the enemy in a war and the government honours the act with



medals for bravery. This is due to the fact that such an act has served a higher principle, that is, the protection of countrymen. Ethics, in the practical sense, is also known as moral action and is an applied discipline that deals with a particular human action and also assesses to what extent it is compatible with the general principles.

9.2 BUSINESS ETHICS

According to Andrew Crane “ Business ethics is the study of business situations, activities and decisions where issues of right and wrong are addressed”

Raymond C. Baumhart contend – “The ethics of business is the ethics of responsibility. The businessman must promise that he will not harm knowingly”.

Thus, Business Ethics (also called corporate ethics) is a form of applied ethics or professional ethics that examines ethical principles and moral or ethical problems that arise in a business environment. It applies to all aspects of business conduct, and is relevant to the conduct of individuals and the entire organizations.

Business ethics concerns itself with adhering to the social principles of the situations in which business takes place. The analysis of this definition leads us to the following discussion.

Business for Profit

It would seem that business ethics does not come within the confines of ethics. As Adam Smith (1779), the father of modern economics says: ‘People of the same trade seldom come together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices.’ People find mechanisms to generate the highest possible returns when conducting business. No one holds it against a worker for demanding higher wages, or a landlord for increasing the rent. Their actions are not considered illegal or unethical. Profits are the just wages for invested capital and entrepreneurship. Hence, these should not be resented and should be left alone outside the boundaries of ethics. Business is for profit; the just reward for doing business lies in the excess returns received on the investment.

Business and Ethics

No matter how hard one tries, it is impossible to separate life from business. For a businessman, business is life. Mahatma Gandhi (1948) said, ‘It is difficult but not impossible to conduct strictly honest business. What is true is that honesty is incompatible with amassing of large fortune.’ The business world is an important part of society, as it is concerned with the livelihoods of people. Business activity too is subjected to the code of conduct without any exception. People expect businessmen to possess the same rationality as any other citizen. Therefore, there is no separate business ethics for businessmen, as ethics applies to all the activities of people. Consequently, we have to keep business within the bounds of ethics.

Character of Business

‘There are two fools in every market: one asks too little, one asks too much,’ so says a Russian proverb. Is there a concept called *balanced profit*? The business in a society reflects its character. Transparency International, in its corruption perception index, gives Finland, Denmark, and New Zealand the first place with 9.4 points. India is way down at 72, with just 3.5 points on a scale of 10. We may gloat over our cultural heritage and religious and ethical glories of the past, but we stand exposed before the world as a corrupt society. Corruption prevails in all walks of life, whether political, social, or economic. If we have to improve our business, we have to improve our business behaviour.

Professional Ethics

The aforementioned discussion may be understood through the following distinctions: ethics and business ethics. We have studied the distinction between normative and practical ethics and have established that business ethics comes under practical ethics and is applied to a particular activity.

Just as a society functions on the social codes of conduct and a country is governed by its constitution, a business is run on corporate codes. In other words, there is a professional code of conduct for any business. These codes keep evolving as other things around evolve and develop. Therefore, not only should business be defined within the confines of ethics, but it should be practised strictly under its own professional code of conduct. This distinction helps to orient the general principles of ethics and business to a particular activity. The principles, however, do not change. For instance, there is a manager who is doing very well in his career because he is both efficient and honest. To his neighbours and friends, he is not only a very successful businessman, but also a very good family man. To a question asked by a journalist on how he divided his time between his family and business despite his busy schedule, he replied, 'Efficiently. 'What is the secret of your success?' asked the journalist. He replied 'Honesty.' The journalist looked inquiringly as if to say, 'Look, business and family are separate.' The businessman said, 'Both efficiency and honesty work equally well at work and at home.' The character of a true professional remains undivided, whether at work or at home. Our roles may change from time to time and from place to place but the integrity of our character should be maintained.

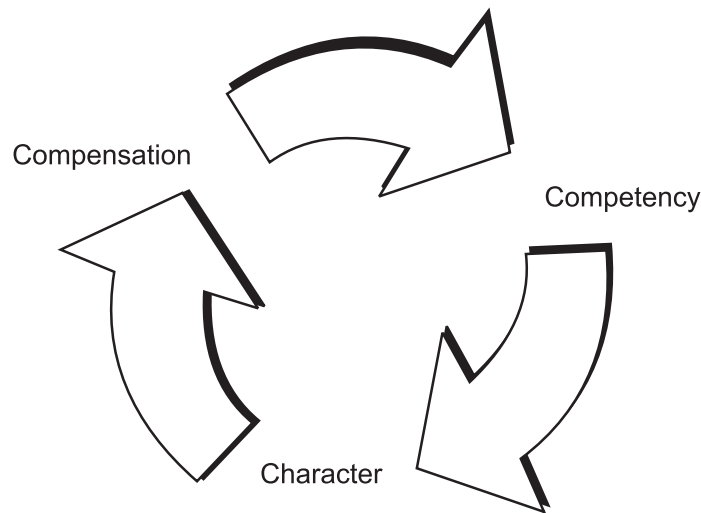


Fig. 9.2 Professional characteristics

Business ethics, thus, professionally adheres to a code of conduct that is in accordance with the normative principles further, it may be concretely stated that professionals bear the following marked characteristics: (i) competency of educational qualification, (ii) professional skills, and (iii) compensation (salary/remuneration, etc.). See Fig. 9.2.

NEED FOR BUSINESS ETHICS

Business ethics is currently a very prominent business topic, and the debates and dilemmas surrounding business ethics have attracted enormous amount of attention from different quarters of organizations and society. Hence, it has emerged as an increasingly important area of study. Some of the major reasons why a good understanding of business ethics is important can be stated as follows:-

Firstly, business malpractices have the potential to inflict enormous harm on individuals, communities and the environment. Thus, through helping us to understand more about the consequences of such malpractices, business ethics seeks to improve the human conduct and condition.

Secondly, the demands placed on business to be ethical by its various stakeholders are constantly becoming more complex and challenging. Business ethics provides the means to appreciate and understand these challenges more clearly, so that firms can meet such ethical expectations more effectively.



Thirdly, ethical infractions are a common occurrence in business. Business ethics provides us with the ability to assess the benefits and problems associated with different ways of managing ethics in organizations.

Fourthly, knowledge of business ethics can provide managers with the necessary tools to improve their ethical decision-making ability and allowing them to correctly identify, diagnose, analyse and provide solutions to the ethical problems and dilemmas, they are confronted with.

Fifthly, business ethics equips managers to identify preferred values associated with total quality management, strategic planning etc and ensuring that behaviour in organisations are aligned with such values.

Finally, business ethics can also be extremely rewarding to study, since it helps in promoting a strong and positive image to the public that helps in building a strong brand equity, goodwill and reputation for the organisations practising it.

9.3 NATURE OF ETHICS AS MORAL VALUE

Value-free Ethics

It would seem that business is an ethically neutral or value-free activity. In other words, the only value business is concerned with is the monetary value. It is not in the interest of business to mix ethical values. An ancient Arabic wisdom states, 'Live together like brothers and do business like strangers.' Business should be kept free from other social relationships and obligations. The only successful relationship that exists in business is that of a vendor and a customer.

It is also said that 'for the merchant, even honesty is a financial speculation.' Indeed, for a businessman every factor in the business is measured in terms of money. The volatility that we see in the stock market is a clear example of the speculative nature of business, which is directly proportional to the prevailing attitude of the people.

Concept of Value-free Ethics

Nowadays, we are familiar with 'sugar-free' soft drinks, 'caffeine-free' coffee, and 'alcohol-free' beer. The concept of 'value-free' business ethics appears to be quite appealing to businessmen. It as though it may be pursued devoid of all rules within a social vacuum. The concept of value-free ethics found application in economics in a rather ironical fashion. Ludwig von Mises, known as the father of the Austrian School of Economics, proposed the pure theory of economics, stating that economic concepts are a priori, that is, they are not dependent on experience, but are purely virtual concepts. The concept of choice, for instance, is a pure concept. It is immaterial whether one chooses water or wine, but the concept in itself is free of such particular elements. Hence, choice is value-free (*wertfrei*). Applied to ethics, it would mean that we should be able to study the principles of this discipline, such as goodness, truth, justice, honour, etc. in their pure form.

It is obvious that such value-free ethics, when understood in the right sense, leads us to study meta-ethics or the fundamental principles of ethics as a pure science. However, if we are to apply an ethical standard to such a study, it would be called a pure study of values, not value-free ethics.

Ethics as a Principle

We have established that social evolution has developed definite principles of civic behaviour, which have attained the status of principles. By principle, we understand that something proceeds and depends on it for its cause. For instance, when one kicks a football, force is the principle that propels it into motion and the ball remains in motion till the force lasts. In other words, the physical world functions strictly according to the laws of physics. It is expected that people also submit their behaviour, both in thoughts and in actions, to these principles. An action is valid as long as it reflects the principle, just as the speed of the moving ball depends on the force it receives.

All moral actions are directed towards their object, the good, which is the principle of all happiness. This is not only the sole purpose of our existence but our co-existence with others as well. We cannot be happy alone; we can only be happy together. The universal idea of the good is applied to individual instances. Individuals are good in their own particular way, and are good in so far as they share the essence of goodness. The universal good is a pure or general idea. It is formed through a process of abstraction of the essence from individuals or particulars.

Business Ethics as Professional Code

Business ethics is not a pure science but a professional practice, and society expects businessmen to abide by the principles of a civil society, just as it expects professionals from other areas such as medicine, bureaucracy, politics and sports to do so. Thus, instead of a value-free business ethics, we have a value-loaded or value-based business practice.

The Seven Principles of Public Life

Selflessness	Holders of public office should take decisions solely in terms of the public interest. They should not do so in order to gain financial or other material benefits for themselves, their family, or their friends.
Integrity	Holders of public office should not place themselves under any financial or other obligation to outside individuals or organizations that might influence them in the performance or their official duties.
Objectivity	In carrying out public business including making public appointments, awarding contracts, or recommending individuals for rewards and benefits, holders of public office should make choices on merit.
Accountability	Holders of public office are accountable for their decisions and actions to the public and must submit themselves to whatever scrutiny is appropriate to their office.
Openness	Holders of public office should be as open as possible about all the decisions and actions that they take. They should give reasons for their decisions and restrict information only when the wider public interest clearly demands.
Honesty	Holders of public office have a duty to declare any private interests relating to their public duties and to take steps to resolve any conflicts arising in a way that protects the public interest.
Leadership	Holders of public office should promote and support these principles by sound leadership and prove to be an example in whatever they perform.

[Extracted from the "First Report of the Committee on Standards of Public Life" UK May 1995]

Ethics and Law- The Interface

Law is essentially an institutionalisation or codification of ethics into specific social rules, regulations and prescriptions. Perhaps the best way of visualizing ethics and law is in terms of two intersecting domains as depicted in the following figure:

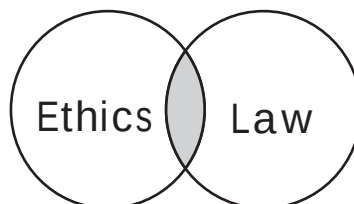


Fig. 9.3

Thus, in one sense, business ethics can be said to begin where law ends. Business ethics is primarily concerned with those issues not completely covered by law, or where there is no definite consensus on whether something is right or wrong. Hence, it is often remarked, that business ethics is about the "grey areas" of business where values are in conflict.



ETHICS AND BUSINESS

Multiple Choice Question

Q1. Define morality

- a) What is considered as correct within a society
- b) Making the right decision's where there is a chance to do wrong
- c) Defining what is right and wrong for an individual or a community
- d) Where individuals have a conscious choice to make a right and ethical

Q2. What is business ethics?

- a) The study of business situations, activities, and decisions where issues of right and wrong are addressed
- b) Defined as decisions organisations make on issues that could be considered right or wrong
- c) Ethics that can be applied to an organisation's practises
- d) Ethical processes businesses use in order to achieve a good ethical standard

Q3. Which is not a reason a business engages in business ethics?

- a) To recover a company's image after a notorious business scandal
- b) To avoid the loss of a good corporate image or being sued for misconduct
- c) To enhance global relationships
- d) To act with real commitment

Q7. Which of the following statements about business ethics is false?

- a) It concerns the impact of a business's activities on society.
- b) It refers to principles and standards that define acceptable behaviour in business organisations.
- c) It relates to an individual's values and moral standards and the resulting business decisions he or she makes.
- d) What is ethical is determined by the public, government regulators, interest groups, competitors, and each individual's personal moral values.

Q8. Studying business ethics will not necessarily

- a) help you recognize ethical issues.
- b) inform you concerning the impact of the work group on ethical decisions.
- c) describe the ethical decision-making process.
- d) tell you what you ought to do.

Q9. Ethical violations destroy

- a) nothing
- b) jobs
- c) trust
- d) morale

- 10. A set of formalized rules and standards that describe what a company expects of its employees is called a(n)**
- a) code of ethics
 - b) opportunity
 - c) moral philosophy
 - d) guidelines
- 11. Which of the following should help reduce the incidence of unethical behavior in an organisation?**
- a) Understanding that individual moral standards, the influence of managers and coworkers, and opportunity influence ethical behavior
 - b) Maximizing ethical conflict in work groups
 - c) Expanding opportunity by providing punishments for violations of the rules
 - d) Overlooking violations of codes of ethics



ETHICS AND BUSINESS

MULTIPLE CHOICE QUESTIONS

Q1. The study of Ethics is Divided into _____ operational areas.

- (a) Six
- (b) Four
- (c) Five
- (d) Nine

Q2. The word ethics is derived from:

- (a) Latin word 'ethike'
- (b) Greek word 'ethik'
- (c) Greek word 'ethike'
- (d) Latin word 'ethik'

Q3. Ethics has evolved with evolution of:

- (a) Culture
- (b) Value
- (c) Moral
- (d) Society

Q4. The relevance of ethics is in its:

- (a) Context
- (b) Principles
- (c) Application
- (d) Understanding

Q5. 'It is difficult but not impossible to conduct strictly honest business' is famous quote by:

- (a) Mahatma Gandhi
- (b) Adam Smith
- (c) George Bernard Shaw
- (d) Peter Drucker

Q6. Law is _____ of ethics

- (a) No connection
- (b) Decodification
- (c) Codification
- (d) Visualisation

Q7. This is not of the 7 principles of Public Life

- (a) Integrity
- (b) Honesty
- (c) Content
- (d) Accountability

Q8. The four types of social responsibility include:

- (a) legal, discretionary, economics, and ethical
- (b) ethical, moral social, and economics
- (c) philanthropic, justice, economic, and ethical
- (d) legal, moral, ethical, and economics

Q9. Business malpractice does not include:

- (a) Black marketing
- (b) Adulteration
- (c) Advertising
- (d) Duplication

Q10. Business ethics calls for avoidance of:

- (a) Competition
- (b) Publicity
- (c) Monopoly
- (d) Self Interest

Q11. Following is not a professional characteristics:

- (a) Competition (Undercutting)
- (b) Competency
- (c) Character
- (d) Compensation

Q12. The responsibility of reviewing rate of Minimum wages lies with---

- (a) Appropriate Government
- (b) Central Government
- (c) State Government
- (d) District Administration

Q13. Rates of Minimum wages fixed under the payment of Minimum Wages, Act, 1948- are reviewed at an interval---

- (a) Of five years
- (b) Of not more than five years
- (c) One in ten years
- (d) One in two years

Q14. Central Government may give directions to a state government ---

- (a) To redress complaint regarding administration of the Act
- (b) To resolve any controversy in interpretation of any provision of the Act
- (c) as to carrying into execution of the Act
- (d) All the above three



Q15. The payment of Minimum Wages Act, 1948 is not applicable to---

- (a) Punjab
- (b) State of Jammu & Kashmir
- (c) Goa
- (d) none of these

Q16. The Inspector appointed by the appropriate government exercise their function within—

- (a) local limits
- (b) the state
- (c) the district
- (d) The local Panchayat

Q17. Minimum wages payable under this act can be paid in kind if---

- (a) Appropriate government authorises
- (b) State Government so desires
- (c) Central Government notify
- (d) So desired by the employees trade unions

Answers

1	(b)	2	(c)	3	(d)	4	(c)	5	(a)	6	(c)	7	(c)	8	(a)	9	(c)	10	(c)	11	(a)
12	(a)	13	(b)	14	(c)	15	(d)	16	(a)	17	(a)										

[illegible]

[illegible]

[illegible]