THE COMPANIES ACT

“A Company is an incorporated association which is an artificial person created by law, having a separate entity with a perpetual succession & a common seal.”

**Salient features of a Company :**

**1) Independent corporate existence :**

On being incorporated a Company becomes a body corporate different from its members. It is a legal person who has its own rights & liabilities.

This can be explained with the help of the following :

**Eg :** Soloman **V/S** Soloman & Company Limited.

**Facts :**

Mr. Soloman was a person manufacturing leather goods & having a proprietary business. He decided to form a Company that comprised of Mr. Soloman, Mrs. Soloman & their 5 children.

Mr. Soloman entered into a contract with Soloman & Company Limited whereby he sold his proprietary business to the Company for 40,000 pounds. In return he got shares worth 20,000 pounds & debentures worth 10,000 pounds.

After sometime the Company went into liquidation. Its total assets were

6,000 pounds & total liabilities were 17,000 pounds {10,000 pounds as Secured Creditors to Mr. Soloman & 7,000 pounds towards other Unsecured Creditors}.

The Company paid the entire amount of 6,000 pounds to Mr. Soloman, as he was a Secured Creditor.

The Unsecured Creditors filed a suit against the Company stating that Mr. Soloman   
& Soloman & Company Limited were one & the same person therefore Mr. Soloman should be personally liable for the acts of the Company.

**Held :**

Mr. Soloman was not liable for the acts of the Company as the Company being distinct from its members both the Company & Mr. Soloman was considered as separate individuals in the eyes of law.

**2) A Company owns property in its own name :**

A Company can enter into a contract in its own name & hence can buy **OR** sell property as a legal person.

**3) Liability of the members :**

Liability of the members of a Company is limited to the extent of value of shares held by them. If certain shares are partly paid & the Company goes into liquidation the members are liable only to the extent of the unpaid amount.

Liability of members may also be limited to the extent of the guarantee given by them.

There may also be Companies with unlimited liability.

**4) Transferable shares :**

Shares of a Company can be easily transferred

**i.e.** a shareholder can sell **OR** transfer his shares to anyone & recover the amount paid by him. This does not affect the capital structure of a Company.

**5) Perpetual succession :**

Perpetual means continuous **OR** without break. Once a Company is formed it lives independent of its members

**i.e.** members may come & go but the Company continues to live until & unless it is wound up.

**6) Common seal :**

The seal of a Company is its signature. A Company being an artificial person cannot sign. Hence whenever a contract has to be entered into by a Company the Directors sign the contract & affix the seal of the Company besides their signatures. Such a contract is deemed to have been entered into by the Company & is therefore binding upon it.

**7) Suing :**

A Company can sue & be sued in its own name.

Advantage of Corporate personality :

Law protects the members of a Company because even though they act on behalf of the Company it is the Company that is held liable. This protection given to members is termed as “Corporate Veil”.

However when members take undue advantage of the “Corporate Veil” for carrying on illegal activity OR for gaining personal profits, law then lifts the “Corporate Veil”, under these circumstances members are held personally liable for the acts of the Company.

“Corporate Veil” may be lifted under the following circumstances :-

1. When the Company assumes an enemy character :

Eg : Daimler Company Limited V/S Continental Tyre & Rubber Company.

**Facts :**

Daimler Company Limited was a Company incorporated in England & hence an English Company.

The Company had several Debtors in U.K. During World War II England & Germany became enemies. The Company filed a suit against its Debtors. The question before the Court was whether the Company was an English Company **OR** an Enemy Company [German Company] as if it was a German Company the Debtors would not be liable.

It was necessary to lift the **“**Corporate Veil**”** to ascertain the true identity of the Company.

**Held :**

It was found that all the members of the Company were Germans & they had direct control over the Company.

The Company was declared as an Enemy Company & the Debtors were not held liable.

1. When the Company is formed for avoiding tax :

If the sole purpose for forming the Company is to avoid tax the Directors are held personally liable for avoiding tax.

Eg : Commissioner of Income Tax V/S Mr. D. M. Petit.

**Facts :**

Mr. Petit was a wealthy person liable for super tax. He formed 4 Companies & became the agent of these Companies.

Whatever income he received was divided into 4 parts & deposited in the account of these Companies as their income. The Company in turn advanced the money as loan to Mr. Petit. The Income Tax authorities filed a case against Mr. Petit for avoiding tax. According to Mr. Petit the Companies were liable for avoiding tax.

**Held :**

Mr. Petit had formed the Companies solely for the purpose of avoiding tax, as the Companies did not carry on any other business.

The **“**Corporate Veil**”** was therefore lifted & Mr. Petit was held liable for avoiding tax.

1. When the Company is formed to avoid terms of contract :

Eg : Gilford Motor Company [GMC] V/S Mr. Homme.

**Facts :**

Mr. Homme was appointed by GMC. At the time of appointment he entered into a contract with GMC that he would not induce the customers of the Company while working for it **OR** even there after.

After some time Mr. Homme resigned & formed his own Company. & became the agent of these Companies. He induced the customers of GMC as an agent of his Company. GMC filed a suit against him for breach of contract.

According to Mr. Homme it was not he but the Company that had induced the customers therefore he was not guilty.

**Held :**

Mr. Homme had formed the Company solely for the purpose of avoiding the terms of contract between GMC & him. Mr. Homme was therefore held liable for breach of contract.

1. When the Company acts as an agent of the members :

As per The Companies Act the Company is the principal & the Directors its agent. According to The Principle Of Agency the principal is liable for the acts of the agent.

If under certain circumstances it were found that the Company has been formed to act as an agent of the Directors OR members then the Directors OR the members as the principal would be personally liable for the acts of the Company.

The benefit of the “Corporate Veil” is not available under these circumstances.

1. Statutory liabilities of the members :

This means the liability imposed by a statute OR an Act.

Eg : For a Public Company there must be a minimum of 7 members.

When a Public Company carries on business with 6 members for a period of more than 6 months it has committed a breach of the provisions of The Companies Act. In such a case the Directors are personally liable for the acts of the Company.

**Types of Companies**

## A Company is classified into different types on the following basis :-

**I Based on The Mode Of Incorporation :**

1. **Chartered Company :**

They are those, which are created by the Royal Charter.

**Eg :** East India Company, Bank Of England, etc.

1. **Statutory Company :**

They are those, which are created by a special Act passed by the

Central Government **OR** State Government.

**Eg :** Reserve Bank Of India, Indian Airlines, etc.

1. **Registered Company :**

They are those, which are registered with the Registrar Of Companies [ROC] under The Companies Act.

II Based on The Liability Of Members :

1. **Companies Limited By Shares :**

In this type of a Company there is a share capital, which has a nominal value. A shareholder is bound to pay the said amount towards the liabilities of the Company. The liability of such a shareholder is therefore limited to the extent of the value of the shares held by him.

1. **Companies Limited By Guarantee :**

In this case the members undertake to contribute up to a certain limit towards the assets of the Company in the event of liquidation. The liability of such members is limited to the extent of the guarantee.

1. **Companies With Unlimited Liability :**

In such a Company the liability of the members are unlimited.

III Based on Interest :

1. **Public Company :**

It is a Company, which is not a Private Company.

**Sec 3(i)(iv)** states that all Companies other than Private Companies are called Public Companies.

1. **Private Company :**

It is a Company, which in its Articles Of Association has the following restrictions :-

* 1. Restriction on the right of members to transfer the shares if any.
  2. Restriction of membership to a maximum of 50 & minimum of 2.
  3. Prohibition on any invitation to the public to subscribe for its shares & debentures.

**IV Based on Control**

1. **Government Company :**

It is a Company in which not less than 51% of the total paid up capital is held by the Central Government **OR** State Government **OR** partly by the Central Government & partly by one **OR** more State Governments.

1. **Foreign Company :**

It is a Company incorporated outside India & having a place of business in India.

1. **Holding Company :**

It is that Company which has a control over a Subsidiary Company through any one of the several methods.

1. **Subsidiary Company :**

A Company is deemed to be a Subsidiary Company under the following conditions :-

* 1. The other Company controls the majority composition of the Board Of Directors [BOD] with the sole intention of having control over the management.
  2. Where the other Company holds a majority of its shares.
  3. The Holding Company’s Subsidiary has its own Subsidiary.

1. One Man Company :

Where a single individual holds almost all the shares of a Company it is termed as a One Man Company.

**Eg :** Soloman & Company Limited.

**Certificate Of Incorporation [COI] :**

It is issued by the ROC on an application submitted by the members of the Company.

For the purpose of incorporation of a Company the members are required to make an appointment with the Registrar along with the following documents :-

1. Memorandum Of Association [M/A] that should be signed by at least 7 persons incase of a Public Company & at least 2 persons incase of a Private Company.
2. Article Of Association [A/A] should be submitted incase of Companies with Unlimited Liabilities, Public Companies Limited By Guarantee & Private Companies Limited By Shares.
3. A letter of approval from the Registrar stating that the name of the Company has been approved.
4. A declaration that all the requirements of a Company are complied with & the same has to be signed by an Advocate,

Chartered Accountant **OR** a person named as a Director.

1. A list of persons who have given their names to be the Director of the Company.

On receipt of the above application along with the documents the Registrar after scrutinizing & being satisfied that the same is in order issues a COI. Once the COI is issued the Company exists as an individual.

The COI is a conclusive proof that all the requirements of the Company have been complied with.

All incorporation contracts are not binding on the Company.

**Distinguish between Partnership Firm & Company :**

|  |  |  |
| --- | --- | --- |
| Sr. No. | Partnership Firm | Company |
| **1** | A Partnership Firm is merely an agreement of persons. It is not a legal entity. | A Company is a legal entity. |
| **2** | The liability of the partners is unlimited  **i.e.** a partner is liable not only to the extent of his share in the Partnership Firm but also to the extent of his personal property. | The liability of the members are limited to the extent of the value of the share **OR** guarantee given by them **OR** as stipulated by the M/A. |
| **3** | A partner cannot transfer OR assign his shares without the consent of all other partners. | A member can transfer his shares subject to the provision of the A/A of the Company. |
| **4** | All partners are mutual agents. | A member is not an agent of the other. |
| **5** | Registration of a Partnership Firm is not compulsory. | Registration of a Company is compulsory. |
| **6** | The management of a Partnership Firm vests on all the partners except the sleeping partner. | The management of a Company vests on the Board Of Directors who are elected periodically by the shareholders. |
| **7** | A creditor of a Partnership Firm is also a creditor of an individual partner. | A creditor of a Company is not a creditor of individual members. |
| **8** | A Partnership Firm has very few statutory obligations. | The Companies Act strictly regulates a Company. |
| **9** | Accounts of a Partnership Firm need not be audited. | Accounts of a Company have to be audited. |
| **10** | The property of a Partnership Firm belongs collectively to all partners. | The property of a Company is not the property of the shareholders. |
| **11** | Death **OR** insolvency of a partner results in dissolution of a Partnership Firm. | Death **OR** insolvency of a member does not result in dissolution of a Company. |
| **12** | A partner can dispose of a property of the Partnership Firm. | A shareholder cannot dispose of the property of the Company. |
| **13** | A partner cannot enter into a contract with a Partnership Firm of which he is a partner. | A shareholder can enter into a contract with a Company of which he is a member. |
| **14** | When restrictions are imposed on the authority of partners they are of no avail against 3rd parties who have no knowledge of the restriction. | Restriction on a Company **OR** authority of Directors are valid restrictions against 3rd parties as they are contained in the M/A & A/A which are public documents. |
| **15** | The number of partners must not exceed 10 incase of a Partnership Firm carrying on banking business & 20 incase of a Partnership Firm carrying on any other business. | A Private Company can have a minimum of 2 members & a maximum of 50 members.  A Public Company can have a minimum of 7 members. There is no limit on the number of maximum members. |

**Memorandum Of Association [M/A] :**

It is a public document that has to be submitted along with the application for Incorporation of a Company.

By a public document we mean that any member of the public is entitled to inspect this document from the office of the Registrar.

## The M/A contains the following clauses :-

I Name Clause :

This clause states the name of the Company.

A Company being a legal person has a name by which it is identified. A Company can have any name provided it is not undesirable. By undesirable we mean that it must not be similar to the name of any other Company.

If the Company is a Private Company & the liability of its members is limited the words “Private Limited” must appear in the name of the Company. If the Company is a Public Company with limited liability the words “Limited” must be written in the name of the Company.

The name of the Company must be printed on every letterhead of the Company & must be painted at the registered office address of the Company.

Alteration of Name Clause :

1. The members have the right to change the Company’s name at any time by passing a special resolution. A copy of the same with the altered name must be sent to the Central Government for approval. On receipt of the approval in writing the members can change the name of the Company.
2. When a Private Company becomes a Public Company **OR** a Public Company becomes a Private Company the word **“**Private**”** must be either deleted **OR** added respectively from the name. This can be done without the approval of the Central Government.
3. When the name of a Company already existing becomes undesirable it may change its name by passing an ordinary resolution. A copy of the same must be sent to the Central Government. The Central Government must approve the name within 12 months. Only after the approval the Company may change its name.

**II Registered Office Address Clause ( Domicile clause ) :**

This clause mentions the registered office address of the Company

**i.e.** the place from where the Company will carry on its business. Every letterhead of the Company must have this address printed on it.

The registered office address must be filed with the Registrar within 30 days of incorporation **OR** before the Company commences its business.

**Alteration of Registered Office Address Clause :**

1. When the registered office address is to be changed to a different place within the same city it can be done at any time. However the information about the same must be sent to the Registrar within 30 days.
2. When the registered office address is to be changed from one city to another within the same state it can be done by passing a special resolution. However a copy of such a resolution must be sent to the registrar within 30 days.
3. When the registered office address is to be changed from one state to another it may be done only for the reasons specified in the **“**Substantive Limit**”** & in the manner prescribed in the **“**Procedural Limit**”**.

## Substantive Limit [Reasons for alteration] :

## To attain the main purpose of the Company by new & improved means.

1. To carry out the business more economically & efficiently.
2. To enlarge OR change its local area of operation.
3. To carry on some business which may be conveniently combined with the existing business.
4. To amalgamate with some other Company.
5. To sell OR dispose of the whole OR part of the undertaking of the Company.

**Procedural Limit :**

If the alteration is proposed for any one of the above reasons it may be done in the following manner :-

A special resolution must be passed for the alteration. A copy of the same along with the approval for the alteration should be sent to the **“**Company Law Board**”**.

The **“**Company Law Board**”** verifies whether sufficient notice of the proposed alteration has been given to all interested members & debenture holders. It must further confirm whether the Directors have satisfied the claims of the members against the alterations. If the claims are not satisfied the **“**Company Law Board**”** may order the Directors to purchase the interest of such persons.

After this the **“**Company Law Board**”** may confirm the alteration. The Company must within 3 months of such confirmation send a copy of the altered M/A to the Registrar who in turn may issue a new Certificate Of Incorporation.

If the Company fails to fulfill the formalities the order of confirmation would lapse & the Company would not be entitled to alter its address.

**III Object Clause**

This clause specifies the objects of the Company.

## It is divided into 2 parts :-

1. Main Object Clause :

This clause must mention the objects that are pursued by the Company on incorporation as well as any other object that may have to be carried out for attaining the main object.

1. Other Object Clause :

This part contains those objects, which the Company may carry out in future.

The Object Clause defines the boundary of the Company within which the Directors must work.

Any Act done beyond the scope of the Object Clause is called as an ”Ultra Vires Act”. Such an Act is not binding upon the Company.

The Object Clause is important because the Shareholders & the Creditors invest in the Company only after seeing the objects of the Company.

**IV Capital Clause**

In this clause the Company has to mention the total capital it would be authorized to raise by the Balance Sheet. If the Company is Limited By Share it should specify the total number of shares as well as the value of the share.

**V Liability Clause**

In this clause the liability of the members should be specified.

**VI Association / Subscribtion Clause :**

In this clause the subscribers give a declaration that they intend to form an association in accordance with the M/A.

Doctrine of Ultra Vires :

The Object Clause states the purpose for which a Company is incorporated.

Any act beyond the scope of the Object Clause is an Ultra Vires Act & is therefore not binding upon the Company.

Eg : Ashbury Railway Carriage & Hire Company V/S Riche

**Facts :**

The Object Clause of the Company contained the following objects :-

* 1. To manufacture & sell railway carriages.
  2. To act as mechanical engineers OR general contractors.

The Company entered into a contract with Mr. Riche in which the Company agreed to finance the construction of railway lines.

At the time of performance the Company refused to finance on the ground that financing was an Ultra Vires act.

Mr. Riche filed a case against the Company on the grounds that the Object Clause mentioned that the Company could act as general contractors that would include a contract to finance.

**Held :**

The Contract was Ultra Vires & the Company was not bound to finance.

The court observed that the term general contractors should be understood by considering the other objects in the Object Clause. In the present case the term general contractors could not include a contract to finance.

The Doctrine of Ultra Vires protects the Company from outsiders.

Effects of Ultra Vires Act :

1. The Directors are personally liable to outsiders as they have the knowledge of the Object Clause & hence know that the contract is Ultra Vires.
2. If the property of the Company has been given to an outsider the Company is entitled to recover the same. The outsider may recover the amount paid by him to the Company.
3. If the Company’s money has been paid to an outsider the Company is entitled to recover the same.
4. If the Company has rendered some services under an Ultra Vires act the Company may recover the charges for the same.

Doctrine of Constructive Notice :

The A/A & M/A are public documents open for inspection to the members of the public. A copy of these are kept with the Registrar Of Companies Therefore any person dealing with the Company is expected to refer to these documents before entering into any contract with the Company.

Constructive Notice means that law should presume that any outsider dealing with the Company has knowledge of the public documents. Not only should he be aware of the contents but should have also understood the contents properly. This shall be presumed even if the outsider has no knowledge about these documents.

The Doctrine of Constructive Notice also protects the Company from outsiders.

Doctrine of Indoor Management :

The Doctrine of Ultra Virus & Constructive Notice protects the Company against outsiders whereas the Doctrine of Indoor Management protects an outsider against the Company.

An outsider dealing with any Company is expected to inspect the public documents before entering into any contract with the Company. However he is not expected to investigate into the internal management of the Company.

The Doctrine of Indoor Management therefore says that if there is any irregularity in the internal management of the Company an outsider shall not be affected by it because internal management is what happens within the closed doors of the Company & as an outsider has no access to it the Company is liable for all such irregularities.

Eg : Royal British Bank V/S Mr. Turquand

**Facts :**

According to the A/A the Director could borrow money provided they were authorized to do so by an ordinary resolution passed by the shareholders.

One of the Directors of the bank approached Mr. Turquand to borrow money.

Mr. Turquand inspected the public documents of the Company & realized that the Directors could borrow money if an ordinary resolution was passed. An ordinary resolution is not a public document therefore Mr. Turquand assumed that if the Director had approached him the ordinary resolution must have been passed. He advanced the money to the bank.

However at the time of repayment the shareholders objected on the grounds that no resolution was passed therefore the act was without authority.

**Held :**

Mr. Turquand had inspected the public documents & in no way could find out whether the ordinary resolution was passed **OR** not as the same is not a public document.

Mr. Turquand’s rights were protected & the Company was held liable to repay the money even though the Director had acted without authority.

**Exception :**

No protection is given to an outsider under the following circumstances :-

1. Where the outsider knows about the irregularity in the internal management.
2. Where the outsider had some suspicion of some irregularity & contracts with the Company without investigating into it.
3. Where the outsider deals with the Company without going through the public documents.
4. Where the contract between the Company & the outsider is itself void.

Articles Of Association :

It is a contract between the Company & its members. It contains the rules & regulations for the internal management of the Company. It is a public document. Each rule in the A/A must be mentioned in a separate paragraph, which must be numbered. The schedule of The Companies Act contains model forms of the A/A. If the members desire they may select any one of these forms OR they may have their own set of rules & regulations. However the A/A must not contradict the provisions of The Companies Act OR the M/A of the Company.

The following Companies must have an A/A :-

1. Unlimited Companies
2. Companies Limited By Guarantee
3. Private Companies Limited By Shares

Alteration of the A/A :

Passing a special resolution subject to the following conditions can alter the A/A :

1. The altered A/A must not contradict the provisions of The Companies Act.
2. The alteration must not increase the liability of the shareholders. If the liability of the shareholders is to be increased it must be done with the written consent of the shareholders.
3. It must not increase the remuneration of the Directors. However this can be done with the previous permission of the Government.
4. The A/A must be altered with retrospective effect.

Binding effect of the A/A :

The A/A is a contract between the Company & its members therefore

1. The members are bound to the Company by the A/A

i.e. if a member commits a breach the Company can enforce the A/A on him.

1. The Company is bound to its members by the A/A.
2. The A/A is not a contract between the members

i.e. a member cannot enforce the A/A on another member however he may do so through the Company.

1. The A/A cannot be enforced against an outsider nor can an outsider enforce the A/A on the Company.

Prospectus :

A Prospectus means any document described OR issued as a Prospectus.

It includes any notice, circular, advertisement OR any other document inviting deposit from the public OR inviting offers for subscription OR purchase of shares & debentures of the Company.

Rules governing a Prospectus :

1. A Prospectus must be dated.
2. It must be registered.
3. Every person named as a Director OR proposed Director must sign it.
4. It must state on its face that a copy of the Prospectus has been delivered to the Registrar for registration.
5. The Prospectus must be issued within 90 days of its registration.
6. The Company & every person who is responsible for issuing a Prospectus without registration shall be punishable with a fine extending up to

Rs. 5,000/-

1. A Prospectus must accompany the following documents :-
   1. The consent of the experts if their reports are to be published in the Prospectus.
   2. A copy of every contract relating to the appointment & remuneration of the managerial personnel.
   3. A copy of every material contract unless it is entered into in the ordinary course of business OR 2 years before the date of the Prospectus.
   4. A written statement relating to the adjustments if any, by the auditors OR accountants of the Company in their reports relating to P&L, B/S, Rate of dividend, etc.
   5. A written consent of the auditors, legal advisors, bankers OR brokers of the Company to act in that capacity.

Contents of the Prospectus :

Part I

1. The object of the Company.
2. Name, address & the occupation of the signatories to the M/A & the number of shares subscribed by them.
3. The number of qualification shares fixed for the Director.
4. The amount of minimum subscription.
5. The time, date & place of opening of subscribers list.
6. The amount to be paid on application & allotment of shares.
7. Name, address & occupation of the vendors through whom the property of the Company has been purchased & the amount payable in cash.

Part II

Reports to be published with the Prospectus

1. Report of the Creditors as to the P&L, assets & liabilities of the Company.
2. Rate of dividend paid by the Company in respect of each class of share for each of the 5 financial years immediately preceding the issue of prospectus.
3. Report of the auditor stating separately the P&L of the Companies subsidiaries.

Membership of the Company

Any person whose name has been entered in the Register of members & who holds shares in the Company is the member of that Company. Membership involves a contract & gives them rights & liabilities. Hence every person competent to contract can become a member of the Company. A Company being a legal entity can enter into contracts & therefore becomes a member of another Company provided it has been authorized to do so by the A/A.

A minor OR a person of an unsound mind cannot become a member even through a representative OR a trustee.

Modes of acquiring membership of a Company :

* 1. By subscription

The subscribers to the M/A are deemed to have agreed to become members of the Company. They become members as soon as the Company is incorporated even though they may not hold share/s OR their names may not appear in the Register of members. These members are termed as 1st members of the Company & must subscribe for the shares directly from the Company.

* 1. By allotment

Any person can acquire this when the Company invites for application for allotment of shares. Any person applying in the prescribed form has a right to get his name entered in the Register of members after allotment. The application for membership is an offer that may be accepted by the Company by allotment. The offer can therefore be revoked before allotment. Incase of allotment the allotee becomes a member not at the time of allotment but only after his name has been entered in the Register.

* 1. By transfer

Shares of a Company are termed as movable property & can be transferred [brought OR sold for a consideration] as per the Articles of Association. Any person buying such share from a member can get his name entered in the Register in place of the seller. The Board Of Directors are empowered by The Companies Act to refuse such a transfer under certain conditions. However a person aggrieved by such refusal may appeal to the Central Government OR file a suit before the court.

* 1. By transmission

When a member of a Company dies his shares are devolved upon his heirs & legal representatives. These persons are therefore entitled to get their names entered in the Register in place of the deceased member.

Similarly when a member becomes insolvent his assets vests on his official assignee. The official assignee therefore becomes a member in place of the insolvent member.

This mode of acquisition of membership is termed as membership by transmission.

The heirs & legal representatives have an option to accept OR decline such membership. But once they respond to the calls OR accept dividend they become full-fledged members. These members have a right to get the shares transferred in favor of the 3rd person without getting the same transferred in their own names.

* 1. By estoppel

A person who knowingly allows his name to remain on the Register for an unreasonable time will be estopped from contending that he is not a member in spite of the fact that there may be no agreement to that effect. This is true in either case where the name has been wrongly entered OR where the name has been wrongly allowed to remain in the Register without being struck off. However this is applicable only when the person is aware of the mistakes & does not take steps to correct the same.

Modes of ceasation of membership :

1. By transfer of share
2. By forfeiture of share
3. By insolvency
4. By death
5. By redemption of redeemable share
6. By compulsory sale of share by the Company
7. By valid surrender of share
8. By successfully rescinding the contract of membership
9. By winding up of the Company

Rights of members :

I Statutory rights

1. A right of priority to have shares offered incase of increase of capital.
2. Right to receive notice of meetings, attend & vote at the meetings.
3. Right to transfer shares.
4. Right to receive share certificates.
5. Right to receive annual report of the Company.
6. Right to apply to the Central Government to call for the A.G.M. if the Board Of Directors fails to do so.
7. Right to apply to the Government for calling an extra ordinary G.M.
8. Right to inspect the Register of members.
9. Right to apply to the Government for investigating into the affairs of the Company.
10. Right to apply to the High Court for relief in case of oppression & mismanagement of the Company.
11. Right to apply to the High Court for winding up.

II Documentary rights

They are those rights of a member, which arise through the M/A & A/A.

III Proprietary rights

1. Right to be registered as a member.
2. Right to participate in distribution of dividends.
3. Right to immunity from personal liability.
4. Right for distribution of assets in case of liquidation.

IV Remedial rights

1. Right to inspect the Companies record.
2. Right to file a suit incase of mismanagement.

Liability of members :

1. To pay to calls if made validly by the Company.
2. To observe the provisions of the A/A.

Register of members :

Every Company must maintain at its registered office a Register of members containing the following information :-

* 1. Name, address & occupation of the member.
  2. Shares held & the amount paid by each member.
  3. The date on which each member becomes a member.
  4. Where the shares are converted into stock the amount of stock held by each member.

The Register of members can be inspected by any member free of cost OR by an outsider on payment of nominal charges.

The Company can close the Register of members for a maximum period of 45 days in a year but only after giving 7 days notice to that effect.

The Companies Act provides that the Register of members shall be prima-facie evidence of the matters stated in it

i.e. the information in the Register unless proved to be incorrect would be deemed to be true.

No notice of any trust is taken OR entered in the Register, which means that where the name of the person appears in the Register who holds shares on behalf of some other person, the person whose name appears in the Register & not the real owner will be deemed to be the member. The real owner cannot claim dividend from the Company nor can the Company make calls to the real owner.

The Companies Act imposes a duty on every person holding shares as a trustee to inform about his holding to the Public trustee. Such a person cannot attend the meetings of a Company.

A person would have to inform the Public trustee only in case of a written trust & if he holds shares worth more than Rs. 1,00,000/-. No trustee can hold shares of more than Rs. 5,00,000/- OR more than 25% of the paid up capital of the Company whichever is less.

Any person aggrieved by any error in the Register may get the same rectified by

* 1. Filing a declaratory suit.
  2. By filing a suit for rectification
  3. By filing an appeal to the Government within 2 months of the knowledge of the error.

Directors :

A Company is an artificial person. It has to act through some human agency like a Director.

A Director is a person who should :-

1. Have an effective control & power over the business of the Company.
2. Represent the Company before an outsider.
3. Manage the day to day affairs of the Company.
4. Be authorized to take important decisions relating to the Companies business.

The Directors are collectively termed as BOD [Board Of Directors].

Role of Directors :

1. Director as a managing partner

A partner who manages the business of a Partnership Firm is called a “managing partner”. A Director could be compared to the “managing partner” as he manages the business of the Company & also has a share in its profits by way of dividend on his share holdings. However a Director does not enjoy implied authority as a “managing partner” nor is he personally liable for the acts of the Company.

1. Director as an agent

A Company being an artificial person acts through the Director. The Director therefore acts for & on behalf of the Company as its agent.

Under the Principle of Agency a notice to an agent is sufficient notice upon the principal. Similarly a notice upon a Director is sufficient notice upon the Company.

1. Director as a trustee

A trustee holds an office of trust & faith. Similarly a Director holds an office of trust & faith. It is only because of this reason that the shareholders have full faith in them & hence appoint them & give the entire assets of the Company under their control.

However a Director differs from a trustee in the sense that a trustee is the legal owner of the property & can deal with the same in his own name. The Director is neither the owner of the Company’s property nor can he deal with it in his own name.

1. Director as an employee

The Companies Act states that a Director may hold an office OR place of profit in the Company as a salaried employee therefore a Director who is generally not an employee of the Company may have an additional post as an employee of the Company.

1. Director as an organ of the Company

A Director is compared to an organ of the body of the Company. Just as the body is responsible for the acts of its organ the Company is responsible for the acts of the Director.

Appointment of Directors :

1. Appointment of 1st Directors

The A/A may contain a list of members who are chosen to be the 1st Directors. These persons become Directors as soon as the Company is incorporated. They shall remain in office till the 1st A.G.M. when they shall retire. If the A/A does not contain such a list the persons subscribing to the A/A would be deemed to be the 1st Directors.

1. Appointment by members at the A.G.M.

Incase of a Public Company OR Private Company which is a subsidiary of a a Public Company only 1/3rd of the total number of Directors can have a permanent position. The remaining 2/3rd retire by rotation.

The senior most in the office shall retire 1st. If all are equally senior 1/3rd will retire by mutual consent. If there is no agreement then 1/3rd shall retire by lots. Once the Directors have retired there is a vacancy created.

The members may decide at the same A.G.M. either to fill OR not this vacancy. If no decision is arrived at the meeting is adjourned to the same day in the next week. This is called a “resembled meeting”. If even at this meeting no decision is taken the Director who had retired at that A.G.M. will be deemed to be automatically re-appointed unless :-

1. The Director has been removed by the meeting.
2. The Director has expressed in writing his unwillingness to be re-appointed.
3. If the Director has disqualified himself.
4. If the Director has been disqualified by the meeting.
5. Appointment at the A.G.M by the shareholders by an ordinary resolution

Directors are appointed at the A.G.M. by the shareholders by passing an ordinary resolution.

Each candidate has to be voted separately which means voting of 2 OR more Directors at the same time is not allowed. However if the members present give their unanimous consent “En Masse OR En Block” voting may be held.

1. Appointment by proportionate representation

A Company may at times be divisible into distinct groups. In such a case it will be impossible for the minority group to elect Directors of their choice by an ordinary resolution. Under such circumstances the A/A of the Company may allow proportionate representation to the minority group in the BOD

i.e. the minority group would be allowed to appoint Directors on the board in accordance with their percentage holding.

1. Appointment by BOD

BOD if authorized by the A/A may appoint Directors in the following cases :-

* 1. The BOD may appoint additional Directors subject to the minimum limit prescribed in the A/A.

These additional Directors shall remain in office till the next A.G.M.

* 1. When the Directors appointed by the shareholders do not complete their term the BOD may fill up the vacancy created by appointing Directors who are termed as “Casual Directors”.

These Directors may remain in office till the original Directors who have vacated the office would have held office.

1. Appointment by the Central Government

Where an application is made by not less than 100 members OR members having at least 10% of the voting rights whichever is less, to the Central Government stating therein that there is a mismanagement OR oppression in the Company the Central Government if satisfied may appoint Directors to the Company.

THE SALE OF GOODS ACT

**Contract of sale:**

A contract of sale of goods is a contract where by the seller transfers **OR** agrees to transfer the property in the goods to the buyer for a price. Such a sale may be absolute **OR** conditional.

Where under a contract of sale the property in the goods is transferred from the seller to the buyer the contract is termed as sale.

Where the transfer of property in the goods is to take place at a future date **OR** after certain conditions are fulfilled the contract is termed as an ‘agreement to sale’. An agreement to sale becomes a sale after the expiry of the time agreed upon **OR** after the condition is fulfilled.

Essentials of a contract of sale:-

1. Parties:

The buyer & the seller who must be competent to contract.

1. Goods:

The contract must be in respect of the sale of goods.

1. Transfer of ownership:

There must be a transfer of ownership from the seller to the buyer

i.e. the buyer becomes the owner of the goods after sale.

1. Consideration:

Consideration of a contract of sale is always in terms of money.

1. Form:

For a contract of sale there is no particular form prescribed. It can be in writing OR oral.

1. A contract of sale may be absolute OR conditional.

A contract of sale is of 2 types:-

When it is absolute the ownership of the goods is transferred to the buyer. Such a contract is termed as a sale.

When the contract is conditional the ownership of the goods is transferred at a future date. Such a contract is termed as an agreement.

When the condition of the transfer of the goods is on a future date it may be either done after the lapse of certain agreed time OR it may depend upon certain conditions upon the fulfillment of which the goods are transferred

i.e. the agreement to sell becomes a sale.

A condition to a contract of sale may be of 2 types:-

1. Condition precedent

A condition that is to be fulfilled before the agreement to sell is converted into sale.

Eg:

A orders for certain furniture to be manufactured by B according to his description. This is an agreement to sell where there is a condition to be fulfilled by B.

i.e. the manufacture of the furniture before the agreement to

sell is converted into sale {the ownership of the goods is

transferred to the buyer}

1. Condition subsequent

A condition that is fulfilled after sale.

Eg:

Auction sale – in an auction sale once the seller accepts the highest bid sale takes place. However the buyer has to make the payment for the goods. As the condition is to be fulfilled after sale it is called as a condition subsequent.

Contract of sale

Absolute Conditional

{Sale} {Agreement to sell}

Time Condition

Subsequent Precedent

**Distinction between Sale & Agreement to sell:**

|  |  |  |
| --- | --- | --- |
| Sr. No. | Sale | Agreement to sell |
| **1** | When the seller ***transfers*** the property in the goods to the buyer for a price it is called as a sale. | When the seller ***agrees to transfer*** the property in the goods to the buyer for a price it is called as an agreement to sell. |
| **2** | Ownership ***is transferred immediately*** in a sale. | Ownership ***is transferred at a future date***. |
| **3** | Sale creates a ***right in rem***  **i.e.** the buyer gets a right against every person in the world. | In an agreement to sell ***a right in personam*** is created  **i.e.** the buyer merely gets a right against an individual. |
| **4** | If the goods are damaged **OR** destroyed the ***buyer suffers the loss*** in the case of a sale. | The ***seller suffers the loss*** in the case of an agreement to sell. |
| **5** | In a sale if the buyer commits default in payment of the price & the goods are in his possession the seller can claim for the recovery of the price from the buyer.  However if the goods are in the possession of the seller he may retain {not deliver} the goods till the payments are made  **i.e.** the seller has ***a right of lien*** over goods. | In an agreement to sell if the buyer commits default & the goods are in the possession with the buyer the seller may file a case for recovery of the goods.  However if the goods are in the possession of the seller the seller may refuse to deliver the same to the buyer.  **i.e.** the seller ***has a right of holding delivery***. |
| **6** | In a sale if the seller commits default the buyer as the owner of the goods has a right to ***recover them***. | In an agreement to sell if the seller commits default the buyer can ***merely claim damages*** **OR** recovery of the amount paid by him. |
| **7** | In a sale if the seller is declared insolvent the buyer as the owner ***can recover the goods*** from the official assignee. | In an agreement to sell the buyer can ***merely recover the amounts paid*** by him from the official assignee with rateable dividends. |
| **8** | When the buyer becomes insolvent the seller in the case of a sale has to ***deliver the goods*** to the official assignee & he can claim the balance of price if any with rateable dividends. | In an agreement to sell if the buyer becomes insolvent the ***seller may refuse to deliver***the goods to the official assignee. |

**Goods:**

Goods mean any kind of movable property other than money & actionable claim & includes

1. stocks & shares,
2. growing crops,
3. grass,
4. things attached to **OR** forming part of land but which can be severed {separated} at the time of the contract.

Types of goods:-

**1) Existing goods:**

They are those which exists in the possession **OR** custody of the seller at the time of the contract of sale in the condition in which they are to be sold.

They are further divided into :-

1. **Ascertained goods:**

They are those, which can be identified at the time of the contract.

**Eg:**

Purchase of TV, Refrigerator, etc.

1. **Unascertained goods:**

They are those, which cannot be identified at the time of the

contract.

**Eg:**

A buyer wants to purchase 5 kgs of sugar out of a bag containing 100

kgs of it.

**2) Future goods:**

They are those, which are not in the possession of the seller in the condition in which they should be sold. These goods are to be produced **OR** manufactured **OR** acquired by the seller after the contract of sale.

**Eg:**

A buyer desires to purchase furniture of a particular description to be made by a carpenter.

Condition & warranty:

A condition is a stipulation {term} essential for the main purpose of the contract, a breach of which gives a *right to repudiate* the contract.

Eg:

A orders 25 litres of milk from B. B supplies buttermilk instead of milk.

To supply milk was a term of the contract without performing which the contract would not be performed. Hence the supply of milk is a condition to the contract & therefore A has a right to cancel the contract.

A warranty is a stipulation collateral OR incidental to the main purpose of the contract, a breach of which merely gives a *right to claim damages*.

Eg:

A orders for 25 litres of milk from B to be packed in 50 bags of half litres each. B supplies 25 litres of milk packed in bags of 1 litre each.

B has committed a breach of the contract but the term is merely collateral to the contract & therefore the supply of milk in specific packing would be a warranty to the contract. Hence A would have the right to claim damages.

Whether a term is a condition OR a warranty depends upon the facts, circumstances & an intention of the parties at the time of the contract of sale.

Cases where conditions may be treated as warranties:

1. When the buyer waives the condition:

When a condition to a contract is not fulfilled & the buyer does not insists on the fulfillment of the same he is deemed to have waived the condition & therefore will not be allowed to repudiate the contract afterwards for the non-fulfillment of the condition.

1. When the buyer treats the condition as a warranty:

If the buyer himself treats a condition as a warranty by claiming damages instead of repudiating the contract the buyer cannot repudiate the contract afterwards.

1. If the contract is to be performed in parts that are not severable & the buyer has accepted the goods, the buyer cannot repudiate the contract for any breach of a condition during the performance of any later part of the contract.

Hence under such circumstances a condition is treated as a warranty & the buyer may merely claim damages.

Implied conditions & Implied warranties:

1. Implied condition as to title {ownership}:

Whenever the seller sells certain goods there is an implied condition that the seller is the owner of the goods, which he can transfer to the buyer. In an agreement to sell the seller may not be the owner of the goods at the time of the contract. But he must acquire the same before the agreement to sell becomes a sale.

1. Implied warranty as to possession:

In every contract of sale there is an implied warranty that the buyer will not be disturbed of his possession of the goods by any 3rd party. If the possession of the buyer is disturbed the buyer may claim damages from the seller.

1. Implied warranty as to encumbrance:

In every contract of sale there is an implied warranty that the goods are free from any change OR 3rd party interest {encumbrance}. If the buyer suffers any loss due to such charge he can claim damages from the seller.

1. Implied conditions in specific contracts:
   1. Sale by sample:

When the seller gives a sample to the buyer of the goods to be sold & the buyer after approving the sample enters into a contract of sale the sale is said to be a sale by sample.

In such a sale there is an implied condition that the goods must correspond to the sample.

* 1. Sale by description:

Where the seller & the buyer agree upon a description of the goods to be sold, the sale is said to be a sale by description.

In such a sale there is an implied condition that the goods must correspond to the description.

* 1. Sale by sample & description:

Where the sale is by way of sample & description there is an implied condition that the goods must correspond both with the sample as well as the description.

1. Implied condition as to quality & fitness [Caveat Emptor]:

As a rule when the buyer purchases goods he does so at his own risk. Therefore the buyer must apply his skill & judgment while purchasing goods. If the goods are found to be of an inferior quality the buyer does not have a right to return the goods. In other words there is no responsibility OR duty cast upon the seller to disclose the defects in his goods. This rule is called “Caveat Emptor” OR “buyers beware”.

This rule is applicable to all the contracts except in the following cases:-

1. Where the buyer requires the goods for a specific purpose & he

discloses the same to the seller.

1. Where the seller uses his skill & judgment & the buyer relies upon the same.
2. Where the seller is a person who usually deals with the goods either as a manufacturer OR as a trader.
3. Implied condition as to merchantable quality OR merchantability:

The goods sold must be of a merchantable quality

i.e. the buyer must be able to sell the goods as goods of that description to anyone he desires

i.e. the buyer must receive sellable goods which any prudent man would accept if he wanted to buy the goods of that description.

If the goods are not sellable the buyer has a right to cancel the contract.

Unpaid seller:

A seller is termed as an unpaid seller when

* 1. The whole price of the goods is not paid
  2. Where a negotiable instrument has been received & the instrument is dishonoured.

Rights of an unpaid seller against the goods:

1) Right of lien:

An unpaid seller can retain the possession of the goods belonging to the buyer {in the case of a sale} if the buyer does not pay the price of the goods. This is known as “right of lien”.

This right is exercised when:-

1. Seller is in possession of the goods.
2. The buyer is the owner of the goods.
3. No credit facility is given to the buyer.
4. Where credit facility is given the credit period has expired.
5. The seller is an unpaid seller.
6. Where the buyer has become insolvent.

2) Right of holding delivery:

This right is similar to the right of lien but can be exercised when the owner of the property is the seller himself

This right can be exercised in an agreement when:-

1. The goods are in the possession of the seller.
2. The seller is the owner of the goods.
3. The seller is an unpaid seller.

3) Right of stoppage in transit:

Goods are said to be in transit when the seller has parted with their possession & the buyer has not yet obtained possession. Transit comes to an end when the possession has been obtained by the buyer.

This right can be exercised when:-

1. The buyer is the owner of the goods.
2. The seller is an unpaid seller.
3. The seller has parted with possession of the goods.
4. The buyer has not yet obtained delivery of the goods.
5. The buyer has not been declared insolvent.

4) Right to resale:

If the price of the goods are not paid the seller may resale the goods to any other buyer.

If the goods are of a perishable nature the seller may exercise this right immediately. However the goods are of a non perishable nature the seller must give a notice in writing to the buyer for payment of the price & disclosing his intentions of reselling the goods.

If the buyer fails to pay within the specified time the seller may resale the goods. If in the second sale the seller suffers a loss he may claim the sale from the first buyer. If he makes a profit he is not bound to pay the same to the buyer.

Rights against the buyer:

1. Suit for price:

A seller can file a suit against the buyer for the recovery of the unpaid amount. Usually this right is exercised when the goods are not in the possession of the seller.

This right can be exercised when:

1. The seller is an unpaid seller.
2. The buyer is the owner of the goods.
3. The buyer wrongfully neglects to pay the price.
4. Suit for interest:

A seller can file a suit for interest on the unpaid amount. The rate of interest depends upon the terms of the contract.

If the terms of the contract do not specify the rate of interest it is for the court to decide the rate of interest claimable by the unpaid seller.

Interest may be claimed by the unpaid seller from the date of delivery of the goods OR from the day the money became payable.

1. Suit for damages:

Where the buyer wrongfully refuses to accept the goods & pay for the goods as a result of which the seller suffers a loss the seller can claim that loss from the buyer.

The loss generally is equal to the difference between [b/w] the market price & the contract price.

If the goods have no market value the loss will be equal to the contract price.

1. Right to repudiate OR cancel the contract:

If any of the party commits a breach OR repudiates the contract before the date of performance the other party has no option either to treat the contract as repudiated OR to treat the contract as existing till the date of performance. This is a case of an anticipatory breach of contract.

An unpaid seller therefore under such circumstances can either repudiate the contract OR file a suit for breach of contract on the date of performance.

Rights of the buyer against a seller:

1) A suit for specific performance:

The seller does not transfer the property in the goods to the buyer. The

buyer may file a suit for specific performance thereby compelling the

seller to transfer the property in the goods in favour of the buyer.

2) A suit for breach of warranty:

Whenever there is a breach of a warranty the buyer may file a suit

against the seller for the loss OR damage caused due to the breach.

3) Suit for repudiation of the contract:

Where the seller may not be in a position to satisfy the conditions to the

contract the buyer may file a suit for repudiation of the contract even

before the due date.

4) Suit for damages for non delivery:

If the seller does not deliver the goods to the buyer on time the buyer

may claim damages for non delivery of the goods.

5) Suit for interest:

If the buyer has paid some money to the seller & the contract is later

repudiated on account of the seller the buyer can file a suit for interest

on the amount paid by him.

Auction sale:

Rules governing an auction sale are as follows :-

1) The sale is complete when the auctioneer announces its completion by

the fall of the hammer OR in any other customary manner.

2) A bidder is at the liberty to withdraw his bid before it is accepted.

3) The auctioneer is not bound to sale the articles to the highest bidder

except in case of a sale by reserve.

4) The auctioneer is bound to hold the auction on the date for which it has

been advertised. As the advertisement is not an offer but an invitation

for offer.

5) A condition in an auction sale is valid.

6) A condition that the bidding once made cannot be withdrawn is

unenforceable.

7) A right to bid may be reserved by the seller.

8) An agreement not to bid against each other is called as knock out

agreement. These are not unlawful.

9) The sale may be notified that there may be a price below which the

goods will not be sold.

10) If the sale is through the court it would be subject to the confirmation

of the court.

NEGOTIABLE INSTRUMENTS ACT, 1881

**Promissory Note [PN] :**

A PN is an instrument in writing {not being a bank note **OR** a currency note} containing an unconditional undertaking signed by the maker, to pay a certain sum of money only to **OR** to the order of, a certain person **OR** to the bearer of the instrument.

Essentials of a PN:-

**1) It must be in writing:**

The PN must be in writing. An oral promise **OR** an undertaking to pay some sum of money is not a valid PN.

**2) It must contain an undertaking to pay:**

It is not necessary that the word promise must be used in a PN however the intension of an unconditional undertaking to pay must be clear from the instrument.

**Eg:**

**“**I owe Rs. 10,000/- to A.**”** INVALID

**“**I acknowledge that I have to pay Rs. 10,000/- to A.**”** INVALID

**“**I promise to pay A **OR** order Rs. 10,000/-.**”** VALID

**“**I acknowledge to pay on demand Rs. 10,000/- for value received.**”** VALID

**3) It must be a definite & unconditional undertaking:**

The promise to pay must be unconditional

**i.e.** it must not depend upon a condition to be fulfilled by the payee.

Eg:

“I promise to pay Rs. 10,000/- to A on B’s marriage” is INVALID because B’s marriage is uncertain.

“I promise to pay Rs. 10,000/- on to A’s death” is VALID because death is certain.

**4) It must be signed:**

The instrument must be signed by the maker with free consent otherwise it is incomplete & of no effect.

5) The parties must be certain:

The maker & the payee of a PN must be certain & definite persons. 2 distinct persons must fill in the role of a maker & payee.

Eg : “A PN payable to my only niece living in England” is a VALID PN.

**6) Specific sum:**

The amount promised to be paid must be certain & specific.

Eg:

“I promise to pay A Rs. 10,000/- along with all other dues on 2/2/2002” is INVALID.

“I promise to pay A Rs. 10,000/- with interest on 2/2/2002” is INVALID.

“I promise to pay A Rs. 10,000/- with interest @ 10% on 2/2/2002” is VALID.

7) Promise must be to pay money only:

A promise to pay anything other than money will invalidate the PN.

Eg:

“I promise to pay A Rs. 10,000/- & deliver him my white horse on 2/2/2002” is INVALID.

“I promise to deliver to A 100 bags of sugar” is INVALID.

8) It must be stamped:

PN are chargeable with stamp duty, which must be affixed on the instrument. An unstamped OR insufficiently stamped PN is not admissible in the court of law.

Bill Of Exchange [BOE]:

A BOE is an instrument in writing containing an unconditional order, signed by the maker, directing a certain person, to pay a certain sum of money only to **OR** to the order of, a certain person **OR** to the bearer of the instrument.

**Essentials of a BOE:-**

1. It must be in writing & may be in any language & in any form.
2. There must be 3 parties to a BOE namely the drawer, the drawee & the payee. The drawer & the payee may be one & the same person but the drawer & the drawee must be distinct persons.
3. It must contain an order to pay. A simple request however does not make an instrument invalid if the words are imperative.
4. The order must be unconditional.
5. The drawer must sign it.
6. The parties must be certain.
7. The order must be to pay a specific sum.
8. It must be to pay money only.
9. It must be stamped.

**Distinguish between PN & BOE:**

|  |  |  |
| --- | --- | --- |
| Sr. No. | Promissory Note | Bill Of Exchange |
| **1** | There are 2 parties in a PN namely the maker & the payee. | There are 3 parties in a BOE namely the drawer, the drawee & the payee. |
| **2** | A PN contains an unconditional promise **OR** an undertaking to pay. | A BOE contains an unconditional order to pay. |
| **3** | The maker of a PN is a debtor. | The drawer of a BOE is a creditor. |
| **4** | The liability of the maker of a PN is primary. | The liability of the drawer of a BOE is secondary  **i.e.** it arises only if the drawee fails to pay. |
| **5** | Notice of dishonour is not necessary to hold the maker of the PN liable. | Notice of dishonour must be given to all parties liable incase of a BOE. |
| **6** | A PN cannot be made payable to bearer. | A BOE can be made payable to bearer. |
| **7** | The provisions regarding acceptance is not applicable for a PN. | Acceptance is a must to enforce the BOE. |

Cheque:

A cheque is a BOE drawn on a specified banker & not expressed to be payable otherwise than on demand. A cheque being a BOE has all its essentials.

The drawee of a cheque is always a banker. If a cheque is dishonored the holder has no remedy against the banker because there is no privity of contract between [b/w] the banker & the payee.

A cheque is valid for a period of 6 months. A cheque is not invalid because it is post-dated **OR** pre-dated.

## Crossing of a cheque:-

An uncrossed cheque is known as an **“**open cheque**” OR ”**bearer cheque**”.** Such a cheque is payable in cash at the counter of the drawee bank. They carry a risk of being encashed on being lost **OR** stolen. To avoid such a risk crossing of cheque was introduced.

## A cheque can be crossed in the following manner: -

**1) Generally crossed cheque:**

A cheque is a generally crossed cheque when

1. it has 2 transverse parallel lines marked across its face **OR**
2. it bears the words **“**& Co**”** b/w the parallel lines **OR**
3. it bears the words **“**not negotiable**”** b/w the parallel lines.

2) Specially crossed cheque:

When a cheque is crossed by 2 transverse parallel lines drawn across its face with the name of a specific bank written in b/w them it is termed as a “specially crossed cheque“.

The amount against such cheques are payable only to the banker in whose favour the cheque has been crossed.

3) Accounts payee cheque:

When a cheque is crossed by 2 transverse parallel lines drawn across its face with the words **“**A/c payee**”** written in b/w them it is termed as an **“**accounts payee cheque**”.**

The amount against such cheques are payable to a bank with which the payee has an account.

**Protection to bankers:**

The banker holds the funds of the drawer. His function is to receive & pay funds on behalf of the customers. The bank must perform this duty in good faith & diligence.

A bank paying **OR** receiving funds against a cheque for its customers in good faith & without negligence is not liable to the owner of the cheque even if the title of the payee is found to be defective. The bank having sufficient funds of the drawer that is applicable towards the payment of a cheque must pay when required to do so otherwise it would be liable to pay compensation for any loss incurred by the drawer because of the default.

Thus it can be seen that the bank has a larger responsibility while making payment on behalf of its customer rather than while receiving.

The bank must therefore make special note while paying off against different types of cheques, namely:-

1. Payment of a generally crossed cheque:

The bank shall not pay the amount to any one other than a banker.

1. **Payment of a specially crossed cheque:**

The bank shall not pay the amount to anyone other than the bank mentioned on the cheque.

1. **Payment of an account payee cheque:**

The bank shall not pay the amount to anyone other than the bank that has the account of the payee.

1. **Payment of a bearer cheque:**

The bank shall pay it at the counter on presentation.

1. **Payment in due course:**

When the bank makes payment of a cheque in its due course it is discharged of its liabilities even though the signature of the payee is subsequently found to be forged.

However if the signature of the drawer were forged the bank would be liable as it is expected to know the signature of its customer.

**Endorsement:**

Endorsement means writing anything on the face **OR** back of the instrument for the purpose of negotiation.

Types of endorsement:-

1. Endorsement in full OR special endorsement:

When the endorser signs on the instrument & mentions the name of the endorsee it is said to be “endorsement in full OR special endorsement”.

Eg: Endorsement with the words “Pay to A OR order“.

In such a case the instrument can be further negotiated by the endorsee by endorsement & delivery.

1. Endorsement in blank OR generous endorsement:

Where the endorser signs but does not put the name of the endorsee it is a “blank OR generous endorsement”.

Such an instrument is payable to the bearer & hence is negotiable by delivery. If such an instrument is dishonoured the endorsee may not be liable as a prior party because he need not sign on the instrument for negotiation.

1. Restrictive endorsement:

When the endorser restricts the rights of the endorsee to further negotiate the instrument OR makes the endorsee an agent to receive payment it is termed as “restrictive endorsement”.

Eg: “Pay A only”, ”Pay A for my use” OR “Pay A for B’s use”.

1. Partial endorsement:

When an instrument is negotiated for a part of the total amount mentioned on the instrument it is called as a “partial endorsement”.

A partial endorsement is invalid. It is valid only when the instrument has been paid in part & the left of part payment has been mentioned on the instrument. In such a case the instrument can be negotiated for the balance amount.

Eg:

Endorsement on an instrument for Rs. 10,000/- with the words pay A Rs. 6,000/- is INVALID.

Received Rs. 4,000/- pay A Rs. 6,000 is VALID.

1. Facultative endorsement:

When the endorser increases his liability by an endorsement it is called a “facultative endorsement”.

Eg : Endorsement with the words “Notice of dishonour waived”.

In this case if the instrument is dishonoured the endorsee can be held liable as a prior part even without serving a notice of dishonour upon him.

1. Conditional OR qualitative endorsement:

Where the endorser excluded his liability OR makes his liability depend upon the happening of a specified event OR makes the right of the endorsee depend upon the happening of a specific even he is said to have endorsed the instrument conditionally. This is also called a ”qualitative endorsement”.

Eg:

Endorsement with the words “Sans recourse” {No liability to prior parties} OR “without recourse”.

A liable if B marries C {Liability of endorser depends upon the happening of a specific event}.

Pay A if B marries C {Right of the endorsee depends upon the happening of a specific event}.

Negotiation Back:

A C

B D

F E

Where the endorser excludes his liability & subsequently the instrument comes back in his hands

i.e. the instrument is negotiated back to him by virtue of which he again becomes the holder of the instrument all the intermediate parties will be liable to him. He cannot however sue any intermediate party to whom he was previously liable by reason of his prior endorsement.

The object of this is to prevent circuit of action. One cannot sue a person to whom he himself is liable.

There is no principle by which a man can be at the same time plaintiff & defendant. But where the prior endorsement was “Without recourse” the holder can enforce payment against all intermediate parties.

This is called “Negotiation Back”.

**Payment in due course:**

When the payment of the instrument is made by the person who is expected to honour the same in accordance with the apparent tenor in good faith & without negligence to any person on presentation of the instrument such a payment is termed as **“**payment in due course**“.**

A payment in due course discharges all the parties to the instrument of their liabilities.

Eg: If a payment of Rs. 500/- is to be made on a particular date in

accordance with the instrument. If Rs. 500/- is paid on OR after maturity the payment is said to be made in due course in accordance with the apparent tenor of the instrument.

## Essentials of payment in due course:-

1. It must be in accordance with the apparent tenor of the instrument.
2. It must be made on behalf of the drawee **OR** the acceptor.
3. It must be made in terms of money only unless agreed by the parties to recover payment by cheque **OR** any other instrument.
4. The person to whom the payment is made must be entitled to receive payment on it & thus be able to give a valid discharge.
5. Any party may make the payment to the instrument.
6. The payment must be made in good faith & without negligence.

**Maturity of an instrument:**

The maturity of an instrument is the date on which it falls due. An instrument marked **“**at sight**”** **OR** **“**on presentation**”** is payable on demand. An instrument marked **“**after sight**”** **OR “**after date**”** in the case of a PN means after presentation for payment. In case of a BOE it means after presentation for acceptance.

Every PN & BOE which is not expressed to be payable **“**on demand**” OR “**at sight**”** **OR** **“**on presentation**”** is at maturity on the 3rd day after the day on which it becomes payable. The additional 3 days are called as **”**days of grace**”**.

In calculating the days of the maturity of a BOE **OR** a PN **“**after sight**”** **OR “**after date**”** the period stated should be held to terminate on the day of the month that corresponds with the day on which the instrument was presented.

**Holder of an instrument:**

The holder of an instrument means any person entitled in his own name to the possession of the instrument. He is also entitled to receive **OR** recover the amount mentioned on it.

When an instrument is lost **OR** destroyed the person entitled to possession & recovery of the amount at the time the instrument was lost is the holder of the instrument. This means that the holder of an instrument may not have actual possession of the same.

The legal representatives of the deceased can claim the instrument as holder of an instrument.

**Holder in due course:**

It means any person who for a consideration becomes the possessor of an instrument payable to bearer **OR** becomes the payee **OR** endorsee of an instrument payable to order before the amount becomes payable & without having sufficient cause to believe that any defect existed in the title of the person from whom he derived his title.

## Essentials of a holder in due course:-

1. Consideration:

He must have paid lawful & valuable consideration to acquire the negotiable instrument.

1. Before maturity:

He must become the holder of the instrument before the amount mentioned in it becomes due & payable.

1. Good faith:

He must have no reason to believe that any defect existed in the title of the person from whom he acquired his title.

Privileges of a holder in due course:

1. A holder in due course can file a suit in his own name against all parties liable.
2. Every prior party to the instrument is liable to the holder in due course till the instrument is satisfied.
3. He gets a good title to the instrument even though the title of the transferee is defective.
4. The parties liable cannot plead that the instrument was stolen **OR** lost **OR** acquired by unlawful means.
5. The validity of the instrument as originally made cannot be denied by the maker **OR** the acceptor of the instrument.

Notice of dishonour:

When an instrument is dishonoured either by non-payment OR by non-acceptance a notice of dishonour must be given to all parties liable on the instrument.

A notice of dishonour need not be given to the maker of a PN, the drawee of a cheque & the acceptor of a BOE.

A notice of dishonour may be oral OR in writing & must contain the date & notice of dishonour & the specificy the time for making the payment. It must be sent either to the place of business OR residence of the person concerned. After the notice has been served if the parties fail to pay the holder OR payee may file a suit against the party.

Noting:

When a PN OR a BOE is dishonoured the holder can make all prior parties liable.

He has to establish the fact of dishonour which can be done in the following manner:-

If an instrument is dishonoured the holder may approach a notary public who is a person appointed by the government. The notary public then presents the instrument again for payment **OR** acceptance. Again if the instrument is dishonoured the notary shall note the facts of dishonour either on the instrument itself **OR** on a separate piece of paper attatched to the instrument.

## Noting must contain the following:-

1. The fact of dishonour.
2. The date of dishonour.
3. Reason of dishonour.
4. Where the person refuses to give any reason for dishonour an explanation as to why the notary treats the instrument to be dishonoured.
5. Charges of the notary.

Protest:

It is a certificate issued by the notary which expressly states that the instrument was presented according to the provisions of law & it was dishonoured.

The certificate must contain the following particulars:-

1. The original copy of the instrument along with the notings must be attatched.
2. Name of the parties for whom & against whom it was protested.
3. Date & reason for dishonour.
4. A statement stating whether the instrument was presented for payment OR acceptance.
5. When reason of dishonour is not given an explanation as to why the instrument was treated as dishonoured.
6. Where the instrument has been accepted earlier & the person in whose favour it was accepted.
7. The charges of the notary public.

Noting & protest are not compulsory but when a protest certificate is produced before the court the court shall presume the fact of dishonour.

**THE AIMS AND OBJECTS OF THE INFORMATION TECHNOLOGY ACT**

It is an Act to provide legal recognition for transactions carried out by means of electronic data interchange and other means of electronic communication, commonly referred to as "electronic commerce", which involve the use of alternatives to paper-based methods of communication and storage of information, to facilitate electronic filing of documents with the Government agencies.

The objective of this act is to protect the transactions carried out using the electronic media and provide legal recognition to such transactions. This act defines various terms to achieve these objectives from the most basic terms such as computer, Computer Network, Computer System, Controller, data etc. to more complicated and security specific terms as asymmetric crypto system, digital signature, key pair, private/public key, digital signature certificates etc.

The aims and objectives of the Act make it   
(a) A Facilitating Act   
(b) An Enabling Act  
(c) A Regulating Act

(a) A Facilitating Act:  
The Information Technology Act, 2000 is a facilitating Act as it facilitates both e-commerce and e-governance. Interestingly, the UNCITRAL Model Law of E-commerce on which this Act is based has made no reference to e-governance. But it was the collective wisdom of the legislature, which  
saw the necessity of introducing concepts like e-governance in this Act. In fact, the entire Chapter III of the Act is devoted to e-governance and e-governance practices. There are 7 sections in the aforesaid Chapter III of the Act, from section 4 to section 10, which deal with e-governance issues. These sections form the basic law related to electronic governance rights, which have been conferred to the persons and the Government(s) both Central and State Governments. It is applicable to the whole of India, including the State of Jammu and Kashmir. It is important to understand that the Information Technology Act, 2000 is the first enactment of its kind in India, which grants e-governance rights to the citizens of India.

(b) An Enabling Act  
The Information Technology Act, 2000 is an enabling Act as it enables a legal regime of electronic records and digital signatures. That is, in order to be called legally binding all electronic records, communications or transactions must meet the fundamental requirements, one authenticity of the sender to enable the recipient (or relying party) to determine who really sent the message, two messages integrity, the recipient must be able to determine whether or not the message received has been modified en route or is incomplete and third, non-repudiation, the ability to ensure that the sender cannot falsely deny sending the message, nor falsely deny the contents of the  
message.   
The Act provides for Digital signatures, which may be considered functional equivalent to physical world signatures capable of meeting all the fundamental requirements, like authenticity of the sender, message integrity and non-repudiation. Digital signature is a misnomer. It does not mean  
scanning the handwritten signatures electronically. In fact by applying digital signatures one may actually transform an electronic message into an alphanumeric code. It requires a key pair (private key for encryption and public key for decryption) and a hash function (algorithm).

(c) A Regulating Act  
The Information Technology Act, 2000 is a regulating Act as it regulates cyber crimes. As stated above, cyber crime is a collective term encompassing both cyber contraventions and cyber offences. The Act not only demarcates contraventions from offences, but also provides a separate redressal mechanism for both types of offences.

**E-GOVERNANCE**

It is an electronic record needs to be recognised by the legal system so as to use it. The IT act 2000 says that Where any law provides that information or any other matter shall be in writing or in the typewritten or printed form, then, notwithstanding anything contained in such law, such requirement shall be deemed to have been satisfied if such information or matter is

(A) Rendered or made available in an electronic form

*(B) A*ccessible so as to be usable for a subsequent reference

Then the electronic record under consideration is legally recognised. However as no document can be used without proper authentication, same rule applies to electronic record as well and thus, electronic records need to have a digital signature. The act defines **digital signature** as authentication of any electronic record by a subscriber by means of an electronic method or procedure in accordance with the provisions of section 3. For the purposes of this section, a document is "signed", with its grammatical variations and cognate expressions, shall, with reference to a person, mean affixing of his hand written signature or any mark on any document and the expression "signature" shall be construed accordingly.

As per the IT act, 2000 the **usage of electronic records and digital signature** is legally valid where

* The filing of any form, application or any other document with any office, authority, body or agency owned or controlled by the appropriate Government in a particular manner.
* The issue or grant of any licence, permit, sanction or approval by whatever name called in a particular manner.
* The receipt or payment of money in a particular manner.

The government may decide the manner/format in which such electronic records shall be filed, created or issued and the manner/method of payment any fees or charges for filing, creation or issue of the electronic record.

Whenever any **law needs records, documents or information to be retained** for any specific period then these records, documents can be retained in the electronic form if

* The information contained therein remains accessible so as to be usable for a subsequent reference.
* The electronic record is retained in the format in which it was originally generated, sent or received or in a format which can be demonstrated to represent accurately the information originally generated, sent or received.
* The details which will facilitate the identification of the origin, destination, date and time of despatch or receipt of such electronic record are available in the electronic record.

However, this clause does not apply to any information which is automatically generated solely for the purpose of enabling an electronic record to be despatched or received. Also the laws where the provision for retention of records, documents or information in electronic format is expressed explicitly are not covered under this clause.

If any law provides that any rule, regulation, order, bye-law, notification or any other matter shall be **published in the Official Gazette**, then, this can be done electronically. Also the date of publication for such publications would be the first date of publication in any form.

**The act does not force** a person, the government or any authority or body established by or under any law or controlled or funded by the Central or State Government to accept, create, issue, retain and preserve any document in electronic form.

Also the government decides the

(a) The type of digital signature.

*(b)* The manner and format in which the digital signature shall be affixed.

(c) The manner or procedure which facilitates identification of the person affixing the digital signature.

*(d)* Control processes and procedures to ensure adequate integrity, security and confidentiality of electronic records or payments.

(e) Any other matter which is necessary to give legal effect to digital signatures.

This provision allows government bodies or persons to use the electronic documents or records for the legal usage when all the rules and regulations are followed and all the conditions are met.

**ABUSE OF DOMINANT POSITION:**

We first see what is meant by a dominant position according to the competition act.

Dominant position is defined as a position of strength, enjoyed by an enterprise, in the relevant market, in India, which enables it to—

(i) Operate independently of competitive forces prevailing in the relevant market

(ii) Affect its competitors or consumers or the relevant market in its favour.

The competition act defines the meaning of the term “Abuse of dominant position”. It says an enterprise will not abuse its dominant position. An enterprise is said to have abused the dominant position if it,

I. Directly or indirectly, imposes unfair or discriminatory—

* Condition in purchase or sale of goods or service
* Price in purchase or sale (including predatory price) of goods or service.

However, the unfair or discriminatory conditions or prices in sale or purchase of goods or service including predatory prices are excluded from this clause if these are adopted to meet the competition.

II. Limits or restricts—

* Production of goods or provision of services or market therefor
* Technical or scientific development relating to goods or services to the prejudice of consumers
* Indulges in practice or practices resulting in denial of market access[in any manner]
* Makes conclusion of contracts subject to acceptance by other parties of supplementary obligations which, by their nature or according to commercial usage, have no connection with the subject of such contracts.
* Uses its dominant position in one relevant market to enter into, or protect, other relevant market

As per the act, the predatory prices are prices which are below the cost, as may be determined by regulations, of production of the goods or provision of services, with a view to reduce competition or eliminate the competitors.

Thus the competition act ensures that the dominating player in the market does not use its position to reduce competition from the market and the market does not become a monopoly.

**THE STRUCTURE AND DUTIES OF THE COMPETITION OF INDIA.**

It is an Act to provide, keeping in view of the economic development of the country, for the establishment of a Commission to prevent practices having adverse effect on competition, to promote and sustain competition in markets, to protect the interests of consumers and to ensure freedom of trade carried on by other participants in markets, in India, and for matters connected therewith or incidental thereto. The objective of the competition act can be highlighted as:

“To promote economic efficiency using competition as one of the means of assisting the creation of market responsive to consumer preferences. The advantages of perfect competition are three-fold: allocative efficiency, which ensures the effective allocation of resources, productive efficiency, which ensures that costs of production are kept at a minimum and dynamic efficiency, which promotes innovative practices.”

To achieve its objectives, the Competition Commission of India endeavours to do the following:

* Make the markets work for the benefit and welfare of consumers.
* Ensure fair and healthy competition in economic activities in the country for faster and inclusive growth and development of economy.
* Implement competition policies with an aim to effectuate the most efficient utilization of economic resources.
* Develop and nurture effective relations and interactions with sectoral regulators to ensure smooth alignment of sectoral regulatory laws in tandem with the competition law.
* Effectively carry out competition advocacy and spread the information on benefits of competition among all stakeholders to establish and nurture competition culture in Indian economy.

**Structure of Commission**

The Commission consists of a Chairperson and other members appointed by the Central Government. These members have to be between two to six in number. The Chairperson and every other Member must be a person of ability, integrity and standing and who has special knowledge of, and such professional experience of not less than fifteen years in international trade, economics, business, commerce, law, finance, accountancy, management, industry, public affairs or competition matters, including competition law and policy, which in the opinion of the Central Government, may be useful to the Commission. The Chairperson and other members are whole-time members.

**Selection Committee for Chairperson and Members of Commission:**

The Chairperson and other Members of the Commission are appointed by the Central Government from a panel of names recommended by a Selection Committee consisting of –

a) The **Chief Justice of India** or his nominee ---- Chairperson;

b) The **Secretary in the Ministry of Corporate Affairs** ---- Member;

c) The **Secretary in the Ministry of Law and Justice** ---- Member;

d) Two **experts** of repute who have special knowledge ---- Members.

of, and professional experience in international trade, economics, business, commerce, law, finance, accountancy, management, industry, public affairs or competition matters including competition law and policy.

**Secretary, experts, professionals and officers and other employees of Commission**:

(1)The Commission may appoint a Secretary and such officers and other employees as it considers necessary for the efficient performance of its functions under this Act.

(2) The Commission may engage, in accordance with the procedure specified by regulations, such number of experts and professionals of integrity and outstanding ability, who have special knowledge of, and experience in economics, law, business or such other disciplines related to competition, as it deems necessary to assist the Commission in the discharge of its functions under this Act.

**Director General:**

The Central Government may, by notification, appoint a Director General for the purposes of assisting the Commission in conducting inquiry into contravention of any of the provisions of this Act and for performing such other functions as are, or may be, provided by or under this Act.

(1)The number of other Additional, Joint, Deputy or Assistant Directors General or such officers or other employees in the office of Director General and the manner of appointment of such Additional, Joint, Deputy or Assistant Directors General or such officers or other employees shall be such as may be prescribed.

(2) Every Additional, Joint, Deputy and Assistant Directors General or such officers or other employees shall exercise his powers, and discharge his functions, subject to the general control, supervision and direction of the Director General.

(3) The Director General and Additional, Joint, Deputy and Assistant Directors General or such officers or other employees, shall be appointed from amongst persons of integrity and outstanding ability and who have experience in investigation, and knowledge of accountancy, management, business, public administration, international trade, law or economics and such other qualifications as may be prescribed.

**Term of office of Chairperson and other Members:**

(1) Every member of the commission including the chairperson has to serve the term of 5 years from the date on which he enters upon his office and shall be eligible for re-appointment.

(2) A vacancy caused by the resignation or removal of any member (including the chairperson) under section 11 or by death or otherwise shall be filled by fresh appointment in accordance with the appropriate provisions.

(3) The chairperson and each member of the commission has to make and subscribe to an oath of office and of secrecy in prescribed form, manner and before authority.

(4) In the event of the occurrence of a vacancy in the office of the Chairperson due to his death, resignation or otherwise, the senior-most Member shall act as the Chairperson, until the date on which a new Chairperson is appointed in accordance with the provisions of this Act to fill such vacancy, enters upon his office.

(5) When the Chairperson is unable to discharge his functions owing to absence, illness or any other cause, the senior-most Member shall discharge the functions of the Chairperson until the date on which the Chairperson resumes the charge of his functions.

**Duties of The Competition Commission:**

The act and the commission were established in order to protect the consumer interests. The basic duties of the commission are

* Eliminate practices having adverse effect on competition
* Promote and sustain competition
* Protect consumers’ interests
* Ensure freedom of trade carried on by other participants in market in India.

The commission can enter into any memorandum or arrangement with the prior approval of the Central Government, with any agency of any foreign country to discharge its duties or perform its functions.